

Texas Historical Statutes Project

1922 SUPPLEMENT TO
VERNON'S CIVIL AND CRIMINAL STATUTES
VOLUME 1

United States Constitution
Texas Constitution
Annotated Civil Statutes (Articles 1 to 4704)



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SUPPLEMENT
TO
VERNON'S
TEXAS CIVIL AND CRIMINAL
STATUTES

EMBRACING
ALL LAWS OF GENERAL APPLICATION PASSED AT THE
FOURTH CALLED SESSION OF THE 35TH AND THE
REGULAR AND CALLED SESSIONS OF THE
36TH AND 37TH LEGISLATURES

ANNOTATED
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN THREE VOLUMES

VOLUME 1
CIVIL STATUTES, TITLES 1 TO 70

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PREFACE

THE publisher of Vernon's Sayles' Civil Statutes of 1914, Vernon's Criminal Statutes of 1916, and the 1918 Combined Supplement to those two works, presents, in three volumes, a second combined Supplement continuing to date those publications, with their various features. All laws of general application enacted by the fourth called session of the 35th Legislature, and by the regular and called sessions of the 36th and 37th Legislatures, have been included in this second Supplement. The new laws have been classified in accordance with the scheme of division adopted by the revisions of 1911. New provisions, which amend or supersede existing laws, are given the same numbers in the Supplement that the old laws bore in the original editions. Entirely new provisions are given lettered or hyphenated numbers, and placed in the titles and chapters to which their subject-matter relates. Notes and references have been made under article headings calling attention to new legislation affecting, but not directly amending or superseding, the old provisions. Thus the reader who has found a provision in the former editions may follow the article number into the Supplement, and will know at once whether any change has been made in the statute law on the matter in hand. If the article number is either omitted from the Supplement or is included for some other purpose, but contains no text or text note, he knows at once that no change has been made by the Legislature as to that subject-matter.

The annotations have been continued on the plan of the former editions down to and including 232 Southwestern Reporter. To facilitate ready reference from the old edition to the Supplement, the notes have been given the same numbers as they bore in the original edition.

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

A cumulative index of the entire living statute law of the state, Civil and Criminal, in a single alphabetical arrangement, is presented in Vol. 3 of this Supplement. This index carries the reader to the book of the Vernon system of annotated statutes in which is to be found the latest expression of the Legislature on each particular subject.

A cumulative historical table of statutes is set forth in Vol. 3, immediately preceding the index. This table embraces all the legislation of a general nature enacted since the adoption of the Revised Civil and Criminal Statutes of 1911. It refers the reader not only to the particular act for which he is searching, but to the subsequent legislation on the same subject.

The late amendments of the Constitutions of the United States and Texas are set forth in the front part of Vol. 1, immediately preceding the statute text. Cross-references appear under the various articles and sections of the state Constitution to articles of the statute where annotations citing the Texas Constitution have been treated.

The valuable matter in the appendix of the original editions has been continued in the Supplement.

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 STATE OF TEXAS

1922

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CONSTITUTION OF THE UNITED STATES AMENDMENTS

[ARTICLE XVIII]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment was proposed to the legislatures of the several states by the Sixty-Fifth Congress, on the 19th day of December, 1917, and was declared, in a proclamation by the Acting Secretary of State, dated on the 29th day of January, 1919, to have been ratified by the legislatures of three-fourths of the whole number of states in the United States.

[ARTICLE XIX]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

This amendment was proposed to the legislatures of the several states by the Sixty-Sixth Congress, on the 19th day of May, 1919, and was declared in a proclamation by the Secretary of State, dated on the 26th day of August, 1920, to have been ratified by the legislatures of three-fourths of the whole number of states in the United States.

CONSTITUTION OF THE STATE OF TEXAS

The Constitution was not annotated in Vernon's Sayles' Civil Statutes 1914, Vernon's Criminal Statutes 1916, or in the combined Supplement of 1918. However in those editions decisions construing or applying the Constitution were set forth in the body of the statute law under the corresponding subject-matter. In the present Supplement, we have set forth in skeleton form the various articles and sections of the Constitution, and placed thereunder cross-references which will serve to carry the searcher to the repositories of constitutional annotations in the body of the statute law. In addition to the references to article numbers in the statute, citation of many cases arising during the period of the present Supplement are given. By following the article references through the former editions of the annotated statutes the earlier cases on the constitutional subjects will be found. The new amendments of the Constitution are set forth herein at their appropriate places.

ARTICLE I

BILL OF RIGHTS

Section 1.—See notes under arts. 764, 870, 7797, Civil Statutes.

Sec. 2.—See notes under art. 7436, Civil Statutes.

Sec. 3.—See notes under arts. 2947, 4848a, 7324a, Civil Statutes; arts. 130, 563, 799a, 1450, Penal Code; *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

Sec. 5.—See notes under arts. 9, 2853, 3691, Civil Statutes; art. 312, Penal Code; arts. 12, 796, Code of Criminal Procedure; *Williams v. State* (Cr. App.) 225 S. W. 173.

Sec. 6.—See notes under arts. 838, 4622, Civil Statutes.

Sec. 8.—See notes to art. 4643, Civil Statutes; arts. 173½, 1165, 1190, Penal Code; art. 11, Code of Criminal Procedure; *Ex parte Stout*, 82 Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277; *Ex parte Tucker*, 110 Tex. 335, 220 S. W. 75.

Sec. 9.—See notes under arts. 594, 5246—42, 5246—44, Civil Statutes; arts. 260, 606, Penal Code; art. 5, Code of Criminal Procedure.

Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. (Sec. 10, art. 1, adopted election ———; proclamation ———.)

See notes to art. 2067, Civil Statutes; arts. 53, 1363, 1449, Penal Code; arts. 4, 24, 447, 476, 635, 744, 840, Code of Criminal Procedure; *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880; *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

Sec. 11.—See notes under art. 6, Code of Criminal Procedure.

Sec. 12.—See notes under art. 7, Code of Criminal Procedure; *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

Sec. 13.—See notes under arts. 1450, 1454, Penal Code; arts. 8, 862, Code of Criminal Procedure; *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153; *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365.

Sec. 14.—See notes under arts. 634, 1450, 1618, Penal Code. arts. 9, 20, 601, Code of Criminal Procedure.

Sec. 15.—See notes under arts. 1631, 1971, 5173, 5175, Civil Statutes; arts. 10, 865a, Code of Criminal Procedure; *White v. White*, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; *Huey v. State* (Cr. App.) 227 S. W. 186.

Sec. 16.—See notes under arts. 594, 1018, 2872, 4977, 5597, 5623a, Civil Statutes; arts. 1190, 1450, 1454, Penal Code; In re Orders in Chambers (Sup.) 226 S. W. 1075.

Sec. 17.—See notes to arts. 870, 999, 1003, 2590, 2939, 4459, 4991, 5277, 6481, 6504, 6881, 7161, 7324a, Civil Statutes; arts. 504, 799a, Penal Code; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. —; San Antonio Public Service Co. v. City of San Antonio (D. C.) 257 Fed. 467; Ex parte White, 82 Cr. R. 85, 198 S. W. 583; Stockwell v. State (Civ. App.) 203 S. W. 109; Stubblefield v. Houston, E. & W. T. Ry. Co. (Civ. App.) 203 S. W. 936; City of Tyler v. Cain (Civ. App.) 204 S. W. 473; Rumbo v. Winterrowd (Civ. App.) 228 S. W. 258.

Sec. 19.—See notes under arts. 594, 731, 838, 870, 871, 999, 1015, 2547, 2536, 2595, 2853, 2872, 2938, 2947, 3971, 5277, 6623, 6649, 7324a, Civil Statutes; arts. 151, 799a, 1190, 1284k, 1451s, Penal Code; arts. 3, 912, Code of Criminal Procedure; Brazeale v. Strength (Civ. App.) 196 S. W. 247; White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; Staffel v. San Antonio School Board of Education (Civ. App.) 201 S. W. 413; Sullivan v. Roach Manigan Paving Co. of Texas (Civ. App.) 220 S. W. 444; Hanzal v. City of San Antonio (Civ. App.) 221 S. W. 237; Edinburg Irr. Co. v. Paschen (Civ. App.) 223 S. W. 329; Elmendorf v. City of San Antonio (Civ. App.) 223 S. W. 631; Zucht v. King (Civ. App.) 225 S. W. 267; Rumbo v. Winterrowd (Civ. App.) 228 S. W. 258; Houston v. Gonzales Independent School Dist. (Com. App.) 229 S. W. 467.

Sec. 20.—See art. 2938, Civil Statutes; art. 13, Code of Criminal Procedure.

Sec. 21.—See art. 2465, Civil Statutes; art. 14, Code of Criminal Procedure.

Sec. 22.—See notes under art. 92, Penal Code; art. 15, Code of Criminal Procedure.

Sec. 23.—See art. 2938, Civil Statutes; art. 475, Penal Code.

Sec. 25.—See notes under art. 62, Penal Code.

Sec. 26.—See notes under arts. 865, 870, 1103, 6394, 7797, Civil Statutes.

Sec. 27.—See *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Sec. 28.—See notes to arts. 1016, 6095c, Civil Statutes; art. 865b, Code of Criminal Procedure; Ex parte Leslie, 87 Cr. R. 476, 223 S. W. 227; Sullivan v. Roach-Manigan Paving Co. of Texas (Civ. App.) 220 S. W. 444.

Sec. 29.—See notes to art. 840, Code of Criminal Procedure; White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; Taylor v. State, 81 Cr. R. 347, 197 S. W. 196; Alvarado v. State, 83 Cr. R. 181, 202 S. W. 322.

ARTICLE II

THE POWERS OF GOVERNMENT

Section 1.—See notes at end of Title 81, ch. 3, Civil Statutes; art. 1428, Penal Code; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; American Type Founders' Co. v. Nichols, 110 Tex. 4, 214 S. W. 301; Board of Water Engineers v. McKnight (Sup.) 229 S. W. 301.

ARTICLE III

LEGISLATIVE DEPARTMENT

Section 1.—See notes to art. 870, Civil Statutes; art. 865b, Code of Criminal Procedure; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; Ex parte Davis, 86 Cr. R. 168, 215 S. W. 341; Sullivan v. Roach-Manigan Paving Co. of Texas (Civ. App.) 220 S. W. 444; Koy v. Schneider, 110 Tex. 369, 221 S. W. 880; Elmendorf v. City of San Antonio (Civ. App.) 223 S. W. 631; Berlew v. State (Cr. App.) 225 S. W. 518.

Sec. 18.—See State v. Valentine (Civ. App.) 198 S. W. 1006.

Sec. 24.—See art. 7056, Civil Statutes.

Sec. 25.—See Ex parte Wilson, 85 Cr. R. 554, 213 S. W. 984.

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Sec. 30.—See San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153.

Sec. 34.—See King v. Terrell (Civ. App.) 218 S. W. 42.

Sec. 35.—See notes under arts. 798, 817, 1011, 1920, 2070, 2178, 2749a, 2767, 2810, 3175a, 3983, 4575, 4746, 4955, 6394, 6602, 6640, 6649, 7151, 7324a, 7480, 7827a, and notes at end of Title 81, ch. 3, Civil Statutes; arts. 111, 151, 475, 496, 532, 557, 559, 563, 699, 799a, Penal Code; arts. 97a, 254, Code of Criminal Procedure.

Sec. 36.—See notes under arts. 817, 7828, Civil Statutes; art. 500, Penal Code; arts. 254, 795, 865b, Code of Criminal Procedure.

Sec. 38.—See notes under art. 559, Penal Code.

Sec. 40.—See Gulf, C. & S. F. Ry. Co. v. State (Civ. App.) 212 S. W. 845; Ex parte Fulton, 86 Cr. R. 149, 215 S. W. 331; Ex parte Davis, 86 Cr. R. 168, 215 S. W. 341.

Sec. 41.—See Koy v. Schneider, 110 Tex. 369, 221 S. W. 880.

REQUIREMENTS AND LIMITATIONS

- Sec. 43.**—See notes under art. 4746, Civil Statutes.
- Sec. 45.**—See notes under arts. 18, 254, 626, 629, 938, Code of Criminal Procedure; Taylor v. State, 81 Cr. R. 347, 197 S. W. 196.
- Sec. 46.**—See notes under art. 634, Penal Code.
- Sec. 47.**—See notes under art. 872, Civil Statutes; arts. 130, 533, Penal Code.
- Sec. 48.**—See notes under art. 7483, Civil Statutes; art. 155, Penal Code.
- Sec. 50.**—See Bexar County v. Linden, 110 Tex. 339, 220 S. W. 761.
- Sec. 51.**—See notes to arts. 1117a, 1193, Code of Criminal Procedure; Lawson v. Baker (Civ. App.) 220 S. W. 260.
- Sec. 52.**—See art. 627, Civil Statutes; notes under arts. 652, 2567, 2595, 2603, 2608b, 7414, Civil Statutes; Bexar County v. Linden, 110 Tex. 339, 220 S. W. 761; Koy v. Schneider, 110 Tex. 369, 221 S. W. 880; White v. Fahring (Civ. App.) 212 S. W. 193; Garrett v. Commissioners' Court of Limestone County (Civ. App.) 230 S. W. 1010.
- Sec. 53.**—See notes under art. 2241, Civil Statutes; Bexar County v. Linden, 110 Tex. 339, 220 S. W. 761; Galveston County v. Gresham (Civ. App.) 220 S. W. 560.
- Sec. 55.**—See notes under arts. 1426, 2241, Civil Statutes; Riggins v. Post (Com. App.) 213 S. W. 600; Bexar County v. Linden, 110 Tex. 339, 220 S. W. 761.
- Sec. 56.**—See notes under arts. 1003, 1011, 1460, 4678, 5151, 6637, 6640, 6649, 7479, 7828, Civil Statutes; arts. 111, 130, 302, 427, Penal Code; art. 254, Code of Criminal Procedure; see Houston v. Gonzales Independent School Dist. (Com. App.) 229 S. W. 467.
- Sec. 57.**—See notes under art. 5494, Civil Statutes.

ARTICLE IV

EXECUTIVE DEPARTMENT

- Section 1.**—See art. 4411, Civil Statutes.
- Sec. 2.**—See arts. 4362, 4392, 4411, Civil Statutes; notes under art. 563, Penal Code.
- Sec. 5.**—See art. 7047, Civil Statutes.
- Sec. 7.**—See United States v. Wolters (D. C.) 268 Fed. 69.
- Sec. 8.**—See Gulf, C. & S. F. Ry. Co. v. State (Civ. App.) 212 S. W. 845.
- Sec. 10.**—See United States v. Wolters (D. C.) 268 Fed. 69.
- Sec. 11.**—See notes under art. 6095c, Civil Statutes; arts. 865b, 1051, Code of Criminal Procedure.
- Sec. 12.**—See State v. Valentine (Civ. App.) 198 S. W. 1006.
- Sec. 20.**—See art. 2287, Civil Statutes.
- Sec. 21.**—See arts. 4302, 7048, Civil Statutes.
- Sec. 22.**—See arts. 338, 4428, 7048a, Civil Statutes; notes under arts. 3837, 7801, Civil Statutes.
- Sec. 23.**—See arts. 4392, 7049, Civil Statutes.

ARTICLE V

JUDICIAL DEPARTMENT

- See Koy v. Schneider, 110 Tex. 369, 221 S. W. 880.
- Section 1.**—See notes under arts. 921, 2241, 5011½f, 5011½jj, 5011½ll, Civil Statutes; arts. 894, 897, 963, 1198, Code of Criminal Procedure; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 502, 1153; Gray v. S. T. Woodring Lumber Co. (Civ. App.) 197 S. W. 231; State v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 197 S. W. 1006; Ex parte White, 32 Cr. R. 85, 198 S. W. 583; State v. Valentine (Civ. App.) 198 S. W. 1006; Bradford v. Moseley (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) Mosely v. Bradford, 190 S. W. 824; De Silvia v. State (Cr. App.) 229 S. W. 542.
- Sec. 2.**—See San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153.
- Sec. 3.**—See art. 1526, Civil Statutes; notes under arts. 1526, 1528, 1529, 1545b, 2184, Civil Statutes.
- Sec. 4.**—See art. 6061, Civil Statutes; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153.
- Sec. 5.**—See notes under arts. 921, 1529, 2184, 6095c, Civil Statutes; arts. 63, 69, 853, 865b, 894, 916, 920a, 1195, Code of Criminal Procedure; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; Baker v. State, 87 Cr. R. 213, 220 S. W. 326.
- Sec. 6.**—See art. 6062, Civil Statutes; notes to arts. 1545b, 1584, 1590, 2097, Civil Statutes; arts. 63, 69, 70, 87, Code of Criminal Procedure; Sutton v. English, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.
- Sec. 7.**—See notes under arts. 1671, 1672, 1678, 1720, Civil Statutes; art. 93, Code of Criminal Procedure; Dean v. Dean (Civ. App.) 214 S. W. 505.
- Sec. 8.**—See arts. 2291, 2296, 3171a, Civil Statutes; notes under arts. 1705, 1706, 1712, 1713, 1766, 2184, 2241, 3046, 3147, 3154, 3207, 4044, 4091, 4643, 4653, 6033, 7442, Civil Statutes; art. 323, Penal Code; arts. 88, 89, 90, 92, Code of Criminal Procedure; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; Bradford v. Moseley (Com. App.) 223

S. W. 171, reversing judgment (Civ. App.) *Mosely v. Bradford*, 190 S. W. 824; *Huey v. State* (Cr. App.) 227 S. W. 186; *Automobile Underwriters of America v. Brooks* (Civ. App.) 228 S. W. 367; *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

Sec. 9.—See arts. 1685, 6063, Civil Statutes.

Sec. 10.—See notes under arts. 3153, 3221, Civil Statutes; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

Sec. 11.—See art. 1675, Civil Statutes; notes under arts. 1521, 1584, 1675-1678, 1736, 3050, Civil Statutes; arts. 30, 64, 617, 618, Code of Criminal Procedure.

Sec. 12.—See notes under arts. 1852, 2180, 3729, Civil Statutes; arts. 19, 451, Code of Criminal Procedure.

Sec. 13.—See art. 1966, Civil Statutes; notes under arts. 1977, 5214, 5217, Civil Statutes; art. 3, Code of Criminal Procedure.

Sec. 15.—See notes under art. 1731, Civil Statutes; *State v. Valentine* (Civ. App.) 198 S. W. 1006; *De Silvia v. State* (Cr. App.) 229 S. W. 542.

Sec. 16.—See art. 6882, Civil Statutes; notes under arts. 32, 921, 1763-1767, 1772, 3206, 3209, 4043, 4091, 4643, 4653, 4979, 5699, 6882, Civil Statutes; arts. 98, 100, 101, 106, 920a, Code of Criminal Procedure; *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969; *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153; *Johnson v. First Nat. Bank* (Civ. App.) 198 S. W. 990.

Sec. 17.—See notes to art. 1203, Code of Criminal Procedure.

Sec. 18.—See art. 2241, Civil Statutes; notes under arts. 610, 2236, 2237, 2241, 2276, 2285, 2567, 2771, Civil Statutes; art. 963, Code of Criminal Procedure; *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560; *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Mosely v. Bradford*, 190 S. W. 824; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Sec. 19.—See arts. 2241, 2291, 2299, Civil Statutes; notes to arts. 921, 2291, 2299, 2393, Civil Statutes; art. 302, Penal Code; art. 106, Code of Criminal Procedure.

Sec. 20.—See art. 1744, Civil Statutes; notes under arts. 1703, 1743, 6786, Civil Statutes.

Sec. 21.—See arts. 338, 348, Civil Statutes; notes under arts. 353, 6749, Civil Statutes; art. 110, Penal Code; *Veltman v. Slater*, 110 Tex. 198, 217 S. W. 378.

Sec. 22.—See notes under arts. 921, 1717, 1775, 6882, Civil Statutes; arts. 98, 106, 894, 897, Code of Criminal Procedure.

Sec. 23.—See art. 7119, Civil Statutes.

Sec. 24.—See notes under arts. 6030, 6031, Civil Statutes; art. 200, Penal Code; *State v. Valentine* (Civ. App.) 198 S. W. 1006.

Sec. 25.—See notes under art. 930, Code of Criminal Procedure; *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718; *In re Orders in Chambers* (Sup.) 226 S. W. 1075.

Sec. 28.—See arts. 1674, 1735, 2288, Civil Statutes; notes to arts. 1678, 1804, Civil Statutes.

Sec. 29.—See art. 1776, Civil Statutes; *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

ARTICLE VI

SUFFRAGE

Section 1.—See arts. 2938, 5115, Civil Statutes, and notes thereunder; notes to art. 1079, Civil Statutes; *Hamilton v. Davis* (Civ. App.) 217 S. W. 431; *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

Sec. 2. Every person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this State one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, that electors living in any unorganized county may vote at any election precinct in the county to which such county is attached for judicial purposes; and provided further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election. Or if said voter shall have lost or misplaced said tax receipt, he or she, as the case may be, shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such tax receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election. The husband may pay the poll tax of his wife and receive the receipt therefor. In like manner the wife may pay the poll tax of her husband and receive the receipt therefor. The Legislature may author-

ize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation. (Sec. 2, art. 6, adopted election November 4, 1902; proclamation Dec. 26, 1902; Amendment adopted election fourth Saturday in July, 1921.)

See arts. 2939, 2942, 3171a, Civil Statutes, and notes thereunder; notes under arts. 1079, 7692, Civil Statutes.

Sec. 3.—See notes under art. 1079, Civil Statutes.

Sec. 4.—See art. 3012, Civil Statutes; notes under art. 2947, Civil Statutes; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

Sec. 5.—See notes under art. 17, Code of Criminal Procedure.

ARTICLE VII

EDUCATION

THE PUBLIC FREE SCHOOLS

Section 1.—See notes under arts. 2767, 2853, Civil Statutes.

Sec. 2.—See notes under arts. 2853, 5385, Civil Statutes.

Sec. 3. One-fourth of the revenue derived from the State occupation taxes and a poll tax of one (\$1.00) dollar on every male inhabitant of this State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and, in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred (\$100.00) dollar valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school districts by general or special law without the local notice required in other cases of special legislation; and all such school districts, whether created by general or special, law may embrace parts of two or more counties. And the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts, and for the management and control of the public school or schools of such district, whether such districts are composed of territory wholly within a county or in parts of two or more counties. And the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and the erection and equipment of school buildings therein; provided, that a majority of the qualified property tax-paying voters of the district voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year fifty cents on the one hundred dollar valuation of the property subject to taxation in such district but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts. (Sec. 3, art. 7, adopted election Nov. 5, 1918; proclamation ———.)

See notes to arts. 924, 925, 2815, 2827, 2850, 2853, 2855, 2857, 2866, 2867, 2876, 2877, 2942, 7354, 7692, Civil Statutes; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880; *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852; *Millhollon v. Stanton Independent School Dist.* (Com. App.) 231 S. W. 332.

Sec. 4.—See notes under arts. 2241, 2772, 2853, Civil Statutes; art. 4041, Appendix to Civil Statutes; *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Sec. 5.—See notes under arts. 2767, 2772, Civil Statutes; art. 4041, Appendix to Civil Statutes; *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Sec. 6.—See notes under art. 2271, Civil Statutes; art. 4280, Appendix to Civil Statutes; *Riggins v. Post* (Com. App.) 213 S. W. 600.

Sec. 8.—See art. 2679, Civil Statutes.

ASYLUMS

Sec. 9.—See *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

UNIVERSITY

Sec. 10.—See arts. 2626, 2627, Civil Statutes.

Sec. 11.—See arts. 2626, 2627, Civil Statutes; *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Sec. 12.—See arts. 2626, 2627, Civil Statutes.

Sec. 13.—See arts. 2626, 2627, 2655, Civil Statutes.

Sec. 14.—See arts. 2626, 2627, Civil Statutes.

Sec. 15.—See arts. 2626, 2627, Civil Statutes.

ARTICLE VIII

TAXATION AND REVENUE

Section 1.—See art. 2942, Civil Statutes; notes under arts. 999, 7324a, 7354, 7355 (§§ 9, 13, 26), 7414, 7476, 7480, 7483, 7503, 7507-11, 7573, 7692, Civil Statutes; arts. 130, 151, 155, 157, 799a, Penal Code; *Meyenberg v. Ehlinger* (Civ. App.) 224 S. W. 312; *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

Sec. 2.—See notes under arts. 928, 7324a, 7355 (§ 9), 7479, 7480, 7483, 7507; Civil Statutes; arts. 130, 151, 155, 157, 799a, Penal Code; *City of Houston v. Scottish Rite Benev. Ass'n* (Sup.) 230 S. W. 978.

Sec. 3.—See *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880; *Meyenberg v. Ehlinger* (Civ. App.) 224 S. W. 312.

Sec. 5.—See notes under arts. 939, 7525, Civil Statutes.

Sec. 6.—See arts. 2417, 2438, Civil Statutes, and notes thereto; *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

Sec. 7.—See *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Sec. 8.—See notes under arts. 939, 7525, Civil Statutes.

Sec. 9.—See notes to arts. 605, 924, 925, 1096a, 2241-2243, 2603, 2608b, 2876 Civil Statutes; *State v. Vincent* (Civ. App.) 217 S. W. 402; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Sec. 11.—See notes to arts. 4749, 7510, 7514, 7525, Civil Statutes.

Sec. 12.—See notes under art. 2244, Civil Statutes.

Sec. 13.—See notes under art. 7639, Civil Statutes.

Sec. 15.—See notes under arts. 958, 7528, Civil Statutes.

Sec. 16.—See *Holcomb v. Spikes* (Civ. App.) 232 S. W. 891.

ARTICLE IX

COUNTIES

Section 1.—See notes under arts. 1331-1338, 1348, Civil Statutes.

COUNTY SEATS

Sec. 2.—See notes under art. 1391, Civil Statutes.

ARTICLE X

RAILROADS

Section 1.—See notes under art. 6481, Civil Statutes.

Sec. 2.—See notes under arts. 6623, 6649, 6670, Civil Statutes; art. 1533, Penal Code; *State v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006; *Texas & N. O. R. Co. v. Levy* (Civ. App.) 199 S. W. 513.

Sec. 3.—See art. 6472, Civil Statutes.

Sec. 4.—See art. 6619, Civil Statutes.

Sec. 6.—See *Atchison, T. & S. F. Ry. Co. v. Weeks* (D. C.) 248 Fed. 970.

Sec. 9.—See notes under art. 6549, Civil Statutes.

ARTICLE XI

MUNICIPAL CORPORATIONS

- Section 2.**—See notes under arts. 605, 2241, Civil Statutes.
Sec. 3.—See *Bexar County v. Linden*, 110 Tex. 339, 220 S. W. 761.
Sec. 4.—See notes under art. 817, Civil Statutes; see *State v. Vincent* (Civ. App.) 217 S. W. 402.
Sec. 5.—See notes under arts. 879, 925, 999, 1003, 1008, 1096a–1096i, 1827, Civil Statutes; *City of San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 41 Sup. Ct. 425, 65 L. Ed. —; *Le Gois v. State*, 83 Cr. R. 460, 204 S. W. 320.
Sec. 6.—See notes under art. 2242, Civil Statutes; *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330.
Sec. 7.—See notes under arts. 605, 610, 764, 1827, 1910, 2241, 2242, Civil Statutes; *Brazeale v. Strength* (Civ. App.) 196 S. W. 247; *J. I. Case Threshing Mach. Co. v. Camp County* (Civ. App.) 218 S. W. 1; *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560; *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702; *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330.
Sec. 9.—See notes under arts. 1521, 3790, Civil Statutes.
Sec. 10.—See notes under arts. 2871, 2883, Civil Statutes.

ARTICLE XII

PRIVATE CORPORATIONS

- See notes under art. 1120, Civil Statutes.
Section 6.—See notes under arts. 582, 589, 1146, Civil Statutes; *Zurn v. Mitchell* (Civ. App.) 196 S. W. 544; *Commercial Guaranty State Bank v. Crews* (Civ. App.) 196 S. W. 901; *Kanaman v. Gahagan* (Civ. App.) 231 S. W. 797.

ARTICLE XIII

SPANISH AND MEXICAN LAND TITLES

- Section 5.**—See notes under art. 5280, Civil Statutes.
Sec. 9.—See notes under art. 2242, Civil Statutes.

ARTICLE XIV

PUBLIC LANDS AND LAND OFFICE

- Section 1.**—See notes under art. 5280, Civil Statutes.
Sec. 2.—See notes under art. 5278, and notes at end of ch. 1, of Title 79, Civil Statutes.
Sec. 7.—See notes under arts. 5910–5916, Civil Statutes; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

ARTICLE XV

IMPEACHMENT

- Section 1.**—See art. 6017, Civil Statutes.
Sec. 2.—See art. 6017, Civil Statutes.
Sec. 6.—See art. 6022, Civil Statutes.
Sec. 7.—See art. 6018, Civil Statutes; notes under art. 6030, Civil Statutes.

ADDRESS

ARTICLE XVI

GENERAL PROVISIONS

Section 1.—See art. 2287, and notes under art. 2818, Civil Statutes: *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

Sec. 2.—See art. 3096, Civil Statutes, and notes; also notes under arts. 2947, 6095c, Civil Statutes; art. 865b, Code of Criminal Procedure

Sec. 11.—See notes under arts. 4980, 4982, Civil Statutes.

Sec. 12.—See *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Sec. 13.—See arts. 56-70, Civil Statutes, and notes.

Sec. 15.—See notes under art. 4621, Civil Statutes.

Sec. 16.—See arts. 370, 552, Civil Statutes.

Sec. 17.—See arts. 1672, 1685, 3044a, and notes under arts. 1731, 1743, 3044a, Civil Statutes; *State v. Valentine* (Civ. App.) 198 S. W. 1006; *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986; *Berlew v. State* (Cr. App.) 225 S. W. 518.

Sec. 18.—See notes under art. 5701, Civil Statutes.

Sec. 19.—See notes under arts. 2021, 5115, Civil Statutes.

Sec. 20. (a) The manufacture, sale, barter and exchange in the State of Texas, of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or any other intoxicant whatever except for medicinal, mechanical, scientific or sacramental purposes, are each and all hereby prohibited.

The Legislature shall enact laws to enforce this Section.

(b) Until the Legislature shall prescribe other or different regulations on the subject, the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication, or any other intoxicant whatever, for medicinal purposes shall be made only in cases of actual sickness and then only upon the prescription of a regular practicing physician, subject to the regulations applicable to sales under prescriptions in prohibited territory by virtue of Article 598, Chapter 7, Title 11, of the Penal Code of the State of Texas.

(c) This amendment is self-operative and until the Legislature shall prescribe other or different penalties, any person acting for himself or in behalf of another, or in behalf of any partnership, corporation or association of persons, who shall, after the adoption of this amendment violate any part of this Constitutional provision, shall be deemed guilty of a felony, and shall, upon conviction in a prosecution commenced, carried on and concluded in the manner prescribed by law in cases of felonies, be punished by confinement in the penitentiary for a period of time not less than one year nor more than five years, without the benefit of any law providing for suspended sentence. And the district courts and the judges thereof, under their equity powers, shall have the authority to issue, upon suit of the Attorney General, injunctions against infractions or threatened infractions of any part of this constitutional provision.

(d) Without affecting the provisions herein, intoxicating liquors are declared to be subject to the general police power of the State; and the Legislature shall have the power to pass any additional prohibitory laws, or laws in aid thereof, which it may deem advisable.

(c) Liability for violating any liquor laws in force at the time of the adoption of this amendment shall not be affected by this amendment, and all remedies, civil and criminal, for such violations shall be preserved. (Sec. 20, art. 16, adopted election May 24, 1919; proclamation _____.)

See notes under art. 2236, Civil Statutes; arts. 157, 302, 496, 588½, 801, Penal Code; *United States v. James* (D. C.) 256 Fed. 102; *Gearheart v. State*, 81 Cr. R. 540, 197 S. W. 187; *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168,

215 S. W. 341; Franklin v. State (Cr. App.) 227 S. W. 486; Shaw v. State (Cr. App.) 229 S. W. 509.

Sec. 22.—See notes under art. 7209, Civil Statutes.

Sec. 23.—See notes under art. 1397, Penal Code; Koy v. Schneider, 110 Tex. 369, 221 S. W. 880.

Sec. 24.—See notes under art. 6253, Civil Statutes.

Sec. 26.—See notes under arts. 4696-4699, Civil Statutes; Holland v. Adams (Civ. App.) 227 S. W. 512.

Sec. 28.—See notes under arts. 306, 3785, 3788, Civil Statutes.

Sec. 30.—See notes under art. 1920, Civil Statutes; White v. Fahring (Civ. App.) 212 S. W. 193; Cowell v. Ayers, 110 Tex. 348, 220 S. W. 764; Garrett v. Commissioners' Court of Limestone County (Civ. App.) 230 S. W. 1010.

Sec. 30a.—See Cowell v. Ayers, 110 Tex. 348, 220 S. W. 764, answers to certified questions conformed to (Civ. App.) 224 S. W. 1119.

Sec. 31.—See notes under arts. 5733, 5736, 5741, Civil Statutes.

Sec. 37.—See notes under arts. 5621-5639, 5644, and section 3 of the Final Title of the Civil Statutes; Reeves v. York Engineering & Supply Co., 249 Fed. 513, 161 C. C. A. 439; McBride v. Beakley (Civ. App.) 203 S. W. 1137.

Sec. 40.—See notes under art. 985, Civil Statutes; San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153; Welder v. Sinton Independent School Dist. (Civ. App.) 218 S. W. 106; Torno v. Hochstetler (Civ. App.) 221 S. W. 623.

Sec. 44.—See notes under art. 2767, Civil Statutes.

Sec. 48.—See Berlew v. State (Cr. App.) 225 S. W. 518.

Sec. 49.—See notes under art. 3785, Civil Statutes.

Sec. 50.—See arts. 3785-3792, Civil Statutes, and notes, also notes under arts. 1012, 1115, 2000, 2469, 3427, 5631, 7528, 7637, Civil Statutes; Murphy v. Lewis (Civ. App.) 198 S. W. 1059; Harrison v. First Nat. Bank of Lewisville (Civ. App.) 224 S. W. 269; Maynard v. Gilliam (Civ. App.) 225 S. W. 818; Davis v. Cox (Civ. App.) 229 S. W. 987.

Sec. 51.—See art. 3786, Civil Statutes and notes, also notes under arts. 2000, 3429, Civil Statutes; Woodward v. Sanger Bros., 246 Fed. 777, 159 C. C. A. 79; Dunn v. Eckhardt, 256 Fed. 315, 167 C. C. A. 485; Harrison v. First Nat. Bank of Lewisville (Civ. App.) 224 S. W. 269.

Sec. 52.—See art. 3429, and notes under arts. 2469, 3420, 3422, 3424, 3425, 3427, 3786, Civil Statutes; Allen v. Ramey (Civ. App.) 226 S. W. 489; Ridling v. Murphy (Com. App.) 228 S. W. 165.

Sec. 53.—See Berlew v. State (Cr. App.) 225 S. W. 518.

Sec. 59. (a) The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forest, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as may be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the main-

tenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted. (Sec. 59, art. 16, adopted election Aug. 21, 1917; proclamation ———.)

See notes under arts. 2603, 2603b, Civil Statutes.

ARTICLE XVII

MODE OF AMENDING THE CONSTITUTION OF THIS STATE

Section 1.—See notes under art. 3036, Civil Statutes; *State v. Vincent* (Civ. App.) 217 S. W. 402; *Hamilton v. Davis* (Civ. App.) 217 S. W. 431; *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479.

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

TITLE 1

ADOPTION

- | | |
|--|--|
| Art.
1. How heir adopted.
2. Rights of adopted heir.
3. Parents may transfer authority, etc.,
how. | Art.
4. Parents thereafter barred, etc.
5. Right of adopted child to support, etc. |
|--|--|

Article. 1. [1] How heir adopted.

Nature of relation.—When adopted person acquires property by descent from his adopter, it is not because he is a child of the adopter, but because arts. 1, 2, put him in position of child with respect to inheritance. *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079, reversing judgment (Civ. App.) 189 S. W. 291.

Agreement for adoption—Sufficiency.—Where an instrument of adoption executed by a husband was not valid, and the wife on leaving him took with her the child sought to be adopted, the husband had no authority to take the child from his wife, and was under no obligation to maintain or support it. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

An instrument reciting that a member of a fraternal insurance order adopted an infant followed by the words "subscribed and sworn to before me," with the signature of a justice of the peace and ex officio notary, is not valid as an instrument of adoption, within this article, in that it was not witnessed or acknowledged, so as to be admissible to registration, as in case of a deed; the jurat of the justice not reciting that it was subscribed and sworn to by the adoptive parent. *Id.*

General reputation.—Plaintiff could not prove legal adoption by general reputation of adoption. *Lane v. Sanders* (Civ. App.) 201 S. W. 1018.

Civil and common law.—Adoption was unknown to common law, but was recognized from earliest days in civil law, under which it created relation of parent and child, with resultant rights and duties. *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079, reversing judgment (Civ. App.) 189 S. W. 291.

Recording.—Under this article, the filing of the instrument constitutes the act of adoption, and not merely evidence of it, and without such filing there is no adoption and no legal rights conferred. *Sanders v. Lane* (Com. App.) 227 S. W. 946.

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

Inheritance by adopted child.—When adopted person acquires property by descent from his adopter, it is not because he is a child of the adopter, but because this article and the preceding article put him in position of child with respect to inheritance. *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079, reversing judgment (Civ. App.) 189 S. W. 291.

Adoption does not constitute person member of family, nor confer privileges or impose duties of parent and child, but merely puts adopted person in position, with respect to succession to estate of adopter, that natural child would occupy, except that, as against child born in wedlock, adopted person cannot take more than one-fourth. *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317, reversing judgment (Civ. App.) 166 S. W. 674.

Art. 3. Parents may transfer authority, etc., how.—The parent or parents of a child who is to be adopted, as provided in Articles 1 and 2 of this Title, may, by an instrument in writing, duly signed and authenticated or acknowledged as deeds are required to be, or where such parent or parents have voluntarily abandoned such child and left such child to the

care of others, for a period of at least three years, or voluntarily left such child to be cared for by charity, for a period of at least three years, and such child shall be adopted as provided in Articles 1 and 2 of this Title, shall be held to have transferred their parental authority and custody over said child so adopted to the party so adopting such child. [Acts 1907, p. 103; Acts 1920, 36th Leg. 3d C. S., ch. 62, § 1, amending art. 3, Rev. Civ. St. 1911.]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 4. Parents thereafter barred, etc.—After the execution of such an instrument of writing duly acknowledged or authenticated, as aforesaid, or after having abandoned such child for a period of at least three years, and after the adoption of such child by another, the parents shall thereafter be barred from exercising any authority, control or custody over the person of such child or its estate, as against the party so adopting him. [Acts 1907, p. 103; Acts 1920, 36th Leg. 3d C. S., ch. 62, § 1, amending art. 4, Rev. Civ. St. 1911.]

Powers of court.—District court, in suit over custody of minor children by maternal grandmother against grandaunt, has authority to require adoptive parents of little girl, grandaunt and her husband, to allow child to visit in home of grandmother, where she might see her brothers and sister. Kirby v. Morris (Civ. App.) 198 S. W. 995.

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

See Royal Neighbors of America v. Fletcher (Civ. App.) 230 S. W. 476, note under art. 1.

TITLE 2

AFFIDAVITS, OATHS AND AFFIRMATIONS

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

Article 9. [3] [3] Form of oath, etc.

By corporation.—In view of arts. 4928-4964, 5504, corporations may make affidavits through their officers and agents when such affidavits are required. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

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

Justice of the peace.—Under this article, because complaint charging defendant with gaming was sworn to by sheriff before justice of the peace, that of itself did not give justice jurisdiction to try case. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

Deputies.—While the general rule is that a deputy may do what his principal officer might, the deputy cannot verify in the name of his principal where a duty such as taking oaths pertains to the deputy individually. *Goodman v. State*, 85 Cr. R. 279, 212 S. W. 171.

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

Knowledge of facts.—Under this article an affidavit for a continuance because of the absence of material witnesses may be made by the applicant's attorney, and he need not state that he had personal knowledge of the matters therein stated. *Doll v. Mundine*, 84 Tex. 315, 19 S. W. 394.

Partners.—Any member of partnership has authority to make affidavit for firm in all matters and suits where required. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Poverty affidavit.—Where judgment for husband and wife was reversed, and cause remanded, with costs to appellant, the filing of wife's affidavit of inability to pay costs or give security, in which she did not purport to act as husband's agent, as authorized by this article, but merely excused his failure to join therein, was not sufficient compliance with art. 1635, requiring such affidavit by "party against whom costs are adjudged," to warrant issuance of mandate without costs; the affidavit of all parties being necessary under the statute. *Hambleton v. Dignowity* (Civ. App.) 213 S. W. 957.

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

Sufficiency in general.—Under this article, an instrument which is not signed by the affiants, and which does not recite that the necessary oath was administered to them, is not an affidavit. *Gordon v. State*, 29 Tex. App. 410, 16 S. W. 337.

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

Cited, *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443.

Authority of attorney of interested party.—A purported bystander's bill of exceptions sworn to before the defendant's attorney can in no circumstances be considered. *Bostick v. State*, 81 Cr. R. 404, 195 S. W. 862; *Same v. State*, 81 Cr. R. 412, 195 S. W. 863; *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 531.

Denial of an application for a continuance, complying with the statute and setting out material evidence, on ground that appellant was illegally sworn by one of his attorneys, where no objection thereto was taken, was improper. *Waites v. State*, 82 Cr. R. 501, 200 S. W. 380.

An affidavit attached to a motion for new trial cannot be taken by attorney for accused. *Ingram v. State*, 83 Cr. R. 215, 202 S. W. 741.

If art. 4649, requiring that petitions for injunctions be verified, applies to a divorce proceeding, wherein district court, by art. 4639, has special authority to make temporary orders respecting property of parties, verification of petition for divorce, irregular in that it was before notary public who was an attorney of record, is subject to amendment, and does not defeat jurisdiction of district court to enter order prohibiting disposition of property of community estate. *Ex parte Gregory*, 85 Cr. R. 115, 210 S. W. 204.

However improper it may be, an attorney who is a notary may swear his client to an affidavit for an attachment. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

TITLE 2 A

AGRICULTURE

Chap.

1. Commercial fertilizers.
4. Experimental stations.
- 7A. Co-operative marketing associations.

Chap.

8. Agricultural seeds.
9. International trading corporations.

CHAPTER ONE

COMMERCIAL FERTILIZERS

Article 14c. Duties and powers of state chemist, etc.

Cited, Ex parte White, 82 Cr. R. 85, 198 S. W. 583.

CHAPTER FOUR

EXPERIMENTAL STATIONS

Art.

- 14p. Government of substations; composition and appointment of board.

Art.

- 14pp. [Superseded.]

Article 14p. Government of sub-stations; composition and appointment of board.—The Board consisting of the Lieutenant Governor and three members whom the Governor is authorized to appoint, and which Board is authorized and empowered to govern, manage and control sub-experiment stations to make experiments and conduct investigations in planting and growing agricultural and horticultural crops and soils, and the breeding, feeding and fattening of livestock for slaughter, is hereby abolished and the authority, duties, powers and functions of said Board shall hereafter vest in and be had and performed by the Board of Directors of the Agricultural and Mechanical College of Texas to be exercised through the proper agency or agencies. [Acts 1913, S. S. p. 98, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 45, § 1.]

Effective Nov. 15, 1921.

Art. 14pp.

Superseded by Acts 1921, 37th Leg. 1st C. S., ch. 45, ante, art. 14p.

CHAPTER SEVEN A

CO-OPERATIVE MARKETING ASSOCIATIONS

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Article 14½k. Declaration of policy.—In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing problems of agricultural products, this Act is passed. [Acts 1921, 37th Leg., ch. 22, § 1.]

Took effect March 1, 1921.

Art. 14½kk. Definitions.—Definitions, as used in this Act:

(a). The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any farm and ranch products;

(b). The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock;

(c). The term "association" means any corporation organized under this Act; and

(d). The term "person" shall include individuals, firms, partnerships, corporations and associations.

Associations organized hereunder shall be deemed non-profit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This Act shall be referred to as the "Co-operative Marketing Act." [Id., § 2.]

Art. 14½l. Who may organize.—Five or more persons engaged in the production of agricultural products may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act. [Id., § 3.]

Art. 14½ll. Purposes.—An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. [Id., § 4.]

Art. 14½m. Preliminary investigation.—Every group of persons contemplating the organization of an association under this Act, is urged to communicate with the Commissioner of the State Markets and Warehouse Department, who will inform it, whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. [Id., § 5.]

Art. 14½mm. Powers.—Each association incorporated under this Act shall have the following powers:

(a). To engage in any activity in connection with the marketing, selling, harvesting, preserving, drying, processing, canning, packing, stor-

ing, handling or utilization of any agricultural products produced or delivered to it by its members, or the manufacturing or marketing of the by-products thereof or in connection with the purchase, hiring, or use by its members of supplies, machinery or equipment, or in the financing of any such activities; or in any one or more of the activities specified in this Section. No association, however, shall handle the agricultural products of any non-member.

(b). To borrow money and to make advances to members.

(c). To act as the agent or representative of any member or members in any of the above mentioned activities.

(d). To purchase or otherwise acquire, and to hold, own and exercise all rights of ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association.

(e). To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the by-laws.

(f). To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association or incidental thereto.

(g). To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere. [Id., § 6.]

Art. 14 $\frac{1}{2}$ n. Members.—(a) Under the terms and conditions prescribed in its by-laws, an association may admit as members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b). If a member of a non-stock association be other than a natural person, such member may be presented by any individual, associate officer or member thereof, duly authorized in writing.

(c). One association organized hereunder may become a member or stock-holder of any other association or associations organized hereunder. [Id., § 7.]

Art. 14 $\frac{1}{2}$ nn. Articles of incorporation.—Each association formed under this Act must prepare and file Articles of incorporation, setting forth:

(a). The name of the association.

(b). The purposes for which it is formed.

(c). The place where its principal business will be transacted.

(d). The term for which it is to exist, not exceeding fifty (50) years.

(e). The number of directors thereof, which must not be less than five (5) and may be any number in excess thereof, and the term of office of such directors.

(f). If organized without capital stock, whether the property rights and interests of each member shall be equal or unequal; and if unequal, the Articles shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each

member may and shall be determined and fixed; and the association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the Articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.

(g). If organized with capital stock, the amount of such capital stock and the number of shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the Articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and privileges granted to each.

The Articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said Articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the Articles of incorporation shall also be filed with the Commissioner of the State Department of Markets and Warehouses. [Id., § 8.]

Art. 14½60. Amendments to articles of incorporation.—The Articles of incorporation may be altered or amended at any regular meeting or at any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the Articles of incorporation when so adopted shall be filed in accordance with the provisions of the general corporation law of this State. [Id., § 9.]

Art. 14½60. By-laws.—Each association incorporated under this Act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this Act. A majority vote of the members or stock-holders, or their written assent, is necessary to adopt such by-laws. Each association under its by-laws may also provide for any or all of the following matters:

(a). The time, place and manner of calling and conducting its meetings.

(b). The number of stock-holders or members constituting a quorum.

(c). The right of members or stock-holders to vote by proxy or by mail, or by both, and the conditions, manner and effects of such votes.

(d). The number of directors constituting a quorum.

(e). The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f). Penalties for violations of the by-laws.

(g). The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same, and the purposes for which they must be used.

(h). The amount which each member or stock-holder shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stock-holder for services rendered by the association to him and the time of payment and the manner of collection; and the marketing con-

tract between the association and its members or stock-holders which every member or stock-holder may be required to sign.

(i). The number and qualification of members or stock-holders of the association and the conditions precedent to members of ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and time when membership of any member shall cease. The automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stock-holder, or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount there in money, which shall be paid to him within one year after such expulsion or withdrawal. [Id., § 10.]

Art. 14 $\frac{1}{2}$ p. General and special meetings; how called.—In its by-laws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten per cent of the members or stock-holders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation published at the principal place of business of the association. [Id., § 11.]

Art. 14 $\frac{1}{2}$ pp. Directors; election.—The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stock-holders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of re-apportioning the directors and of re-districting the territory covered by the association. The by-laws may provide that primary elections should be held in each district to elect the directors apportioned to such districts and the result of all such primary elections must be ratified by the next regular meeting of the association.

An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by district. In such a case the board of directors shall immediately call a special meeting of the members or stock-holders in that district to fill the vacancy. [Id., § 12.]

Art. 14½q. Election of officers.—The directors shall elect from their number a president and one or more vice-presidents. They shall also elect a secretary and treasurer, who need not be directors, and they may combine the two latter offices and designate the combined office as secretary-treasurer. The treasurer may be a bank or any depository, and as such shall not be considered as an officer but as a function of the board of directors. In such case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. [Id., § 15(13).]

Art. 14½qq. Stock; membership certificates; when issued; voting; liability; limitations on transfer and ownership.—When a member of an association established without capital stock, has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stock-holder of a co-operative association shall own more than one-twentieth of the issued common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth of the issued common stock.

No member or stock-holder shall be entitled to more than one vote.

Any association organized with stock under this Act may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retireable by the association on such terms and conditions as may be provided for by the Articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

The association may at any time except when the debts of the association exceed fifty per cent. (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors and pay for it in cash within one (1) year thereafter. [Id., § 14.]

Art. 14½r. Removal of officer or director.—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten per cent of the members, requesting the removal of the officer, or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, when the petition for removal of a director must be signed by twenty per cent of the members residing in the

district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of the members of that district, the director in question shall be removed from office. [Id., § 15.]

Art. 14 $\frac{1}{2}$ rr. Referendum.—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting, provided, however, that a special meeting may be called for the purpose. [Id., § 16.]

Art. 14 $\frac{1}{2}$ s. Marketing contract.—The association and its members may make and execute marketing contracts, requiring the members to sell, for a period of time, not over ten years, all or any specified part of their agricultural products or specified commodities, exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto; and pay over to its members the re-sale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight per cent per annum, and reserves for retiring the stock, if any, and other proper reserves; and interest not exceeding eight per cent per annum upon common stock.

The by-laws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stock-holder to the association upon the breach by him of any provisions of the marketing contract regarding the sale or delivery or with-holding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State.

In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. [Id., § 17.]

Art. 14 $\frac{1}{2}$ ss. Purchasing business of other associations, etc.; payment; stock issued.—Whenever an association organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquiring interest, shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued. [Id., § 18.]

Art. 14 $\frac{1}{2}$ t. Annual reports.—Each association formed under this Act shall prepare and make out an annual report on forms furnished by the Commissioner of Markets and Warehouses, containing the name of the association, its principal place of business and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stock-holders of a stock association or the number of members and amount of membership fees received, if a

non-stock association; the total expenses of operation; the amount of its indebtedness, or liability, and its balance sheets. [Id., § 19.]

Art. 14½tt. Conflicting laws not to apply.—Any provisions of this law which are in conflict with this Act shall not be construed as applying to the associations herein provided for. [Id., § 20.]

Art. 14½u. Officers and agents to give bond; liability on failure to require bond.—Each and all officers, employes and agents, handling funds or property of the corporations created under the provisions of this Act, or any property or funds of any person placed under the control of or in the possession of said corporation, shall be required to execute and deliver to the corporation a bond, for the benefit of all members of said corporation, conditioned upon the faithful performance of the duties and obligations of such person, and further conditioned that such person shall faithfully account for any and all funds, moneys and property coming into his or her hands or possession, by reason of such office or employment, and shall promptly remit to the person, or persons, entitled to receive the same, all moneys which may come into his possession by virtue of being such officer, employee or agent, and in case of sale or failure to sell any products under the care of and in the possession of such officer, employee or agent, that he shall promptly make a true and correct report of said sale, or in case of failure to sell, the reasons why said sale is not made.

In case the officers and directors of any corporation authorized to be created under the provisions of this Act, shall fail to have all officers, employees and agents handling such funds or property, execute the bond provided for herein, each and all of said officers and directors shall be personally liable for all losses occasioned by such failure, and which might have been recovered on said bond. [Id., § 21.]

Art. 14½uu. Interest in other corporations or associations.—An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, pressing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipts shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. [Id., § 22.]

Art. 14½v. Contracts and agreements with other associations.—Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative corporation, association or associations, formed in this or any other State for the co-operative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same methods, means and agencies for carrying on and conducting their respective businesses. [Id., § 23.]

Art. 14½vv. Association heretofore organized may adopt the provisions of this act.—Any corporation or association organized under pre-

viously existing statutes, may by a majority vote of its stock-holders or members be brought under the provisions of this Act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Secretary of State, to the effect that the corporation or association has by a majority vote of its stock-holders or members decided to accept the benefits and be bound by the provisions of this Act. Articles of incorporation shall be filed as required in Section 8 [Art. 14½nn], except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to Articles of incorporation. [Id., § 24.]

Art. 14½w. Breach of marketing contract of co-operative association; spreading false reports about the finances or management thereof.—Any person or persons or any corporation whose offices or employees knowingly induces or attempts to induce any member or stock-holder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be liable to the association aggrieved thereby in a civil suit for damages suffered in three times the amount of actual damage proven, for each offense. [Id., § 25.]

Art. 14½ww. Associations not in restraint of trade.—No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily; nor shall the marketing contracts or agreements between the association and its members nor any agreements authorized in this Act be considered illegal or in restraint of trade. [Id., § 26.]

Art. 14½x. Constitutionality.—If any section of this Act shall be declared unconstitutional for any reason, the remainder of the Act shall not be affected thereby. [Id., § 27.]

Art. 14½xx. Application of general corporation laws.—The provisions of the general corporation laws of this State, and all powers and rights thereunder shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this Act. [Id., § 28.]

Art. 14½y. Annual license fee.—Each association organized hereunder shall pay an annual license fee of ten dollars (\$10.00) but shall be exempt from all franchise or license taxes. [Id., § 29.]

Art. 14½yy. Filing fees.—For filing Articles of incorporation, an association organized hereunder shall pay ten dollars (\$10.00) and for filing an amendment to the Articles, two dollars and fifty cents (\$2.50). [Id., § 30.]

CHAPTER EIGHT

AGRICULTURAL SEEDS

Art.
 14%g. Agricultural seeds defined.
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 14%g.b. Statements attached to packages of mixed seeds; contents.
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Art.
 14%g. Actions by buyer against seller for damages must be based upon samples examined and tested; accrued rights; sales between farmers.
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 14%g.i. Annual appropriation; use of with fees for enforcement of act.
 14%g.j. Definitions.

Article 14 $\frac{3}{4}$. **Agricultural seeds defined.**—For the purpose of this Act agricultural seeds are defined as the seeds of alfalfa, Irish potatoes and sweet potatoes, clovers, corn, cotton, saccharine, sorghums, non-saccharine sorghums, broom corn, small grains, (including rice), cowpeas, soybeans, velvet beans, peanuts, vetch, rape, millet, Johnson grass, Bermuda grass, Kentucky blue grass, orchard grass, sudan grass, onion and Rhodes grass, which are to be used for sowing or seeding purposes. [Acts 1919, 36th Leg. 2d C. S., ch. 62, § 1.]

Took effect Oct. 27, 1919.

Art. 14 $\frac{3}{4}$ a. **Statements attached to packages; contents.**—Agricultural seeds, except as herein otherwise provided, which are offered or exposed for sale within this State for seeding purposes, in lots of ten (10) pounds or more, shall bear a plainly written or printed statement in the English language stating:

- (a) Commonly accepted name of agricultural seed.
- (b) Correct weight in pounds and ounces.
- (c) Name of State where seed was grown, and if unknown, a statement that the locality where grown is unknown.
- (d) Approximate percentage of germible seed as determined by germination test and date on which germination test was made.
Name and address of person, firm or party or agency making the germination test, provided however, that the statement shall not be a basis for prosecution under this Act.
- (e) Name and address of vendor.
- (f) The approximate percentage, by weight, or purity, meaning freedom of such agricultural seed from foreign matter and from other seed distinguishable by their appearance.
- (g) The approximate total percentage, by weight, of weed seeds or other foreign matter.
- (h) The name and the approximate number per pound of each kind of the seed of the following named noxious weeds which are present at the rate of, or in excess of, one such noxious weed seed in five (5) grams of agricultural seed. Such noxious weed seed are defined as seeds of dodder (*cascuta*, various species), bind, weed or wild morning glory (*convolvulus*, various species), blue weed (*helianthus ciliatus*), wire grass (*Paspalum distichum*), Bermuda grass, (*cynodon dactylon* L.) Johnson grass, (*Andropogon Halotensis*), and all other seeds or foreign matter known (by science), to be noxious are hereby defined as noxious weed seeds. [Id., § 2.]

Art. 14 $\frac{3}{4}$ b. **Statements attached to packages of mixed seeds; contents.**—Mixtures of seeds offered or exposed for sale within the State for seeding purposes, in lots of ten (10) pounds or more, containing one or more kinds of the agricultural seeds defined in Section 2 of this Act [Art. 14 $\frac{3}{4}$ a] in excess of five per centum, by weight, of the total mixture, shall bear a plainly written or printed statement in English language, stating:

- (a) That such seed is a mixture.
- (b) The approximate percentage, by weight of inert matter.
- (c) The requirements providing in paragraphs (c), (g) and (h) of Section 2 [Art. 14 $\frac{3}{4}$ a], of this Act. [Id., § 3.]

Art. 14 $\frac{3}{4}$ c. **Seeds excepted from operation of act.**—The provisions of this Act shall not apply to agricultural seeds, or mixtures of seeds, as defined in Section 3, of this Act [Art. 14 $\frac{3}{4}$ b], when plainly labeled, "not clean seed," or "not tested seed" nor "seeds sold to merchants to be recleansed before being sold or exposed for sale for seeding purposes, or when in storage for the purpose of recleansing." [Id., § 4.]

Art. 14 $\frac{3}{4}$ d. **Test or analysis of seed; conduct of.**—The percentage of purity of agricultural seed and the mixture as defined in this Act, and oth-

er percentages required by this Act, shall be based upon a test or analysis, conducted either by the Commissioner of Agriculture, or his Assistants, or by the Vendor of the agricultural seed, or "mixture," or his agents; provided that such test or analysis made by the vendor or his agents shall conform to the reasonable regulations which said Commissioner of Agriculture is hereby authorized and directed to prescribe, or shall conform to the reasonable regulations or methods of testing adopted or used by the Association of Official seed analysis of the United States Department of Agriculture. [Id., § 5.]

Art. 14³/₄e. Samples of seed for examination and test; fees for; report of result.—Whoever buys or sells agricultural seeds, defined in Section 1, of this Act [Art. 14³/₄], or mixtures of seeds as provided in Section 3, of this Act [Art. 14³/₄b], for the use in this State for seeding purposes, may submit fair samples of such seeds to the Commissioner of Agriculture for examination, and test of purity and of viability, and said Commissioner of Agriculture shall cause such examination and test to be promptly made, and report thereon, and return to the sender. For the test of purity, said Commissioner of Agriculture shall charge a fee of twenty-five cents, for the examination of each sample, and for a test of vitality, a fee of twenty-five cents, either or both of which fees shall be payable in advance, provided that these tests shall be made free of charge to the citizens of this State. All money received from receipt of such fees shall be paid into the Treasury of the State, to be credited to the funds of the Department of Agriculture. [Id., § 6.]

Art. 14³/₄f. Enforcement of act by Commissioner of Agriculture; samples for analysis; report to Governor.—The enforcement of this Act shall be entrusted to the Commissioner of Agriculture, and he is authorized in person or by his inspectors, or assistants to take for analysis, paying the reasonable purchase price, a sample not exceeding four ounces in weight, from any lot of agricultural seeds or "mixtures" offered or exposed for sale; provided that said sample shall be drawn or taken in the presence of the vendor or parties interested, or his or their agents or representatives, and shall not be less than ten per cent of the whole lot inspected and shall be thoroughly mixed and then divided into two samples and placed in glass or metal vessels or containers, carefully sealed and a label placed on each vessel stating the name of the agricultural seed or mixture sampled, the name of the vendor from whose stock said samples were taken, and the date and place of taking such samples, and said label shall be signed by said Commissioner of Agriculture, or his authorized agent; or said sample may be taken in the presence of the disinterested witnesses if the vendor or party in interest fails or refuses to be present, when notified. One of said duplicate samples shall be left with or on the premises of the vendor or party in interest, and the other retained by the Commissioner of Agriculture, for analysis and comparison with the labels required by Sections two and three of this Act [Arts. 14³/₄a, 14³/₄b].

The Commissioner of Agriculture shall annually and prior to December first, make and submit to the Governor a report of the services performed by him or his assistants, together with an itemized account of all moneys paid out as authorized under this Act. [Id., § 7.]

For section 8 of this Act, see post, Penal Code, art. 1007a.

Art. 14³/₄g. Actions by buyer against seller for damages must be based upon samples examined and tested; accrued rights; sales between farmers.—No action for the recovery of damages or any liability whatsoever for any violation of any of the provisions of this Act, or for the breach of any legal duty or obligation in the sale of the agricultural seeds defined in Section one of this Act [Art. 14³/₄], or the sale of mix-

tures defined in Section three of this Act [Art. 143⁴b], shall be maintained by the buyer and against the vendor of such seeds, unless the claim or claims of such buyer are based upon properly drawn samples of such seed, from the bulk thereof, and examined in the way and manner provided in Section six of this Act [Art. 143⁴e]; provided, that none of the provisions of this Act shall affect any right accruing prior to the time when this Act shall go into effect; provided that nothing in this Act shall be construed as preventing one farmer from selling to another farmer such seed grown on his own farm as covered by the provisions of this Act without having said seed tested and labeled as provided for herein. [Id., § 9.]

Art. 143⁴h. Results of analysis and tests may be published in report of Commissioner.—The result of the analysis and tests of seed made by the Commissioner of Agriculture of samples drawn by him or his inspectors may at his discretion, be published in his report. [Id., § 10.]

Art. 143⁴i. Annual appropriation; use of with fees for enforcement of act.—There shall be appropriated annually from the State Treasury, the sum of \$. in favor of the Department of Agriculture and the same together with the fees provided for in Section Six of this Act [Art. 143⁴e], may be expended in the enforcement of this Act. So much of said appropriation and the moneys secured as fees for tests and analysis of seed after first exhausting the moneys secured from the collection of the fees as herein provided for, shall be paid to the Commissioner of Agriculture as he may show by his bills has been expended in performing the duties required by this Act. [Id., § 11.]

Art. 143⁴j. Definitions.—The words, “persons,” “vendor” and “party” in interest and “whoever” as used in this Act shall be construed to impart both the plural and singular, as the case demands, and shall include corporations, companies, societies and individuals. [Id., § 12.]

COUNTY AID TO FARMERS IN PURCHASE OF SEED

The counties of the state were authorized to purchase seed for planting for distribution to residents of such counties unable to procure seed by reason of poverty for the years 1918 and 1919, to be repaid from the proceeds of the crops of the distributees, and to pay for such seed out of the funds of the county or out of moneys advanced by the state, by Acts 1918, 35th Leg. 4th C. S. ch. 4, and Acts 1919, 36th Leg., ch. 22, respectively. The obligations incurred by counties under Acts 1918, 35th Leg. 4th C. S. were authorized to be extended for 2 years, by Acts 1919, 36th Leg., ch. 23, § 1.

CHAPTER NINE

INTERNATIONAL TRADING CORPORATIONS

Art.
14%. Incorporation; powers.
14%a. Stock may be used in payment for property at.
14%b. Aliens not to obtain control of cor-

Art.
poration, but may become stockholders; cancellation of charter and receivership.
14%c. Repeal; anti-trust laws.

Article 147⁸. Incorporation; powers.—Private corporations may be created for the purpose of engaging in international trading and the purchase and sale of the products of the farm, ranch, orchard, mine and forest; such corporations shall be empowered to pledge, borrow, hypothecate and receive in trust for the purpose of sale any and all products of the farm, ranch and orchard, and shall be authorized to buy, sell and exchange raw products of the farm, ranch, orchard, mine and forest, and to take in payment therefor finished products of whatsoever kind and character that they may determine at a fair, equitable and just valuation, such corporations shall have power to charter, lease, construct or pur-

chase necessary vessels, ships, docks, wharves and warehouses for the conduct of their business; they shall have a right to pool products of the farm in the sale of same, and may hypothecate or pledge the credit of such corporations for the products so received under contract for the necessary funds with which to market same; they shall have generally and specially all the rights, purposes and privileges belonging to a corporation, engaging in international trading; they shall have the right to borrow money as other business corporations and to lend the same upon products that they may be engaged in the sale of, either as owner, agent, consignee or commission merchant. [Acts 1921, 37th Leg., ch. 120, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 147/8a. Stock may be issued in payment for property at appraised value; approval and filing of charter.—Corporations created under the terms and provisions of this Act shall have authority to receive in payment of capital stock the products of farm, ranch and orchard, and shall have authority to receive in payment for capital stock manufacturing establishments, and the stock and bonds of same, at a fair, equitable and just valuation. Whenever property is received in payment for capital stock, it shall be the duty of the Secretary of State to appoint a board of appraisers who are familiar with the valuations of such property so taken in payment for capital stock, to appraise same and furnish him with a sworn statement of the valuations of the property so taken in payment for capital stock. On receipt of same it shall be his duty to approve, file and record the charter of such corporation under the general terms and provisions of the Corporation Laws of the State of Texas. [Id., § 2.]

Art. 147/8b. Aliens not to obtain control of corporation, but may become stockholders; cancellation of charter and receivership.—All corporations created under Section 1 hereof [Art. 147/8] shall never surrender the control of such corporation to stockholders, bondholders, pledgees or mortgagees of any other country save and except the United States of America. A majority of the stock shall in all instances be owned by citizens of the United States of America, and a majority of the directors thereof, as well as the officers of such corporation, shall in all instances be citizens of the United States and of the State of Texas, nothing, however, in this section shall prevent citizens of foreign countries of becoming stockholders in such corporations, but the control of such corporations shall never in any instance be vested in citizens of other countries than the United States of America. Violation of any of the provisions of this section shall be sufficient cause for the Secretary of State to cancel the charter of said corporation and same shall be placed in the hands of a receiver as now provided by law. [Id., § 3.]

Art. 147/8c. Repeal; anti-trust laws.—All laws and parts of laws in conflict herewith are hereby specially repealed, but nothing in this Act shall be construed so as to repeal, or in anywise abridge, any part of the Anti Trust Laws of the State of Texas. [Id., § 4.]

TITLE 3

ALIENS

Art.	Art.
15. Alien ownership of lands inhibited; reciprocal legislation.	20. Duty to institute escheat proceedings.
16. Under certain circumstances and conditions permitted.	21a. Alien may not act as guardian, executor, or administrator.
17. Collection of debts and enforcement of liens.	21b. Corporation controlled by aliens shall not acquire lands in this state; escheat.
18. May hold land acquired in permissive way for five years.	21c. Land held in trust for alien subject to forfeiture.
19. May convey before institution of escheat proceedings; conveyance to evade law.	21d. Reports as to alien ownership; failure to make report; report by minor or insane person.

Article 15. [9] Alien ownership of lands inhibited; reciprocal legislation.—No alien or person who is not a citizen of the United States shall acquire title to or own any lands in the State of Texas, or acquire any leasehold or other interest in such lands, except as hereinafter provided; but he shall have and enjoy in the State of Texas such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this title and the General Laws of the State. [Acts 1892, S. S. p. 6, and Acts 1854, p. 98; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 15, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

Cumulative and not restrictive.—This article is cumulative and not restrictive of the common and general laws, permitting aliens to inherit personal property in the state and to sue therefor. *Southwestern Surety Ins. Co. v. Vickstrom* (Civ. App.) 203 S. W. 389.

Reciprocal legislation.—Under this article, the provision of state laws must be looked to to determine rights of aliens regardless of whether his own country grants reciprocal rights to citizens, and if it did and went further, state laws would, ipso facto, expand to comprehend additional benefits allowed by alien's domicile. *Southwestern Surety Ins. Co. v. Vickstrom* (Civ. App.) 203 S. W. 389.

Workmen's compensation.—Nonresident aliens are entitled to recover benefits of Workmen's Compensation Act not expressly excluding them, in view of this article. *Southwestern Surety Ins. Co. v. Vickstrom* (Civ. App.) 203 S. W. 389.

Art. 16. [10] Under certain circumstances and conditions permitted.—This title shall not apply to any land now owned in this State by aliens, not acquired in violation of any law of this State, so long as it is held by the present owners; nor to lots or parcels of land owned by aliens in any incorporated town or city of this State, nor to the following classes of aliens, who are, or who shall become, bona fide inhabitants of this State, so long as they shall continue to be such bona fide inhabitants of the State of Texas:

(1) Aliens who were bona fide inhabitants of this State on the date on which this Act becomes a law.

(2) Aliens eligible to citizenship in the United States who shall become bona fide inhabitants of this State, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States.

(3) Aliens who are natural born citizens of nations which have a common land boundary with the United States.

(4) Aliens who are citizens or subjects of a nation which now permits American citizens to own land in fee in such country; and any resident alien who shall acquire land under the provisions of this article shall have five years after he shall cease to be a bona fide inhabitant of this State in which to alienate said land. [Acts 1892, p. 6; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 16, Rev. Civ. St. 1911.]

Art. 17. [11] Collection of debts and enforcement of liens.—The provisions of this title shall not prevent aliens from acquiring lands, or any interest therein, in the ordinary course of justice in the collection of debts; nor from acquiring liens upon real estate, or any interest therein; nor from lending money and securing the same upon real estate, or any interest therein; nor from enforcing any such lien; nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured. [Acts 1892, p. 6; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 17, Rev. Civ. St. 1911.]

Art. 18. [12] May hold land acquired in permissive way for five years.—All aliens prohibited from owning land in this State under the provisions of this title, who shall hereafter acquire real estate in Texas by devise, descent, or by purchase as permitted by this title, may hold same for five years; and if such alien is a minor, he may hold same for five years after attaining his majority, or if of unsound mind, for five years after the appointment of a legal guardian. [Acts 1892, p. 6; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 18, Rev. Civ. St. 1911.]

Art. 19. [13] May convey before institution of escheat proceedings; conveyance to evade law.—Any alien who shall hereafter hold lands, in Texas, in contravention of the provisions of this title, may, nevertheless, convey the fee simple title thereof at any time before the institution of escheat proceedings as hereinafter provided; provided, however, that if any such conveyance shall be made by such alien either to an alien or to a citizen of the United States, in trust, and for the purpose and with the intention of evading the provisions of this title, such conveyance shall be null and void; and any such land so conveyed shall be forfeited and escheated to the State absolutely. [Acts 1892, p. 6; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 19, Rev. Civ. St. 1911.]

Art. 20. [14] Duty to institute escheat proceedings.—It shall be the duty of the Attorney General, or the district or county attorney, when he shall be informed, or have reason to believe that lands in the State are being held contrary to the provisions of this title, to institute suit in behalf of the State of Texas in the district court of the county where such lands are situated, praying for the escheat of the same on behalf of the State, as in case of estates of persons dying without devise thereof and having no heirs. [Acts 1892, p. 6; Acts 1921, 37th Leg., ch. 134, § 1, amending art. 20, Rev. Civ. St. 1911.]

Art. 21a. Alien may not act as guardian, executor, or administrator.—No alien shall ever be appointed or permitted to qualify as guardian of the estate of any minor or person of unsound mind, or as executor or administrator of the estate of any decedent in this State, unless he is permitted to own land under the provisions of this title. [Acts 1921, 37th Leg., ch. 134, § 1, adding art. 21a to Rev. Civ. St. 1911.]

Art. 21b. Corporation controlled by aliens shall not acquire lands in this state; escheat.—No corporation in which the majority of the capital stock is legally or equitably owned by aliens prohibited by law from owning land in the State of Texas shall acquire title to or own any lands in the State of Texas, or any leasehold or other interest in such lands, and land so owned shall be subject to escheat under the provisions of this title as though owned by a non-resident alien. [Acts 1921, 37th Leg., ch. 134, § 1, adding art. 21b to Rev. Civ. St. 1911.]

Art. 21c. Land held in trust for alien subject to forfeiture.—Land owned in trust, either by an alien or by a citizen of the United States,

for the beneficial use of any alien or aliens, or any corporation prohibited from owning land in this State under the provisions of this title, shall be subject to forfeiture as though the legal title thereto was in such alien or corporation. [Acts 1921, 37th Leg., ch. 134, § 1, adding art. 21c to Rev. Civ. St. 1911.]

Art. 21d. Reports as to alien ownership; failure to make report; report by minor or insane person.—All aliens now owning lands in the State of Texas, shall on or before the 1st day of January 1923 file a written report under oath, with the Clerk of the County Court of the County in which such land is located, giving the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date and place of arrival of said alien in the United States, and his or her present residence and postoffice address, and the length of time of residence in the State of Texas, the foreign prince, potentate, state or sovereignty, of which the alien may be at the time be a citizen or subject, and the number of acres of land owned by such alien in such county, the name and number of the survey, the abstract and certificate number, the name of the person or persons, from whom acquired, the date when acquired, and shall either describe said land by metes and bounds, or refer to recorded deed in which same is so described, which report shall be known as "Report of Alien Ownership." Provided further, that all aliens hereafter purchasing, or in any manner acquiring lands located in Texas, shall within six months after such purchase, or acquisition, file with the County Clerk of the County in which such land is located, a "Report of Alien Ownership," in terms as above required.

Any alien who may now own land in Texas, or who may hereafter acquire any land in Texas, by purchase or otherwise, who does not, within the time prescribed in this Article, file the reports herein provided for, shall be subject to have such land forfeited and escheated to the State of Texas. The reports herein acquired shall, when the alien is a minor or insane person, be filed by the parent or guardian of such alien. It shall be the duty of the Clerk of the County Court of each county to file and record the reports above provided for in a separate volume, to be entitled, "Record of Alien Owned Lands," for said county, which record shall be alphabetically indexed. The recording fees for recording such reports shall be paid by the alien owner. [Acts 1921, 37th Leg., ch. 134, § 1, adding art. 21d to Rev. Civ. St. 1911.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Alien enemies.—A proceeding for appointment of permanent administrator of the estate of a deceased, who left no property in the state, the only reason for the appointment being to prosecute a suit for the benefit of the heirs who are residents of Austria-Hungary, will be suspended until the end of the war, in view of Trading with the Enemy Act, § 7, cl. b (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½d), denying to alien enemies the right to maintain suits in courts of the United States. Galveston, H. & S. A. Ry. Co. v. Blankfield (Civ. App.) 211 S. W. 808.

The prosecution of a proceeding by an alien enemy being against public policy, it is the duty of the court to stay the proceeding when the fact that plaintiff is an alien enemy is made to appear at any stage of the proceeding, and it is not necessary that any plea or exception should be made by defendant. *Id.*

While the court, upon the fact being made to appear that plaintiff was an alien enemy, might be authorized to dismiss the proceedings, the less harsh practice of suspending proceedings until the end of the war is now the proper practice. *Id.*

TITLE 4

AMUSEMENTS—PUBLIC

Article 22. Defining places of public amusement.

Negligence in conduct of place of public amusement.—Swimming pool. See Barnes v. Honey Grove Natatorium Co. (Civ. App.) 228 S. W. 354.

TITLE 5
APPORTIONMENT

- Art.
24. Senatorial districts.
25. Returns made to whom.
25a. When effective.
25b. Partial invalidity.
26. Representative districts.

- Art.
27. Returns made to whom.
28. Congressional districts.
29. Supreme judicial districts.
30. Judicial districts.

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.	Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Anderson ...	6	55	7	3	1	Erath	21	105	12	29	2
Andrews ...	30	88	16	70	8	Falls	13	62, 96	11	82	3
Angelina ...	3	12	2	2	9	Fannin ...	9	38, 41	4	6	6
Aransas ...	18	70	14	36	4	Payette ...	15	66	9	22	1
Archer ...	23	110	13	30	2	Fisher ...	24	117	18	39	7
Armstrong ...	31	123	18	47	7	Floyd ...	30	120	18	64	7
Atascosa ...	18	76	15	81	4	Foard ...	23	114	18	46	7
Austin ...	15	25	10	22	1	Fort Bend ..	17	20	8	23	1
Bailey ...	30	120	18	64	7	Franklin ...	8	126	1	76	6
Bandera ...	26	86	16	38	4	Freestone ..	6	57	6	77	5
Bastrop ...	14	127	10	21	3	Frio ...	27	76	15	81	4
Baylor ...	23	113	13	50	2	Gaines ...	30	17, 18	7	72	8
Bee ...	18	70	14	36	4	Galveston ...	17	118	10, 56	1	1
Bell ...	21	95, 96	11	27	3	Garza ...	30	118	13	72	7
Bexar ...	25	78	14	37, 45, 57, 73	4	Gillespie ...	25	85	16	33	4
Blanco ...	19	85	14	33	3	Glasscock ...	29	91	16	70	8
Borden ...	30	118	18	32	8	Gollad ...	18	69	9	24	4
Bosque ...	21	98	11	18	2	Gonzales ...	19	67	9	25	4
Bowie ...	1, 3	1, 3	1	5	6	Gray ...	31	122	18	31	7
Brazoria ...	17	21	9	23	1	Grayson ...	9	44, 45	4	15, 59	5
Brazos ...	14	26	6	85	1	Gregg ...	2	6, 33	3	71	6
Brewster ...	29	87	16	83	8	Grimes ...	5	26, 27	8	12	1
Briscoe ...	31	120	18	64	7	Guadalupe ...	19	80	14	25	4
Brooks ...	27	74	15	79	4	Hale ...	30	120	18	64	7
Brown ...	25	125	17	35	3	Hall ...	31	121	18	46	7
Burleson ...	14	65	10	21	1	Hamilton ...	21	94	11	52	3
Burnet ...	20	84	17	33	3	Hansford ...	31	124	18	31	7
Caldwell ...	19	81	10	22	3	Hardeman ...	23	114	15	46	7
Calhoun ...	18	69	9	24	4	Hardin ...	4	14	2	9, 75	9
Callahan ...	24	107	17	42	2	Harris ...	16	19	8	11, 55, 61, 80	1
Cameron ...	27	72	15	28	4	Harrison ...	2	5, 6	2	71	6
Camp ...	7	4	1	76	6	Hartley ...	31	124	18	69	7
Carson ...	31	123	18	31	7	Haskell ...	24	113	18	39	2
Cass ...	1	2, 3	1	5	6	Hays ...	19	81	10	22	3
Castro ...	31	120	18	64	7	Hemphill ...	31	124	18	31	7
Chambers ...	17	17	7	75	1	Henderson ...	6	54	3	3	5
Cherokee ...	3	31	2	2	6	Vidalgo ...	27	73	15	79	4
Childress ...	31	121	18	46	7	Hill ...	12	59, 60	6	66	5
Clay ...	23	110	13	30	2	Hockley ...	30	119	18	72	7
Cochran ...	30	119	18	72	7	Hood ...	12	105	12	29	2
Coke ...	25	92	16	51	3	Hopkins ...	8	39, 126	1	8	6
Coleman ...	25	125	17	35	3	Houston ...	5	30	7	3	1
Collin ...	19	43, 45	4	59	5	Howard ...	30	91	16	32	2
Collingsworth	31	122	18	46	7	Hudspeth ...	29	90	16	34	8
Colorado ...	15	25	9	25	1	Hunt ...	10	40, 42	4	8, 62	5
Comal ...	19	80	14	22	3	Hutchinson..	31	124	18	31	7
Comanche ...	25	104	17	52	2	Irion ...	25	91	16	51	3
Concho ...	25	92	17	35	3	Jack ...	22	109	13	43	2
Cooke ...	9	46	13	16	2	Jackson ...	18	22	9	24	1
Corvell ...	21	94	11	52	3	Jasper ...	3	13	2	1	9
Cottle ...	30	121	18	50	7	Jefferson ...	4	15, 16	2	58, 60	9
Crane ...	29	88	16	70	8	Jeff Davis ...	29	88	16	83	8
Crockett ...	29	86	16	83	3	Jim Hogg ...	27	74	15	79	4
Crosby ...	30	119	18	72	7	Jim Wells ...	27	71	15	79	4
Culberson ...	29	90	16	34	8	Johnson ...	12	98, 99	12	18	2
Dallam ...	31	124	18	69	7	Jones ...	24	115	17	39	2
Dallas ...	11	50, 51	5	14, 44, 68	5	Karnes ...	18	79	14	81	4
Dawson ...	30	119	18	72	7	Kaufman ...	6	51, 52	3	86	5
Deaf Smith..	31	123	18	69	7	Kendall ...	26	85	14	38	4
Delta ...	8	126	1	8, 62	5	Kenedy ...	27	74	15	28	4
Denton ...	22	49, 101	13	16	2	Kent ...	30	118	18	39	7
DeWitt ...	18	68	9	24	1	Kerr ...	26	86	16	38	4
Dickens ...	30	118	18	50	7	Kimble ...	25	86	16	33	4
Dimmitt ...	27	77	15	49	4	King ...	30	114	18	50	7
Donley ...	31	122	18	47	7	Kinney ...	29	87	15	63	4
Duval ...	27	71	15	79	4	Kleberg ...	27	74	15	28	4
Eastland ...	24	106, 107	17	88, 91	2	Knox ...	23	114	18	50	2
Ector ...	29	88	16	70	8	Lamar ...	8	37, 38	1	6, 62	6
Edwards ...	29	86	16	63	4	Lamb ...	30	120	18	64	7
Ellis ...	12	100	5	40	5	Lampasas ...	20	93	17	27	3
El Paso ...	29	89, 90	16	34, 41, 65	8	La Salle ...	27	76	15	81	4

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.	Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Lavaca	15	23	9	25	1	Rockwall ...	10	51	5	86	5
Lee	14	65	10	21	8	Runnels	25	92	17	35	3
Leon	5	56	6	12	1	Rusk	2	8	3	4	6
Liberty	4	14	7	9, 75	9	Sabine	3	11	2	1	9
Limestone ..	13	61	6	77	5	San Augustine	5	11	2	1	9
Lipscomb ...	31	124	18	31	7	San Jacinto..	3	29	7	9	9
Live Oak	18	76	15	36	4	San Patricio..	18	70	14	36	4
Llano	29	85	17	33	3	San Saba ...	20	93	17	33	3
Loving	29	88	16	70	8	Schleicher ...	25	86	16	51	3
Lubbock	30	119	18	72	7	Scurry	24	118	18	32	2
Lynn	30	119	18	72	7	Shackelford..	24	115	17	42	2
Madison	5	56	6	12	1	Shelby	2	10	2	4	9
Marion	1	3	1	76	6	Sherman	31	124	18	69	7
Martin	30	88	16	70	8	Smith	7	32, 33	3	7	6
Mason	25	86	16	33	4	Somervell ...	12	98	12	18	2
Matagorda ..	17	21	9	23	1	Starr	27	74	15	79	4
Maverick	29	87	15	63	4	Stephens	24	108	17	42, 90	2
McCulloch ...	25	93	17	35	3	Sterling	25	91	16	51	3
McLennan ...	13	96, 97	11	19,54,74	3	Stonewall ...	30	118	18	39	2
McMullen ...	27	76	15	36	4	Sutton	29	86	16	83	4
Medina	29	77	15	38	4	Swisher	31	123*	18	64	7
Menard	25	86	16	33	4	Tarrant	28	101,102	12	17,48,67†	2
Midland	29	88	16	70	8	Taylor	24	116	17	42	2
Milam	13	64, 65	6	20	3	Terrell	29	87	16	63	8
Mills	25	104	17	27	3	Terry	30	119	18	72	7
Mitchell	24	117	16	32	2	Throckmorton	24	113	13	39	2
Montague ...	22	47	13	16	2	Titus	1	35	1	76	6
Montgomery..	5	27	7	9, 75	9, 75	Tom Green..	25	91	16	51	3
Moore	31	124	18	69	7	Travis	20	82	10	26, 53	3
Morris	1	35	1	76	6	Trinity	5	28	7	12	1
Motley	30	121	18	50	7	Tyler	3	12	2	75	9
Nacogdoches.	3	9	2	2	9	Upshur	7	4	3	7	6
Navarro	6	58, 60	6	13	5	Upton	29	88	16	83	8
Newton	3	13	2	1	9	Uvalde	29	77	15	63	4
Nolan	24	117	17	32	2	Val Verde ...	29	87	16	63	4
Nueces	27	71	14	28	4	Van Zandt ...	7	53	3	86	5
Ochiltree ...	31	124	18	31	7	Victoria	18	69	9	24	4
Oldham	31	123	18	69	7	Walker	5	29	7	12	1
Orange	4	15	2	1	9	Waller	15	20	8	80	1
Palo Pinto ..	2	108	17	29	2	Ward	29	88	16	70	8
Panola	2	7	2	4	6, 9	Washington..	14	24	10	21	1
Parker	22	103	12	43	2	Webb	27	75	15	49	4
Parmer	31	120	18	69	7	Wharton	17	22	9	23	1
Pecos	29	88	16	83	8	Wheeler	31	122	18	31	7
Polk	5	28	7	9	9	Wichita	23	111,112	13	30,78,89	2
Potter	31	123	18	47	7	Wilbarger ...	23	112	13	46	7
Presidio	29	88	16	83	8	Willacy	27	74	15	28	1
Rains	10	42	4	8	5	Williamson..	20	83, 84	10	26	3
Randall	31	123	18	47	7	Wilson	18	79	14	81	4
Reagan	29	91	16	83	8	Winkler	29	88	16	70	8
Real	29	86	16	38	4	Wise	22	48	13	43	2
Red River ..	8	36	1	6	6	Wood	7	34	3	7	5
Reeves	29	88	16	70	8	Yoakum	30	119	18	72	7
Refugio	18	70	9	24	4	Young	23	109	13	30	2
Roberts	31	124	18	31	7	Zapata	27	75	15	49	4
Robertson ..	14	63	6	85	3	Zavala	27	77	15	38	4

*Swisher county is omitted from the new representative apportionment act. Under the former act it was in the 123d district.
 †By Acts 1919, 36th Leg. 2d C. S., ch. 80, a criminal judicial district is created in Tarrant county.

SENATORIAL DISTRICTS

- Article 24. [16] [11]** The Senatorial Districts of the State of Texas shall hereafter be composed respectively of the following named counties, each of which districts shall be entitled to elect one Senator, to-wit:
- No. 1. Bowie, Marion, Cass, Morris and Titus.
 - No. 2. Harrison, Gregg, Rusk, Panola and Shelby.
 - No. 3. Cherokee, Nacogdoches, San Augustine, Angelina, Sabine, Newton, Jasper and Tyler.
 - No. 4. Orange, Jefferson, Hardin and Liberty.
 - No. 5. Grimes, Montgomery, Trinity, Leon, Houston, Polk, Madison, Walker and San Jacinto.
 - No. 6. Navarro, Henderson, Anderson, Freestone and Kaufman.
 - No. 7. Camp, Wood, Upshur, Smith and Van Zandt.
 - No. 8. Lamar, Delta, Franklin, Hopkins and Red River.
 - No. 9. Cooke, Grayson and Fannin.

- No. 10. Rockwall, Collin, Hunt and Rains.
 No. 11. Dallas.
 No. 12. Johnson, Hill, Ellis, Hood and Somervell.
 No. 13. McLennan, Falls, Limestone and Milam.
 No. 14. Bastrop, Lee, Burleson, Washington, Brazos and Robertson.
 No. 15. Fayette, Lavaca, Colorado, Austin, and Waller.
 No. 16. Harris.
 No. 17. Wharton, Ft. Bend, Matagorda, Brazoria, Galveston and Chambers.
 No. 18. Wilson, Atascosa, Karnes, DeWitt, Victoria, Goliad, Live Oak, San Patricio, Bee, Refugio, Aransas, Calhoun and Jackson.
 No. 19. Blanco, Hays, Comal, Caldwell, Guadalupe and Gonzales.
 No. 20. San Saba, Lampasas, Llano, Burnet, Williamson and Travis.
 No. 21. Bell, Erath, Bosque, Hamilton and Coryell.
 No. 22. Montague, Jack, Wise, Denton, Palo Pinto and Parker.
 No. 23. Hardeman, Foard, Knox, Wilbarger, Baylor, Wichita, Archer, Young and Clay.
 No. 24. Scurry, Fisher, Jones, Haskell, Shackelford, Stephens, Eastland, Callahan, Taylor, Nolan, Mitchell and Throckmorton.
 No. 25. Comanche, Mills, Brown, Coleman, McCulloch, Mason, Menard, Concho, Rannels, Coke, Tom Green, Schleicher, Irion, Sterling, Gillespie and Kimble.
 No. 26. Kerr, Kendall, Bexar and Bandera.
 No. 27. Zavalla, Frio, McMullen, La Salle, Dimmitt, Webb, Duval, Jim Wells, Kenedy, Nueces, Kleberg, Willacy, Brooks, Jim Hogg, Zapata, Starr, Hidalgo and Cameron.
 No. 28. Tarrant.
 No. 29. El Paso, Hudspeth, Culberson, Reeves, Loving, Winkler, Ward, Ector, Midland, Glasscock, Reagan, Upton, Crane, Crockett, Sutton, Edwards, Real, Kinney, Val Verde, Terrell, Brewster, Presidio, Jeff Davis, Pecos, Uvalde, Medina and Maverick.
 No. 30. Bailey, Lamb, Hale, Floyd, Motley, Cottle, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Yoakum, Terry, Lynn, Garza, Kent, Stonewall, Gaines, Dawson, Borden, Andrews, Martin and Howard.
 No. 31. Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Gray, Wheeler, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Parmer, Castro, Swisher, Briscoe, Hall and Childress. [Acts 1901, S. S., p. 9; Acts 1921, 37th Leg. 1st C. S., ch. 60, § 1.]

Effective April 1, 1924.

Special act fixing apportionment.—Acts 1921, 37th Leg., ch. 104, § 5, creating Kenedy county, places such county in the 23d senatorial district. But such act is superseded by Acts 1921, 37th Leg. 1st C. S., ch. 60, § 1, ante, art. 24, placing such county in the 27th district.

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

- First District—Bowie.
 Second District—Harrison.
 Third District—Angelina.
 Fourth District—Jefferson.
 Fifth District—Walker.
 Sixth District—Navarro.
 Seventh District—Smith.
 Eighth District—Lamar.

Ninth District—Grayson.
 Tenth District—Hunt.
 Eleventh District—Dallas.
 Twelfth District—Ellis.
 Thirteenth District—McLennan.
 Fourteenth District—Bastrop.
 Fifteenth District—Colorado.
 Sixteenth District—Harris.
 Seventeenth District—Wharton.
 Eighteenth District—Bee.
 Nineteenth District—Caldwell.
 Twentieth District—Williamson.
 Twenty-first District—Bell.
 Twenty-second District—Wise.
 Twenty-third District—Wichita.
 Twenty-fourth District—Taylor.
 Twenty-fifth District—Brown.
 Twenty-sixth District.—Bexar.
 Twenty-seventh District—Nueces.
 Twenty-eighth District—Tarrant.
 Twenty-ninth District—El Paso.
 Thirtieth District—Lubbock.
 Thirty-first District—Potter. [Acts 1901, S. S., p. 10; Acts 1921, 37th Leg. 1st C. S., ch. 60, § 2.]
 Sec. 3 repeals all laws in conflict.

Art. 25a. When effective.—This Act shall take effect and be in force on and after April 1, A. D. 1924, not sooner. [Acts 1921, 37th Leg. 1st C. S., ch. 60, § 4.]

Art. 25b. Partial invalidity.—Should any provision, part or section of this Act be held to be unconstitutional, it shall in no wise affect the remainder of the Act, but that the remainder of the Act shall be and remain in full force and effect as though the portion that may be held unconstitutional had never been a part of this Act. [Id., § 5.]

REPRESENTATIVE DISTRICTS

Art. 26. That the State of Texas be and is hereby apportioned and divided into Representative Districts, and the said Districts and the number of Representatives in each District shall be as follows:

No. 1. The First District, composed of the county of Bowie, and shall elect one Representative.

No. 2. The Second District, composed of the county of Cass, and shall elect one Representative.

No. 3. The Third District, composed of the counties of Bowie, Cass and Marion, and shall elect one Representative.

No. 4. The Fourth District, composed of the counties of Camp and Upshur, and shall elect one Representative.

No. 5. The Fifth District, composed of the county of Harrison, and shall elect one Representative.

No. 6. The Sixth District, composed of the counties of Harrison and Gregg, and shall elect one Representative.

No. 7. The Seventh District, composed of the county of Panola, shall elect one Representative.

No. 8. The Eighth District, composed of the county of Rusk, and shall elect one Representative.

No. 9. The Ninth District, composed of the county of Nacogdoches, and shall elect one Representative.

No. 10. The Tenth District, composed of the county of Shelby, and shall elect one Representative.

No. 11. The Eleventh District, composed of the counties of San Augustine and Sabine, and shall elect one Representative.

No. 12. The Twelfth District, composed of the counties of Angelina and Tyler, and shall elect one Representative.

No. 13. The Thirteenth District, composed of the counties of Jasper and Newton, shall elect one Representative.

No. 14. The Fourteenth District, composed of the counties of Hardin and Liberty, and shall elect one Representative.

No. 15. The Fifteenth District, composed of the counties of Orange and Jefferson, and shall elect one Representative.

No. 16. The Sixteenth District, composed of the county of Jefferson and shall elect two Representatives.

No. 17. The Seventeenth District, composed of the counties of Chambers and Galveston, and shall elect one Representative.

No. 18. The Eighteenth District, composed of the county of Galveston, and shall elect one Representative.

No. 19. The Nineteenth District, composed of the county of Harris, and shall elect five Representatives.

No. 20. The Twentieth District, composed of the counties of Waller and Fort Bend, and shall elect one Representative.

No. 21. The Twenty-first District, composed of the counties of Brazoria and Matagorda, and shall elect one Representative.

No. 22. The Twenty-second District, composed of the counties of Wharton and Jackson, and shall elect one Representative.

No. 23. The Twenty-third District, composed of the county of Lavaca, and shall elect one Representative.

No. 24. The Twenty-fourth District, composed of the county of Washington, and shall elect one Representative.

No. 25. The Twenty-fifth District, composed of the counties of Austin and Colorado, and shall elect one Representative.

No. 26. The Twenty-sixth District, composed of the counties of Brazos and Grimes, and shall elect one Representative.

No. 27. The Twenty-seventh District, composed of the counties of Grimes and Montgomery, and shall elect one Representative.

No. 28. The Twenty-eighth District, composed of the counties of Polk and Trinity, and shall elect one Representative.

No. 29. The Twenty-ninth District, composed of the counties of Walker and San Jacinto, and shall elect one Representative.

No. 30. The Thirtieth District, composed of the county of Houston and shall elect one Representative.

No. 31. The Thirty-first District, composed of the county of Cherokee, and shall elect one Representative.

No. 32. The Thirty-second District, composed of the county of Smith, and shall elect one Representative.

No. 33. The Thirty-third District, composed of the counties of Smith and Gregg, and shall elect one Representative.

No. 34. The Thirty-fourth District, composed of the county of Wood, and shall elect one Representative.

No. 35. The Thirty-fifth District, composed of the counties of Morris, and Titus, and shall elect one Representative.

No. 36. The Thirty-sixth District, composed of the county of Red River, and shall elect one Representative.

No. 37. The Thirty-seventh District, composed of the county of Lamar, and shall elect one Representative.

No. 38. The Thirty-eighth District, composed of the counties of Lamar and Fannin, and shall elect one Representative.

No. 39. The Thirty-ninth District, composed of the county of Hopkins and shall elect one Representative.

No. 40. The Fortieth District, composed of the county of Hunt and shall elect one Representative.

No. 41. The Forty-first District, composed of the county of Fannin, and shall elect one Representative.

No. 42. The Forty-second District, composed of the counties of Rains and Hunt, and shall elect one Representative.

No. 43. The Forty-third District, composed of the county of Collin, and shall elect one Representative.

No. 44. The Forty-fourth District, composed of the county of Grayson, and shall elect two Representatives.

No. 45. The Forty-fifth District, composed of the counties of Grayson and Collin, and shall elect one Representative.

No. 46. The Forty-sixth District, composed of the county of Cooke, and shall elect one Representative.

No. 47. The Forty-seventh District, composed of the county of Montague, and shall elect one Representative.

No. 48. The Forty-eighth District, composed of the county of Wise, and shall elect one Representative.

No. 49. The Forty-ninth District, composed of the county of Denton, and shall elect one Representative.

No. 50. The Fiftieth District, composed of the county of Dallas, and shall elect five Representatives.

No. 51. The Fifty-first District composed of the counties of Dallas, Rockwall and Kaufman, and shall elect one Representative.

No. 52. The Fifty-second District, composed of the county of Kaufman, and shall elect one Representative.

No. 53. The Fifty-third District, composed of the county of Van Zandt, and shall elect one Representative.

No. 54. The Fifty-fourth District, composed of the county of Henderson, and shall elect one Representative.

No. 55. The Fifty-fifth District, composed of the county of Anderson, and shall elect one Representative.

No. 56. The Fifty-sixth District, composed of the counties of Leon and Madison, and shall elect one Representative.

No. 57. The Fifty-seventh District, composed of the county of Freestone, and shall elect one Representative.

No. 58. The Fifty-eighth District, composed of the county of Navarro, and shall elect one Representative.

No. 59. The Fifty-ninth District, composed of the county of Hill, and shall elect one Representative.

No. 60. The Sixtieth District, composed of the counties of Navarro and Hill, and shall elect one Representative.

No. 61. The Sixty-first District, composed of the county of Limestone, and shall elect one Representative.

No. 62. The Sixty-second District, composed of the county of Falls, and shall elect one Representative.

No. 63. The Sixty-third District, composed of the county of Robertson, and shall elect one Representative.

No. 64. The Sixty-fourth District, composed of the county of Milam, and shall elect one Representative.

No. 65. The Sixty-fifth District, composed of the counties of Milam, Burleson and Lee, and shall elect one Representative.

No. 66. The Sixty-sixth District, composed of the county of Fayette, and shall elect one Representative.

No. 67. The Sixty-seventh District, composed of the county of Gonzales, and shall elect one Representative.

No. 68. The Sixty-eighth District, composed of the county of DeWitt, and shall elect one Representative.

No. 69. The Sixty-ninth District, composed of the counties of Victoria, Goliad and Calhoun, and shall elect one Representative.

No. 70. The Seventieth District, composed of the counties of Aransas, Refugio and Bee and San Patricio, and shall elect one Representative.

No. 71. The Seventy-first District, composed of the counties of Nueces, Jim Wells and Duval, and shall elect one Representative.

No. 72. The Seventy-second District, composed of the county of Cameron, and shall elect one Representative.

No. 73. The Seventy-third District, composed of the county of Hidalgo, and shall elect one Representative.

No. 74. The Seventy-fourth District, composed of the counties of Kleberg, Willacy, Kenedy, Jim Hogg, Brooks, and Starr, and shall elect one Representative.

No. 75. The Seventy-fifth District, composed of the counties of Zapata and Webb, and shall elect one Representative.

No. 76. The Seventy-sixth District, composed of the counties of LaSalle, McMullen, Live Oak, Atascosa, and Frio, shall elect one Representative.

No. 77. The Seventy-seventh District, composed of the counties of Dimmitt, Zavala, Uvalde, and Medina, and shall elect one Representative.

No. 78. The Seventy-eighth District, composed of the county of Bexar, and shall elect five Representatives.

No. 79. The Seventy-ninth District, composed of the counties of Wilson and Karnes, and shall elect one Representative.

No. 80. The Eightieth District, composed of the counties of Guadalupe and Comal, and shall elect one Representative.

No. 81. The Eighty-first District, composed of the counties of Hays and Caldwell, and shall elect two Representatives.

No. 82. The Eighty-second District, composed of the county of Travis, and shall elect two Representatives.

No. 83. The Eighty-third District, composed of the county of Williamson, and shall elect one Representative.

No. 84. The Eighty-fourth District, composed of the counties of Williamson and Burnet, and shall elect one Representative.

No. 85. The Eighty-fifth District, composed of the counties of Blanco, Llano, Kendall and Gillespie, and shall elect one Representative.

No. 86. The Eighty-sixth District, composed of the counties of Mason, Menard, Schleicher, Crockett, Sutton and Kimble, Kerr, Bandera, Real and Edwards, and shall elect one Representative.

No. 87. The Eighty-seventh District, composed of the counties of Maverick, Kinney, Val Verde, Terrell and Brewster and shall elect one Representative.

No. 88. The Eighty-eighth District, composed of the counties of Presidio, Jeff Davis, Reeves, Loving, Winkler, Ward, Ector, Crane, Pecos, Upton, Midland, Martin and Andrews and shall elect one Representative.

No. 89. The Eighty-ninth District, composed of the county of El Paso, and shall elect two Representatives.

No. 90. The Ninetieth District, composed of the counties of El Paso, Hudspeth, and Culberson, and shall elect one Representative.

No. 91. The Ninety-first District, composed of the counties of Glasscock, Howard, Sterling, Reagan, Irion, and Tom Green, and shall elect one Representative.

No. 92. The Ninety-second District, composed of the counties of Coke, Runnels, and Concho, and shall elect one Representative.

No. 93. The Ninety-third District, composed of the counties of McCulloch, San Saba, and Lampasas, and shall elect one Representative.

No. 94. The Ninety-fourth District, composed of the counties of Hamilton and Coryell, shall elect one Representative.

No. 95. The Ninety-fifth District, composed of the county of Bell, and shall elect one Representative.

No. 96. The Ninety-sixth District, composed of the counties of Bell, Falls, and McLennan, and shall elect one Representative.

No. 97. The Ninety-seventh District, composed of the county of McLennan shall elect two Representatives.

No. 98. The Ninety-eighth District, composed of the counties of Johnson, Somervell, and Bosque, and shall elect one Representative.

No. 99. The Ninety-ninth District, composed of the county of Johnson and shall elect one Representative.

No. 100. The One Hundredth District, composed of the county of Ellis and shall elect two Representatives.

No. 101. The One Hundred and First District, composed of the county of Tarrant shall elect four Representatives.

No. 102. The One Hundred and Second District, composed of the counties of Tarrant and Denton and shall elect one Representative.

No. 103. The One Hundred and Third District, composed of the county of Parker, and shall elect one Representative.

No. 104. The One Hundred and Fourth District, composed of the counties of Comanche and Mills and shall elect one Representative.

No. 105. The One Hundred and Fifth District, composed of the counties of Erath and Hood, and shall elect one Representative.

No. 106. The One Hundredth and Sixth District, composed of the county of Eastland, and shall elect one Representative.

No. 107. The One Hundred and Seventh District, composed of the counties of Eastland and Callahan, and shall elect one Representative.

No. 108. The One Hundred and Eighth District, composed of the county of Palo Pinto and Stephens, and shall elect one Representative.

No. 109. The One Hundred and Ninth District, composed of the counties of Young and Jack, and shall elect one Representative.

No. 110. The One Hundred and Tenth District, composed of the counties of Archer and Clay, and shall elect one Representative.

No. 111. The One Hundred and Eleventh District, composed of the county of Wichita, and shall elect two Representatives.

No. 112. The One Hundred and Twelfth District, composed of the counties of Wichita and Wilbarger, and shall elect one Representative.

No. 113. The One Hundred and Thirteenth District, composed of the counties of Baylor, Haskell, and Throckmorton, and shall elect one Representative.

No. 114. The One Hundred and Fourteenth District, composed of the counties of Hardeman, Foard, Knox and King and shall elect one Representative.

No. 115. The One Hundred and Fifteenth District, composed of the counties of Jones, and Shackelford, and shall elect one Representative.

No. 116. The One Hundred and Sixteenth District, composed of the county of Taylor, and shall elect one Representative.

No. 117. The One Hundred and Seventeenth District, composed of the counties of Nolan, Fisher, and Mitchell, and shall elect one Representative.

No. 118. The One Hundred and Eighteenth District, composed of the counties of Dickens, Stonewall, Kent, Scurry, Borden, and Garza, and shall elect one Representative.

No. 119. The One Hundred and Nineteenth District, composed of the counties of Gaines, Dawson, Yoakum, Terry, Lynn, Cochran, Hockley, Lubbock, and Crosby, and shall elect one Representative.

No. 120. The One Hundred and Twentieth District, composed of the counties of Bailey, Farmer, Castro, Lamb, Hale, Briscoe, and Floyd, and shall elect one Representative.

No. 121. The One Hundred and Twenty-first District, composed of the counties of Motley, Cottle, Hall, and Childress, and shall elect one Representative.

No. 122. The One Hundred and Twenty-second District, composed of the counties of Donley, Collingsworth, Wheeler, and Gray, and shall elect one Representative.

No. 123. The One Hundred and Twenty-third District, composed of the counties of Carson, Armstrong, Randall, Potter, Deaf Smith, and Oldham, and shall elect one Representative.

No. 124. The One Hundred and Twenty-fourth District, composed of the counties of Hartley, Dallam, Sherman, Moore, Hutchinson, Hansford, Ochiltree, Roberts, Hemphill, and Lipscomb, and shall elect one Representative.

No. 125. The One Hundred and Twenty-fifth District, composed of the counties of Brown and Coleman, and shall elect one Representative.

No. 126. The One Hundred and Twenty-sixth District shall be composed of the counties of Delta, Hopkins and Franklin, and shall elect one Representative.

No. 127. The One Hundred and Twenty-seventh District shall be composed of the county of Bastrop, and shall elect one Representative. [Acts 1911, S. S., p. 80, § 1; Acts 1921, 37th Leg. 2d C. S., ch. 6, § 1.]

Took effect Nov. 24, 1921.

Special act fixing apportionment.—Acts 1921, 37th Leg., ch. 104, § 5, creating Kenedy county, places such county in the 77th representative district. But this act is superseded by Acts 1921, 37th Leg. 2d C. S., ch. 6, § 1, ante, art. 26.

Art. 27. Returns made to whom.—In all districts composed of only one county, the county judge of each county shall receive the returns and issue a certificate of election to the Representative elected, as shown by the highest number of votes cast for any one person; but in the several districts composed of more than one county, the county judge of the following named counties shall receive the returns and issue certificates of election to the Representative elected in their respective districts, to-wit:

- In the Third District, Marion County;
- In the Sixth District, Harrison County;
- In the Eleventh District, San Augustine County;
- In the Twelfth District, Angelina County;
- In the Thirteenth District, Newton County;
- In the Fourteenth District, Liberty County;
- In the Fifteenth District, Jefferson County;
- In the Seventeenth District, Galveston County;
- In the Twentieth District, Fort Bend County;
- In the Twenty-first District, Brazoria County;
- In the Twenty-second District, Wharton County;
- In the Twenty-fifth District, Colorado County;
- In the Twenty-sixth District, Brazos County;
- In the Twenty-seventh District, Montgomery County;
- In the Twenty-eighth District, Polk County;
- In the Twenty-ninth District, Walker County;
- In the Thirty-third District, Gregg County;
- In the Thirty-fourth District, Wood County;
- In the Thirty-fifth District, Titus County;
- In the Forty-second District, Hunt County;
- In the Forty-fifth District, Grayson County;
- In the Fifty-first District, Rockwall County;

In the Fifty-sixth District, Leon County ;
 In the Sixtieth District, Navarro County ;
 In the Sixty-fifth District, Burleson County ;
 In the Sixty-ninth District, Goliad County ;
 In the Seventieth District, Bee County ;
 In the Seventy-first District, Nueces County ;
 In the Seventy-fourth District, Starr County ;
 In the Seventy-fifth District, Webb County ;
 In the Seventy-sixth District, Atascosa County ;
 In the Seventy-seventh District, Uvalde County ;
 In the Seventy-ninth District, Karnes County ;
 In the Eightieth District, Guadalupe County ;
 In the Eighty-first District, Caldwell County ;
 In the Eighty-fourth District, Burnet County ;
 In the Eighty-fifth District, Blanco County ;
 In the Eighty-sixth District, Kerr County ;
 In the Eighty-seventh District, Val Verde County ;
 In the Eighty-eighth District, Reeves County ;
 In the Ninetieth District, El Paso County ;
 In the Ninety-first District, Tom Green County ;
 In the Ninety-second District, Runnels County ;
 In the Ninety-third District, McCulloch County ;
 In the Ninety-fourth District, Coryell County ;
 In the Ninety-sixth District, McLennan County ;
 In the Ninety-eighth District, Bosque County ;
 In the One Hundred and Second District, Denton County ;
 In the One Hundred and Fourth District, Comanche County ;
 In the One Hundred and Fifth District, Erath County ;
 In the One Hundred and Seventh District, Eastland County ;
 In the One Hundred and Eighth District, Palo Pinto County ;
 In the One Hundred and Ninth District, Young County ;
 In the One Hundred and Tenth District, Clay County ;
 In the One Hundred and Twelfth District, Wilbarger County ;
 In the One Hundred and Thirteenth District, Haskell County ;
 In the One Hundred and Fourteenth District, Hardeman County ;
 In the One Hundred and Fifteenth District, Jones County ;
 In the One Hundred and Seventeenth District, Mitchell County ;
 In the One Hundred and Eighteenth District, Scurry County ;
 In the One Hundred and Nineteenth District, Lubbock County ;
 In the One Hundred and Twentieth District, Hale County ;
 In the One Hundred and Twenty-first District, Hall County ;
 In the One Hundred and Twenty-second District, Donley County ;
 In the One Hundred and Twenty-third District, Potter County ;
 In the One Hundred and Twenty-fourth District, Dallam County ;
 In the One Hundred and Twenty-fifth District, Brown County ;
 In the One Hundred and Twenty-sixth District, Hopkins County .
 [Acts 1911, S. S., p. 80, § 2 ; Acts 1921, 37th Leg. 2d C. S., ch. 6, § 2.]

CONGRESSIONAL DISTRICTS

Art. 28. [20] [15].

Special act fixing apportionment.—Acts 1921, 37th Leg., ch. 104, § 5, creating Kenedy county, places such county in the 15th congressional district.

SUPREME JUDICIAL DISTRICTS

Art. 29. [21] [16].

4.

Acts 1921, 37th Leg., ch. 104, § 5, creating Kenedy county, places such county in the 4th supreme judicial district.

JUDICIAL DISTRICTS

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

4. The Fourth Judicial District shall be composed of the counties of Rusk, Panola and Shelby, and the terms of the District Court shall be held therein each year as follows:

In Rusk County beginning on the first Monday in January and continuing for five weeks; on the seventeenth Monday following the first Monday in January and continuing for five weeks; on the first Monday in September and continuing for five weeks.

In Shelby County the terms of the District Court shall be commenced as follows: On the sixth Monday following the first Monday in January and run for six weeks; on the twenty-second Monday following the first Monday in January and run for six weeks; on the sixth Monday following the first Monday in September and run for five weeks.

In Panola County the terms of the court shall be commenced as follows: On the twelfth Monday following the first Monday in January and run for five weeks; the twenty-eighth Monday following the first Monday in January and run for five weeks and the eleventh Monday following the first Monday in September and run for four weeks. [Acts 1911, p. 93, § 2; Acts 1921, 37th Leg., ch. 33, § 1.]

That the terms of office of the present District Judge and District Attorney in the three counties of the said Fourth Judicial District shall in no way be interfered with by the provisions of this Act, and they shall continue to hold such office for which they were originally elected until their successors have been lawfully chosen and qualified. [Acts 1921, 37th Leg., ch. 33, § 2.]

That all process or writs of any kind issued to or out of any of the courts of each of the respective districts prior to the time when this law shall become effective shall in no way be invalidated, but shall in every way be valid and shall be considered as having been made returnable to the next term of the court in the county from which they are returnable. That this law shall become effective August 1st, 1921. [Id., § 5.]

Time for filing appeal bond.—Where appeal bond was not filed in trial court within time allowed by this subdivision and art. 2084, Court of Civil Appeals is without power to hear and determine appeal, which must be dismissed. *Farmer v. McKinley* (Civ. App.) 208 S. W. 408.

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

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

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

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

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

In the County of Bowie, on the seventh Monday after the First Monday in September of each year, and may continue in session until the first Monday in January following. [Acts 1907, p. 198; Acts 1911, p. 167; Acts 1915, 34th Leg., ch. 5, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 11, § 1.]

That all process issued out of the District Court of the counties of said district before this Act takes effect is hereby made returnable to the terms of said court, as fixed by this Act, and all bonds heretofore execut-

ed, and the recognizances entered of record in said court shall bind the parties for their appearance, or to fulfill the obligation of such bonds and recognizances at the terms of said court as fixed by this Act, and all process heretofore returned, as well as all bonds and recognizances heretofore taken in the District Courts of the Sixty-second Judicial District shall be as valid as if no change had been made in the time of holding said courts in the counties of said district. [Acts 1921, 37th Leg. 1st C. S., ch. 11, § 2.]

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

Sec. 4 of the act repeals all laws in conflict. The act took effect Aug. 8, 1921.

11.

Time of docketing case.—Appeal from county court of Harris county held, under arts. 3635, 3636, and art. 30, subd. 11, and in view of Acts 34th Leg. (1st Called Sess.) c. 19 (Supp. 1918, art. 30, subds. 23, 80), though not docketed until after second term of Sixty-First district court, not subject to dismissal, being docketed before second term of other districts. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

12. The Twelfth Judicial District of Texas shall be composed of the Counties of Trinity, Leon, Walker, Madison and Grimes, as now constituted, and the District Courts shall be held therein as follows:

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

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

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

In the County of Madison, on the twelfth Monday after the third Monday in February and September of each year, and the terms of Court convening on the Twelfth Monday after the third Monday in February may continue for three weeks and the terms of court convening on the twelfth Monday after the third Monday in September may continue four weeks.

In the County of Grimes, on the third Monday in June and on the sixteenth Monday after the third Monday in September of each year, and may continue in session for six weeks. [Acts 1905, p. 55; Acts 1919, 36th Leg., ch. 67, § 1.]

All writs and process returnable to the Courts at the times now fixed by law shall be returnable at the terms and times as fixed by this Act, and shall be valid. [Acts 1919, 36th Leg., ch. 67, § 2.]

Explanatory.—Sec. 3 of Acts 1919, 36th Leg., ch. 67, repeals all conflicting laws. The act took effect 90 days after March 19, 1919, date of adjournment.

16.

Judicial notice of time of sessions.—The Court of Civil Appeals must take judicial knowledge of the time for holding sessions of the district court in Montague county, in the Sixteenth judicial district and also that a determination of a primary election contest cannot take place at a regular session thereof until after the November election. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

18.

Explanatory.—Acts 1920, 36th Leg. 3d C. S., ch. 4, though dealing with the 29th judicial district alone, purports to amend sec. 3 of Acts 1917, 35th Leg., ch. 45. The latter act had reference to the 18th and 29th districts and appears in the 1918 Supplement under art. 30, subd. 18. The amendment would seem to supersede the provision as far as the 18th district is concerned.

20.

Constitutionality of statute.—Acts 35th Leg., c. 96, § 19 (Supp. 1918, art. 30, subds. 20, 85) providing that if court in Twentieth and Eighty-Fifth judicial districts is in session by virtue of existing laws at time act becomes effective, the act will not be operative until after term shall have expired or be terminated by order of judge, is not unconstitutional as delegating to judge power to suspend laws contrary to Const. art. 1, § 28. *Hughes v. State* (Civ. App.) 204 S. W. 640.

23.

See note under subd. 11.

27. The 27th Judicial District of this State shall be composed of the counties of Bell, Lampasas and Mills, and the terms of the court shall be held therein each year as follows:

In the County of Bell, on the first Monday in January, March and June and on the third Monday in October and may continue in session until the business is disposed of, except that the June term may continue in session for eight weeks only.

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

In the County of Mills, on the 9th Monday after the first Monday in March and on the fourth Monday in September and may continue in session three weeks. Provided this Act shall not go into effect until the first Monday in June A. D. 1918, upon which date it shall be in full force and effect. [Acts 1913, p. 115, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 33, § 1.]

Took effect March 25, 1918.

28. The Twenty-eighth Judicial District of the State of Texas shall be composed of the counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, and the terms of the District Court shall be held therein each year as follows:

In the county of Cameron, on the first Monday in January of each year, and may continue in session six weeks; and on the twentieth Monday after the first Monday in January of each year, and may continue in session three weeks; and on the twelfth Monday after the first Monday in August of each year, and may continue in session six weeks.

In the county of Nueces, on the sixth Monday after the first Monday in January of each year, and may continue in session ten weeks; and on the first Monday in August of each year, and may continue in session ten weeks.

In the county of Kleberg, on the sixteenth Monday after the first Monday in January of each year, and may continue in session two weeks; and on the tenth Monday after the first Monday in August of each year, and may continue in session two weeks.

In the county of Willacy, on the eighteenth Monday after the first Monday in January of each year, and may continue in session two weeks; and on the eighteenth Monday after the first Monday in August of each year, and may continue in session two weeks.

In the county of Kenedy, on the twenty-third Monday after the first Monday in January of each year, and may continue in session two weeks; and on the twentieth Monday after the first Monday in August of each year, and may continue in session two weeks.

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

that if any court in any county of said judicial district shall be in session at the time this Act takes effect, such court shall continue in session until the term thereof shall expire or be adjourned under the provisions of existing laws. Thereafter the courts of said county or counties shall conform to the requirements of this Act. [Acts 1913, 1st C. S., p. 14; Acts 1915, 34th Leg., ch. 48, § 1; Acts 1917, 35th Leg., ch. 46, § 6a; Acts 1917, 35th Leg., ch. 82, § 1 (§ 6a); Acts 1917, 35th Leg. 1st C. S., ch. 19, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 6a.]

Acts 1921, 37th Leg., ch. 104, § 5, creating Kenedy county, places such county in the 28th judicial district.

29. That the Twenty-ninth Judicial District of Texas shall be composed of the counties of Hood, Palo Pinto and Erath as now constituted and the terms of the district court shall be held therein as follows:

In Hood County, beginning on the first Monday of March and September and may continue in session for five weeks.

In Palo Pinto County, beginning on the fifth Monday after the first Monday in March and September and may continue in session eight weeks.

In Erath County, beginning on the thirteenth Monday after the first Monday in March and September and may continue in session until all business is disposed of. [Acts 1909, 2d C. S., p. 390; Acts 1917, 35th Leg., ch. 45, § 2; Acts 1920, 36th Leg. 3d C. S., ch. 4, § 1 (§ 2).]

All process issued or served before this Act goes into effect, including recognizances and bonds returnable to the district court of any of the said counties in said judicial district, shall be considered as returnable to said court, in accordance with the terms as prescribed in this Act, and all such process is hereby legalized, and grand and petit juries drawn and selected under existing laws in any of the counties in said judicial district shall be considered lawfully drawn and selected for the next term of the district court of their respective counties held in accordance with this Act, and after this Act takes effect. All such process is hereby legalized and validated; provided that if said court in any county in said judicial district shall be in session at the time this Act takes effect, such court affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, and thereafter the terms of said court of said counties shall conform to the requirements of this Act. [Acts 1917, 35th Leg., ch. 45, § 3; Acts 1920, 36th Leg. 3d C. S., ch. 4, § 1 (§ 3).]

Explanatory.—The act amends sections 2 and 3 of ch. 45, Acts 1917, 35th Leg. Regular Session. Sec. 4 repeals all laws in conflict. The act took effect June 8, 1920.

30. The district courts of the Eighty-ninth, Seventy-eighth, and Thirtieth Judicial Districts shall have concurrent jurisdiction of all cases, civil, criminal and appellate, over which the district courts of this State have jurisdiction under the Constitution and laws of this State, co-extensive with the limits of Wichita County; provided, however, that no grand jury shall be drawn for the Eighty-ninth District Court, unless the judge thereof, in his discretion, shall decide that the same is necessary and shall make a special order for the same upon the minutes of said court. [Acts 1903, p. 96; Acts 1915, 34th Leg., ch. 128; Acts 1915, 34th Leg. 1st C. S., ch. 6, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 12, § 2.]

The judges of the Thirtieth, Seventy-eighth and Eighty-ninth District Courts for Wichita County may each, in his discretion, either in term time or vacation, on motion of either party or on agreement of the parties, or of his own motion, where the judge believes the administration of justice may be facilitated thereby, transfer any cause, civil, or criminal from the dockets of their respective courts to the docket of either of the other district courts of said county, and shall note said transfer on the docket, whereupon the clerk of the district court to which said cause has been transferred shall docket such case, and the same shall

there be tried and disposed of as if it originally filed in said court, and no transcript of the record shall be necessary to the jurisdiction of court to which such case has been transferred and no formal proceeding shall be necessary to show such transfer. [Acts 1920, 36th Leg. 3d C. S., ch. 12, § 3.]

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

Took effect June 12, 1920.

See *Hart Cotton Mach. Co. v. Graham Gin Co.* (Civ. App.) 209 S. W. 269; *Republic Oil & Gas Co. v. Owen* (Civ. App.) 210 S. W. 319.

35. The Thirty-fifth Judicial District of this State shall be composed of the following counties:

Brown, Coleman, Concho, McCulloch, and Runnels, and the District Court shall be holden therein each year as follows:

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

A term beginning on the first Monday in January of each year, and may continue in session for three weeks thereafter; a term beginning on the sixteenth Monday after the first Monday in January of each year, and may continue in session for three weeks thereafter; a term beginning on the last Monday in August of each year and may continue in session for three weeks thereafter.

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

A term beginning on the third Monday after the first Monday in January of each year and may continue in session for four weeks thereafter; a term beginning on the nineteenth Monday after the first Monday in January of each year, and may continue in session for three weeks thereafter; a term beginning on the eighth Monday after the last Monday in August of each year, and may continue in session for four weeks thereafter.

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

A term beginning on the seventh Monday after the first Monday in January of each year, and may continue in session for four weeks thereafter; a term beginning on the twenty-second Monday after the first Monday in January of each year and may continue in session until the business is disposed of; a term beginning on the twelfth Monday after the last Monday in August of each year, and may continue in session for four weeks thereafter.

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

A term beginning on the eleventh Monday after the first Monday in January of each year and may continue in session for three weeks thereafter; a term beginning on the third Monday after the last Monday in August of each year, and may continue in session for three weeks thereafter.

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

A term beginning on the fourteenth Monday after the first Monday in January of each year, and may continue in session for two weeks thereafter; a term beginning on the sixth Monday after the last Monday in August of each year and may continue in session for two weeks thereafter. [Acts 1913, p. 115, § 2; Acts 1921, 37th Leg., ch. 31, § 1.]

That all process issued or served before this Act goes into effect, returnable to the District Courts of said Judicial District, shall be return-

able to said courts as fixed by the terms of this Act and said process is hereby legalized and validated; and all grand and petit jurors selected and drawn under existing laws in any of the courts of said Judicial District, shall be considered lawfully drawn and selected for the next term of the District Court of the respective counties held after this Act takes effect; and all appearance bonds and recognizances taken in and for said courts shall bind the parties therein obligated to appear at the next terms of said courts held under this Act. [Acts 1921, 37th Leg., ch. 31, § 2.]

That all laws and parts of laws in conflict with this Act shall be and the same are hereby repealed; provided, however, that in the event any term of the District Court in any of the counties herein affected be in session when this Act takes effect, the same shall in no manner affect said term of court, but the same shall continue in session under the old law for said term, and this Act shall only affect subsequent terms of court in said county. [Id., § 3.]

Took effect 90 days after March 12, 1921, date of adjournment.

36.

Validity of process.—Gen. Laws 1917, c. 91 (Supp. 1918, art. 30, subd. 26), did not take effect until August, 1917, and citation issued on May 14, 1917, commanding defendants to appear on the second Monday after the first Monday in September, as provided by said section, was void; the term of court in San Patricio county fixed by law then in force being on the sixth Monday after the first Monday in September. *Schleicher v. Schmedt* (Civ. App.) 209 S. W. 185.

37. That Bexar County shall constitute the Thirty-seventh Judicial District. [Acts 1911, p. 87; Acts 1921, 37th Leg., ch. 5, § 1.]

The judges of the Thirty-seventh, Forty-fifth, Fifty-seventh and Seventy-third Judicial Districts, as heretofore existing, shall be and remain judges of the respective courts as provided for in this Act, until the expiration of their respective terms of office, to which they were elected, and until their successors are elected and qualified. [Acts 1921, 37th Leg., ch. 5, § 5.]

That the jurisdiction of said district courts of Bexar County herein created by this Act shall be concurrent and shall extend with the limits of Bexar County over all cases, proceedings and matters of which district courts are given jurisdiction by the Constitution and the laws of this State, and hereinafter providing the courts of the Thirty-seventh and Forty-fifth Judicial Districts shall give preference to the trial of criminal cases and empanel grand juries. [Id., § 6.]

The terms of the District Courts of the Thirty-seventh Judicial District and the Forty-fifth Judicial Districts shall be held as follows: One term beginning on the first Monday in October, and may continue in session until the last Saturday before the first Monday in November. One term beginning on the first Monday in November, and may continue in session until the last Saturday before the first Monday in January. One term beginning on the first Monday in January and may continue in session until the last Saturday before the first Monday in March. One term beginning on the first Monday in March, and may continue in session until the last Saturday before the first Monday in May. One term beginning on the first Monday in May, and may continue in session until the last Saturday before the first Monday in July. The terms of the district courts, the Fifty-seventh and Seventy-third Judicial District, in said respective courts shall be held, as follows: One term beginning on the first Monday in October, and may continue in session until the last Saturday before the first Monday in December. One term beginning on the first Monday in December, and may continue in session until the last Saturday before the first Monday in February. One term beginning on the first Monday in February and may continue in session until the last Saturday before the first Monday in April. One term beginning on the first Monday in April and may continue in session until the last Saturday be-

fore the first Monday in June. One term beginning on the first Monday in June, and may continue in session until the last Saturday before the first Monday in July. [Id., § 7.]

That all writs and process heretofore issued or that may hereafter be issued up to the time this Act shall take effect by and from said district courts and made returnable to said terms of court as now fixed by law, shall be returnable to the next ensuing terms of said courts as fixed by this Act; and all such writs and process shall be valid and legal. [Id., § 8.]

That the District Attorney of the Thirty-seventh Judicial District shall be and remain the District Attorney of the Thirty-seventh Judicial District, as herein defined; and shall also represent the State in all cases, criminal and civil, in the Forty-fifth, Fifty-seventh and Seventy-third Judicial Districts, and shall be elected by the qualified voters of said Thirty-seventh Judicial District. [Id., § 9.]

The judges of said district courts may, in their discretion, or by agreement of the parties, transfer any civil or criminal suit or cause of action from one district court to another, by an order duly entered upon the minutes of the court, and when such transfer is made, the clerk shall enter such case or cases upon the docket of the court to which the transfer is made. When the transfer is made by the court of its own motion, unless the parties are present in court, and take notice of such transfer, reasonable notice of such order or orders shall be given to the parties or their attorney of record; provided that in cases where ancillary writs be granted by either of the judges, and transfer may be made to the court of the judge granting such writ without such notice. [Id., § 10.]

The District Court of the Forty-fifth Judicial District shall empanel a grand jury at the next term after this Bill becomes effective, and the District Court of the Thirty-seventh Judicial District shall empanel a grand jury at the second term after this Bill becomes effective, and the District Court of the Forty-fifth Judicial District, and the District Court of the Thirty-seventh Judicial District shall alternate in empaneling grand juries thereafter. [Id., § 11.]

The District Court of the Thirty-seventh Judicial District shall transfer by order entered on the minutes, one-half of the criminal cases on its docket to the District Court of the Forty-fifth Judicial District, taking the oldest case in point of the time of filing the indictment and leave said case remaining in the District Court of the Thirty-seventh Judicial District, and transfer the second criminal case to the District Court of the Forty-fifth Judicial District, and the third case remaining in the District Court of the Thirty-seventh Judicial District, and the fourth case on the docket of said court shall be transferred to the District Court of the Forty-fifth Judicial District, and shall transfer each alternate case until one-half of said criminal cases are transferred to the District Court of the Forty-fifth Judicial District. The District Court of the Thirty-seventh Judicial District and the District Court of the Forty-fifth Judicial District shall give preference to the trial of the criminal cases and forfeited bond cases. These two courts shall speedily try all forfeited bond cases. [Id., § 12.]

The Grand Jury shall return their indictments into the courts by which they were empaneled. [Id., § 13.]

Explanatory.—Took effect Feb. 1, 1921. Sec. 14 of the act repeals all laws in conflict.

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

In Kerr County on the first Monday in February and August of each year and may continue in session four weeks, provided, however, that the

June term of said court for the year 1921 shall be held for said county and may continue in session for three weeks.

In Kendall County, on the first Monday in March and September of each year, and may continue in session for three weeks.

In Zavala County, on the third Monday after the first Monday in March and September and may continue in session for three weeks.

In Medina County, on the sixth Monday after the first Monday in March and September of each year, and may continue in session for four weeks.

In Bandera County, on the tenth Monday after the first Monday in March and September of each year and may continue in session for three weeks.

In Real County, on the thirteenth Monday after the first Monday in March and September of each year, and may continue in session for two weeks. [Acts 1913, 1st C. S., p. 22; Acts 1917, 35th Leg., ch. 67; Acts 1917, 35th Leg., ch. 209, § 1; Acts 1921, 37th Leg., ch. 29, § 1; Acts 1921, 37th Leg., ch. 37, § 1.]

All writs and process, civil and criminal, in said courts shall be issued, served and returned in conformity with this Act. [Acts 1921, 37th Leg., ch. 29, § 2; Acts 1921, 37th Leg., ch. 37, § 2.]

Explanatory.—Sec. 3 repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

42. That the Forty-second Judicial District of the State of Texas shall be composed of the counties of Taylor, Callahan, Stephens, and Shackelford, and the terms of court shall be held in each county therein each year as follows:

In the county of Taylor on the first Monday in September of each year and may continue in session seven weeks.

In the county of Callahan on the seventh Monday after the first Monday in September of each year and may continue in session three weeks.

In the county of Stephens on the tenth Monday after the first Monday in September of each year and may continue in session four weeks.

In the county of Shackelford on the fourteenth Monday after the first Monday in September of each year and may continue in session until and including Saturday before the first Monday of the next succeeding January thereafter.

In the county of Taylor on the first Monday in January of each year and may continue in session six weeks.

In the county of Callahan on the sixth Monday after the first Monday in January of each year and may continue in session three weeks.

In the county of Stephens on the ninth Monday after the first Monday in January of each year and may continue in session three weeks.

In the county of Shackelford on the twelfth Monday after the first Monday in January of each year and may continue in session three weeks.

In the county of Taylor on the fifteenth Monday after the first Monday in January of each year and may continue in session six weeks.

In the county of Callahan on the twenty-first Monday after the first Monday in January of each year and may continue in session three weeks.

In the county of Stephens on the twenty-fourth Monday after the first Monday in January of each year and may continue in session three weeks.

In the county of Shackelford on the twenty-seventh Monday after the first Monday in January of each year and may continue in session three weeks. [Acts 1917, 35th Leg., ch. 52; Acts 1917, 35th Leg. 1st C. S., ch. 17; Acts 1919, 36th Leg., ch. 139, § 8; Acts 1919, 36th Leg. 2d C. S., ch. 5, § 1 (§ 8); Acts 1921, 37th Leg., ch. 53, § 1 (§ 8).]

That the office of Assistant District Attorney for the Forty-second Judicial District and the Ninetieth Judicial District for the county of Stephens, created by Chapter 12 of the General Laws of the Fourth Called Ses-

sion of the Thirty-sixth Legislature, being an Act approved October 4, 1920, shall be and the same is hereby expressly abolished. [Acts 1921, 37th Leg., ch. 53, § 2.]

The District Attorney of the Forty-second Judicial District of Texas shall hold his office as District Attorney of said district for the remainder of the term for which he was elected and until his successor is duly elected and qualified, and he shall perform the duties of district attorney in the counties of Taylor, Callahan and Shackelford and his compensation for such services as said district attorney shall be the same as now or hereafter provided by law for district attorneys in districts containing two or more counties. [Id., § 3.]

The jurisdiction of the district court for the Forty-second Judicial District of Texas within and for the county of Stephens over and with respect to criminal cases is hereby abolished and the jurisdiction over and with respect to criminal cases within and for said Stephens county is hereby vested in the District Court of the Ninetieth Judicial District of Texas; and upon the taking effect of this Act the Judge of the said Forty-second Judicial District shall transfer from his docket to the docket of the District Court of the Ninetieth Judicial District all criminal cases then pending in said District Court for the Forty-second Judicial District by appropriate order entered on the minutes of said court, and the said district court for the Ninetieth Judicial District of Texas shall try and dispose of said criminal cases so transferred to it in the same manner as if the same were filed originally in said court.

All process, writs and bonds issued or executed prior to the taking effect of this Act and returnable to the terms of the Forty-second Judicial District Court as now fixed by law in the various counties thereof are hereby made returnable to the term of said court as reorganized by this Act, and all process heretofore returned as well as all bonds and recognizances heretofore entered into in any of the various counties of said Forty-second Judicial District as now constituted shall be as valid as if no change had been made in the time of holding court in the various counties of said district or in the jurisdiction of the various counties thereof. [Id., § 5.]

Explanatory.—Sec. 6 of the act repeals all laws in conflict. The act took effect March 21, 1921.

For special provisions affecting this district and district 90, see subd. 90 of this article.

See *Horn v. Missouri, K. & T. Ry. Co., of Texas* (Civ. App.) 201 S. W. 1101.

45. That Bexar County shall constitute the Forty-fifth Judicial District. [Acts 1911, p. 87, § 2; Acts 1921, 37th Leg., ch. 5, § 2.]

For special provisions relating to this district and the 37th, 57th, and 73d districts, see subd. 37 of this article.

47. That the Forty-seventh Judicial District shall be composed of the counties of Donley, Armstrong, Randall and Potter, and the terms of the district court shall be held therein as follows:

In the county of Donley on the second Monday in January, and third Monday in July, and may continue in session four weeks.

In the county of Armstrong on the fourth Monday after the second Monday in January and the fourth Monday after the third Monday in July and may continue in session three weeks.

In the county of Randal on the seventh Monday after the second Monday in January and the seventh Monday after the third Monday in July, and may continue in session three weeks.

In the county of Potter, on the tenth Monday after the second Monday in January, and on the tenth Monday after the third Monday in July, and may continue in session ten weeks; and in said county of Potter on the twentieth Monday after the second Monday in January, and the twentieth Monday after the third Monday in July, and may continue in session two

weeks. [Acts 1913, S. S., p. 19; Acts 1921, 37th Leg. 1st C. S., ch. 16, § 1.]

That all process issued or served before this Act takes effect, including recognizances, bail bonds and appeals bonds returnable to the district court of any of the counties of said Judicial District, shall be considered and held returnable to said courts in accordance with the terms as prescribed by this Act, and all process is hereby legalized; and all grand jurors and petit jurors selected and drawn under the existing laws in any of the counties of said judicial district shall be considered and held lawfully selected and drawn for the next terms of the district court of the respective counties held after this Act takes effect, and all such process is hereby legalized and validated. [Acts 1921, 37th Leg. 1st C. S., ch. 16, § 2.]

Sec. 3 repeals all laws in conflict. The act took effect Nov. 15, 1921.

49.

Process issued before act took effect.—Although defendants were cited to appear November 19th, where Acts 35th Leg. c. 91, § 2 (Supp. 1918, art. 30, subd. 49), effective August 1st, changing term so that it began October 8th instead of November 19th, contained a clause making all process theretofore issued returnable to term of court therein fixed, court was authorized to render default judgment on October 13th, no answer having been filed. *Queiroli v. Whitesides* (Civ. App.) 206 S. W. 122; *Queiroli v. Simon & Dunlap* (Civ. App.) 206 S. W. 123.

57. That Bexar County shall constitute the Fifty-seventh Judicial District. [Acts 1911, p. 87, § 3; Acts 1921, 37th Leg., ch. 5, § 3.]

For special provisions relating to this district and districts 37, 45, and 73, see subd. 37.

61. Harris County shall constitute the Sixty-first Judicial District, as well as other Judicial Districts or parts of Judicial Districts provided by law, and the jurisdiction of the District Courts in and for said Judicial Districts, shall be concurrant and co-extensive with the limits of said county, but shall extend to civil cases only. The terms of the District Court of said Sixty-first Judicial District shall be begun and holden on the second Monday in May, September, November, January and March of each year, and may continue in session until the business is disposed of. All writs and process returnable to said court at the terms and at the times now fixed by law shall be returnable at the terms and times as fixed by this Act, and shall be valid. [Acts 1903, p. 22; Acts 1921, 37th Leg., ch. 20, § 1 (§ 2); Acts 1921, 37th Leg., ch. 35, § 1 (§ 2).]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

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

In the county of Terrell on the second Monday in January and July of each year, and may continue in session two weeks.

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

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

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

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

In the county of Val Verde on the fifteenth Monday after the first Monday in January and July and may continue in session until the business is disposed of.

That all process, writs and bonds issued, served or executed prior to the taking effect of this Act and returnable to the terms of said court in each of said counties, comprising said Judicial District, and all processes heretofore returnable, as well as all bonds and recognizances heretofore entered into,

in any of said counties in said Judicial District shall be valid and binding. [Acts 1913, 1st C. S., p. 34; Acts 1917, 35th Leg. ch. 67, § 3; Acts 1917, 35th Leg. ch. 209, § 1; Acts 1921, 37th Leg., ch. 15, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 12, § 1.]

That all process issued or served before this Act goes into effect, including recognizances and bonds, returnable to the District Court of any of said counties, shall be considered as returnable to said courts, in accordance with the terms as prescribed by this Act, and all such process is hereby legalized and all grand and petit juries drawn and selected under existing laws in any of the counties in said Judicial District shall be considered lawfully drawn and selected for the next term of the District Court for their respective counties held in accordance with this Act; provided, that if any court in any county of said Judicial District shall be in session at the time this Act takes effect, said court shall continue in session until the term thereof shall expire under the provisions of the existing law. Thereafter the courts of said counties shall conform to the requirements of this Act. [Acts 1921, 37th Leg. 1st C. S., ch. 12, § 2.]

Sec. 3 of the act repeals all laws in conflict. The act took effect Nov. 15, 1921.

The District Courts of each of said Judicial Districts shall be holden at the times now prescribed for the spring terms; and thereafter, all the courts in each of said Sixty-third and Eighty-third Districts shall be holden at the times as herein prescribed in Section 1 of this Act. [Acts 1921, 37th Leg., ch. 15, § 2.]

The District Judges and District Attorneys for the Sixty-third and Eighty-third Judicial Districts, respectively, and now in office, shall continue in office during the time for which they were elected, respectively. [Id., § 3.]

All process issued out of the District Courts of any of the counties named in this Act, issued or served before this Act takes effect, including recognizances and bonds, returnable to the District Courts of any such respective counties, shall be considered as returnable to such respective courts in accordance with the terms and times of holding same as prescribed in and fixed by this Act; and all such process is hereby legalized. And all grand and petit juries drawn and selected under existing laws for any of the counties of said districts shall be considered lawfully drawn and selected for the next of the respective District Courts held after this Act takes effect, and all such process is hereby legalized and validated. [Id., § 4.]

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

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

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

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

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

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

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

In the County of Bailey, on the twenty-first Monday after the second Monday in January and first Monday in August, and may continue in session one week. [Acts 1911, 1st C. S. p. 102; Acts 1917, 35th Leg., ch. 117, § 1; Acts 1919, 36th Leg., ch. 82, § 1; Acts 1919, 36th Leg. 2d C. S. ch. 7, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Bailey County, heretofore unorganized and attached to the County of Castro for judicial purposes, is severed from said Castro County, but all suits filed in Castro County which otherwise would have been filed in Bailey County had it been an organized county at the time of filing said suits, and all indictments for offenses occurring in Bailey County which have been returned by any grand jury in Castro County, prior to the organization of Bailey County, and which said civil and criminal cases being yet untried and are on the docket of Castro County, said cases shall be by the Clerk of Castro County, transferred, together with all bonds and other process pertaining to said cases, to Bailey County for trial. [Acts 1917, 35th Leg., ch. 117, § 2; Acts 1919, 36th Leg., ch. 82, § 2; Acts 1919, 36th Leg. 2d C. S., ch. 7, § 2.]

All process issued out of the District Court of the counties of said District before this Act takes effect, is hereby made returnable to the term of said Court, as fixed by this Act, and all bonds heretofore executed, and recognizances entered of record in any of said courts shall bond the parties for their appearance, or to fulfill the obligations of such bonds and recognizances at the term of said Court as fixed by this Act, and all process heretofore returned as well as all bonds and recognizances heretofore taken in the District Courts of the Sixty-fourth Judicial District, shall be as valid as if no change had been made in the time of holding said Courts in the Counties of said District. [Acts 1917, 35th Leg., ch. 117, § 3; Acts 1919, 36th Leg., ch. 82, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 7, § 3.]

Should the District Court in any of the Counties of said District be in session under the existing laws when this Act takes effect, the same shall continue and end its term under such existing laws, and all process, writs, judgments and decrees shall be valid, and shall not be affected by the change in the time of holding the courts in the district, by this Act. [Acts 1917, 35th Leg., ch. 117, § 4; Acts 1919, 36th Leg., ch. 82, § 4; Acts 1919, 36th Leg. 2d C. S., ch. 7, § 4.]

Explanatory.—Sec. 5 of Acts 1919, 36th Leg. 2d C. S., ch. 7, repeals all conflicting laws. The act took effect July 15, 1919.

66.

Extension of term.—Acts 34th Leg. c. 139, did not authorize the extension of the March term of the district court of Hill county beyond the end of the seven weeks specified, because the business of the grand jury was not finished, and an indictment returned during extension would be invalid (per Davidson, J.). *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

While an order entered on minutes may not have been necessary to extend a regular term of district court under Acts 34th Leg. c. 139, such order did not destroy power existing under such statute or bring extension within art. 1726, authorizing extension on different grounds and requiring an order. *Id.*

Acts 34th Leg. c. 139, authorized extension of March term of district court of Hill county beyond end of seven weeks specified, where business of grand jury was unfinished, and an indictment returned during extension was not invalid for that reason, but was returned into open court as required by Code Cr. Proc. 1911, art. 445. *Id.*

71. The Seventy-first Judicial District of Texas shall be composed of the counties of Harrison and Gregg, and the terms of the District Court shall be held therein each year as follows: In the county of Harrison on the first Monday in January and continue in session until the first Monday in March; on the first Monday in April and continue in session until the first Monday in June; on the fourth Monday in June and continue in session until the first Monday in September unless sooner adjourned by the court; on the first Monday in September and continue in session to the third Monday in

October; on the fifth Monday following the third Monday in October and continue in session until the first Monday in January.

That the terms of the court in Gregg County for each year shall begin respectively as follows: On the first Monday in March and continue in session until the first Monday in April, on the first Monday in June and continue in session three weeks; on the third Monday in October and continue for four weeks. [Acts 1911, p. 93; Acts 1921, 37th Leg., ch. 33, § 3.]

That the District Judge of the Seventy-first Judicial District as now constituted shall be and remain the District Judge of the Seventy-first Judicial District during the full term of office for which he was elected. That the County Attorney of Harrison County and the County Attorney of Gregg County shall each have and perform all the duties and prerogatives of a District Attorney in attendance upon the District Court for each of their respective counties, and the County Attorney for Harrison County shall receive the same compensation as now allowed by law, and the County Attorney of Gregg County shall receive such additional compensation as may accrue to him by reason of being prosecuting attorney of the District Court in Gregg County, the District Clerk of Gregg County, Texas, shall be and continue as the District Clerk of the District Court in said county for the Seventy-first Judicial District until the expiration of the term to which he is elected or until his successor shall be duly selected and qualified according to law. [Acts 1921, 37th Leg., ch. 33, § 4.]

Took effect Aug. 1, 1921. For provisions applicable to this district and district 4, see subd. 4 of this article.

72. The Seventy-second Judicial District of the State of Texas shall be composed of the counties of Lynn, Dawson, Gaines, Yoakum, Terry, Crosby, Garza, Lubbock, and Hockley and the unorganized county of Cochran, and the terms of the District Court shall be held therein, in each year, in each of the counties, as follows:

In the county of Lynn on the first Mondays in March and September, and may continue in session two weeks.

In the county of Dawson on the second Monday after the first Mondays in March and September, and may continue in session two weeks.

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

In the county of Yoakum on the sixth Monday after the first Monday in March and September, and may continue in session one week.

In the county of Hockley on the seventh Monday after the first Monday in March and September, and may continue in session one week.

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

In the county of Crosby on the tenth Monday after the first Monday in March and September, and may continue in session two weeks.

In the county of Garza on the twelfth Monday after the first Monday in March and September, and may continue in session two weeks.

In the county of Lubbock on the fourteenth Monday after the first Monday in March and September, and may continue in session until business is disposed of. [Acts 1913, p. 4; Acts 1918, 35th Leg. 4th C. S., ch. 9; Acts 1921, 37th Leg. 1st C. S., ch. 13, § 1.]

The unorganized county of Cochran is hereby attached to the county of Hockley for judicial and all other purposes. [Acts 1921, 37th Leg. 1st C. S., ch. 13, § 2.]

That all process issued or served before this Act takes effect, and all bonds and recognizances, returnable to the district courts in said Judicial District, for all juries drawn for any of said courts, are hereby changed so as to be returnable to various terms of the courts of said counties, as changed by this Act, and shall be as valid as if returnable to the terms as fixed by this Act. [Id., § 3.]

Sec. 4 of the act repeals all laws in conflict. The act took effect Aug. 18, 1921.

73. That Bexar County shall constitute the Seventy-third Judicial District. [Acts 1911, p. 87; Acts 1921, 37th Leg., ch. 5, § 4.]

For special provisions relating to this district and districts 37, 45, and 57, see subd. 37.

78.

See Republic Oil & Gas Co. v. Owen (Civ. App.) 210 S. W. 319.

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

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

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

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

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

In the county of Duval on the fifteenth Monday after the second Monday in February of each year, and may continue in session two weeks; on the first Monday in January of each year, and may continue in session two weeks, and in addition thereto, there shall be an additional term of court in Duval County for the year 1921, which shall convene on the fourth Monday in August of said year, and may remain in session one week.

In the county of Jim Wells on the seventeenth Monday after the second Monday in February of each year, and may continue in session four weeks. [On the second Monday after the first Monday in January of each year, and may continue in session to and including the Saturday proceeding the second Monday in February of each year.] [Acts 1915, 34th Leg., ch. 48, § 2; Acts 1921, 37th Leg., ch. 8, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 5, § 1.]

All processes, writs and bonds issued, served or executed prior to the taking effect of this Act and returnable to the terms of said court in each of said counties, comprising said judicial district, and all processes heretofore returnable, as well as all bonds and recognizances heretofore entered into, in any of said counties, shall be as valid and binding as if no change had been made by this Act in the times of holding said terms of court. [Acts 1921, 37th Leg. 1st C. S., ch. 5, § 2.]

All process issued or served before this Act goes into effect, including recognizances and bonds, returnable to the District Court of any of said counties, shall be considered as returnable to said courts, in accordance with the terms as prescribed by this Act, and all such process is hereby legalized and all grand and petit juries drawn and selected under existing laws in any of the counties in said judicial district shall be considered lawfully drawn and selected for the next term of the District Court for their respective counties held in accordance with this Act; provided, that if any court in any county of said judicial district shall be in session at the time this Act takes effect, said court shall continue in session until the term thereof shall expire under the provisions of the existing laws. Thereafter the courts of said counties shall conform to the requirements of this Act. [Id., § 3.]

Section 2 of Chapter 48 of the Laws of the Thirty-fourth Legislature passed and approved March 12, 1915, and Chapter 8 of the Laws Thirty-seventh Legislature passed and approved February 2, 1921, both acts relating to the times of holding district courts in said district, are hereby repealed and all laws and parts of laws in conflict herewith are also hereby repealed. [Id., § 4.]

Took effect Aug. 14, 1921.

80.

See note under subd. 11.

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

In the county of Frio on the last Monday in August and the first Monday in February and may continue in session three weeks.

In the county of LaSalle, on the third Monday after the last Monday in August and the first Monday in February, and may continue in session three weeks.

In the county of Atascosa, on the sixth Monday after the last Monday in August and the first Monday in February, and may continue in session three weeks, at each of which terms a grand jury shall be empanelled.

In the county of Wilson on the ninth Monday after the last Monday in August and the first Monday in February, and may continue in session six weeks.

In the county of Atascosa, on the fifteenth Monday after the last Monday in August and the first Monday in February, and may continue in session three weeks.

In the county of Karnes, on the eighteenth Monday after the last Monday in August and the first Monday in February, and may continue in session five weeks.

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

All grand and petit jurors selected in any of said counties when this Act shall take effect shall be legal jurors for the various terms of said courts as fixed by this Act. [Acts 1917, 35th Leg., ch. 91, § 3; Acts 1921, 37th Leg., ch. 16, § 1.]

Explanatory.—The act amends Acts 35th Leg. Reg. Sess. ch. 91, § 3, to read as above set forth. Sec. 2 of the act repeals all laws in conflict. Took effect 90 days after adjournment, which occurred March 12, 1921.

83. The Eighty-third Judicial District of the State of Texas shall be composed of the counties of Jeff Davis, Presidio, Brewster, Pecos, Upton, Reagan, Sutton and Crockett, and the District Courts shall be held therein as follows:

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

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

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

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

In the county of Upton on the twelfth Monday after the first Monday in January and July and may continue in session one week.

In the county of Reagan on the thirteenth Monday after the first Monday in January and July and may continue in session one week.

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

In the county of Sutton on the seventeenth Monday after the first Monday in January and July and may continue in session until the business is disposed of. [Acts 1917, 35th Leg., ch. 67, § 5; Acts 1921, 37th Leg., ch. 15, § 1.]

For special provisions applicable to this district and district 63, see subd. 63 of this article.

85.

See note under subd. 20, ante.

87. [There is no 87th judicial district.]

88. Eastland County shall constitute the Eighty-eighth Judicial District of Texas and the jurisdiction of said district court shall be co-extensive with the limits of said county over all cases, civil and criminal, proceedings and matters of which district courts of this State are given jurisdiction by the Constitution and laws of this State.

The terms of said district court shall be held as follows:

Beginning on the first Mondays in January, March, May, July, September and November of each year, and may continue in session until the business of the court is disposed of. [Acts 1919, 36th Leg., ch. 139, § 1.]

The present judge of the Forty-second Judicial District shall be and constitute the judge of the newly created Eighty-eighth Judicial District and shall continue in office for the term for which he was elected Judge of the Forty-second District which is until the next General Election and until his successor is elected and qualified.

The district attorney of the present Forty-second Judicial District shall be the District Attorney in and for the Forty-second Judicial District of Texas and may hold his office until the next General election and until his successor is elected and qualified. [Id., § 2.]

The district clerk of Eastland County shall be the clerk of the district court of said Eighty-eighth Judicial District, sitting in Eastland County, and shall receive such compensation for his services as is provided by law for district clerks. [Id., § 3.]

The county attorney of Eastland County shall do and perform all the duties of county attorney and district attorney in the Eighty-eighth Judicial District, composed of Eastland County, and shall receive the same compensation for his services as is now, or which may hereafter be fixed by law for district attorneys acting in judicial districts composed of two or more counties. [Id., § 4.]

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

The jurisdiction of said district courts shall be such jurisdiction as is granted by the Constitution and Laws of the State of Texas to judicial district courts of said State. [Id., § 6.]

Upon the taking effect of this Act, the judge of the Forty-second Judicial District shall immediately transfer to the district court of the Eighty-eighth Judicial District all cases originating in Eastland County, of which the district court has jurisdiction; and when such transfers are made, the clerk of the Eighty-eighth Judicial District shall enter such cause, or causes, upon the docket of the said Eighty-eighth Judicial District Court to which said transfer, or transfers, are made and when so

entered upon the docket of the said Eighty-eighth Judicial District Court, the judge of the said court shall try and dispose of said case or cases, in the same manner as if the same were filed originally in the said court.

All process, writs and bonds, issued or executed prior to the taking effect of this Act and returnable to the terms of the Forty-second Judicial District Court as now fixed by law, in the county of Eastland are hereby made returnable to the terms of the district court of the newly created Eighty-eighth Judicial District of Texas, and all process heretofore returned, as well as all bonds and recognizances, heretofore entered into in said Forty-second District Court shall be as valid as if no change had been made in said Forty-second District or in the time of holding said courts.

All process, writs and bonds issued or executed prior to the taking effect of this Act and returnable to the Forty-second District Court as heretofore fixed by law in the counties of Taylor, Callahan, Stephens and Shackelford are hereby made returnable to said Forty-second District Court as re-organized by this Act, and such process, writs and bonds shall be as valid as if no change had been made in said Forty-second District or in the time of holding court in the several counties thereof. [Id., § 7.]

See ante, subd. 42 of this article. Sec. 9 repeals all laws in conflict. The act took effect 90 days after March 19, 1919, date of adjournment.

89. That Wichita County shall hereafter constitute the Eighty-ninth Judicial District, and the terms of said district court shall begin on the first Mondays in January, April, July and October, and shall continue until the Saturday night preceding the opening of the following term unless the business of the term is sooner disposed of. [Acts 1920, 36th Leg. 3d C. S., ch. 12, § 1.]

After the Eighty-ninth District Court shall become organized the clerk of the district courts of Wichita County shall make up the dockets of the district courts for said county by filing each new case in the court having the first appearance day after the filing of the petition to which ten days service may be had and all criminal cases shall be originally filed in the court to which the indictment or information is returned and all appeals in probate cases shall be to the court holding the first term after such appeal is perfected. [Id., § 4.]

The clerk of the district court, Thirtieth District for Wichita County shall be the clerk of the Eighty-ninth District Court, and the district attorney of the Thirtieth Judicial District of Texas shall represent the State in all criminal causes cognizable in said court, when he can be personally present; and in his absence, the county attorney of Wichita County shall prosecute the pleas of the State in said court and for this service such county attorney shall receive such fees and emoluments as are now provided for by general law for like services to county attorneys throughout the State. [Id., § 6.]

As soon as this Act takes effect, the Governor shall appoint a suitable person as judge of the Eighty-ninth Judicial District of Texas, who shall hold his office until the next general election, in November, 1920, and until his successor is elected and qualified. He shall possess the Constitutional qualifications for district judges in this State. [Id., § 7.]

Took effect June 12, 1920. For special provisions applicable to this district, and to district 30, see subd. 30 of this article.

90. Stephens County shall constitute the Ninetieth Judicial District of Texas, and the jurisdiction of said district court shall be co-extensive with the limits of said county over all cases, civil and criminal, proceedings and matters of which district courts of this State are given jurisdiction by the Constitution and laws of this State. The terms of said district court shall be held as follows:

Beginning on the first Monday in January, March, May, July, September and November of each year, and may continue in session for eight weeks. [Acts 1920, 36th Leg. 3d C. S., ch. 3, § 1.]

The Governor shall appoint a suitable person as judge of the Ninetieth Judicial District Court as herein constituted, who shall hold such office until the next general election and until his successor shall have been elected and qualified. The judges of said court shall thereafter be elected as provided by the Constitution and laws of the State for the election of district judges. [Id., § 2.]

The district clerk of Stephens County shall be the clerk of the district court of said Ninetieth Judicial District sitting in Stephens County, and shall receive such compensation for his service as is provided by law for district clerks; and in the event of a vacancy in the office of the district clerk of said Stephens County, the judge of the Ninetieth Judicial District Court shall appoint a suitable person to fill such vacancy. [Id., § 3.]

Explanatory.—Sec. 9 repeals all laws in conflict. The act took effect June 3, 1920.

After the taking effect of this Act, the judge of the district court of the Forty-second Judicial District shall by order entered upon the minutes of said court transfer to the district court of the said Ninetieth Judicial District such civil and criminal cases then pending upon the docket of the said district court of the Forty-second Judicial District as shall, within his discretion, equalize the business on the dockets of the said two district courts, taking into consideration the length of terms and the number of terms of said courts, respectively; provided, that no cases then on trial in the said Forty-second Judicial District Court, nor any case on appeal, shall be so transferred; and when said order has been made and entered, the clerk of the district court of Stephens County shall make up a docket for the use of the said court of the said Ninetieth Judicial District by placing thereon such cases as have been so transferred, in the order of their respective numbers; and the cases so transferred shall bear the same docket numbers as in the court from which they were so transferred. [Acts 1920, 36th Leg. 3d C. S., ch. 3, § 4; Acts 1920, 36th Leg. 4th C. S., ch. 12, § 1 (§ 4).]

Took effect Oct. 4, 1920.

The clerk shall place upon the docket and upon the court papers opposite the number of each case remaining on the docket of the Forty-second Judicial District Court the letter "A", and shall place upon the docket and upon the court papers opposite the number on each case transferred to the docket of the Ninetieth Judicial District Court the letter "B". And this requirement shall also be observed as to all new cases filed in either of said courts, so that the letter "A" opposite the file number shall indicate that the case pends in the Forty-second Judicial District Court; and that the letter "B" opposite the file number shall indicate that the case pends in the Ninetieth Judicial District Court. [Acts 1920, 36th Leg. 3d C. S., ch. 3, § 5.]

The district court of the Forty-second Judicial District and the district court of the Ninetieth Judicial District in the county of Stephens, shall have concurrent jurisdiction with each other of all matters, civil and criminal, of which jurisdiction is given to the district court by the Constitution and laws of the State of Texas. Either the judge of the Forty-second Judicial District, or the judge of the Ninetieth Judicial District of Stephens County, may, at his discretion, either in term time or vacation, transfer any case or cases, civil or criminal, that may be at the time pending in his court, to the other district court in said county of Stephens, by order or orders entered upon the minutes of the court making such transfer, and, where such transfer or transfers are made, the clerk shall enter such case or cases upon the dockets of the court to which such transfer or transfers are made, and when so entered upon the docket, the judge of said court shall try and dispose of such cases in the same manner as if such

cases were originally filed in said court, and in case of the disqualification of the judge of either of said courts in any case, such case, on the suggestion of such judge of his disqualification entered on the docket, shall stand transferred to the other of said courts, and be docketed by the clerk accordingly. [Id., § 6.]

That all process, writs and bonds issued or executed prior to the taking effect of this Act and returnable to the terms of the Forty-second Judicial District Court as now fixed by law in the county of Stephens, are hereby made returnable to the terms of the district court of the newly created Ninetieth Judicial District of Texas, as in all cases transferred to said court; and all process heretofore returned, as well as bonds and recognizances heretofore entered into in said Forty-second Judicial District Court, shall be as valid as if transfer had not been made to the court of the Ninetieth Judicial District. [Id., § 7.]

That the judge of the district court of the said Ninetieth Judicial District may, in his discretion, have a grand jury drawn for and organized at any term of his court, and all bills of indictment returned by said grand jury shall be returnable to the district court of the Ninetieth Judicial District in said Stephens County. [Acts 1920, 36th Leg. 3d C. S., ch. 3, § 8; Acts 1920, 36th Leg. 4th C. S., ch. 12, § 2 (§ 8).]

The district attorney in and for the Forty-second Judicial District shall also be the district attorney in and for the Ninetieth Judicial District and his compensation shall be the same as is now provided by law for district attorneys. After the taking effect of this Act the district attorney of said Forty-second and Ninetieth Judicial Districts may appoint an assistant district attorney for said districts, who shall have all the qualifications of the district attorney, such as are necessary to perform the duties and affairs of such office. Said assistant district attorney shall reside in Stephens County, and his compensation shall not exceed three thousand dollars per annum. Such salary shall be paid monthly and the amount thereof shall be fixed by the district attorney by and with the consent of the district judges of the Forty-second and Ninetieth Judicial District Courts by an order entered on the minutes of said courts. Said salary to be paid out of the fees of office collected by said district attorney, and such fees to be the same as are now allowed and permitted by law to be paid to district attorneys of this State. [Acts 1920, 36th Leg. 4th C. S., ch. 12, § 3, adding § 8a to Acts 1920, 36th Leg. 3d C. S., ch. 3.]

The office of District Attorney for the Ninetieth Judicial District of Texas is hereby created by this Act; and that the Governor of Texas, immediately upon taking effect of this Act, shall appoint a suitable and legally qualified person as district attorney for the Ninetieth Judicial District of Texas who shall hold his office until the next general election and until his successor is duly elected and qualified and he shall receive such salary as now or hereafter provided by law for district attorneys in districts containing two or more counties. Said District Attorney may appoint an Assistant District Attorney for said district court whose salary shall not exceed three thousand (\$3,000.00) dollars per annum and which shall be paid out of the general fund of Stephens county at such times and on such terms and conditions as may be prescribed by the commissioners' court of Stephens county. [Acts 1921, 37th Leg., ch. 53, § 4.]

Explanatory.—Sec. 6 of the act repeals all laws in conflict. The act took effect March 21, 1921. See subd. 42 of this article for provisions applicable to districts 42 and 92.

91. That the Ninety-first Judicial District of Texas be and the same is hereby created, to be composed of the county of Eastland in the State of Texas, and the jurisdiction of said district court shall be coextensive with the limits of said county over all cases, and civil and criminal proceedings and matters of which district courts of this State are given ju-

isdiction by the Constitution and laws of this State. [Acts 1920, 36th Leg. 3d C. S., ch. 33, § 1.]

The terms of said court shall be as follows:

Beginning on the first Monday in February, April, June, August, October and December of each year, and may continue in session until the business of the court is disposed of. [Id., § 2.]

The district clerk of Eastland County shall be the clerk of the district court of said Ninety-first Judicial District, sitting in Eastland County, and shall receive such compensation for his service as is provided by law for district clerks. [Id., § 3.]

The county attorney of Eastland County shall do and perform all the duties of county attorney and district attorney in the said Ninety-first Judicial District, as well as the Eighty-eighth Judicial District, composed of Eastland County, and shall receive the same compensation for his services as is now or which may hereafter be fixed by law for district attorneys acting in judicial districts composed of two or more counties. [Id., § 4.]

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

The district courts of Eastland County, Texas, shall have concurrent civil and criminal jurisdiction with each other in said county in matters over which the jurisdiction is given or shall be given by the Constitution and laws of Texas to district courts; provided, that no grand jury shall be impanelled in the Ninety-first District Court of said county, except that by the special order of the judge of said Ninety-first District Court, a grand jury shall be called for said court. [Id., § 6.]

Either of the judges in the said district court of Eastland County may, in their discretion, either in term time or in vacation, transfer any case or cases, civil or criminal, to any other of said district courts by order entered on the minutes of his court, or minutes of orders made in chambers as the case may be, which orders, when made, shall be copied and certified to by said clerk, together with all orders made in said case, and such certified copies of such orders shall be filed among the papers of any case thus transferred, and the fees thereof shall be taxed as a part of the costs of said suit, and the clerk of said court shall docket any such case in the court to which it shall have been transferred, and when so entered, the court to which the same shall have been thus transferred shall have like jurisdiction therein as in cases originally brought in said court, and the same shall be dropped from the docket of the court from which it was transferred; provided, that when there shall be a transfer of any case from one court to the other, as herein provided, on motion of either of the parties to said suit, notice must be given to either the opposite party, or his attorney, by the party making the motion to transfer, one week before the time of entering the order of transfer. [Id., § 7.]

When the court provided by this Act is organized, and the law creating this court takes effect, the clerk of the district court of Eastland County, Texas, shall file all suits in his office alternately in said Eighty-eighth Judicial District Court and said Ninety-first Judicial District Court herein provided for. [Id., § 8.]

From and after the first day of January of the year A. D. 1925 the existence of the Ninety-first Judicial District herein provided shall cease, and the functions of the district court hereby established in said district shall terminate and any unfinished or pending business in or connected with

said court in said Ninety-first Judicial District shall by the clerk of the said court be transferred to the court in said Eighty-eighth Judicial District. [Id., § 9.]

Took effect June 18, 1920.

By Acts 1921, 37th Leg., ch. 103 the unorganized county of Cochran, now attached to Lubbock county, is attached to Hockley county for judicial purposes.

TITLE 6

APPRENTICES

Art. 43. Rights of persons to whom minor is apprenticed.	Art. 55. No guardian of person when minor is apprenticed.
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Article 43. [34] [29] Rights of persons to whom minor is apprenticed.

Cited, Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008.

Art. 55. [46] [41] No guardian of person when minor is apprenticed.

Cited, Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008.

TITLE 7

ARBITRATION

CHAPTER ONE

ARBITRATION IN GENERAL

Art.	Art.
56. Right to arbitrate.	62. Procedure on trial.
58. Agreement to be filed in court having jurisdiction.	63. Award to be written out, filed and entered as judgment.
59. Day of trial to be designated by justice or clerk, etc.	65. Appeal from an award.

Article 56. [47] [42] Right to arbitrate.

Construction of statute.—Statutes providing for arbitration should be liberally construed. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

What constitutes agreement for arbitration.—Agreement of the owners of certain surveys that, in view of doubt and uncertainty as to boundaries, a certain surveyor should resurvey them, and that they should be bound by the result, held one of arbitration. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

Common law arbitration.—A recital in the contract that it should be filed with the clerk of the court in accordance with the statute, etc., showed a statutory as distinguished from common-law arbitration; the statutes by implication being incorporated into the agreement. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Art. 58. [49] [44] Agreement to be filed in court having jurisdiction.

Waiver as to filing.—While arts. 58, 59, provide that an agreement for statutory arbitration shall be filed with the clerk such a matter of procedure may be waived. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Art. 59. [50] [45] Day of trial to be designated by justice or clerk, etc.

Filing agreement—waiver.—While arts. 58, 59, provide that an agreement for statutory arbitration shall be filed with the clerk such a matter of procedure may be waived. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Art. 62. [53] [48] Procedure on trial.

Swearing witnesses.—While arbitrators' failure to swear witnesses before giving their testimony and to comply with the arbitration agreement was an irregularity, yet where the witnesses were recalled and sworn as to the statements they had made, and no special injury to complaining party is shown, and no fraud, unfairness, or impartiality was participated in by the arbitrators, the award will be considered just and equitable. *Angus v. Beggs* (Civ. App.) 208 S. W. 707.

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

Number of arbitrators acting.—Where the parties agree upon the number of arbitrators, they are entitled to the judgment of each, and the neglect or refusal of any one to act will render an award made by others invalid. *Beirne v. North Texas Gas Co.* (Civ. App.) 221 S. W. 301.

Filing.—Where defendants the unsuccessful parties to an arbitration proceeding made no exception below on the ground that the arbitration agreement was not filed with the clerk as required by statute, the appellate court will presume that it was waived. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Conclusiveness of award.—An arbitration agreement as to boundaries is valid, and the award subject to impeachment only as in other cases. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

Objections to award.—Where the merits of the decision of arbitrators was not attacked, but defeated party alleged generally that he was improperly excluded from the hearing, and not allowed to cross-examine witnesses, and that if given a fair opportunity he could show want of indebtedness, objection is too general to prevent judgment on the award. *Angus v. Beggs* (Civ. App.) 208 S. W. 707.

Action on award.—On a common-law arbitration, action may be required on the award to establish it and secure judgment; but in case of statutory arbitration the award under this article, is entered as the judgment of the court, and the court performs no judicial function, its duties being merely ministerial. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Setting aside award.—While arbitrations are favored in law, and every reasonable intendment will be indulged in to support them a showing of fraud, bias, or intimidation will avoid an award. *Anderson Bros. v. Parker Const. Co.* (Civ. App.) 222 S. W. 677.

In the absence of gross and palpable error in award, charges of fraud of arbitrator are not sustained by evidence of the merits of the controversy submitted. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

If an award conforms to submission, it may be impeached only for fraud, partiality, misconduct, or gross mistake committed on the part of the arbitrator to the manifest injury of the party complaining. *Id.*

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

Right of appeal.—Where no right of appeal is reserved, the award is final and conclusive, and no appeal can be taken from the judgment entered thereon; but if such right is reserved presumptively the dissatisfied party may appeal from the decision of the district court hearing the appeal from the decision of the arbitrators. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

Failure to appeal.—If no right of appeal is reserved, the decision of the arbitrators under this article becomes final, and the award on motion will be made the judgment of the court unless impeached on equitable grounds as fraud. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

TITLE 8

ARCHIVES

CHAPTER ONE

ARCHIVES OF THE GENERAL LAND OFFICE

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| <p>Art.
82. What shall be considered archives of the general land office.</p> <p>83. Effect to be given to archives deposited.</p> | <p>Art.
90a. Loan of archives to University of Texas.</p> |
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Article 82. [62] [57] What shall be considered archives of the general land office.

What constitutes archives or public documents.—Under Act April 24, 1871, providing for the obtaining of the acts and charters of the town of Guerrero among others, and filing the same as records in the general land office, a statement purporting to have been made in 1831, and showing to whom lands had been previously granted in Guerrero, and who then owned them, is not such an “act, charter, or grant” as was authorized to be obtained and filed as a record in the general land office, though it was an archive of Guerrero. *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49.

Under this article instruments deposited or filed in a General Land Office do not become archives thereof, unless their deposit or filing was authorized by law. *Landry v. Robison*, 110 Tex. 295, 219 S. W. 819.

Affidavits for a duplicate certificate filed to meet the requirements of Rev. St. 1879, arts. 3883-3885, and approved by the land commissioner, who issued a duplicate certificate thereon, became archives of the land office, and certified copies thereof were as admissible in evidence as the originals. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

An original duplicate copy of a testimonio of Mexican land in Texas was the private property of the grantee or his assignee, and neither it nor a copy thereof became an archive of the land office, by reason of its being filed in such office. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

A map, not filed in the surveyor's office or the General Land Office, does not become an archive in either office, and is not admissible to determine boundaries in trespass to try title. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

Art. 83. [63] [58] Effect to be given to archives deposited.

Admissibility as evidence.—This article does not affect admissibility of archives as evidence, when they are relevant. *Texas Mex. Ry. Co. v. Jarvis*, 69 Tex. 527, 7 S. W. 210.

Art. 90a. Loan of archives to University of Texas.—That County Commissioners and other custodians of public records are hereby authorized, in their discretion, to lend to the library of the University of Texas, for such length of time and on such conditions as they may determine, such part or parts of their archives and records as have become mainly of an historical value, taking a receipt therefor from the librarian of the University of Texas; and the librarian of the University of Texas is hereby authorized to receipt for such records as may be transferred to the said library, and to make copies thereof for historical study. [Acts 1921, 37th Leg., ch. 43, § 2.]

Explanatory.—Took effect 90 days after March 12, 1921, date of adjournment. Sec. 2 of the act provides for certification by the librarian of the University to copies of public records in his custody, and is set forth, post, as art. 3707a.

TITLE 9

ASSIGNMENTS FOR CREDITORS

Art.	Art.
91. General assignments, how made and construed; preferences void.	96. Where assignee shall reside and his preliminary duties and bond approved by county or district judge.
92. Assignment acknowledged, etc., inventory.	101-103.
95. How and when consenting creditors may accept.	105. Dividend declared, etc.

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

6. Instruments operating as assignments.—Where sellers and buyers agreed that proceeds of note representing part of consideration for goods should be applied to payment of any and all debts or claims against goods, held, that creditors of sellers had an interest in note and were entitled to judgment for proportional amount of their claims. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Agreement whereby purchaser deposited purchase price in a bank, deposit to be paid to approved creditors of vendor on checks signed by both, did not amount to an assignment for benefit of vendor's creditors. *Foscue v. Provident Nat. Bank of Waco* (Civ. App.) 210 S. W. 555.

A deed of trust authorizing the trustees to take possession of and at the end of 90 days sell the goods and lands conveyed and distribute the proceeds among the grantor's creditors, any surplus to be returned to the grantor, is in legal effect only a mortgage with a power of sale. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

10. Partnership.—Under Sayles' Civil St. art. 65a, providing that every assignment by an insolvent debtor or in contemplation of insolvency, shall inure to the equal benefit of all creditors, an assignment by a firm is not brought within the statute unless it is shown that each of the partners is insolvent. *Hudson v. Eisenmayer Milling & Elevator Co.*, 79 Tex. 401, 15 S. W. 385.

12. Property included and sufficiency of description.—Where corporation did not make general assignment for creditors, but made chattel mortgage or conveyance in trust to private trustee for creditors, title to cause of action against director for corruptly disposing of assets was vested in trustee. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

16. Preference of creditors, conditions, and directions as to management of trust.—Where one agrees to pay debts of another from a specified fund in consideration of the transfer of property, he is bound to distribute the fund pro rata among the creditors, and upon failure of the debtor to transfer part of the property the transferee can withhold from the fund an amount equaling the value of the property not transferred, but must pro rate the balance, unless some creditors are paid in full without knowledge of the partial failure of consideration; priority of maturity date of obligations being immaterial. *American Nat. Bank of Houston v. American Loan & Mortgage Co.* (Com. App.) 228 S. W. 169.

A deed of trust empowering the trustees to sell, for the benefit of certain creditors, the debtor's stock of merchandise and fixtures and his interest in certain land, creates a prior lien in favor of all the creditors mentioned, and one only of them is not, by virtue of a writ of garnishment served on the trustees after they took charge of the debtor's merchandise, and the levy of a writ of attachment on the land, entitled to any preference in the distribution of the proceeds of the sale of the land on foreclosure of a vendor's lien thereon by the trustees. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

17. Operation and effect as to creditors.—Father, having expressly assumed payment of son's debt in consideration of the conveyance to father of certain land, was liable to son's creditor unless debt was barred by limitations. *Bell v. Swim* (Com. App.) 229 S. W. 470.

24. Bona fide purchasers from assignee.—Although the title which an assignee takes under a general assignment for benefit of creditors is not better than that which the assignor had, and generally only such title will pass to a purchaser under the assignee, whether immediate or remote, yet where a purchaser upon the faith of the record pays value, without notice of a secret equity with which the property was affected at the time of the assignment, he acquires such title as the record discloses the assignor owned. *Etheridge v. Campbell* (Com. App.) 215 S. W. 441.

Art. 92. [72] Assignment acknowledged, etc.; inventory.

Schedules and inventory.—Under a general assignment for the benefit of creditors, all the property of the debtor, except that exempt from forced sale, passes to the assignee, whether included in the inventory or not. *Etheridge v. Campbell* (Com. App.) 215 S. W. 441.

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

Necessity of acceptance.—Although creditors of sellers did not know, at time of its creation of trust in note given as part consideration for goods, they had a right thereafter to affirm it and to enforce it in their favor, and, when they affirmed trust, they were no longer simple contract creditors. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Art. 96. [76] Where assignee shall reside and his preliminary duties and bond approved by county or district judge.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Approval of bond.—As the district judge is authorized by statute to remove an assignee and appoint his successor, he is the proper person to approve the bond of the successor. *Perry v. Stephens*, 77 Tex. 246, 13 S. W. 984.

Arts. 101–103.

Cited, *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Art. 105. [85] Dividend declared, etc.

See *Kaufman v. Wolf*, 77 Tex. 250, 13 S. W. 987.

TITLE 10

ASYLUMS

Chap.

1. The lunatic asylums.
2. Pasteur Hospital.
3. The deaf and dumb and the blind and other asylums.

Chap.

4. State home for lepers.
5. State tuberculosis sanatorium.

CHAPTER ONE

THE LUNATIC ASYLUMS

Art.

- 107c. [Repealed.]
- 107ee. Transfer of property of Northwest Texas Insane Asylum to board of control.
- 107eee. Same; duties of board of control.
- 107ff. Name changed.
- 107g, 107h. [Note.]
- 107ii. Persons admitted to hospital.
- 107iii. White and negro patients kept separate.
- 107iiih. Acts repealed.

1. THE BOARD OF MANAGERS

108-112. [Repealed.]

113-118. [Note.]

5. OF JUDICIAL PROCEEDINGS IN CASES OF LUNACY

150. Apprehension.
151. The writ and its requisites.

Article 107c. [Repealed.]

See art. 7150½h, post.

Art. 107ee. Transfer of property of Northwest Texas Insane Asylum to Board of Control.—The property of the Northwest Texas Insane Asylum of this State shall be delivered by the Governor, the Lieutenant Governor and the Attorney General to the Board of Control, and all the authority conferred by Chapter 183, General Laws passed by the Regular Session of the Thirty-fifth Legislature upon the Governor, the Lieutenant Governor and the Attorney General, is hereby conferred upon and shall be applicable to the Board of Control; and the appropriation made for the Northwest Texas Insane Asylum by Chapter 168, General Laws passed by the Regular Session of the Thirty-sixth Legislature, is made available for the Board of Control, and shall apply to them in the same manner that it did apply to the Governor, the Lieutenant Governor and the Attorney General. [Acts 1920, 36th Leg. 3d C. S., ch. 56, § 1.]

Took effect June 18, 1920.

Art. 107eee. Same; duties of Board of Control.—It shall be the duty of the Board of Control to take charge of said Northwest Texas Insane Asylum and manage the same under the same authority that they manage the other insane asylums of the State. They shall also finish the construction and equipment of the buildings now under construction in which shall be included, among other things, plumbing, sewerage disposal plant, heating plant and equipment, waterworks plant and equipment, laundry plant and equipment, ice plant and equipment, electric wiring and fixtures and all equipment and furnishings necessary to make

the asylum plant as now constructed a complete operating unit. For such purposes the appropriation heretofore made in Chapter 168, General Laws passed by the Regular Session of the Thirty-sixth Legislature, is hereby appropriated and made available. [Id., § 2.]

Art. 107ff. Name changed.—That the name of the Insane Asylum at Rusk, Texas, known as the hospital for the negro insane be changed to "The East Texas Hospital for the Insane." [Acts 1919, 36th Leg. 2d C. S., ch. 39, § 1.]

Took effect July 25, 1919.

Art. 107g.

See art. 7150 $\frac{1}{4}$ h, abolishing the Board of Managers, and transferring its powers to the State Board of Control.

Art. 107h.

See art. 7085g.

Art. 107ii. Persons admitted to hospital.—As soon as this Act becomes effective and operative, the Superintendent of said Asylum shall admit all persons in Texas who have been adjudged insane, giving preference to those who are now in jail, or other places of restraint. [Id., § 2.]

Art. 107iii. White and negro patients kept separate.—Both white and negro patients shall be admitted to said hospital, but the whites and negroes shall be kept in separate wards, and the two races shall be kept separate and apart at all times. [Id., § 3.]

Art. 107iiii. Acts repealed.—All laws and parts of laws in conflict with this Act are hereby repealed, but this Act is intended to be cumulative of all other laws relating to the care and custody of the insane. [Id., § 4.]

1. THE BOARD OF MANAGERS

Arts. 108–112. [88–92] [Repealed.]

See art. 7150 $\frac{1}{4}$ h, post.

Arts. 113–118. [93–96b].

See art. 7150 $\frac{1}{4}$ h, abolishing the boards of managers and transferring their powers to the State Board of Control.

5. JUDICIAL PROCEEDINGS IN CASES OF LUNACY

Art. 150. [128] [106] Apprehension.—If information in writing and under oath be given to any county judge that any person in his county is a lunatic, or non compos mentis, and that the welfare of himself or of others requires that he be placed under restraint, or that such lunatic is a convict confined in the state penitentiary, and such county judge shall believe such information to be true, he shall forthwith issue his warrant for the apprehension of such person, or, upon the filing of such complaint before any justice of the peace, said justice may issue the warrant for the apprehension, returning said complaint and warrant to said county judge; and said county judge shall fix a day and place for the hearing and determining of the matter, which place shall be either in the court house of the county or at the residence of the person named, or at the state penitentiary, if he be a state convict, as the county judge

may deem best for such person. [Acts 1903, p. 236; Acts 1899, p. 172; Acts 1876, p. 138.]

See notes following art. 165a in Vernon's Sayles' Civ. St. 1914, and in Supplement of 1918.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Explanatory.—Acts 33d Leg. ch. 163, amended Rev. St. 1911, arts. 150 to 165, inclusive, so as to make them read as set forth in Vernon's Sayles' Civ. St. 1914, arts. 150-165a, and repealed all laws in conflict with the amendatory act. The Court of Civil Appeals in *White v. White*, 183 S. W. 369, and in *Loving v. Hazlewood*, 184 S. W. 355, held such amendatory act invalid, in that the substitution of a commission for a jury violated the constitutional right of trial by jury. The Supreme Court, on writ of error in the *White Case*, reported at 108 Tex. 570, 196 S. W. 508, upheld such decision, but declined to discharge the prisoner on the ground that subsequent proceedings had been taken under the former law to obtain an adjudication of insanity. The refusal to discharge the prisoner under the circumstances would seem to be a judicial recognition of the revival of the old law by the failure of the new. The old law is therefore set forth herein as a part of the statute law of the state.

Constitutionality of act of 1913.—Const. U. S. Amend. 14, is not necessarily violated by an act substituting a commission for a jury in determining sanity, provided such provisions are in accord with the due course of law of the land; but there having been under statute right to jury trial in lunacy proceedings at date of adoption of Const. art. 1, §§ 15, 19, 29, providing that "right of trial by jury shall remain inviolate," etc., Acts 33d Leg. c. 163, amending Rev. St. 1911, arts. 150-165, substituting a commission for a jury in such proceeding, is invalid. *White v. White*, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

Where defendant was adjudged a lunatic by a commission purporting to act under Acts 33d Leg. (1913) c. 163 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 150-156, 159-165), the adjudication is without force as a judgment, where the statute was subsequently declared unconstitutional. *Barton v. State* (Cr. App.) 230 S. W. 989.

Nature of proceedings.—Proceedings to determine insanity are of a civil, not a criminal, nature. *White v. White*, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

Art. 151. [129] [107] The writ and its requisites.—The warrant provided for in the preceding article shall run in the name of the "State of Texas," shall be directed to the sheriff or any constable of the county; and the officer receiving it shall forthwith take into custody the person named therein, and at the designated time and place have him before the county judge for trial and examination. [Id.]

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 152. [130] [108] Jury to be summoned.—At the time of issuing the warrant mentioned in the preceding article the county judge shall also issue an order to the sheriff or constable, directing him to summon a jury of six competent jurors of the county, to be and appear before such judge at the time and place designated in said order, for the hearing and determination of the matter. [Id.]

Art. 153. [131] [109] Cause to be docketed, etc.—The cause shall be docketed on the probate docket of the court in the name of the state of Texas as plaintiff, and of the person charged to be insane as defendant. The county attorney shall appear and represent the state on the hearing, and the defendant shall also be entitled to counsel; and in proper cases the county judge may appoint counsel for that purpose. [Act Aug. 15, 1878, p. 138, § 1.]

Art. 154. [132] [110] Jury impaneled and sworn.—At the time appointed for the hearing, or at any other time to which the proceeding may have been postponed, the cause shall be called for trial and a jury of six men impaneled, to whom shall be administered the following oath: "You and each of you do solemnly swear, (or affirm) that upon all the issues about to be submitted to you in the matter of the state of Texas against A B, you will a true verdict render according to the evidence. So help you God."

Art. 155. [133] [111] **Special issues to be submitted.**—After the evidence is heard the county judge shall submit the matter to the jury upon the following special issues:

1. Is A B, the defendant, of unsound mind?
2. If the defendant is of unsound mind, is it necessary that he should be placed under restraint?
3. If you answer both the foregoing questions in the affirmative, then what is the age and nativity of the defendant?
4. How many attacks of insanity has he had, and how long has the present attack existed?
5. Is insanity hereditary in the family of defendant or not?
6. Is defendant possessed of any estate, and, if so, of what does it consist and its estimated value?
7. If the defendant is possessed of no estate, are there any persons legally liable for his support? If yea, name them. [Act Aug. 15, 1876, p. 138, §§ 1-2.]

Art. 156. [134] [112] **Verdict.**—The jury shall return plain answers in writing to the issues named in the preceding article, but, if they find either the first or second issue in the negative, they need not determine further, and the defendant shall be discharged.

Art. 157. [135] [113] **Judgment.**—Upon return of a verdict finding that the defendant is of unsound mind, and that it is necessary that he be placed under restraint, judgment shall be entered adjudging the defendant to be a lunatic, and ordering him to be conveyed to the lunatic asylum for restraint and treatment.

Art. 158. [136] [114] **Reimbursement to the state from lunatics not indigent.**—The special issues submitted to the jury, with the answers thereto, shall be incorporated in the judgment, and, if it be found that the defendant is possessed of property, or that some other person is legally liable for his support, the county judge may, from time to time, upon request of the superintendent of the lunatic asylum, cite the guardian of such lunatic, or other person legally liable for his support, to appear at some regular term of the county court for civil business, then and there to show cause why the state should not have judgment for the amount due it for the support and maintenance of such lunatic; and, if sufficient cause be not shown, judgment may be entered against such guardian or other person for the amount found to be due the state, which judgment may be enforced as in other cases.

Art. 159. [137] [115] **Limitation as to amount and procedure.**—The state, in cases provided for in the preceding article, shall in no instance recover more than five dollars per week for the support of any lunatic, and the certificate of the superintendent of the lunatic asylum as to the amount due shall be sufficient evidence to authorize the court to render judgment.

Art. 160. [138] [116] **County attorney to represent state.**—The county attorney shall appear and represent the state in all cases provided for in the two preceding articles.

Art. 161. [139] [117] **Warrant to convey lunatic to asylum.**—Immediately after any person is adjudged a lunatic, the county judge shall communicate with the superintendent of the asylum, and, if notified by the latter that there is a vacancy in the institution or that the patient can be accommodated, he shall issue his warrant to the sheriff or some

other suitable person, directing him to convey the lunatic to the asylum without delay, which warrant shall prescribe the number of guards to be allowed, in no case to exceed two, and shall be executed with all convenient dispatch. [Act Aug. 15, 1876, p. 139, § 3.]

Art. 162. [140] [118] Relative or friend may give bond, etc.—No warrant to convey a lunatic to the asylum shall issue if some relative or friend of the lunatic will undertake, before the county judge, his care and restraint, and will execute a bond in a sum to be fixed by the county judge, payable to the state, with two or more good and sufficient sureties to be approved by the county judge, conditioned that the party giving such bond will restrain and take proper care of the lunatic so long as his mental unsoundness continues, or until he is delivered to the sheriff of the county or other person, to be proceeded with according to law; which bond shall be filed with, and constitute a part of, the record of the proceedings, and may be sued and recovered upon by any party injured, in his own name. [Act Aug. 15, 1876, p. 138, § 1.]

Art. 163. [141] [119] Record made up and forwarded.—The proceedings in any inquisition of lunacy shall be entered of record in the probate minutes of the county court by the clerk thereof; and before any patient is sent to the asylum the county judge shall cause a complete transcript of the proceedings to be made up and certified by the clerk of the county court under the seal of said court, which transcript he shall forward by mail to the superintendent of the asylum. [Act Aug. 15, 1876, pp. 138, 139, §§ 1, 3.]

Art. 164. [142] [120] Suitable clothing to be provided.—Before sending any patient to the asylum, the county judge shall take care that the patient is provided with two full suits of substantial summer clothing and one full suit of substantial winter clothing. [Act Aug. 15, 1876, p. 139, § 3.]

Art. 165. Fees of officers in lunacy cases.—In judicial proceedings in cases of lunacy, as prescribed in this chapter, in each case the sheriff and county clerk shall be allowed the same fees as are now allowed said officers for similar services in misdemeanor criminal cases, the county attorney shall be allowed a fee of five dollars, provided, that such fees shall be allowed only when a conviction is obtained; said costs to be paid out of the estate of the defendant, if he shall have an estate sufficient therefor, otherwise said costs shall be paid out of the county treasury; and the jurors in such cases shall be allowed fifty cents each, to be paid out of the county treasury. Justices of the peace who may take complaints, issue warrants and subpoenas in such lunacy cases, shall receive the same fees as are now allowed them by law for taking complaints, issuing warrants and subpoenas in criminal misdemeanor cases. Constables shall receive for executing warrants and serving subpoenas in lunacy cases the same fees as are now allowed them by law for similar services in criminal misdemeanor cases; such fees to be paid upon conviction out of the estate of the defendant, if he shall have an estate sufficient therefor, otherwise the same shall be paid by the county upon an account approved by the county judge. [Acts 1903, p. 110.]

CHAPTER TWO

PASTEUR HOSPITAL

Art. 166. Admission of patients; requirements as to.	Art. 170. [Note.]
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Article 166. Admission of patients; requirements as to.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 170.

See art. 7085g, fixing salary of head physician of institute.

CHAPTER THREE

THE DEAF AND DUMB AND THE BLIND AND OTHER ASYLUMS

<p>1. GENERAL PROVISIONS</p> <p style="padding-left: 20px;">a. BOARD OF TRUSTEES</p> Art. 171-174. [Repealed.] 175-179. [Note.] 180. [Repealed.] <p style="padding-left: 20px;">2. PARTICULAR PROVISIONS</p> <p style="padding-left: 40px;">a. BLIND ASYLUM</p> <p style="padding-left: 60px;"><i>a. Texas School for the Blind</i> 187½a, 187½b. [Repealed.]</p> <p style="padding-left: 40px;">d. CONFEDERATE HOME</p> 205. [Note.] 206. Appointment of superintendent; qual- ifications; removal; tenure; duties; salary.	<p style="padding-left: 20px;">Art.</p> 206a. Repeal. 206b. Cumulative of other provisions. 208½. Transfer of wives of inmates from Confederate Woman's Home to Confederate Home. <p style="padding-left: 40px;">dd. CONFEDERATE WOMAN'S HOME</p> 208b, 208d. [Note.] <p style="padding-left: 20px;">e. DEAF, DUMB AND BLIND ASYLUM FOR COL- ORED YOUTHS</p> 210. [Note.] <p style="padding-left: 40px;">f. EPILEPTIC COLONY</p> 212. [Repealed.] <p style="padding-left: 20px;">g. STATE COLONY FOR THE FEEBLE MINDED</p> 232c. [Note.]
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1. GENERAL PROVISIONS

a. Board of Trustees

Articles 171-174. [143-146] [Repealed.]

See art. 7150¼d, post.

Arts. 175-179. [147-151]

See art. 7150¼h, post, abolishing the boards of trustees and managers and transferring their powers and duties to the State Board of Control.

Art. 180. [152] [Repealed.]

See art. 7150¼h, post.

2. PARTICULAR PROVISIONS

a. Blind Asylum

A. TEXAS SCHOOL FOR THE BLIND

Arts. 187½a, 187½b. [Repealed.]

See art. 7150¼h, post.

d. Confederate Home

Art. 205. [172]

See art. 7150¼h, abolishing the board of trustees and transferring its powers and duties to the State Board of Control.

Art. 206. [173] Appointment of superintendent; qualifications; removal; tenure; duties; salary.—The State Board of Control shall appoint a Superintendent, who shall be an ex-Confederate soldier or the son of an ex-Confederate soldier, whose duties of office shall be the supervision of the affairs of said home, keeping the accounts of same, and its general management, under the direction of the State Board of Control. He shall be under the control of and subject to removal (for cause duly spread upon the records of said home) by said Board, and unless sooner removed by said Board for cause, shall hold his office for a term of two years or until his successor shall be appointed and qualified.

In addition to his other duties he shall keep in a book prepared for that purpose, the name and age of each inmate, date of admission to the home, the company and regiment or other command or capacity, in which the military service was performed, and the State from which he entered the service, and such other data concerning the history of the inmates as the board of trustees may prescribe. The superintendent of said home shall receive a salary of two thousand dollars per annum. [Acts 1891, p. 14; Acts 1895, p. 42; Acts 1921, 37th Leg., ch. 78, § 1, amending art. 206, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.
See art. 7085h, fixing salary of superintendent.

Art. 206a. Repeal.—All laws and parts of laws in conflict with the provision that the son of a Confederate soldier is eligible for appointment to said office are hereby repealed. [Acts 1921, 37th Leg., ch. 78, § 2.]

Art. 206b. Cumulative of other provisions.—This Act shall be cumulative of the provisions of Chapter 167, Acts of the Regular Session of the Thirty-sixth Legislature, relating to the Superintendent of the Confederate Home, and particularly cumulative of the provisions of Section nine (9) thereof [Art. 7150 $\frac{1}{4}$ h]. [Id., § 3.]

Art. 208 $\frac{1}{2}$. Transfer of wives of inmates from Confederate Woman's Home to Confederate Home.—That any woman who is the wife of a Confederate soldier, and who is an inmate of the Confederate Woman's Home, and whose husband is an inmate of the Confederate Home, and who became the wife of such soldier prior to his admission into the Confederate Home, may, on her request, be transferred from the Confederate Woman's Home to the Confederate Home and may remain as an inmate of the Confederate Home with her husband so long as her husband remains an inmate of that institution, and while such inmate she shall be entitled to the same care, support, maintenance and privileges, and be subject to the same discipline, rules and regulations, as other inmates of that institution; but the wife of any Confederate soldier so transferred to the Confederate Home shall be immediately transferred back to the Confederate Woman's Home on the death of her husband, or whenever for any reason her husband ceases to be an inmate of the Confederate Home, or whenever in the judgment of the governing board of the Confederate Home it will be to the interest of the individual, or of that institution, to make such transfer. [Acts 1921, 37th Leg., ch. 44, § 1, adding art. 208 $\frac{1}{2}$ to Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

dd. Confederate Woman's Home

Art. 208b.

See art. 7150 $\frac{1}{4}$ h, abolishing the board of managers and transferring its powers and duties to the State Board of Control.

Art. 208d.

See art. 7085h, fixing salary of superintendent.

*e. Deaf, Dumb and Blind Asylum for Colored Youths***Art. 210. [176]**

See art. 7150¼h, post, abolishing the board of trustees and transferring its powers and duties to the State Board of Control.

*f. Epileptic Colony***Art. 212. [Repealed.]**

See art. 7150¼h, post.

*g. State Colony for the Feeble Minded***Art. 232c.**

See art. 7150¼h, abolishing the board of managers and transferring its powers to the State Board of Control. See, also, art. 7085g, fixing salary of superintendent.

CHAPTER FOUR**STATE HOME FOR LEPERS****Articles 232½-232½f.**

Note.—Repealed by Acts 1919, 36th Leg. ch. 142, and by ch. 143 of the same session the appropriation made for the institution is transferred and made available for the isolation of lepers.

Arts. 233-239.

Note.—These articles which were superseded by Acts 1917, 1st. C. S., ch. 24 (Supplement 1918, arts. 232½-232½f) seem to be revived by the repeal of the latter act by Acts 1919 (36th Leg.) chs. 142 and 143.

CHAPTER FIVE**STATE TUBERCULOSIS SANATORIUM**

Art.	Art.
239b-239j. [Note.]	239¼e. Management by Board of Control; superintendent; salary and bond; operation of present sanatorium.
239n. Application for admission; requisites.	239¼ee. Lease to United States.
AMERICAN LEGION MEMORIAL SANATORIUM	239¼f. Rule of civil service to apply.
239¼. Institution established.	239¼g. Physicians as advisory board.
239¼a. Board established; construction of buildings, etc.	239¼h. Building board not to act until title perfected.
239¼b. Equipment; additional buildings; architect; bond.	239¼i. Rules and regulations; admission of patients; priority; charges.
239¼c. Construction contracts let to lowest bidder.	239¼j. Cases admitted; test period.
239¼d. Bond of contractor; payments to contractor.	239¼k. Appropriation; how expended.
	239¼l. Existing contract not impaired.
	239¼m. Rules and regulations.

Articles 239b-239j.

See art. 7150¼h, post, transferring the management and control of the sanatorium to the State Board of Control and abolishing the existing board of managers.

Art. 239n. Application for admission; requisites.

Cited in dissenting opinion, San Antonio & A. P. Ry. Co. v. Blair, 108 Tex. 434, 196 S. W. 1153.

AMERICAN LEGION MEMORIAL SANATORIUM

Art. 239¼. Institution established.—There is hereby created and established and there shall be maintained by the State of Texas a tuberculosis sanatorium to be known as the American Legion Memorial Sana-

torium of Texas, and which sanatorium shall be located in Kerr County, Texas, near the town of Kerrville, upon a site not owned and being used as a tuberculosis sanatorium by the American Legion Department of Texas, said sanatorium to be constructed, maintained and operated as provided in this Act. [Acts 1921, 37th Leg., ch. 18, § 1.]

Act took effect Feb. 28, 1921.

Art. 239¹/₄a. Board established; construction of buildings, etc.—

A Board, composed of the State Health Officer, the Chairman of the Board of Control, and the Superintendent of the State Tuberculosis Sanatorium, is hereby authorized to construct, equip and provide for the establishment of said tuberculosis sanatorium at said place, and is hereby directed to take due cognizance of the latest and most approved scientific methods of treatment of tuberculosis, and shall seek the cooperation of the United States Public Health Service, and other health and tuberculosis agencies, to the end that a strictly modern sanatorium shall be erected. [Acts 1921, 37th Leg. 1st C. S., ch. 56, § 1, amending § 2, Acts 1921, 37th Leg., ch. 18.]

Took effect Sept. 5, 1921.

Art. 239¹/₄b. Equipment; additional buildings; architect; bond.—

Said building board shall first equip for operation the sanatorium now on said site, and the same shall be operated as soon as possible as provided in this Act, and then said building board shall have constructed in addition to those now constructed on said site, suitable additions and substantial, permanent and fire-proof buildings and equipment so that the entire sanatorium when completed will be sufficient to accommodate not less than six hundred (600) patients and the Superintendent and necessary employees, said building, equipment and sanatorium to be provided with modern improvements for furnishing good water, heat, ventilation, sewerage and other necessities. Said building board shall have plans and specifications for said building and sanatorium prepared by the Chief of Division of Design, Construction and Maintenance of the State Board of Control, and said building board is authorized to do all things necessary to construct and establish this sanatorium; provided, that the building board and architect shall take into consideration all buildings, equipment and improvements now on said site and shall not duplicate the same except where necessary. It is the purpose of this Act to provide for a sanatorium that will accommodate at least six hundred (600) patients and the Superintendent and necessary employees, taking into consideration the buildings, equipment and improvements now on said tract of land; and the architect whose plans and specifications are accepted shall be the supervising architect in the construction of said sanatorium; said architect shall act at all times under the supervision and control of said building board; said architect shall execute bond payable to the State of Texas at Austin, Texas, in a sum to be fixed by the building board and to be approved by said board, with good and sufficient sureties, conditioned that said architect shall be liable and bound to pay to the State of Texas all damages it may sustain by reason of defective plans or specifications or any willful failure or negligent performance of duty on the part of said architect. The compensation of said architect shall be fixed by the building board provided in Section Two of this Act; provided that the State shall not be limited to one recovery upon said architect's bond or any contractor's bond hereinafter provided for, if not exhausted, and it shall be authorized to bring as many actions as may be necessary until said bond, or bonds, be exhausted.

The surety or sureties on any bond provided for in this Act shall be any surety or indemnity company authorized to do such business under the laws of the State of Texas. [Acts 1921, 37th Leg., ch. 18, § 3.]

Art. 239 $\frac{1}{4}$ c. Construction contracts let to lowest bidder.—Bids to construct said sanatorium or any portion thereof shall be let to the lowest responsible bidder, or bidders, after advertising in two daily newspapers in the State for thirty days. The bids may be so arranged that the buildings, equipment or other items may be bid upon by items or units. [Id., § 4.]

Art. 239 $\frac{1}{4}$ d. Bond of contractor; payments to contractor.—The contractor and each contractor shall enter into a good and sufficient bond to be approved by said board, payable to the State of Texas in a sum double the amount of the contract, conditioned that said contractor will do the work contracted for according to the plans and specifications furnished by the architect and use such materials in the construction thereof as may be called for in said plans and specifications and comply in every respect with all the conditions of said contract and pay for all labor and material. Eighty per cent. of the materials shall be paid for when actually delivered on the grounds and the same per cent. for labor when done, payable monthly, to be payable only on the certificate of the supervising architect approved by said board, and the remaining twenty per cent. to be paid when said sanatorium, buildings, equipment or work undertaken by the contractor shall have been completed to the entire satisfaction of said board and architect and according to contract and plans and specifications. Provided, that the Comptroller shall not issue any warrants except upon itemized statements sworn to by the contractor or contractors and approved by said supervising architect and said board, which shall be filed with the Comptroller. [Id., § 5.]

Art. 239 $\frac{1}{4}$ e. Management by Board of Control; superintendent; salary and bond; operation of present sanatorium.—The Sanatorium herein created shall be operated, controlled and managed by the Board of Control of this State through a Superintendent and said Board of Control shall appoint a Superintendent for said sanatorium who shall reside at the sanatorium and who shall have authority to appoint and employ necessary employees, assistants and servants and for which appropriations shall be made by the Legislature. The salary of said Superintendent shall be Five Thousand (\$5,000.00) Dollars per annum and in addition thereto he shall be entitled to living quarters, heat, light, fuel and water. Said Superintendent shall be required to give bond in the sum of Five Thousand (\$5,000.00) Dollars, conditioned upon the faithful performance of his duties and he shall take the Constitutional oath of office. Provided, that the present sanatorium on said site, or so much thereof as practicable, shall be at once prepared by said building board for operation and shall immediately be operated by the Board of Control through the Superintendent provided for pending the completion of the entire sanatorium and the entire sanatorium shall be completed as soon as possible thereafter and put in operation. [Id., § 6.]

Art. 239 $\frac{1}{4}$ ee. Lease to United States.—The Board of Control of the State of Texas may and are hereby authorized to enter into negotiations and make any agreement with the accredited representatives of the United States Government, the United States Public Health Service, or other Federal agent or agency for the purpose of leasing, and they are hereby authorized and empowered to lease to the United States Government

any or all of said American Legion Memorial Sanatorium of Texas for disabled tubercular ex-service men and women for such time and on such terms as in the judgment of said Board of Control may seem proper.

In the event no such lease or rental contract is made and entered into, as herein provided, then said sanatorium shall be operated, controlled and managed as provided by this Act and by Chapter 18 of the General Laws of the Regular Session of the Thirty-seventh Legislature. [Acts 1921, 37th Leg. 1st C. S., ch. 56, § 2, adding § 6a to Acts 1921, 37th Leg., ch. 18.]

Took effect Sept. 5, 1921.

Art. 2391/4f. Rule of civil service to apply.—The purpose of this bill being to bring about the best results for World War Veterans who are afflicted with this disease, and for the general welfare of the State, it is hereby expressed that it is the desire of this Legislature that the physicians, Superintendent, and others connected with this sanatorium whose appointments are herein provided for, they, and each of them, shall be permitted to hold their respective offices and employment during the term of their good behavior, and that they be removed only for cause, which cause shall be determined by the Board of Control; and that such persons shall be under, as nearly as possible, the rule of civil service, to the end that they may be taken entirely out of politics. Provided, that nothing in this Section shall be construed as intending to violate the Constitution fixing the terms of officers. [Acts 1921, 37th Leg., ch. 18, § 7.]

Art. 2391/4g. Physicians as advisory board.—Three competent, licensed physicians, citizens of this State, experienced in the treatment of tuberculosis, shall be appointed by the Governor of Texas who with the State Health Officer as chairman shall constitute the advisory board to advise with the Superintendent in the management of the sanatorium herein created and in the treatment and care of the patients afflicted with tuberculosis. The members of said Advisory Board shall serve without compensation, but shall be entitled to be reimbursed for necessary traveling expenses, including hotel bills, incurred in the performance of duty under this Act. [Id., § 8.]

Art. 2391/4h. Building board not to act until title perfected.—The building board herein provided for shall not proceed to perform its duties prescribed in this Act unless and until the tract of land and all improvements thereon shall be deeded to the State of Texas as herein provided and the title hereto has been passed upon and approved by the Attorney General of Texas, and until such time the sanatorium herein provided for shall not be operated as a State institution. [Id., § 9.]

Art. 2391/4i. Rules and regulations; admission of patients; priority; charges.—The Superintendent and Advisory Board are hereby authorized to promulgate rules and regulations for the operation and maintenance of the Sanatorium herein created, and shall prescribe rules for the admission of patients to said hospital; provided, however, in all cases, priority and preferential rights of admission to said hospital shall always be given to honorably discharged veterans of the World War. After such preference and priority shall be given, if there should be further available beds, then any bona fide citizens of this State who has been such for at least six (6) months next preceding the date of his application, having tuberculosis, shall be entitled to be admitted into the sanatorium herein created upon application to the Superintendent; provided, that if such person shall make affidavit which affidavit shall never be required of any honor-

ably discharged veteran of the World War, that he or she is unable to pay for admission and treatment, such person shall be admitted and treated free of charge. Such affidavit shall be taken as prima facie evidence of the fact that such person is unable to pay. In the event the applicant shall not make an affidavit and is able to pay not exceeding Five (\$5.00) Dollars per week, a charge of not exceeding Five (\$5.00) Dollars per week shall be made for treatment of each such person; and in the event the applicant is able to pay more than Five (\$5.00) Dollars per week, he or she shall be required to pay not exceeding Ten (10.00) Dollars per week.

Provided further that the Superintendent of the Sanatorium shall enter into contract or agreement with the United States Government or any authorized agent, agencies or representatives thereof to accept into said sanatorium and treat any person otherwise eligible having tuberculosis, whereby the sanatorium shall be compensated for treatment or service rendered such persons in such sum as may be agreed upon by both parties and as authorized and provided for by the laws of the United States, and the rules and regulations as are now or may be hereafter promulgated by the United States Public Health Service or other Federal agent or agency. [Acts 1921, 37th Leg. 1st C. S., ch. 56, § 3, amending § 10, Acts 1921, 37th Leg., ch. 18.]

Took effect Sept. 5, 1921.

Art. 239¹/₄j. Cases admitted; test period.—Any person having tuberculosis and otherwise eligible shall be eligible to be admitted for treatment in the sanatorium herein created whether such person has incipient, moderately advanced or far advanced tuberculosis; provided, that the Superintendent shall not be precluded from entering and keeping in the sanatorium any person otherwise eligible for observation and tests a reasonable length of time sufficient to determine whether such person has tuberculosis or not, where there are symptoms indicating that the applicant may have tuberculosis. [Acts 1921, 37th Leg., ch. 18, § 11.]

Art. 239¹/₄k. Appropriation; how expended.—The sum of One Million, Five Hundred Thousand (\$1,500,000.00) Dollars is hereby appropriated out of any funds in the Treasury of the State of Texas not otherwise appropriated to be used, first to the discharge of all liens and incumbrances and equip and put in operation the present sanatorium now located near Kerrville and mentioned in Section 1 of this Act [art. 239¹/₄] and then in constructing such additions, buildings, equipment and other necessities as provided for in Section 3 of this Act [Art. 239¹/₄b]. The necessary traveling and other expenses of the building board herein provided for shall be paid out of said appropriation. [Id., § 12.]

Art. 239¹/₄l. Existing contracts not impaired.—It is not the intention of this Act to impair the obligation of any contract already entered into relative to the sanatorium or any part thereof, upon said tract of land, and the building board is hereby expressly authorized to take into consideration any such present contracts and make any arrangements or agreements with any contractor now having a contract relative to said sanatorium in order to carry out the purposes of this Act. [Id., § 13.]

Art. 239¹/₄m. Rules and regulations.—The Superintendent of the sanatorium acting with the Advisory Board herein created shall make rules and regulations for the conduct of the sanatorium. [Id., § 14.]

TITLE 11

ATTACHMENT AND GARNISHMENT

Chap.
1. Attachment.

Chap.
2. Garnishment.

CHAPTER ONE

ATTACHMENT

Art.	Art.
240. Attachment issued, when and by whom.	256. Personal property to remain in hands of officer, unless.
243. May issue on debt not due, but, etc.	258. Replevy by the defendant.
244. Plaintiff must give bond with security.	264. Return of writ.
247. Attachment abated for want of affidavit or bond.	265. Requisites of the return.
250. Form of writ of attachment.	267. Attachment creates a lien.
252. Duty of sheriff, etc.	268. Judgment of foreclosure.
253. May demand indemnity.	269. Judgment when the property has been replevied.
254. Property subject to attachment.	270. Order of court when attachment quashed; pending appeal property may be replevied.
255. Levy, how made.	

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

See *Davis v. Robinson*, 70 Tex. 394, 7 S. W. 749; *First Nat. Bank of Stephenville v. McClellan* (Civ. App.) 211 S. W. 794.

Cited, *Bell v. Indian Live Stock Co.* (Sup.) 11 S. W. 344, 3 L. R. A. 642; *Petty v. Lang*, 81 Tex. 238, 16 S. W. 999. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Affidavits—**Affidavit by agent or attorney.**—An attachment affidavit, signed by a member of the plaintiff firm, which merely recited that he was a member of the firm, is sufficient; the affidavit on its face showing his authority to make the oath. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

— **Indebtedness and amount.**—Plaintiff had a contract with defendant by which he was to sell goods for the latter in a certain territory, and to accept as compensation commissions on the amount of goods sold; the defendant to have the right to reject any sale on account of any lack of responsibility of the purchaser. Held, in an action for the breach of such contract by defendant in refusing to allow plaintiff to carry out the contract, that under the provision of this article requiring an affidavit for an attachment to state the amount of the demand due plaintiff, an attachment was not authorized; such contract not affording any certain standard by which the amount of damages could be ascertained and the amount thereof averred in the affidavit. *Hochstadler v. Sam*, 73 Tex. 315, 11 S. W. 408.

In view of the provision authorizing attachment only on affidavit that defendant is justly indebted to plaintiff a creditor of deceased could not maintain attachment against property, in the hands of deceased's widow, alleged to have been fraudulently conveyed to her by deceased during his lifetime. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Where contingency was to take place at the expiration of the contract, and plaintiff set forth the contract, which showed that defendant had breached contract and rendered it terminated, held, that court erred in abating attachment on grounds that it was levied on a contingency, while affidavit stated that defendant was justly indebted. *Paxton v. Trabue* (Civ. App.) 216 S. W. 399.

— **Converting property to money.**—Delay of 14 days intervening between execution of affidavit and bond for writs of attachment and garnishment, the ground of the attachment being that defendant was about to convert his property into money to place it beyond the reach of creditors, held not to authorize the inference that the facts stated in the affidavit, though necessarily somewhat transient, had ceased to exist when the affidavit and bond were filed. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

— **Fraud in incurring debt.**—Where defendants indebted to a bank on notes are shown to have conspired to obtain money from the bank upon worthless security, and that the bank relying thereon, advanced the money, such fraud held to constitute a basis for attachment of defendants' property under subd. 12. *Lancaster v. Corsicana Nat. Bank* (Civ. App.) 229 S. W. 580.

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

Cited, *Hochstadler v. Sam*, 73 Tex. 315, 11 S. W. 408.

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

Cited, *Petty v. Lang*, 81 Tex. 238, 16 S. W. 999.

Sureties.—Attachment bond signed by attorney without leave of court is not void or voidable. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

Objection to the sufficiency of sureties on an attachment bond on ground they were nonresidents cannot be taken on a motion to quash, but must be taken by plea in abatement. *Id.*

Wrongful attachment in general.—Falsity of affidavit. See *Lancaster v. Corsicana Nat. Bank* (Civ. App.) 229 S. W. 580.

When real or personal property had been levied on by attachment, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

— **Defenses.**—In action on attachment bond, testimony of deputy sheriff, who filled out bond, held to require verdict against sureties, who contended that bond read for smaller amount when their signatures were obtained. *Knox v. Horne* (Civ. App.) 200 S. W. 259.

— **Amount recoverable for wrongful attachment.**—Damages for wrongful attachment are limited to those directly and proximately resulting from the seizure, and hence a levy on lands generally affords no ground for actual damages. *Spillman v. Weston* (Civ. App.) 200 S. W. 557.

— **Exemplary damages.**—Under a plea in reconvention for malicious attachment, where plaintiff had sustained no actual damages, no exemplary damages were recoverable. *Spillman v. Weston* (Civ. App.) 200 S. W. 557.

— **Costs and attorney fees.**—Where malicious attachment prevented negotiation of loan making defendant unable to meet payment on prior loan, holder of which employed attorney and advertised land for sale, attorney's fees, advertising expenses, and bonus paid money lender held not recoverable, being too remote. *Spillman v. Weston* (Civ. App.) 200 S. W. 557.

Cross-action for conversion.—In suit on a note, with attachment levied upon defendants' joint property, defendants, claiming exemption, were entitled by plea in reconvention to ask judgment against plaintiff for value of property levied upon treating it as conversion. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

By bringing such cross-action defendants abandoned the property to plaintiff and it became his property. *Id.*

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

Form of objection.—Objection to the sufficiency of sureties on an attachment bond on ground they were nonresidents cannot be taken on a motion to quash, but must be taken by plea in abatement. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

Defects in affidavit.—A writ of attachment cannot be abated, because allegations of affidavit therefor falsely state causes for the attachment. *Paxton v. Trabue* (Civ. App.) 216 S. W. 399.

On motion to abate attachment on ground that demand at date of institution of suit was only a contingent one, allegation of affidavit for attachment that debt was due and owing is controlling. *Id.*

Party entitled to move for abatement.—This article does not give a claimant of the property levied on the right to move in abatement. *Roos v. Lewyn*, 5 Civ. App. 593, 23 S. W. 450.

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

Amendment of writ.—Rule allowing amendment of writs of attachment to remedy clerical errors does not permit correction of clerical error in reciting in writ amount in excess of jurisdiction of court. *McDaniel v. Cage & Crow* (Civ. App.) 201 S. W. 1078.

Art. 252. [198] [164] Duty of sheriff, etc.

See *Kanamán v. Hubbard*, 110 Tex. 560, 222 S. W. 151, affirming judgment (Civ. App.) 160 S. W. 304.

Art. 253. [199] [165] May demand indemnity.

Extent of liability.—There is no authority under Texas law for assessment of attorney's fees against creditors or sureties on sheriff's indemnity bonds taken under this article, when sued for conversion, unless the bonds so provide. *Coppard v. Gardner* (Civ. App.) 199 S. W. 650.

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

In general.—A writ of attachment may not be legally levied upon any property except such as is subject to levy under execution. *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

Ownership in general.—Where sale is procured by buyer's fraud or misrepresentation, seller's right to retake goods is superior to the claim of an attaching creditor, where the goods remain with buyer; for the subsequent attaching creditor obtains no better right

to the property than the fraudulent buyer. *Blount-Decker Lumber Co. v. Farmers' Lumber Co.* (Civ. App.) 211 S. W. 247.

The interest of one of several devisees in the land devised may be attached for a debt owing by the devisee. *Sewell v. Taylor* (Civ. App.) 224 S. W. 530.

Since a vendor who reserves in his deed a lien for part of the purchase price retains no interest in the land subject to sale under execution, his interest is not subject to attachment under this article. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

Trusts and assignments.—Although it was the intention of attaching creditors to sell the interest of the beneficiary of a spendthrift trust, leaving the trustee's possession undisturbed during the existence of the trust, such sale cannot be sanctioned but will be enjoined, as the testator's intention cannot be thus defeated by a sale of any part of the corpus of the trust estate. *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

A stock of merchandise was assigned to plaintiff for the purpose of protecting him from liability as surety on a bond. The written assignment, which authorized him to sell the goods and deposit the proceeds until an adjustment should be made of the liability on the bond, to indemnify himself therefrom for his liability and to return the unsold goods to the assignor if he should be released from the bond, was duly recorded, and plaintiff took possession. A creditor of the assignor took the goods from him on attachment. Held, that plaintiff had a right of action against the creditor for the amount of his liability on the bond. *Schmick v. Bateman*, 77 Tex. 326, 14 S. W. 22.

Property pledged or mortgaged.—Under art. 3744, providing that goods and chattels pledged, assigned, or mortgaged as security may be levied upon and sold on execution against the pledgor, etc., property mortgaged or pledged is not exempt from attachment and, while the mortgagee or pledgee cannot be deprived of possession, he cannot complain of or resist a levy, where his right of possession has not been interfered with. *Briggs v. Briggs* (Civ. App.) 227 S. W. 511.

Art. 255. [201] [167] Levy, how made.

See *Kanaman v. Hubbard*, 110 Tex. 560, 222 S. W. 151, affirming judgment (Civ. App.) 160 S. W. 304.

Cited, *Schmick v. Bateman*, 77 Tex. 326, 14 S. W. 22.

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

Liability of plaintiff for acts of officer.—As under arts. 252, 255, 256, the sheriff's possession of property attached at the instance of the plaintiff is no more subject to control of the plaintiff as to the manner in which he keeps the same than to direction of defendant, and as levy of a writ of attachment does not satisfy the debt, plaintiff is not responsible to defendant for injury to the attached party due to misconduct or negligence of the sheriff; but the sheriff's wrong is an injury to both parties to whom the sheriff and the sureties on his bond may be caused to respond. *Kanaman v. Hubbard*, 110 Tex. 560, 222 S. W. 151, affirming judgment (Civ. App.) 160 S. W. 304.

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

Judgment on bond.—In an action by attachment on a verified account, where defendant was served with process, but after replevying the property did not appear, it was proper to enter judgment on the account against defendant and the sureties on the replevin bond without further evidence in support of the account or foreclosure of the attachment lien. *Vogt v. Dorsey*, 85 Tex. 90, 19 S. W. 1033.

In rendering judgment in attachment suit, against sureties on a replevy bond for value of attached automobile, the court, in view of this article, need not find as to its value. *Wells v. Cloud* (Civ. App.) 202 S. W. 331.

Proof of title in another than defendant.—In an attachment suit wherein an automobile was levied on and defendant retained possession by a replevy bond, defendant cannot prove it belonged to a firm, and that the attachment was therefore invalid because not made as prescribed by art. 3743. *Wells v. Cloud* (Civ. App.) 202 S. W. 331.

Art. 264. [210] [176] Return of the writ.

Direction for return instanter.—A direction for the return of a second writ of attachment instanter is not ground for quashing it, under this article. *Panhandle Nat. Bank v. Still*, 84 Tex. 339, 19 S. W. 479.

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

Sufficiency of return.—Under the provision requiring the sheriff's return to "describe the property attached with sufficient certainty to identify it," a levy describing two tracts of land each as a certain tract containing 150 acres, more or less, on which is located the new town of M., in L. county, state of Texas, along the line of the said S. A. & A. P. Ry., including all of the right, title, and interest of said railway company in and to any and all town lots and blocks heretofore laid off upon said tract, said interest being such as has been deeded, sold, released, or contracted to said railway company, or to any person as trustee for them, by S. B. M., of F. county, Tex., less such portions as have been heretofore legally disposed of by them, and donated and set apart for right of way and depot purposes, is insufficient, since, if it intended to describe a survey, it should have pointed out what survey was meant, or, if not, it should have described each lot and

block intended. As it stands, it would compel a sale in mass. *San Antonio & A. P. Ry. Co. v. Harrison*, 72 Tex. 478, 10 S. W. 556.

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

Lien in general.—The effect of a levy of attachment is to create a lien upon the property, but there is no satisfaction of the plaintiff's debt until the property is sold under the judgment foreclosing the lien. *Kanaman v. Hubbard*, 110 Tex. 560, 222 S. W. 151, affirming judgment (Civ. App.) 160 S. W. 304.

Independent of the operation of registration statutes, the lien of an attaching creditor is limited to the actual interest which the debtor has in the estate, and only through such statutes can a creditor acquire a better right or higher title than his debtor had. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

Creditors who attached the interest of their debtor in certain lands, in which the record showed he had only a vendor's lien, but which in fact had been reconveyed to him by an unrecorded deed, thereby secured a lien upon the title given him by the deed. *Id.*

Priority.—Since this article provides that a valid attachment levy on land shall create a lien from the date of the levy, it is immaterial that the service of the citation by publication on the owner, a nonresident, was not completed until some time after the levy; and a purchaser from him, after the levy, but before the completion of the service, takes subject to the lien of the attachment. *Walton v. Cope*, 3 Civ. App. 499, 22 S. W. 765.

Chattel mortgagee of attached cordwood, by his agreement with the attorneys for plaintiff and defendant mortgagor that the wood might be sold and the proceeds turned over to him to hold in escrow awaiting final judgment, held not to have waived his mortgage lien, superior to the attachment lien of plaintiff, nor to have done anything to estop him from asserting his lien after proper surrender of the fund in his hands or its deposit in court. *Loya v. Bowen* (Civ. App.) 215 S. W. 474.

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

See *Vogt v. Dorsey*, 85 Tex. 90, 19 S. W. 1033.

Jurisdiction.—In view of this article in action involving \$490, commenced, with levy of attachment, in district court of Harrison county, after Acts 32d Leg. c. 54 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1811-55), conferred such jurisdiction judgment entered in that court after Acts 33d Leg. c. 53, retransferring jurisdiction to county court, was void. *Jackson v. Lancaster* (Civ. App.) 199 S. W. 1179.

Under this article a justice court, in suit within its jurisdiction, has authority to decree a foreclosure of attachment lien on real estate, and direct an order of sale of the land; Const. art. 5, § 8, not conferring exclusive jurisdiction on district courts. *Baker v. Pitluk & Meyer*, 109 Tex. 237, 205 S. W. 982.

Under this article a justice court possesses authority to enforce by express foreclosure a lien acquired on land by levy of attachment from the court, decreeing the foreclosure, although there is no valid objection to the method provided by said article for enforcement of attachment lien by mere judgment recital of issuance and levy of attachment followed by execution. *Id.*

County court has power to foreclose an attachment lien. *Bracht v. Adamson* (Civ. App.) 211 S. W. 624.

An attachment issued out of the county court can be levied upon real estate, in view of this article, providing for enforcement of the lien of attachment issued from a county court and levied on land. *Sewell v. Taylor* (Civ. App.) 224 S. W. 530.

Judgment.—Before the adoption of this article, requiring the judgment to show an express foreclosure of the lien, the judgment was admissible, though it did not show the condemnation of the property, in the absence of any showing therein that the attachment had been abandoned. *Harris v. Daugherty*, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812, following *Wallace v. Bogel*, 66 Tex. 572, 2 S. W. 96.

In suit by plaintiff, who had farmed land together with defendant, to recover an amount due him, the trial court did not err in rendering judgment on defendant's replevy bond, and also for foreclosure of the attachment lien. *Coopwood v. Wofford* (Civ. App.) 219 S. W. 504.

— **Nonresident.**—Proper judgment in attachment and garnishment proceedings against nonresident not personally appearing would be to limit judgment's execution to specific property attached or garnished. *Burrow-Jones-Dyer Shoe Co. v. Gerlach Mercantile Co.* (Civ. App.) 200 S. W. 250.

An attachment lien on land of a nonresident defendant, duly served personally by notice as provided by statute, can be foreclosed, though the defendant was not informed by the nonresident notice served on him that foreclosure was sought. *Lane v. First Nat. Bank* (Civ. App.) 216 S. W. 490.

Sale.—Under arts. 267, 268, the effect of a levy of attachment is to create a lien upon the property, but there is no satisfaction of the plaintiff's debt until the property is sold under the judgment foreclosing the lien. *Kanaman v. Hubbard*, 110 Tex. 560, 222 S. W. 151, affirming judgment (Civ. App.) 160 S. W. 304.

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

Judgment in general.—In an attachment suit there was no error in rendering judgment against sureties on the replevy bond for the value of an automobile as estimated by the sheriff when bond was given, together with interest, as such judgment is plainly authorized by this article. *Wells v. Cloud* (Civ. App.) 202 S. W. 331.

In rendering judgment in attachment suit, against sureties on a replevy bond for

value of attached automobile, the court, in view of art. 258, need not find as to its value. *Id.*

Judgment against sureties on a replevin bond follows as a matter of law, without notice to them, after judgment against their principal, under this article. *Tripplatt v. Hendricks* (Civ. App.) 212 S. W. 754.

In suit by plaintiff, who had farmed land together with defendant, to recover an amount due him, the trial court did not err in rendering judgment on defendant's replevy bond, and also for foreclosure of the attachment lien. *Coopwood v. Wofford* (Civ. App.) 219 S. W. 504.

Default judgment.—In an action by attachment on a verified account, where defendant was served with process, but after replevying the property did not appear, it was proper to enter judgment on the account against defendant and the sureties on the replevin bond without further evidence in support of the account or foreclosure of the attachment lien. *Vogt v. Dorsey*, 85 Tex. 90, 19 S. W. 1033.

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

See *Blum v. Addington* (Sup.) 9 S. W. 82.

CHAPTER TWO

GARNISHMENT

Art.	Art.
271. Writ of garnishment, who may issue and when.	294. For effects.
272. Bond to be executed in certain cases.	296. Judgment against incorporated companies, etc., for shares, etc.
273. Application for the writ, etc.	297. Sales of such shares, etc., how made.
274. Proceeding by, shall be docketed, etc.	298. Effect of such sale.
276. Form of writ.	299. Traverse of answer of garnishee, by plaintiff.
277. To be dated, etc.	300. By defendant.
278. Sheriff, etc., to execute and return forthwith.	301. Trial of issue on controverted answer.
279. Effect of service of, defendant may replevy.	302. When garnishee is a foreign corporation or resides in another county.
280. Answer to, must be under oath, in writing and signed.	303. Duty of clerk, or justice, of such county in such cases.
281. Garnishee to be discharged on answer, when.	306. Current wages not subject to garnishment.
282. Judgment by default, when.	307. Costs in garnishment proceedings.
283-292. Repealed.	
293. Judgment against garnishee when he is indebted.	

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

Cited, *Bell v. Indian Live Stock Co.* (Sup.) 11 S. W. 344, 3 L. R. A. 642; *First Nat. Bank of Stephenville v. McClellan* (Civ. App.) 211 S. W. 794.

In general.—Statutes authorizing writ of garnishment must be strictly construed, and party attempting to avail himself of that remedy must strictly follow the law. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

Although garnishment proceeding under art. 271, is ancillary to main action, yet in view of articles 274, 293, 299, it is suit between judgment creditor and garnishee, in which the "amount in controversy" affecting jurisdiction is "the amount of plaintiff's judgment, with interest and costs," and where plaintiff's judgment is less, but with interest called for by the judgment exceeds, \$100, art. 1589, providing amount in controversy shall be "exclusive of interest and costs," does not apply. *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187.

Garnishment is merely a species of attachment, being a summary proceeding and the statute governing it should be followed with strictness. *Buerger v. Wells*, 110 Tex. 566, 222 S. W. 151, reversing judgment (Civ. App.) *Wells v. Globe Fire Ins. Co.*, 157 S. W. 289.

Buyers, after having paid drafts, were not estopped in their action for rescission from garnishing proceeds in hands of a bank in process of transmission to other bank with which drafts had been deposited for collection. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

Attachment basis of proceeding.—In an action in which an original attachment has been issued, an application for a writ of garnishment, under subd. 1 of this article, is fatally defective if it does not state that an original attachment has issued in the suit, and the omission cannot be cured by amendment, article 273 providing that the applica-

tion shall state inter alia the facts authorizing the issue of the writ. *Scurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478, 14 S. W. 148.

Under subsds. 1 and 3, and arts. 272, 273, providing that writ of garnishment cannot be issued without bond unless affidavit or application shows that attachment has been issued or judgment rendered, an application for writ, or the affidavit, must show the facts. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

Property or fund in possession of garnishee and ownership thereof in general.—Where a construction contract was satisfactorily completed by contractor's successor, money due the contractor when he quit was subject to garnishment by his creditors. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

Where widow traded her homestead, advancement of \$425 by man who thereafter became her husband and his assumption of mortgage of \$900 on property received in exchange was sufficient consideration for having notes executed by other trading party made payable to such husband, so that debt represented by them could not be garnished as her property. *Simmons-Newsome Co. v. Malin* (Civ. App.) 196 S. W. 281.

Where S. shipped plaintiff's goods to him, and drew draft on him in favor of G. with bill of lading attached, for more than plaintiff owed, the bank through which draft was collected for G. is not liable to plaintiff as garnishee of S. *Smith v. Houston Nat. Exch. Bank* (Civ. App.) 202 S. W. 181.

The fact that money was deposited in the name of another, when standing alone, will make a prima facie case of ownership by such other; but where it appears that control of deposit was reserved by an agreement that it was to be paid out on checks drawn by the depositor as agent for the other, and the depositor on being garnished hastily withdrew the deposit and transferred it to the name of still another person, the court will find, in a garnishment proceeding, that the money belonged to the depositor. *Hulshizer v. First State Bank of Robstown* (Civ. App.) 207 S. W. 584.

Where a business was sold under agreement whereby the buyer deposited in a bank the purchase price, to be paid out by creditors of the seller on checks signed by both buyer and seller, no part of the deposit was garnishable as belonging to the seller until such creditors as he had approved by signing checks jointly with the buyer had been paid. *Foscue v. Provident Nat. Bank of Waco* (Civ. App.) 210 S. W. 555.

Community funds in name of wife may be impounded by garnishment in aid of judgment against husband. *Szanto v. First State Bank of Mt. Calm* (Civ. App.) 212 S. W. 371.

In a garnishment proceeding evidence held insufficient to support a finding that funds held by the garnishee belonged to the debtor against whom plaintiff had filed suit. *Denison Bank & Trust, Co. v. People's Guaranty State Bank of Tyler* (Civ. App.) 218 S. W. 561, 562.

Where a bank acquires title to a draft with bill of lading attached by crediting the amount to consignee's account, and the consignee pays the draft, being compelled to do so before receiving the bill of lading by the United States Food Administration, and the shipment is not as guaranteed, and a judgment is obtained against the consignee, the consignee cannot recover the amount of damages due him in a garnishment against the bank. *F. A. Madane & Co. v. Security Nat. Bank* (Civ. App.) 219 S. W. 506.

Even if a joint undertaking, whereby two persons were to furnish money and a third, M., was to buy and sell hogs, and the three divide profits equally, did not constitute a partnership, the proceeds of a sale are not subject to garnishment for an individual debt of M.; his interest in the funds being contingent on there being a profit, determinable only after settlement of the indebtedness of the joint undertaking. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

A partnership fund is not subject to garnishment for the individual debt of a member of the firm, especially where the firm's assets are insufficient to satisfy its debts. *Id.*

Debt due one as trustee is not subject to garnishment for his individual debt, though his creditor has no prior notice of the trust. *Id.*

Where judgment debtor gave bank a draft for collection, but his account was credited with the amount of the draft, and it was sent to another bank for collection, the latter was agent for the first bank, and immediately upon collection of the draft by the agent bank the transaction became a closed affair, and the first bank became the absolute owner of the proceeds of the draft, and judgment creditor could not deprive the first bank of its property by garnishment proceedings against the agent bank. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

In garnishment proceeding by a judgment creditor, evidence held to show that money in a bank paid on draft was not the property of the judgment debtor, but was the property of another bank which was payee in a draft drawn upon the plaintiff by the judgment debtor. *Id.*

Where agent, engaged in loaning principal's money, deposited checks from principal payable to him as manager in a bank in his own name, the funds belonged to the principal and were not subject to garnishment in third party's action against agent. *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Claims by third persons.—A contractor's assignment of his contract rights, under which the assignee claimed only balance due after contractor's debts were discharged, does not prevent contractor's creditors from subsequently garnisheeing amounts due him under the contract. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

That a judgment obtained by intervener in garnishment proceedings against the debtor had been appealed is immaterial, where intervener also had another judgment exceeding face of its claim which had not been appealed. *Id.*

Facts in evidence showing that seller shipped goods to its own order and assigned its account against buyer, and delivered draft on buyer with bill of lading to assignee, who intervened in garnishment proceedings, held to support court's finding that the proceeds of draft in hands of bank to which assignee had sent it for collection belonged to assignee intervener, and could not be reached by seller's creditor. *Gateway Produce Co. v. Sunset Fruit & Produce Co.* (Civ. App.) 222 S. W. 654.

Indebtedness of garnishee.—Where parties agreed that principal of notes should not be paid, but interest should be paid until payee's death, makers were liable in garnishment proceedings for interest due when garnishees' answers were filed, but not thereafter. *Shropshire v. Alvarado State Bank* (Civ. App.) 196 S. W. 977.

Evidence held sufficient upon which to base a finding that when the garnishment writ was served the owner, garnishee, was indebted to contractors, defendants in garnishment, so that there were funds belonging to the latter in garnishee's hands when the writ was served. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

Where the contractor and the owner had settled by letters the amount due on the construction of an irrigation plant when the owner was made garnishee in an action against the contractor, the objection that the demand was unliquidated and not subject to garnishment must fail. *Id.*

Plaintiff's judgment.—There can be no valid judgment against a garnishee without a valid judgment against principal defendant. *Burrow-Jones-Dyer Shoe Co. v. Gerlach Mercantile Co.* (Civ. App.) 200 S. W. 250.

The judgment must be a personal one upon which execution might issue. *Id.*

Judgment in rem against nonresident by publication after attachment and garnishment proceedings against property in state binds only the property attached, and does not support garnishment proceedings instituted after entry of such judgment in rem. *Id.*

Where application for writ of garnishment is filed at the same time as the main suit, or prior to final judgment, it is ancillary to and part of the main suit, and the court will take judicial knowledge of the proceedings in the main suit and consider them together; but where the original suit is terminated at the time of the institution of the garnishment proceedings, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment without proof of a valid, subsisting, and unsatisfied judgment. *Tripplett v. Hendricks* (Civ. App.) 212 S. W. 754.

A dormant judgment—one not kept alive by issuance of execution—will support a writ of garnishment. *Id.*

Garnishment proceeding should not be dismissed because of appeal in the main case, but should be continued to await result of appeal. *Farmers' State Bank of Merkel v. First Nat. Bank* (Civ. App.) 228 S. W. 268.

Where defendants perfected their appeal by a cost bond only, thus coming within art. 2100, declaring that in such case the bond shall not have the effect to suspend the judgment, but execution shall issue thereon as if no appeal had been taken, the trial court has jurisdiction to entertain garnishment proceedings pursuant to art. 271, subd. 3, for, even if the word "execution," instead of being accepted as any means appropriate for the enforcement of the judgment, should be taken in its strict sense, the article indicates that proceedings for enforcement of the judgment are not suspended, and hence, though garnishment, which is a species of execution, be deemed not within the strict letter of the act, it is permissible. *Durham v. Scrivener* (Civ. App.) 228 S. W. 282.

The garnishment authorized by subd. 3, where plaintiff has a judgment and makes affidavit that defendant has not within his knowledge property in his possession subject to execution to satisfy the judgment, is merely ancillary to the main case, and depends upon the existence of a final judgment execution of which has not been suspended by appeal or otherwise. *Id.*

That the judgment on which a garnishment proceeding was based became dormant after the court had obtained control over the funds in the hands of the garnishee did not prevent maintenance of the proceeding, and could not be complained of by one claiming the money garnished. *Childs v. Gearhart* (Civ. App.) 229 S. W. 762.

Affidavits.—In affidavit or sworn application for writ of garnishment, averment of title of garnishee as "National Bank of Commerce of Amarillo, Texas," is not allegation of residence of garnishee required by art. 271, subd. 2, and art. 273. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

An affidavit, "G. being first duly sworn on oath says that he is attorney for plaintiff in the foregoing and attached application for writ of garnishment against the National Bank of Commerce, Houston, Texas, wherein Four Acre Oil Company is plaintiff, and he states under oath upon information and belief that the facts therein stated are true," was insufficient under art. 271, subd. 3, and art. 273. *Four Acre Oil Co. v. National Bank of Commerce* (Civ. App.) 206 S. W. 711.

Nonexistence of property subject to execution.—Under the statute plaintiff in a suit for debt against more than one defendant, as a suit against maker and indorser of notes, cannot call a stranger into court on writ of garnishment of a fund as the maker's, subjecting such stranger to inconvenience of proceeding and possible hazard, if either defendant has property within the state subject to execution from which the demand may be made; it being requisite that affidavit state "defendants" (not merely defendant) have no property within state. *Buenger v. Wells*, 110 Tex. 566, 222 S. W. 151, reversing judgment (Civ. App.) *Wells v. Globe Fire Ins. Co.*, 157 S. W. 289.

Art. 272. [218] [184] Bond when no attachment has issued and no judgment has been rendered.

See *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

Bond.—Garnishment proceedings may be maintained after judgment obtained, without giving bond. *Szanto v. First State Bank of Mt. Calm* (Civ. App.) 212 S. W. 971.

Use of bond in other suit.—Garnishment bond has performed its function when suit in which it was filed has been dismissed and cannot be used in new suit for purpose of procuring another writ against different garnishee. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

Art. 273. [219] [185] Application for the writ, etc.

Cited, *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Sufficiency of application in general.—Under art. 271, subds. 1, 3, and arts. 272, 273, providing that writ of garnishment cannot be issued without bond unless affidavit or application shows that attachment has been issued or judgment rendered, an application for writ, or the affidavit, must show the facts. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

An affidavit, "G. being first duly sworn on oath says that he is attorney for plaintiff in the foregoing and attached application for writ of garnishment against the National Bank of Commerce, Houston, Texas, wherein Four Acre Oil Company is plaintiff, and he states under oath upon information and belief that the facts therein stated are true," was insufficient under art. 271, subd. 3, and this article. *Four Acre Oil Co. v. National Bank of Commerce* (Civ. App.) 206 S. W. 711.

Garnishment affidavit, under art. 271, subd. 2, and art. 273, is not required, in view of art. 276, to state amount of indebtedness claimed. *First Nat. Bank of Stephenville v. McClellan* (Civ. App.) 211 S. W. 794.

A special exception to part of an application for a writ of garnishment, alleging that "said judgment is still in force and satisfied," should have been sustained upon the ground that the allegations were contradictory. *Tripplott v. Hendricks* (Civ. App.) 212 S. W. 754.

Where all the statutory requirements of an affidavit for garnishment have been met, that affidavit contains other allegations is immaterial. *Szanto v. First State Bank of Mt. Calm* (Civ. App.) 212 S. W. 971.

Name and residence of garnishee.—In affidavit or sworn application for writ of garnishment, averment of title of garnishee as "National Bank of Commerce of Amarillo, Texas," is not allegation of residence of garnishee. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

The requirement of statute that affidavit for garnishment state garnishees' residence is satisfied by statement that as a firm they are engaged in business in a certain county. *Sunset Wood Co. v. Kelly* (Civ. App.) 203 S. W. 921.

Allegation in application for garnishment that garnishee was a corporation duly incorporated under the laws of Texas with its offices and principal place of business "In Mexia, Limestone county, Tex.," was a sufficient allegation that its residence was in Mexia, Limestone county, Tex. *Sanders v. Farmers' State Bank of Mexia* (Civ. App.) 228 S. W. 635.

The name of the president of a bank was no essential part of application for garnishment proceedings against the bank as garnishee, and it was immaterial that it was misspelled and that the names were not idem sonans. *Id.*

Attachment basis of proceeding.—See *Scurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478, 14 S. W. 148.

Art. 274. [220] [186] Case shall be docketed, etc.

See *Van Velzer v. Houston Installment Co.* (Civ. App.) 216 S. W. 469.

Defects and amendment.—Under this article, and in view of article 280, held that a writ of garnishment should not be quashed where it otherwise conformed to the statute, because the name of the plaintiff appeared in an interrogatory as to how much the garnishee was indebted, instead of the name of defendant. *Wasson v. Harris* (Civ. App.) 209 S. W. 758.

Where a writ of garnishment, through a clerical error, contained the name of plaintiff instead of defendant in an interrogatory as to how much the garnishee was indebted, etc., held that plaintiff should be allowed to correct the error by amendment, though of course the amendment would not relate back to the date of service of the writ, and only funds belonging to the defendant which the garnishee had in his possession at the date of amendment would be impounded. *Id.*

Amount in controversy.—See *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187.

Art. 276. [222] [188] Form of writ.

See *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639, § L. R. A. 321, 19 Am. St. Rep. 734.

Cited, *Gause v. Cone*, 73 Tex. 239, 11 S. W. 162.

Defects in form.—Garnishment affidavit, under art. 271, subd. 2, and art. 273, is not required, in view of article 276, to state amount of indebtedness claimed. *First Nat. Bank of Stephenville v. McClellan* (Civ. App.) 211 S. W. 794.

Service on Jack Reed of garnishee process directed against Jack Reeves will not support judgment against Reed, in the absence of a showing that he was the person intended to be sued and such showing is not made by return reciting service on Reed nor by default, interlocutory and final judgments against Reed, though the judgment recited that such person was known by both names. *Reed v. McCutcheon & Church* (Civ. App.) 217 S. W. 174.

The personal pronoun "he" in a writ of garnishment, which evidently referred to a bank the name of which preceded it, held manifestly a typographical mistake and entirely immaterial. *Sanders v. Farmers' State Bank of Mexia* (Civ. App.) 228 S. W. 635.

Disclosure as to right of exemption.—See *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639, 8 L. R. A. 321, 19 Am. St. Rep. 734.

Art. 277. [223] [189] Writ to be dated, etc.

See *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639, 8 L. R. A. 321, 19 Am. St. Rep. 734.

Art. 278. [224] [190] Sheriff, etc., to execute and return writ forthwith.

Return.—Return on writ of garnishment, showing it was served on officer of garnishee bank by sheriff of county, held conclusive of question whether it was in fact served by one interested in judgment and not officer of county, in absence of pleading raising question, motion to quash writ, etc. *Wise v. Johnson* (Civ. App.) 198 S. W. 977.

Art. 279. [225] [191] Effect of service of writ; defendant may replevy.

Effect of service.—Under the provision that "from and after the service of such writ of garnishment it shall not be lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects," where a writ of garnishment and summons are issued but not served upon the garnishee, his subsequent appearance and answer give the court no jurisdiction of the fund. *Insurance Co. of North America v. Friedman Bros.*, 74 Tex. 56, 11 S. W. 1046.

—Lien or rights acquired.—Where chattel mortgagee was entitled to lien on part of proceeds of insurance policy, if proceeds of policy had not been exempt from garnishment, service of writ on insurance company would have conferred on mortgagee right to such proceeds to extent of their lien superior to right of holder of vendor's lien. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Garnishment cannot confer higher right than that of defendant in original suit, and plaintiff in garnishment succeeds to rights of original defendant against garnishee. *Hubbell, Slack & Co. v. Farmers' Union Cotton Co.* (Civ. App.) 196 S. W. 681.

Payments or transfers by garnishee.—The assignee of a judgment occupies no better position than the judgment creditor, and, if he took the assignment after service of garnishment on the judgment debtor, he took it subject thereto, and, if he has failed to require his assignor to file the replevy bond under this article, or to take other steps to protect himself, he cannot complain of delay in collection of his judgment by reason of the garnishment proceeding. *O'Brien v. Barcus* (Com. App.) 212 S. W. 941.

A judgment debtor who had been garnisheed in an action against his creditor is entitled to restrain execution on the judgment under art. 4647, though he fails to tender the excess of the amount of the judgment over the claim of plaintiff in garnishment, in view of art. 279, which prevents garnishees from paying any debt to the defendant in garnishment after service of writ. *Id.*

Where intervener procured a transfer from one acting for the garnishment debtor, contractor, for the benefit of intervener's principal, he took the construction contract as originally made between the owner and the contractor and the amount due thereon as fixed cum onere, and intervener acquired no better right to the debt for constructing the irrigation plant than the contracting corporation had, and the prior service of garnishment writ prevented voluntary payment by owner, and the superior right to the money was in garnishor. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

Where a debtor borrowed money for farming purposes from a bank which kept such money on deposit subject to check and a creditor garnished the bank, the debtor replevying the funds in the bank on a replevy bond payable to the creditor, the bank, not having applied the funds garnished to its debt from the debtor, cannot do so after the service of garnishment and the replevy of the property; it being fully protected by the replevy bond. *Osceola Mercantile Co. v. Nabors* (Civ. App.) 221 S. W. 991.

Replevy by defendant.—Where defendant, sued for debt, other parties as a firm being garnishees, did not give replevy bond to replevy effects or debts garnisheed, but filed what was intended as such bond, made payable to the garnishee partners and not to plaintiff, default judgment against garnisheed firm was proper, though sureties on "replevy bond" were not made parties. *Army Bank of Ft. Sam Houston v. Sunset Wood Co.* (Civ. App.) 206 S. W. 222.

Where an action was commenced and writ of garnishment issued, the principal defendant, who did not file a replevy bond, cannot, under this article, raise objections to the writ which might have been urged by the defendant in garnishment. *Wasson v. Harris* (Civ. App.) 209 S. W. 758.

In garnishment the debtor under the statute may make such defense as the garnishee could have made, but he cannot defend on the ground that the garnishee might have exercised rights which it waived. *Osceola Mercantile Co. v. Nabors* (Civ. App.) 221 S. W. 991.

Art. 280. [226] [192] Answer to the writ must be in writing, under oath and signed.

See *Van Velzer v. Houston Installment Co.* (Civ. App.) 216 S. W. 469.

Sufficiency of answer.—Garnishees having interposed no exceptions or pleas to plaintiff's attempt to hold them liable in the garnishment proceeding on a direct liability of them to him, objection thereto is not available on appeal. *Smith v. Houston Nat. Exch. Bank* (Civ. App.) 202 S. W. 181.

Defendant is never required to allege and prove facts required to be alleged by plaintiff; a rule applying to a garnishee. *Wilkens & Lange v. Christian* (Civ. App.) 223 S. W. 253.

Answer of garnishee held not construable as admitting indebtedness by him to defendant debtor when the writ was served. *Id.*

— **Defenses.**—Garnishee has same rights in defending against the process of time of service that he would have had in suit against him by the debtor. *Wilkens & Lange v. Christian* (Civ. App.) 223 S. W. 253.

— **Interpleading third persons.**—A garnishee may file an answer in a garnishment suit admitting the debt and make the defendant, judgment plaintiff in another court, a party to the garnishment suit, deposit the money in the registry of the court in which the garnishment is pending, and enjoin the enforcement of the judgment in the other court. *North British & Mercantile Ins. Co. of London & Edinburg v. Klaras* (Com. App.) 222 S. W. 208, reforming judgment (Civ. App.) *Klaras v. North British & Mercantile Ins. Co. of London & Edinburg*, 200 S. W. 584.

In a garnishment proceeding, it was proper for the court, on application of the garnishee, to bring in adverse claimants to the fund. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

Interrogatories.—Under art. 274, and in view of this article, held that a writ of garnishment should not be quashed where it otherwise conformed to the statute, because the name of the plaintiff appeared in an interrogatory as to how much the garnishee was indebted, instead of the name of defendant. *Wasson v. Harris* (Civ. App.) 209 S. W. 758.

Art. 281. [227] [198] Garnishee to be discharged on his answer, when.

See *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Art. 282. [228] [194] Judgment by default, when.—The garnishee shall in all cases after lawful service file an answer to the writ of garnishment on or before appearance day of the term of the court to which such writ is returnable and should the garnishee fail to file such answer to said writ as herein required, it shall be lawful for the court, at any time after judgment shall have been rendered against defendant, and on or after appearance day, to render judgment by default, as in other civil cases against such garnishee for the full amount of such judgment against the defendant, together with all interest and costs that may have accrued in the main case and also in the garnishment proceedings, provided that the answer of such garnishee may be filed as in any other civil case at any time before such default judgment is rendered. [P. D. 159; Acts 1921, 37th Leg., ch. 105, § 1, amending art. 282, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act repeals arts. 283-292, Rev. Civ. St. 1911, and all laws in conflict. The act took effect April 2, 1921.

Arts. 283-292. [Repealed.]

Explanatory.—Acts 1921, 37th Leg., ch. 105, § 2, repeals articles 283, 284, 285, 286, 287, 288, 289, 290, 291, and 292, ch. 2, of the Revised Civil Statutes of 1911.

See *Horst v. City of London Fire Ins. Co.*, 73 Tex. 67, 11 S. W. 148; *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697; *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346.

Art. 287 cited, *Keating v. J. Stone & Sons Live Stock Co.*, 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670.

Judgment against garnishee.—Proper judgment in attachment and garnishment proceedings against nonresident not personally appearing would be to limit judgment's execution to specific property attached or garnished. *Burrow-Jones-Dyer Shoe Co. v. Gerlach Mercantile Co.* (Civ. App.) 200 S. W. 250.

Art. 293. [239] [205] Judgment against the garnishee when he is indebted.—Should it appear from the answer of the garnishee or should it be otherwise made to appear and be found by the court that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount is in excess of the amount of the plaintiff's judgment against the defendant with interest and costs, in which case, judgment shall be rendered against the garnishee for the full amount of the judgment already rendered against the defendant, together with interest and costs of the suit in the original case and also in the garnishment proceedings; and if the garnishee fail, or refuse to pay such judgment rendered against him, execution shall issue thereon in the same manner and under the same conditions as is or may be provided by law for the issuance of execution in other cases. [P. D. 157; Acts 1921, 37th Leg., ch. 105, § 3, amending art. 293, Rev. Civ. St. 1911.]

Took effect April 2, 1921.

See *Horst v. City of London Fire Ins. Co.*, 73 Tex. 67, 11 S. W. 148; *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Right to judgment.—After the replevy of a fund garnished, the garnishee is but a nominal party, and no judgment can be rendered against him except as to the amount due, and that it was replevied, and no execution can be awarded against him. *Osceola Mercantile Co. v. Nabors* (Civ. App.) 221 S. W. 991.

In a garnishment proceeding by a judgment creditor against a bank to impound money collected under a draft, wherein another bank intervened and proved ownership of the draft, plaintiff was not entitled to a judgment against the intervening bank, although it was indebted to the judgment debtor; no writ of garnishment having been sued out against the intervening bank. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

Amount of judgment.—Where the disclosure showed an amount due defendant "for the use of herself and children in proportion to their several interests in the land sold," plaintiff was entitled to judgment for the amount of defendant's interest after deducting the undivided interest of the children. *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775.

Amount in controversy.—See *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187.

Art. 294. [240] [206] Judgment against the garnishee for effects.

See *Horst v. City of London Fire Ins. Co.*, 73 Tex. 67, 11 S. W. 148; *Carter v. Bush*, 79 Tex. 29, 15 S. W. 167.

Art. 296. [242] [208] Judgment against incorporated companies, etc., for shares of stock or interest.

Cited, *Keating v. J. Stone & Sons Live-Stock Co.*, 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670.

Sale of pledged stock.—Stock held as collateral security is property and effects subject to garnishment under this article. *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113.

Lien on stock.—Under this and the following article, service of a writ of garnishment on a corporation gives the plaintiff a quasi lien on the shares of stock owned by the defendant, and a sale under a judgment in the suit passes title as against a subsequent garnishment, though the judgment in the latter suit is rendered first. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

Art. 297. [243] [209] Sale of shares of stock, etc., how made.

See *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863, note under art. 296.

Art. 298. [244] [210] Effect of such sale.

Cited, *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113.

Art. 299. [245] [211] Plaintiff may traverse answer of garnishee.

See *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346; *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187; *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Controverting the answer.—An objection that garnishor in controverting answer did not allege, that the garnishee and intervener knew that the trustee held the construction

contract under which the debt was garnished for any other person than himself held not well taken; such allegation being unnecessary, where it was alleged that such trustee was holding it in trust for the contractor corporation. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

Art. 300. [246] [212] Defendant may traverse the answer.

See *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Art. 301. [247] [213] Trial of issue on controverted answer.

See *Phenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566; *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346.

Scope of issues.—In garnishment proceeding strictly, the only issue properly determinable, as between plaintiff and garnishee, is whether garnishee was indebted or had in its possession effects belonging to defendant in the main action. *Smith v. Houston Nat. Exch. Bank* (Civ. App.) 202 S. W. 181.

Art. 302. [248] [214] Trial of issue on controverted answer when garnishee is a foreign corporation or resides in another county.—Should the garnishee be a foreign corporation, not incorporated under the laws of the State of Texas, and should its answer be controverted, the issues thus formed shall be tried in the court where the main suit is pending, or was tried; but if the garnishee whose answer is controverted be not a foreign corporation and reside in some county, other than the one in which the main case is pending, or was tried, then upon the filing of a controverting affidavit by any party to the suit, the plaintiff may file in any court in the county of the residence of the garnishee having jurisdiction of the amount of the judgment in the original suit, a duly certified copy of the judgment in such original suit and of the proceedings in garnishment, including a certified copy of the plaintiff's application for the writ, the answer of the garnishee, and the affidavit controverting such answer, and the court wherein such certified copies are filed shall try the issues made as provided by law. [P. D. 161; Acts 1921, 37th Leg., ch. 105, § 4, amending art. 302, Rev. Civ. St. 1911.]

Took effect April 2, 1921.

Jurisdiction.—Under arts. 283, 284, 290, 292, 299, 301-305, where corporation, resident of D. county, without residence in H. county or agent there, was garnisheed on judgment obtained in H. county, and its answer was controverted, district court of H. county had no jurisdiction of garnishment cause. *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346.

Where garnishee bank filed its plea to have matter heard in the district court of its domicile, the court had no authority other than to discharge the bank or send the matter for adjudication to some court in the county where the bank was domiciled, and a judgment thereafter rendered was void and subject to collateral attack. *Reed v. First State Bank of Purdon* (Civ. App.) 211 S. W. 333.

Presumption on appeal.—See *Swearingen v. Wilson*, 2 Civ. App. 157, 21 S. W. 74; notes under art. 3687, rule 12.

Art. 303. [249] [215] Case to be docketed and notice to issue.

See *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346. Cited, *Swearingen v. Wilson*, 2 Civ. App. 157, 21 S. W. 74.

Art. 306. [252] [218] Current wages not subject to garnishment.

Cited, *Dempsey v. McKennell*, 2 Civ. App. 284, 23 S. W. 525.

What are wages.—Money due an attorney for legal services is not exempt from garnishment, under Const. art. 16, § 28, providing that "current wages for personal services" shall be exempt, nor under this article. *First Nat. Bank of Cleburne v. Graham* (App.) 22 S. W. 1101.

Under Const. art. 16, § 28, providing that current wages for personal service shall not be subject to garnishment, wage of \$75 a month, totaling \$300, agreed upon by widow and decedent's manager and brother as fair compensation to defendant for taking charge of decedent's business during his illness, was exempt as "current wages for personal service," though at time agreement for services was made no particular compensation was agreed on; purpose of the provision being to exempt wage until due and in possession of earner, provided, if he is unable to collect, exemption continues until he can collect, in exercise of ordinary diligence. *Lee v. Emerson-Brantingham Implement Co.* (Civ. App.) 222 S. W. 283.

Nonresidents.—Non-residents of the state are entitled to the benefit of Const. art. 16, § 28, and this article. *Bell v. Indian Live Stock Co.* (Sup.) 11 S. W. 344, 3 L. R. A. 642.

Extent of disclosure.—Under this article, a garnishee who is indebted to the principal defendant for current wages is bound to disclose the facts showing the exemption where the principal defendant has not voluntarily appeared, and has not been formally cited to appear, in the garnishment proceeding, though arts. 276, 277, in terms, require the garnishee to answer only as to the fact of indebtedness. *Missouri Pac. Ry. Co. v. Whip-sker*, 77 Tex. 14, 13 S. W. 639, 8 L. R. A. 321, 19 Am. St. Rep. 734.

Art. 307. [253] [219] Costs.

Allowance of costs.—A garnishee is not entitled to attorney's fees, where it erroneously denied, and litigated its indebtedness. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

Defendant bank being a stakeholder or garnishee as to plaintiff's deposit, it was entitled to recover an attorney's fee of \$100 against garnishor where by reason of his conduct in suing out garnishment bank was caused to expend that amount. *Reed v. First State Bank of Purdon* (Civ. App.) 211 S. W. 333.

A garnishee on discharge is entitled to recover his attorney's fees of plaintiff. *Wil-kens & Lange v. Christian* (Civ. App.) 223 S. W. 253.

Costs of an unsuccessful claimant in garnishment should not be adjudged against plaintiff in garnishment, though he is unsuccessful because of the claim of another (art. 2031). *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

A bank should have been allowed a reasonable attorney's fee for filing an answer as garnishee under this article, where it had no property of judgment debtor in its hands. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

TITLE 12

ATTORNEY AT LAW

Art. 309-316. [Repealed.]	Art. 317g. Fee for issuing license.
317. Board of examiners; number; qualifications; appointment; terms of office; oath.	317h. License to be issued only by Supreme Court.
317a. Duties of board; examinations; recommendations for license.	318-321. [Repealed.]
317b. Rules and regulations by Supreme Court; what to include.	323. Persons convicted of felony shall not be licensed.
317c. Fee for examination; disposition of.	324. Misbehavior or contempt, how punished.
317d. Removal of members of board.	325. May be suspended or license revoked, when.
317e. Exemption of graduates of law schools.	328. Citation, how issued and when served.
317f. Rules and regulations for admission of attorneys from other jurisdictions.	331. Barratry, forfeiture of license by, etc.
317ff. Certain licenses validated.	332. Penalty for refusing to pay over money.
	333. Allowed to inspect papers.

Articles 309-316. [Repealed by Acts 1919, 36th Leg., ch. 38, § 10. See post, art. 317.]

Art. 317. [257] [222a] **Board of examiners; number; qualifications; appointment; terms of office; oath.**—From and after the taking effect of this Law, there shall be one Board of Examiners for the State of Texas. This Board shall consist of five lawyers, having the qualifications required of Members of the Supreme Court of the State. They shall be appointed by the Supreme Court and shall each hold office for a period of two years, and until his successor shall be appointed, and shall qualify. They shall be required to take the Constitutional Oath of Office. [Acts 1903, p. 60; Acts 1897, p. 17; Acts 1846, p. 245; Acts 1905, p. 150; Acts 1919, 36th Leg., ch. 38, § 1.]

Explanatory.—Acts 1919, 36th Leg., ch. 38, amends art. 317 of the Revised Civil Statutes of 1911 to read as set forth in this article, and the 8 articles next following. Section 10 of this act repeals articles 309-316, 318-321, of the Revised Civil Statutes of 1911. The act took effect 90 days after March 19, 1919, date of adjournment. Cited, In re Orders in Chambers (Sup.) 226 S. W. 1075.

Art. 317a. Duties of board; examinations, recommendations for licenses.—It shall be the duty of this Board, acting under the instructions of the Supreme Court, as hereinafter provided, to pass upon the eligibility of all candidates for examination for license to practice Law within this State, and to examine thoroughly such of these as may show themselves eligible therefor, as to their qualifications to practice Law. This Board shall not recommend any person for license to practice Law unless such person shall affirmatively show to the Board, in the manner to be prescribed by the Supreme Court, that he is of such moral character and of such capacity and attainment that it would be of advantage to the public, and particularly to any community in which he may follow his profession for him to be licensed. [Acts 1919, 36th Leg., ch. 38, § 2.]

Art. 317b. Rules and regulations by Supreme Court; what to include.—The Supreme Court is hereby authorized and empowered to make any and all rules and regulations which, in its judgment, may be proper and expedient to govern eligibility for such examination, and the manner of conducting the same, covering, among other points, proper and effective guarantee to insure:

(a) Good moral character on the part of each candidate for license.

(b) Adequate pre-legal study and attainment.

(c) Adequate study of the Law for a period of at least two years, covering the course of study prescribed by the Supreme Court, or the equivalent of such course, before coming to the examination.

(d) The legal topics to be covered by such study and by the examination given.

(e) The time and place for holding the examinations, the manner of conducting same and the grades to be made by the candidates to entitle them to be licensed, provided that whenever as many as five applicants shall request the Board to conduct an examination in any particular town or city convenient to their place of residence, the examination of such applicants shall be conducted at such town or city at some suitable time, to be determined by the Board.

(f) Any other such matters as shall be desirable in order to make the issuance of a license to practice Law evidence of good character, and fair capacity and real attainment and proficiency in the knowledge of Law. [Id., § 3.]

Art. 317c. Fee for examination; disposition of.—The fee for such examination shall be fixed by the Supreme Court, not to exceed Twenty (\$20.00) Dollars for each candidate, which shall be paid to the Clerk of the Supreme Court at the time the application for examination is made. The money thus obtained shall be used:

First: To pay all legitimate expenses incurred in holding the examination, and

Second: As compensation to the Members of the Board under such regulations as shall be agreed upon by the Board, or determined by the Supreme Court. [Id., § 4.]

Art. 317d. Removal of members of board.—The several examiners shall be subject to removal by the Supreme Court for incompetency, indifference or inattention to duty. [Id., § 5.]

Art. 317e. Exemption of graduates of law schools.—It is hereby declared to be the duty of the Supreme Court, by General Order to that effect, to exempt graduates of such Law Schools as may be approved by the Supreme Court from taking any examination as to pre-legal or legal studies and attainments, but such graduates must, in all instances, furnish evidence as to moral character required of candidates; provided that every Law School in this State shall be approved for this purpose which maintains the following standards:

(a) Admission requirements of Law equivalent to successful completion of the four years' High School Course.

(b) A Law Curriculum extending over at least three scholastic years, with not less than ten hours' class room work in Law a week for each of the three classes respectively.

(c) Standards for credit based upon written examination satisfactory to the Supreme Court.

(d) A Law Library of not fewer than twenty-five (2500) hundred well selected Law Books. [Id., § 6.]

Art. 317f. Rules and regulations for admission of attorneys from other jurisdictions.—The Supreme Court shall make such rules and regulations as to admitting attorneys from other jurisdictions to practice Law in this State as it shall deem proper and just. All such attorneys must be required to furnish satisfactory proof as to good moral character. [Id., § 7.]

Art. 317ff. Certain licenses validated.—That all license to practice law in the courts of record of this State, heretofore issued by the clerk of the Supreme Court, purporting to have been issued under the provisions of Chapter 91 of the General Laws of the State of Texas passed by the Thirty-fourth Legislature at its regular session, and where the issuance of such license may not have been fully authorized under a strict construction of said Act, be and they are hereby validated, and that the holders thereof granted the same privileges of attorneys and councillors at law, as though such license had been fully warranted by said Act; provided, that nothing in this Act shall be constr[ct]ed as authorizing the clerk of the Supreme Court to issue other license under the provisions of Chapter 91 of the General Laws passed by the Thirty-fourth Legislature at its regular session until the applicant therefor shall comply with the provisions of this Act. [Acts 1918, 35th Leg. 4th C. S., ch. 19, § 2.]

Explanatory.—Sec. 1 of this act amended art. 318 of the Revised Civil Statutes of 1911, which was repealed by Acts 1919, 36th Leg., ch. 38, § 10. See ante, art. 317.

Art. 317g. Fee for issuing license.—The fee for issuing such license shall be One (\$1.00) Dollar, to be paid to the clerk of the Supreme Court at the time the license is issued. Money thus received by the Clerk shall be deemed fees of office and must be applied as provided by Law as to such fees. [Acts 1919, 36th Leg., ch. 38, § 8.]

Art. 317h. License to be issued only by Supreme Court.—No license to practice Law in this State shall be issued by any court or authority except by the Supreme Court of the State, under the provisions of this Act. [Id., § 9.]

Arts. 318–321. [Repealed by Acts 1919, 36th Leg., ch. 38, § 10. See ante, art. 317.]

Art. 323. [261] [226] Persons convicted of felony shall not be licensed.

See *Lotto v. State* (Civ. App.) 208 S. W. 563.

Art. 324. [262] [227] Misbehavior or contempt, how punished.

Contempt.—That defendant's attorney in a criminal case stated in the presence of the court to a witness on cross-examination, "All you know about it is you want to put J. B. in the penitentiary," did not justify the court in fining him for contempt. *Ex parte Heidingsfelder*, 84 Cr. R. 204, 206 S. W. 351.

Art. 325. [263] [228] May be suspended or license revoked, when.—Any attorney at law who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or of contempt involving fraudulent or dishonorable conduct or malpractice, may be suspended from practice, or his license may be revoked by the district court of the county in which such attorney resides, or of the county where such conduct or malpractice occurred in manner and form as hereinafter provided, regardless of the fact that such fraudulent or dishonorable conduct, or malpractice, or contempt involving fraudulent or dishonorable conduct or malpractice may constitute a criminal offense under the penal code of this State, and regardless of whether he is being prosecuted or has been convicted for the violation of any such penal provision or not. [Act Jan. 18, 1860, p. 25; P. D. 177; Acts 1921, 37th Leg., ch. 68, § 1, amending art. 325, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

Malpractice or misconduct.—An attorney, who remarked that "Germany is going to win the war, and I hope she will," was not guilty of "dishonorable conduct" within this

article; such conduct being clearly outside the scope of the attorney's relations. *Lotto v. State* (Civ. App.) 208 S. W. 563.

Effect of change in statute.—Where a statute giving grounds for disbarment of an attorney was construed by the court of final jurisdiction and was thereafter re-enacted without material change, to give the statute a new construction disbarring an attorney on a new ground would be in effect disbarring the attorney by a law not previously prescribing the offense. *Lotto v. State* (Civ. App.) 208 S. W. 563.

Art. 328. [266] [231] Citation, how issued and when served.

Appearance as waiving defects.—In an action to disbar an attorney, appearance in court was a waiver of any defects in the service. *Lotto v. State* (Civ. App.) 208 S. W. 563.

Art. 331. Barratry, forfeiture of license by, etc.

Barratry.—A stipulation, in a contract of employment of attorneys, to the effect that the client could not settle his claim without the attorneys' consent did not render the contract void as against public policy. *Wichita Falls Electric Co. v. Chancellor & Bryan* (Civ. App.) 229 S. W. 649.

Art. 332. [269] [234] Penalty for refusing to pay over money.

Parties who may proceed by motion.—Company which guaranteed lawyer would turn over moneys collected, on account of lawyer's failure to pay collection to collecting agency or to owner of account, whereby company was cast in judgment, held not entitled to invoke against lawyer the provision of this article, that attorney who fails to pay over money may be proceeded against on motion of party injured. *United States Fidelity & Guaranty Co. v. Huffmaster* (Civ. App.) 204 S. W. 337.

Art. 333. [270] [235] Allowed to inspect papers.

Taking papers from courthouse.—See *Swann v. State*, 39 Cr. R. 310, 46 S. W. 36.

DECISIONS RELATING TO SUBJECT IN GENERAL

2¾. **Acting as surety.**—As the rule prohibiting attorneys from becoming sureties without leave of court is only directory, an attachment bond, signed by an attorney, is not void or voidable. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

3. **Retainer and authority.**—Where counsel who represented firm admitted in writing on the firm's appeal that members of firm authorized filing of answer to petition filed by attorneys for the firm, the admission conceded all required to satisfy Court of Civil Appeals that firm was before trial court and before Court of Civil Appeals by the appeal. *Wooster v. Hoecker* (Civ. App.) 195 S. W. 332.

Statement of attorney for administratrix that he thought she would pay claim when she got the money held not to bind her or estop her from pleading limitations against the claim. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

While accused may agree to waive the introduction of criminative facts, if the waiver is warranted by law, counsel cannot agree to such waiver. *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

As against objection to bond, attorneys by whom names of sureties were signed there-to are presumed authorized to do so. *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

As a general rule, the authority of an attorney to represent his client continues as to all matters regarding the enforcement of judgment. *Hamilton v. Hamilton* (Civ. App.) 225 S. W. 69.

In a suit against executors for an accounting, in which appointment of receiver was asked because of danger that property would be lost, defendants could not complain of finding as one ground for appointment that executors refused to follow the history of the property after it was delivered to the executor and residuary legatee of the estate of decedent's widow, where the refusal was by their attorney. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

6. — **Termination of employment.**—While ordinarily the employment of attorneys terminates on the rendition of final judgment, a judgment does not become final until at expiration of term at which it is entered, and in the absence of a special agreement between attorney and client, the employment lasts until the expiration of term as far as modification of judgment and notice thereof is concerned. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

Though in a proper case the attorney continues to represent his client until the judgment actually rendered by the court has been entered on motion for such judgment nunc pro tunc, the record should show that the attorney had express authority to continue to represent his client, where the judgment nunc pro tunc was entered two years after the first entry of final judgment, and in the meantime client had removed her residence to another state. *Hamilton v. Hamilton* (Civ. App.) 225 S. W. 69.

As a general rule, the authority of an attorney to represent his client ceases when the case is finally disposed of; that is, when final judgment is entered therein. *Id.*

9. — **Notice to attorney.**—That attorney for judgment creditor knew of prior unrecorded deed given by debtor would not, under principles of agency, bind judgment creditor whose abstract of judgment was recorded. *Ives v. Culton* (Civ. App.) 197 S. W. 619.

That attorney who secured judgment had equitable interest in fund to be derived

therefrom held to make him merely co-owner with judgment creditor, so that his knowledge of prior unrecorded deed could not be imputed to client. *Id.*

Attorney's knowledge of agreement, whereby deeds were placed with him in escrow, held not the knowledge of one subsequently employing him to pass on the title to land conveyed by one of such deeds. *Dowdy v. Furtner (Civ. App.) 198 S. W. 647.*

Where, after an attorney employed by plaintiff to prosecute a suit on a note was advised of the pendency of bankruptcy proceedings against the maker, such attorney entered the military service of the United States and did not communicate the defense to plaintiff, knowledge of the attorney could not, under the rules applicable to principal and agent, be imputed to plaintiff. *Lynch v. McKee (Civ. App.) 214 S. W. 484.*

Knowledge acquired by an attorney prior to his employment by a client could not be imputed to the client. *Ives v. Culton (Com. App.) 229 S. W. 321.*

13. — **Agreements of counsel.**—Under Code Cr. Proc. 1911, art. 22, permitting defendant to waive any right except trial by jury, one accused of homicide is bound by an agreement of his counsel to the giving of a charge defining malice aforethought after the argument. *Jacobs v. State, 85 Cr. R. 505, 213 S. W. 628.*

Attorneys are authorized to stipulate concerning any facts to be established by the evidence. *Richmond v. Sangster (Civ. App.) 217 S. W. 723.*

15. **Liability to client.**—Although an attorney orally promised to permit his client to redeem property the attorney had purchased under tax sale, out of which the attorney's fees were to be paid, yet when the client, without offering to redeem, refused an offer from another for the full value of the property, the attorney's obligation terminated. *Ivey v. Teichman (Civ. App.) 201 S. W. 695.*

19. **Compensation.**—Under contract between attorneys and client, held, that the attorneys became the equitable owners of one-half of the judgment obtained by them for their client. *C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson (Civ. App.) 196 S. W. 262.*

Evidence held insufficient to show bad faith or gross negligence such as would entirely bar an attorney from recovering compensation, although he erroneously advised an alien that he could hold title to land in Oklahoma. *Morales v. Cline (Civ. App.) 202 S. W. 754.*

Under agreement by a bank to pay plaintiff attorney's fees for foreclosure against a third party, if the bank collected the full amount on foreclosure, profits made by the bank upon selling the property could not be credited on the foreclosure judgment in order to show that the entire judgment was collected. *People's Sav. Bank v. Marrs (Civ. App.) 206 S. W. 847.*

Under an agreement to pay certain attorney's fees if the entire amount of judgment, which included such attorney's fees, should be collected from a third person, if the full judgment were collected the attorney would be entitled to interest not merely from the date of collection, but from the date of the judgment since collection of the judgment would include interest, which it provided it should bear from its date. *Id.*

20. — **Fees in certain causes.**—Where land was sold, resold to one who did not assume payment of the vendor's lien, and part of it again sold by him to defendant, who as part consideration assumed payment of the sum of \$4,784, with interest accrued and to accrue, representing part of the unpaid principal sum due on the vendor's lien notes, assuming and agreeing to pay on the principal and interest of the notes an amount equivalent to \$23 a lot on each lot conveyed to him, defendant was liable to the holder of the vendor's lien notes for the specific amount on the principal and interest thereof, but was not liable for attorney's fees. *Allen v. Traylor (Com. App.) 212 S. W. 945.*

21. — **Services contrary to public policy.**—The public appearance by an attorney employed by a county before the river and harbors committee of Congress, to explain and urge its approval of a proposed improvement without attempt to use personal influence, is not "lobbying," and a contract for such services is not contrary to the public policy. *Galveston County v. Gresham (Civ. App.) 220 S. W. 560.*

Attorney cannot recover for services in procuring reinstatement of lease of coal lands by Department of Interior where order of reinstatement was a nullity; the contract to procure such order being void, illegal, and contrary to public policy. *Brandenburg & Brandenburg v. Moroney (Civ. App.) 224 S. W. 714, conforming to Supreme Court's answer to certified questions, 110 Tex. 536, 221 S. W. 928.*

26. **Recovery of attorney fees.**—In receivers' proceedings, held, that petitioner alone was liable for attorney's fees for filing original petition, in view of the agreement for settlement. *J. B. Farthing Lumber Co. v. Greenwood (Civ. App.) 197 S. W. 313.*

28. **Contracts for compensation.**—Contracts between attorneys and client are scrutinized closely because of the relation existing between them, but where contract is reasonable, and where attorney has taken no unfair advantage and has made full and fair disclosure of facts, client is liable thereon. *Laybourn v. Bray & Shifflet (Civ. App.) 214 S. W. 630.*

Attorney and clients have the right to abrogate original contract of employment and enter into new contract in absence of fraud or undue influence on part of attorneys exercised by reason of their relation to client. *Id.*

31. **Contingent fees — Creation of interest in litigation.**—In suit to cancel oil lease executed by plaintiffs, husband and wife, wherein their attorney intervened to enforce lien on leasehold in hands of defendants, declaration of equitable lien on leasehold interest of a defendant in favor of attorney held erroneous in view of contract between attorney and plaintiffs, contemplating attorney should acquire no vested interest prior to forfeiture of lease and second lease for best price obtainable. *Finkelstein v. Roberts (Civ. App.) 220 S. W. 401.*

A contract, employing an attorney to bring suit on a promissory note for the attorney's fees provided for in the note, the client to receive the full amount of principal and

interest before the attorney should receive any of the proceeds as fees, amounted to an equitable assignment of an interest in the cause of action and judgment to the attorney. *Ives v. Culton* (Com. App.) 229 S. W. 321.

A contract between attorney and client, "In order to secure the services as attorneys in the case of the death of my husband, J. D. K., * * * I hereby set over to said attorneys one-third of same against all parties," etc., did not provide for a contingent fee, but was an assignment of a one-third interest in the case, rather than any amount or judgment which might be recovered by prosecuting the litigation. *Wichita Falls Electric Co. v. Chancellor & Bryan* (Civ. App.) 229 S. W. 649.

32. — Client's right to compromise.—Contract by litigants with their attorney not to compromise lawsuit is against public policy, and null and void. *Browne v. King* (Civ. App.) 196 S. W. 884.

Husband and wife, suing to cancel their oil lease, had power to compromise suit without consent of their attorney, though they had contracted with him not to do so, and defendant lessees were not liable to attorney for such breach of contract by his clients unless in compromising defendants acted with wrongful purpose. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

If oil lease was an absolute nullity, breach of agreement by lessors, husband and wife with their attorney, not to compromise suit to cancel lease without consent of attorney, entitled him to judgment against husband for damages if compromise was made with intent to deprive attorney of fee, though wife was not bound by agreement, not having power to contract. *Id.*

In suit to cancel oil lease executed by plaintiffs, husband and wife, wherein plaintiffs' attorney intervened to enforce his contract with them, declaring an agreement made by plaintiffs with defendant lessees, defendants cannot be held on such agreement except in accordance with its terms, including their stipulation to pay all claims as attorneys established against plaintiffs by suit or compromise, the compromise having established nothing against plaintiffs. *Id.*

33. Attorney in fact.—Where attorney in fact was employed to sue to recover land, for which he was to receive half of land recovered or half the proceeds, and his principals compromised the suit, defendant was not liable for attorney's proportionate share of amount of compromise. *Browne v. King* (Civ. App.) 196 S. W. 884.

35. Evidence.—In an action by attorneys against opponent of their client, who fraudulently compromised with their client, evidence held to show that defendant had actual notice of plaintiffs' one-third interest in their client's cause of action. *Wichita Falls Electric Co. v. Chancellor & Bryan* (Civ. App.) 229 S. W. 649.

TITLE 13

ATTORNEYS—DISTRICT AND COUNTY

Chap.	1. District attorneys.	Chap.	2. County attorneys.
	1a. Criminal district attorney of Harris county.		3. General provisions applicable to both district and county attorneys.

CHAPTER ONE

DISTRICT ATTORNEYS

Art.	338. Legislature may provide for election of.	Art.	340d. Same; salaries; how paid.
340a. Salary and fees.		340e. Same; oath of office; duties; removal.	
340b. Assistant district attorneys; stenographer; salaries.		340f. Same; counties to which act applies.	
340c. Same; additional assistants and employés; salaries.		340g. Same; repeal.	

Article 338. [275] [240] Legislature may provide for election of.

Power of legislature.—Under Const. art. 5, § 21, and art. 4, § 22, relating to county and district attorneys, the Legislature has no power to pass an act which will exclude them from their rights to prosecute all actions for the state. *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375.

Art. 340a. Salary and fees.—In any county having a population in excess of one hundred thousand inhabitants, according to the last census of the United States, and according to any United States Census which may hereafter be taken, the district attorney of such county shall receive a salary of \$500.00 from the State of Texas, as provided in the Constitution of Texas, and all fees, commissions and perquisites earned by such office; provided, that the amount of such salary, fees, commissions and perquisites to be so received and retained by him shall not exceed the sum of \$6,000.00 in any one year; and provided further, that all salaries, fees, commissions and perquisites so earned and received by such office in excess of \$6,000.00 during each and every fiscal year shall be paid into the county treasury of said county in accordance with the terms and provisions of the maximum fee bill, except as to such portion of such excess as shall be used and expended in the payment of salaries to deputies, assistants and stenographers as hereinafter provided. [Acts 1917, 35th Leg., ch. 64, § 1; Acts 1919, 36th Leg., ch. 47, § 2.]

Took effect 90 days after March 19, 1919, date of adjournment.
See *Harris County v. Crooker* (Civ. App.) 224 S. W. 792.

Art. 340b. Assistant district attorneys; stenographer; salaries.—Such district attorney, in connection with, and for the purpose of conducting his office in such county, shall be, and is, hereby authorized to appoint six assistant district attorneys, two of whom shall receive a salary not to exceed three thousand dollars per annum, and one of whom shall receive a salary not to exceed twenty-four hundred dollars per annum and three of whom shall receive a salary not to exceed twenty-one hundred dollars per annum, all salaries payable monthly. He shall also be authorized to employ a stenographer, who shall receive a salary not to exceed fifteen hundred dollars per annum, payable monthly, and two investigators, who shall each receive a salary not to exceed fifteen hundred dollars per annum, payable monthly. The salaries of the assistants,

deputies and stenographer and investigators above provided for shall be paid by said county by warrant drawn upon the general funds thereof. [Acts 1919, 36th Leg., ch. 47, § 3.]

Art. 340c. Same; additional assistants and employés; salaries.—Should such district attorney be of the opinion that the number of deputies, assistants and stenographer above provided for are insufficient or inadequate for the proper investigation of crime and the efficient performance of the duties of said office, he may, with the written consent of the county judge of said county, to be spread upon the minutes of the commissioners' court, appoint such additional assistants and employés as may be so authorized by such county judge, such additional assistants and employés to receive salaries of not exceeding eighteen hundred dollars per annum each, to be paid monthly; provided, however, that if at any time the county judge shall be of opinion that such additional assistants and employés, or any of them, are not necessary he may, by written declaration spread upon the minutes of the commissioners' court, withdraw, amend or qualify his written authority previously given for the appointment of such additional assistants or employés, the same to become effective on the first day of the next succeeding month; provided however, that said county judge shall give to such district attorney ten days written notice of his intention to so amend or qualify such written authority. [Id., § 4.]

Art. 340d. Same; salaries; how paid.—The salaries for the additional assistants and employés as above provided for herein, shall be paid out of the excess fees collected by such district attorney and his office, which would otherwise go to said county, a detailed, itemized statement under oath of which he shall include in his annual report as provided to be made in the maximum fee bill; and in no event shall said county be liable for the salaries of such additional assistants or employés. [Id., § 5.]

Art. 340e. Same; oath of office; duties; removal.—The assistant district attorneys above provided for, when so appointed, shall take the oath of office, and be authorized to represent the State in any court or proceeding in which such district attorney is or shall be authorized to so represent the State, such authority to be exercised under the direction of said district attorney, and such assistants, deputies, stenographer and investigator, whether regular or additional, shall be subject to removal at the will of said district attorney. Each of said assistant district attorneys shall be authorized to perform any official act devolving upon or authorized to be performed by such district attorney in said county. [Id., § 6.]

Art. 340f. Same; counties to which act applies.—The provisions of this Act shall apply to every district attorney within the State of Texas within counties of a population of more than one hundred thousand, to be determined as above provided, whether said district attorney be of and for a judicial district called and known by number, or whether called and known as a criminal judicial district or whether of and for any court called or known as a criminal district court; and whether such district attorney be called and known as a district attorney, or a criminal district attorney, or the criminal district attorney of any named county or court. [Id., § 7.]

Art. 340g. Same; repeal.—All laws and parts of laws in conflict herewith are hereby repealed, whether referred to herein or not; provid-

ed, however, that this act is not intended, and shall not be considered or construed as repealing or affecting Chapter 121, Page 315, Acts of the Thirty-fifth Legislature, Regular Session, except in so far as it applies to the amount of fees to be retained by the Criminal District Attorney of Dallas County, Texas, and as to the amount and method of payment of salaries to the assistant criminal district attorneys, special assistants and stenographer employed in the office of the Criminal District Attorney of Dallas County, Texas, and Chapter 167 of the Acts of the regular session of the Thirty-fifth Legislature of the State of Texas, appearing on page 378 thereof, but shall be cumulative thereof; and provided further, that the same shall be cumulative of all laws not in conflict with the provisions hereof. [Id., § 8.]

CHAPTER ONE A

CRIMINAL DISTRICT ATTORNEY OF HARRIS COUNTY

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| <p>Art.
345a. Criminal district attorney of Harris county, etc.</p> <p>345b. District attorney; how commissioned; salary and fees.</p> | <p>Art.
345c. What fees to be retained, etc.</p> |
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Article 345a. Criminal district attorney of Harris county, etc.

See *Harris County v. Crooker* (Civ. App.) 224 S. W. 792.

Authority of city attorney.—A city attorney in Harris county may prosecute cases in the city court under state law, where the district attorney is disqualified or refuses to act, in view of this article. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Art. 345b. District attorney; how commissioned; salary and fees.

See *Harris County v. Crooker* (Civ. App.) 224 S. W. 792.

Effect of city ordinance.—An ordinance of the town of Magnolia Park, in Harris county, fixing the fees of the city attorney in criminal cases to be taxed against the defendant, but providing that no fees should be taxed unless the city attorney prosecuted in person, will not be construed as forbidding fees to be taxed in favor of the district attorney of such county, allowed him under arts. 345a, 345b; Code Cr. Proc. 1911, arts. 1177, 1179, 1180. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Although a city in Harris county could, under Code Cr. Proc. 1911, art. 1177, provide that no fees should be allowed attorneys prosecuting criminal cases in the city court, it could not fix a fee to be taxed in cases prosecuted by the city attorney, and then deny the district attorney of the county a right to fees, in view of arts. 345a, 345b, and Code Cr. Proc. 1911, arts. 1179, 1180. *Id.*

Art. 345c. What fees to be retained, etc.

Fees to be paid over to county.—Money collected by the district attorney of a county as fees for discharging his duties on behalf of the state did not belong to the county. *Harris County v. Crooker* (Civ. App.) 224 S. W. 792.

Under this act the district attorney for the criminal district court of Harris county is bound to pay over to the county only the part of the fees earned by him he is expressly directed to pay over, and may retain all others, whether earned in the court or not. *Id.*

CHAPTER TWO

COUNTY ATTORNEYS

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| <p>Art.
346. Election and term of office.</p> <p>347. May appoint assistants.</p> <p>348. Vacancy in office, how filled.</p> | <p>Art.
350. Joint duties of county and district attorneys.</p> <p>351. Bond and oath of.</p> |
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Article 346. [280] [245] Election and term of office.

Power of Legislature.—Under Const. art. 5, § 21, and art. 4, § 22, relating to county and district attorneys, the Legislature has no power to pass an act which will exclude them from their rights to prosecute all actions for the state. *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375.

Art. 347. [281] [245a] May appoint assistants.

Administering oath.—In view of this article, giving assistant county attorney the same authority to administer oath as county attorney possesses, complaint was invalid where jurat recited that complaint was sworn to and subscribed before the county attorney by his deputy (following *Arbetter v. State*, 79 Cr. R. 487, 186 S. W. 769). *Goodman v. State*, 85 Cr. R. 279, 212 S. W. 171.

While the general rule is that a deputy may do what his principal officer might, the deputy cannot verify in the name of his principal where a duty such as taking oaths pertains to the deputy individually. *Id.*

A complaint reciting: "Sworn to and subscribed by R. A. D. [the affiant], before me, on this 18th day of October, 1918, _____, County Attorney of Ellis County, Texas. W. H. F., Assistant County Attorney, Ellis County," etc., sufficiently showed the affidavit was taken by W. H. F., the assistant county attorney. *Dickerson v. State*, 85 Cr. R. 378, 212 S. W. 497.

Art. 348. [282] [246] Vacancy in office, how filled.

Power to remove and declare vacancy.—Under Const. art. 5, § 24, only the district court, and not the commissioners' court, may remove the county attorney from office or declare a vacancy in his office, although under section 21 the commissioners' court may fill a vacancy existing in such office pending next general election. *Hamilton v. King* (Civ. App.) 206 S. W. 953.

Art. 350. [284] Joint duties of county and district attorneys.

Legislative regulation of duties.—Rev. St. 1911, arts. 7487-7502, relating to collection of taxes, is not unconstitutional as interfering with the rights of district or county attorneys, because the words allowing county tax collectors to "sue" and "commence an action" will be construed to mean to institute actions and assist where the attorneys so desire. *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375.

Art. 351. [285] [248] Bond and oath of.

Cited, *Luckey v. Short*, 1 Civ. App. 5, 20 S. W. 723.

CHAPTER THREE

GENERAL PROVISIONS APPLICABLE TO BOTH DISTRICT AND COUNTY ATTORNEYS

Art.	Art.
366. Shall institute proceedings against officers, when, etc.	369. Admissions made by shall not prejudice the state.
368. To institute quo warranto proceedings.	

Article 366. [300] [260] Shall institute proceedings against officers, when, etc.

Authority to prosecute action in name of state.—Neither arts. 366, 368, nor any other statute conferred any right upon a county attorney to bring an action in behalf of a county to restrain the commissioners' court, county judge, and clerk from allowing officers to buy postage stamps out of county funds. *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

The provision authorizing district or county attorney to institute proceedings against any officer intrusted with the "collection or safe-keeping of any public funds," who is abusing the trust confided in him, held not to empower district attorney to bring action against county judge for money appropriated as salary from county funds in the keeping of the county treasurer; the county judge not being intrusted either with the keeping or the collection of such funds, and the proper proceeding in such case being against the treasurer, and not the county judge. *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

Under this article district attorney may bring an action against county treasurer to recover loss sustained by reason of payments made under a statute which has been declared void by the Supreme Court, regardless of whether the prosecution is directed by the treasurer, under arts. 1505, 1506, or the commissioners' court. *Id.*

Art. 368. [302] To institute quo warranto proceedings.

See *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

Art. 369. [303] [261] Admission made by, shall not prejudice the state.

Cited, *McClesky v. State*, 4 Civ. App. 322, 23 S. W. 518.

TITLE 14

BANKS AND BANKING

Chap.

1. Banks.
- 2a. Loan and brokerage companies.
3. Savings banks.

Chap.

5. Bank deposit guaranty law.
6. General provisions.

CHAPTER ONE

BANKS

Art.

370. Banks, incorporated how.
375. Capital stock prescribed; to be fully paid up.
376. Powers of corporation.

Art.

377. Cash reserve.
378. Duties of directors.
- 378a. Limitation upon borrowing, etc., by directors and officers.

Article 370. Banks, incorporated how.

Incorporation under special act.—A banking corporation attempted to be organized under a prior special act after the adoption of Const. 1876, art. 16, section 16 of which prohibited the organization of such corporations, was illegal and nonexistent, despite its attempted organization was after the amendment of 1904 authorizing the incorporation of banks by general laws. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

Where banking corporation authorized by special act was not organized before adoption of Const. 1876, art. 16, section 16 of which prohibited organization of such corporations, it had no legal existence when organized after 1904, despite the constitutional amendment of that date authorizing the incorporation of banks by general laws, and subscribers to its stock, in suit by a receiver to enforce their subscriptions, were not estopped to defend on the ground that there was no legal corporation, despite Rev. St. 1911, art. 1138. *Id.*

National banks.—A national bank, being incorporated by the federal government, and subject to its laws in its organization and issuance of stock, is subject to the federal statutes, which are supreme and controlling; if the federal and state provisions on any point with reference to national banks conflict, the state rules must yield. *Citizens' Nat. Bank of Stamford v. Stevenson* (Com. App.) 231 S. W. 364.

Art. 375. Capital stock prescribed; to be fully paid up.

Rights of persons induced to purchase stock by fraud.—Where seller of bank stock is a director of the bank and claims to be familiar with the business affairs thereof, buyer is entitled to rely upon seller's representations as to the value of such stock, without making an investigation, although he could have ascertained, by such investigation, the falsity of the representations. *Barber v. Keeling* (Civ. App.) 204 S. W. 139.

Where bank stockholder was induced to acquire stock through misrepresentations of transferor, the transaction was voidable and not void. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

A banking corporation attempted to be organized under a prior special act after the adoption of Const. 1876, art. 16, section 16 of which prohibited the organization of such corporations, was illegal, and nonexistent, despite its attempted organization was after the amendment of 1904 authorizing the incorporation of banks by general laws, and agreements to subscribe to its stock were unenforceable as between the company and the subscribers. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

Art. 376. Powers of corporation.

Estoppel to deny powers.—Irrespective of arts. 376, 378, 546, as to powers of banks, a bank was estopped to plead ultra vires to avoid its purchase of an account against one indebted to it, where it delayed disavowal of such purchase until the debtor's assets were shown insufficient to meet price paid for account. *Bay City Bank & Trust Co. v. Rice-Stix Dry Goods Co.* (Civ. App.) 195 S. W. 344.

Ultra vires acts.—Where creditor bank agreed with debtor, insolvent coal company, to purchase and pay for coal sufficient to supply company's trade and pay operating expenses, president of company to act as bank's agent for sale and delivery, and net proceeds from business to be applied to company's debt to bank, title to coal purchased pursuant to such agreement, and turned over to the president of the company, remained in the bank as between it and the company, although agreement was ultra vires as to bank. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

Creditor of insolvent coal company would have no greater right to levy upon and sell coal purchased by bank, another creditor, pursuant to agreement with company to supply its trade, than the coal company would have to claim ownership therein, although agreement through which bank acquired coal was ultra vires to its charter. *Id.*

Ultra vires of a bank cannot be the basis of an action against or a defense by, the banks; but the government alone may complain, in a proceeding to forfeit bank's charter, that bank exceeded its charter powers. *Id.*

In an action against a bank officer personally and against the bank for breach of contract for sale of cotton, petition held not to show cause of action, since the transaction is ultra vires; it not being alleged that the bank had, when contracting, any cotton to deliver, or would in due course of business acquire such cotton as collateral to any loans made; it not being within the bank's power to engage in buying and selling for future delivery. *Martin v. Hemphill* (Civ. App.) 221 S. W. 333.

Art. 377. Cash reserve.—Every banking corporation chartered under the laws of this State with a capital stock of less than twenty-five thousand dollars and which does not become a member of a Federal Reserve Bank under the laws of the United States, shall at all times have an amount of cash on hand and cash due from other banks equal to at least twenty per cent. of the aggregate amount of its demand deposits; and every bank, not located in a central reserve city, having a capital stock of twenty-five thousand dollars or more, and which do not become members of a Federal Reserve Bank under the laws of the United States, shall at all times have an amount of cash on hand and cash due from other banks, equal to at least fifteen per cent. of the aggregate amount of its demand deposits. Whenever the reserve of any bank as hereinbefore required shall fall below the amount specified above for its class, then such bank shall not make any new loans or discounts until it shall by collection restore its lawful reserve. Such reserve fund, or any part thereof, together with the current receipts may be kept on hand or on deposit payable on demand in any bank or banking association of the State of Texas, or any bank, banking association or trust company regularly chartered and operating under the laws of any State or under the laws of the United States, approved by the Commissioner of Insurance and Banking, and having a paid up capital stock of fifty thousand dollars or more, but the deposit in any one bank or trust company shall not exceed twenty per cent. of the total deposits, capital and surplus of the bank making the deposit. [Acts 1905 S. S. p. 491; Acts 1907, p. 60, § 7; Acts 1914, 33d Leg. 3d C. S., ch. 3, § 3; Acts 1920, 36th Leg. 3d C. S., ch. 41, § 1.]

Explanatory.—The title and enacting part describe the act amended as having been "passed at the Second Called Session of the Thirty-third Legislature and approved October 19, 1914," etc., whereas the act was passed at the Third Called Session of the named Legislature. Took effect June 17, 1920.

Art. 378. Duties of directors.

See *Bay City Bank & Trust Co. v. Rice-Stix Dry Goods Co.* (Civ. App.) 195 S. W. 344.

Art. 378a. Limitation upon borrowing, etc., by directors and officers.

Membership in partnership.—A bank with the knowledge of all of its officers could properly make a loan to a partnership of which its president, a large stockholder, was a member. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

CHAPTER TWO A

LOAN AND BROKERAGE COMPANIES

Art.

385a. Corporation to loan money and act as trustee.

385b. Capital paid in; statements; examina-

Art.

tion and taking possession of by Commissioner of Insurance and Banking.

Article 385a. Corporations to loan money and act as trustee.—Corporations may be created for any or all of the following purposes, to-wit:

To accumulate and lend money, purchase, sell and deal in notes, bonds, and securities, but without banking and discounting privileges. To act as Trustee under any lawful express trust committed to them by contract and as agent for the performance of any lawful act. But no corporation organized hereunder shall act as agent or trustee in the consolidation of or for the purpose of combining the assets, business, or means of any other persons, firms, corporations or associations, nor shall such corporation as agent or trustee carry on the business of another. [Acts 1919, 36th Leg., ch. 83, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 385b. Capital paid in; statements; examination and taking possession of by Commissioner of Insurance and Banking.—No corporation created under this Act shall be authorized to engage in or carry on any such business unless it shall have an actual paid in capital of not less than \$10,000, and providing that each corporation organized under this Act shall publish in some newspaper of general circulation in the county where it has its principal place of business, on or before the first day of February of each year, a statement of its condition on the previous thirty-first day of December, in such form as may be required by the Commissioner of Insurance and Banking, showing under oath its assets and liabilities. That a copy of this statement shall be filed with the Commissioner of Insurance and Banking and a fee of \$10.00 paid that officer for filing the same.

That it shall be the duty of the Commissioner of Insurance and Banking to examine, or cause to be examined, such corporation annually. The said corporation shall pay the actual traveling expenses, hotel bills, and all other actual expenses incident to such examination, and a fee therefor not exceeding one-eighth of one per centum of its actual paid in capital.

If upon examination it shall appear that the assets of said corporation, exclusive of its said capital paid in, are less than its liabilities, the said Commissioner of Insurance and Banking shall notify it thereof in writing, and if the said corporation shall not within thirty days from receipt of said notice restore and make good such impairment of its capital, then it shall be the duty of the Commissioner of Insurance and Banking to take possession of the said corporation and its property and to wind the same up and distribute its assets in accordance with the provisions of the law of this State with reference to the winding up of the affairs of banks incorporated under its laws. And if it shall appear from such examination that said corporation has exceeded its corporate powers or has been guilty of an unlawful act or acts, the said Commissioner shall, in writing, notify the said corporation to cease such act or practice and to conduct its business in accordance with law and its charter powers, and if such corporation shall fail or refuse for a period of thirty days thereafter to comply with such notice, then it shall be the duty of the said Commissioner of Insurance and Banking to take possession of the said Corporation and its assets and wind it up and distribute the said assets as hereinbefore provided. [Id., § 2.]

CHAPTER THREE

SAVINGS BANKS

Article 397. Payment of deposits; regulations; notice; interest.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

CHAPTER FIVE

BANK DEPOSIT GUARANTY LAW

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| <p>Art.
445. What banking, etc., corporations may protect depositors.</p> <p>448. Bank, etc., electing guaranty fund method, to pay what and when, for creation of fund.</p> <p>453. Commissioner may wind up affairs of bank, etc.</p> <p>454. No bank, etc., notified, shall have a lien or charge against assets, etc.</p> <p>457. Shall collect debts, etc.</p> <p>458. On order of court, etc., may sell, etc., bad debts, or real or personal property.</p> <p>459. May enforce liability of stockholders if, etc.</p> | <p>Art.
470. Guaranty fund to receive its portion of dividends, with interest.</p> <p>473. Bank aggrieved may enjoin proceedings by commissioner.</p> <p>474. Continued liquidation by commissioner decided by stockholders, when.</p> <p>484. Bank may place affairs under commissioner, how, etc.</p> <p>486. Depositors paid in full out of guaranty fund, etc.</p> <p>487. State to have first lien on assets, etc.</p> <p>503. Fees for examination of bank with view to bond.</p> |
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Article 445. What banking, etc., corporations may protect depositors.

County as depositor.—Under art. 2440 et seq., and the bank deposit guaranty law, a county which deposited its funds in bank held not entitled to assert any superior claim over other creditors in distribution of assets of bank after its insolvency. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Art. 448. Bank, etc., electing guaranty fund method, to pay what and when for creation of fund.—For the purpose of creating a Depositors' Guaranty Fund any such bank or trust company which shall elect to secure its deposits under the Depositors' Guaranty Fund provided for in this chapter, if its application is approved by said Board as prescribed by Article 451, shall pay to said Banking Board on January 1, 1910, one per cent. of its daily average deposits for the preceding year ending November 1, 1909, not including United States, State or other public funds, if otherwise secured. Annually after the first payment to said fund, each bank and trust company subject to the provisions of the guaranty fund plan of this chapter, shall pay to said Board one-fourth of one per cent. of its daily average deposits for the year ending November 1st, of the preceding year, as above defined, which amount shall be added to said guaranty fund; provided, that when the amount available in said guaranty fund shall reach the sum of five million dollars, the Commissioner of Insurance and Banking shall notify all banks and trust companies subject to the provisions of this chapter, at least thirty days before the next annual payment, of that fact and thereafter the banks and trust companies participating shall not pay any further amount into said fund until said fund shall be depleted. In the event of the depletion of said fund from any cause so that it falls below five million dollars or below the amount of the guaranty fund on January 1st preceding, or in the event of necessity to meet an emergency at any time, said Banking Board shall have authority to require the payment for the current year of two per cent. of such daily average deposits, or such part thereof as may be necessary to restore said fund to the maximum above named, or to its amount as of January first preceding, or to meet the emergency; but no bank or trust company coming under the provisions of this chapter shall ever be required to pay more than two per cent. of its daily average deposits for any one year; provided, further, that the first payment herein provided for by any bank which shall hereafter elect to secure its deposits under the Depositors' Guaranty Fund shall be made by said bank to said Banking Board

without reference to said maximum amount in said Depositors' Guaranty Fund. [Acts 1909, 2 S. S., p. 406, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 33, § 1.]

Took effect Nov. 15, 1921.

Art. 453. Commissioner may wind up affairs of bank, etc.

See *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823; *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542; *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

Discretion of commissioner.—Under art. 453, and art. 459, the questions whether it is necessary to enforce such liability, and, if so, to what extent, are referred to the judgment and discretion of the commissioner of banks and his decision is conclusive. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Effect of delay in taking action.—Where a bank, being unable to meet its obligations, transferred its assets to another, which assumed its liability to creditors, the delay of the commissioner of banking for nearly four years in appointing a special agent to take charge of the bank, and in making an assessment against stockholders, did not affect his right or authority to act under arts. 453, 459. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Art. 454. No bank, etc., notified, shall have a lien or charge against assets, etc.

Right of surety company to urge off-set as against commissioner.—Bonding and surety company sued by commissioner of insurance and banking, administering insolvent bank, on bond of whose cashier surety company had gone, held not entitled to offset against commissioner claim against bank arising from judgment against it, the surety company, on its guaranty of bank as county depository, which claim against bank was acquired after commissioner's administration had begun. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Art. 457. Shall collect debts, etc.

See *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

Art. 458. On order of court, etc., may sell, etc., bad debts, or real or personal property.

See *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 459. May enforce liability of stockholders if, etc.

Showing of necessity for enforcement of liability.—The commissioner's determination is conclusive. *Brooks v. Austin* (Civ. App.) 206 S. W. 723; *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Power and duty to collect assessments in general.—The liability of stockholders of a bank, under art. 552, and the power of the commissioner of banking to enforce it under art. 459, do not depend on whether the bank has assets, or whether the special agent appointed to act for the commissioner is able to take possession of them. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Where a bank, being unable to meet its obligations, transferred its assets to another, which assumed its liability to creditors, the delay of the commissioner of banking for nearly four years in appointing a special agent to take charge of the bank, and in making an assessment against stockholders, did not affect his right or authority to act under arts. 453, 459. *Id.*

Under art. 459, the commissioner, if he makes an assessment, shall collect the same from all stockholders if it is possible to do so. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Until an agent to liquidate bank is elected at stockholders' meeting called by commissioner of insurance and banking, under art. 474, the commissioner is authorized to collect assessment of stockholders' liability, under arts. 459, 552, and 556. *Id.*

Calling meeting.—In commissioner's action to enforce personal liability of bank stockholders, under arts. 459, 552, and 556, the commissioner's failure to call a meeting of stockholders, under art. 474, is no defense. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Real owner liable.—Under arts. 459, 552, 556, the real owner of bank stock at time of bank's failure can be assessed and held liable for bank's debts, although not stockholder of record. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Transfer of stock.—Bank stockholder who transferred stock under misrepresentation is not liable for stockholders' liability assessment, under arts. 459, 552, and 556, after stock has been transferred, the transaction being voidable and not void. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Where the commissioner of insurance and banking, after having determined that it was necessary in order to settle debts of insolvent state bank to levy a 100 per cent. assessment against the stockholders, sent notice thereof to defendant, who had transferred his stock less than a year prior to date of bank's default, with demand for payment, no further proceedings were necessary as a condition precedent to suit. *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

This article, when construed with other articles, is broad enough to confer on the commissioner of insurance and banking authority to enforce the liability of a former stockholder who has transferred his stock less than one year before date on which bank made default in payment of debts. *Id.*

Subscriptions induced by fraud.—That bank stockholder was induced to acquire stock through misrepresentation of former holder, where there was no fraud perpetrated by bank, is no defense in action to enforce stockholders' personal liability upon bank's insolvency, under arts. 459, 552, and 556. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Art. 470. Guaranty fund to receive its portion of dividends, with interest.

Cited, *Austin v. First Nat. Bank of Teague* (Civ. App.) 205 S. W. 839.

Art. 473. Bank aggrieved may enjoin proceedings by commissioner.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 474. Continued liquidation by commissioner decided by stockholders.

Failure to call meeting.—In commissioner's action to enforce personal liability of bank stockholders, under arts. 459, 552, and 556, the commissioner's failure to call a meeting of stockholders, under art. 474, is no defense. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Art. 484. Bank may place affairs under commissioner, how, etc.

See 1918 Supp. arts. 6016½-6016¾c, as to newspaper publication instead of posting.

Art. 486. Depositors paid in full out of guaranty fund, etc.

See *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Deposits otherwise secured.—Under this article, one bank's deposit with another, evidenced by a certificate of deposit and secured by bond of depository bank, with sureties, was a secured deposit, unprotected by the Depositors' Guaranty Fund, "deposits otherwise secured" excepted by statute, meaning secured otherwise than by Depositors' Guaranty Fund Act, including art. 486. *Austin v. First National Bank of Teague* (Civ. App.) 205 S. W. 839.

Art. 487. State to have first lien on assets, etc.

See *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.
Cited, *Austin v. First Nat. Bank of Teague* (Civ. App.) 205 S. W. 839.

Art. 503. Fees for examination of bank with view to bond.

Cited, *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

CHAPTER SIX

GENERAL PROVISIONS

<p>Art. 517dd. Expense of investigation on application for charter.</p> <p>521. Appointment and compensation of examiners; general liquidating agent; removal.</p> <p>521a. Superseded.</p> <p>523. Duties of commissioner in cases of certain derelictions, etc., of banks, etc.; duties of attorney general.</p> <p>530. Directors may appoint and remove officers, etc., authority of officers, etc.; acts without authority void.</p> <p>539. Loans limited.</p>	<p>Art. 546. Bank, etc., not to employ its moneys in trade, etc.</p> <p>547a. Powers of trust companies.</p> <p>551. Bank, etc., shall not make voluntary assignment, etc.</p> <p>552. Stockholders' liability for debts of bank, etc., defined.</p> <p>554. Receipt of deposits or creation of debts while insolvent.</p> <p>556. Who liable where stock held by executor, etc.</p> <p>561. Business of solvent corporation may be closed, how.</p>
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<p>Art. 562. Who may accept provisions of this title, and how.</p> <p>564. Increase of stock for excessive ratio of deposits to stock and surplus, required; penalty.</p>	<p>Art. 567. No bank, etc., to own over ten per cent of stock of another, or loan on its stock, e'tc.</p> <p>574. Bonds of officers and employes of banks.</p>
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Article 517dd. Expense of investigation on application for charter—When application is made for the organization of a State bank, the applicants shall be required to pay to the Commissioner of Insurance and Banking of the State all actual necessary expenses incurred by the Department of Insurance and Banking in making an investigation of such application not to exceed fifty dollars. [Acts 1920, 36th Leg. 3d C. S., ch. 48, § 1.]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 521. Appointment and compensation of examiners; general liquidating agent; removal.—The Commissioner of Insurance and Banking, from time to time, shall appoint such number of State bank examiners as may be necessary to make the examination of banking corporations required and allowed by law, which number shall at no time exceed the ratio of one examiner for each forty banking corporations then subject to examination under the laws of this State; and the Commissioner of Insurance and Banking may also designate any one of said State bank examiners as a general liquidating agent, with his office in the banking department, for the purpose of liquidating any one or all State banks in the process of liquidation and for the purpose of conducting such liquidation under the direction of the said Commissioner. The salary of each of said State bank examiners and of the general liquidating agent shall be for their first year of employment in the Department at the rate of Two Thousand Four Hundred (\$2,400.00) Dollars per year, and such salary shall be increased by the sum of Two Hundred (\$200.00) Dollars per year for each year of continuous service in the Department until the maximum salary of Three Thousand Six Hundred (\$3,600.00) Dollars shall be reached, and in addition to the salaries above specified, they shall receive all necessary traveling expenses, and it is provided that bank examiners and liquidating agent now in the employ of such Department shall have the period of past continuous employment counted in determining their rate of pay; said State bank examiners and the general liquidating agent may be discharged and removed by the Commissioner of Insurance and Banking. The entire salary of the general liquidating agent may be assessed by the Commissioner of Insurance and Banking against any bank or banks in liquidation in amounts proportionate to the salary and time required of the general liquidating agent in such liquidation, and may be collected and paid into the State Treasury as fees. [Acts 1905, S. S., p. 505; Acts 1909, 2d S. S., p. 424, § 33; Acts 1921, 37th Leg., ch. 65, § 1.]

Sec. 2 provides that the act shall not become effective until Sept. 1, 1921.

Art. 521a. [Superseded.]

Explanatory.—Acts 1921, 37th Leg., ch. 65, § 1, amends Acts 1917, 35th Leg., ch. 205, § 5, so as to read as set forth above (art. 521), and to be known as art. 521.

Art. 523. Duties of commissioner in cases of certain derelictions, etc., of banks, etc.; duties of attorney general.

See 1918 Supp. arts. 6016½-6016½c, as to newspaper publication instead of posting.
Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Appointment of receiver.—In suit against a bank to recover funds held in escrow for plaintiff and others, facts alleged in the petition held sufficient to justify immediate ap-

pointment of receiver for such funds, to protect plaintiff's rights, without notice to the bank. *Temple State Bank v. Mansfield* (Civ. App.) 215 S. W. 154.

Art. 530. Directors may appoint and remove officers, etc.; authority of officers, etc.; acts without authority void.

Sale, pledge or indorsement of bills and notes.—Under this article the cashier of a bank, authorized by a duly entered resolution, had authority to contract to pledge the bank's bills receivable for payment of an indebtedness. *Houston Nat. Exch. Bank of Houston v. Gregg County* (Civ. App.) 202 S. W. 805.

Art. 539. Loans limited.

Amount that may be loaned to one person.—Where bank had loaned debtor the full amount it was permitted by law to loan one person, the act of its vice president in causing it to discount a note executed by him and another for accommodation of such debtor was not a fraud on the bank as having increased such debtor's indebtedness to bank in violation of banking laws; the debtor not being liable on such note. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

Even if bank, having loaned debtor the full amount it was permitted by law to loan one person, had discounted note by third parties upon which such debtor was an avowed obligor, the matter of overloan would not affect validity of loan, being a matter solely between the bank and the government.—Id.

That a national bank, through the device of discounting accommodation paper of controlling stockholders of a company, exceeded its legal loaning capacity to such company is no defense to the makers of the accommodation paper when sued on one of their notes, the matter of overloan being solely between national government and bank. *Goldstein v. Union Nat. Bank of Dallas* (Civ. App.) 216 S. W. 409.

Art. 546. Bank, etc., not to employ its money in trade, etc.

See *Bay City Bank & Trust Co. v. Rice-Stix Dry Goods Co.* (Civ. App.) 195 S. W. 344.

Art. 547a. Powers of trust companies.—Any trust company organized under the laws of the State with a capital of not less than five hundred thousand dollars shall, in addition to all other powers conferred by law, have the power to purchase, sell, discount and negotiate with or without its endorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers and other evidences of indebtedness; to purchase and sell, with or without its endorsement or guaranty, stocks, bonds, securities, including the obligations of the United States or of any States thereof; to issue debentures, bonds and promissory notes, to accept bills or drafts drawn upon it, but in no event having liabilities outstanding thereon at any one time exceeding five times its capital stock and surplus; provided, however, that with the consent in writing of the Commissioner of Insurance and Banking, they may have outstanding at any one time ten times the capital stock and surplus; and generally to exercise such powers as are incidental to the powers conferred by this Act. [Acts 1920, 36th Leg. 3d C. S., ch. 49, § 1.]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 551. Bank, etc., shall not make voluntary assignment, etc.

See *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Cited, *Austin v. First Nat. Bank of Teague* (Civ. App.) 205 S. W. 839.

What constitutes assignment.—The transfer, by a bank unable to meet its obligations, of all of its property and assets as security to another bank, which assumed its indebtedness, was not a voluntary general assignment of the business and affairs of the bank, in violation of this article. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Failure of banking commissioner to act.—Where the F. Bank, being unable to meet its obligations, transferred all of its assets to the C. Bank, which assumed the indebtedness of the F. Bank, if it thereupon became the duty of the commissioner of insurance and banking to take possession of such assets, under this article, his failure to do so did not render null and void, as contrary to public policy, such contract, which required the F. Bank to repay any amount not realized by the C. Bank from such assets. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Art. 552. Stockholder's liability for debts of bank, etc., defined.

Liability of and assessment against stockholders.—Until an agent to liquidate bank is elected at stockholders' meeting called by commissioner, under art. 474, the commissioner

is authorized to collect assessment of stockholders' liability under arts. 459, 552, and 556. The commissioner's failure to call a meeting of stockholders, under art. 474, is no defense. His determination is conclusive, but if he makes an assessment he must collect the same from all stockholders if it is possible to do so. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

The real owner of bank stock at time of bank's failure can be assessed and held liable for bank's debts, although not stockholder of record. *Id.*

Const. art. 16, § 16, defining liability incident to ownership of stock in banking corporations, is self-executing. This article does not extend the liability of a former stockholder of an insolvent banking corporation beyond the limits fixed by Const. art. 16, § 16; the words "each stockholder of such corporation," occurring in the article of the statute, meaning stockholders owning and holding shares at time of default. *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

The liability of stockholders of a bank, under this article, and the power of the commissioner of banking to enforce it under art. 459, do not depend on whether the bank has assets, or whether the special agent appointed to act for the commissioner is able to take possession of them. This article construed as applying only to debts contracted by the bank in the ordinary course of business, an indebtedness for money borrowed to pay debts so contracted is contracted in the ordinary course of business, and the stockholders are liable. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Subscription obtained by fraud.—That bank stockholder was induced to acquire stock through misrepresentation of former holder, where there was no fraud perpetrated by bank, is no defense in action to enforce stockholders' personal liability upon bank's insolvency, under arts. 459, 552, and 556. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Effect of transfer of shares.—Bank stockholder who transferred stock under misrepresentation is not liable for stockholders' liability assessment, under arts. 459, 552, and 556, after stock has been transferred, the transaction being voidable and not void. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Under Const. art. 16, § 16, and this article, the liability of a stockholder, who transferred his stock within less than one year prior to date on which bank made default in payment of its debt, was not secondary but the same, as to debts existing at the time of transfer, as that of present stockholders. *Austin v. Campbell* (Civ. App.) 210 S. W. 277; *Same v. Kelly* (Civ. App.) 210 S. W. 282; *Same v. Yates* (Civ. App.) 210 S. W. 282; *Same v. Huffman* (Civ. App.) 210 S. W. 283.

Art. 554. Receipt of deposits or creation of debts while insolvent.

What constitutes creation of debt.—The transfer by a bank of all of its property and assets as security to another bank, which assumed its liabilities to creditors, did not create a new debt in violation of Code Cr. Proc. art. 532, and this article. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

Art. 556. Who liable where stock held by executor, etc.

See *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

Art. 561. Business of solvent corporation may be closed, how.

See *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823.

Art. 562. Who may accept provisions of this title, and how.

See *Wichita Falls Sash & Door Co. v. Jackson* (Civ. App.) 203 S. W. 100.

Art. 564. Increase of stock for excessive ratio of deposits to stock and surplus, required; penalty.—If, from the sworn statement of the average daily deposits of any state bank or banking corporation, organized under or subject to the general banking laws of this State, for the year ending on the first day of November, 1920, or of any subsequent year, filed with the Commissioner of Insurance and Banking, as provided in this Title, it shall appear that such average daily deposits for such year amounted to more than five times the capital stock and surplus of such bank on November 1st of such year, if the capital stock of such bank is not more than ten thousand dollars, (\$10,000.00), or more than six times such capital stock and surplus, if the capital stock is more than ten thousand dollars, (\$10,000.00), and less than twenty thousand dollars, (\$20,000.00), or seven times the capital stock and surplus, if the capital stock is twenty thousand dollars, (\$20,000.00), or more and less than forty thousand dollars, (\$40,000.00), or eight times such capital stock and surplus, if the capital stock is forty thousand dollars, (\$40,000.00), or more and less than seventy-five thousand dollars, (\$75,000.00), or nine

times such capital stock and surplus, if the capital stock is seventy-five thousand dollars, (\$75,000.00), or more and less than one hundred thousand dollars, (\$100,000.00), or ten times such capital stock and surplus, if the capital stock is one hundred thousand dollars, (\$100,000.00), or more; then, in any such case, it shall be the duty of the State Banking Board to require that such state bank shall, within sixty days thereafter, increase its capital by twenty-five per cent, thereof; provided, that the State Banking Board may relieve, or refuse to relieve, any such bank from such order on showing to said board of conditions applying to and relating to the increase of the average daily deposits in such bank, which said board may find to justify such relief or not to justify such relief; and it shall be the duty of the Commissioner of Insurance and Banking to immediately furnish such state bank or banking corporation with a certified copy of the order making such requirement, as well as any order granting or refusing to grant relief from such requirement; and upon receipt of the order making such requirement, the directors of such state bank or banking corporation shall, within the time required, cause such increase to be made in the capital stock; and if the same is not done within such time, it shall be unlawful for such bank to thereafter receive any deposits at any time when its total demand and time deposits and savings accounts shall in the aggregate amount to more than the limitation herein placed upon deposits. [Acts 1909, 2 S. S., p. 423, § 27; Acts 1921, 37th Leg., ch. 54, § 1, amending art. 564, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act is penal in its nature and is set forth post as art. 531a, Penal Code. The act took effect April 2, 1921.

Art. 567. No bank, etc., to own over ten per cent. of stock of another, or loan on its stock, etc.

National bank.—It is not illegal for one national bank to loan money and take a note therefor secured by the stock of another national bank. *Citizens' Nat. Bank v. Stevenson* (Com. App.) 231 S. W. 364.

Art. 574. Bonds of officers and employés of banks.

Set-off by surety company.—Bonding and surety company sued by commissioner of insurance and banking, administering insolvent bank, on bond of whose cashier surety company had gone, held not entitled to offset against commissioner claim against bank arising from judgment against it, the surety company, on its guaranty of bank as county depository, which claim against bank was acquired after commissioner's administration had begun. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

DECISIONS RELATING TO SUBJECT IN GENERAL

Deposits in general.—Where a business was sold under agreement whereby the buyer deposited in a bank the purchase price, to be paid out to creditors of the seller on checks signed by both buyer and seller, no part of the deposit was garnishable as belonging to the seller until such creditors as he had approved by signing checks jointly with the buyer had been paid. *Foscue v. Provident Nat. Bank of Waco* (Civ. App.) 210 S. W. 555.

A check may be certified by a bank by cashier writing thereon the word "Good" and signing his name. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

In suit by next friend of a minor against a bank to recover money deposited with the bank by the minor's mother, the money having been so blended and intermingled by the mother with her own funds that it could not be specifically designated, and it having been transferred to the son long after it was transferred to the bank by the mother, evidence held not to show that plaintiff was the owner of it. *Watson v. First State Bank of Dallas* (Civ. App.) 223 S. W. 233.

Where mortgagor shipped mortgaged cattle to commission firm, and where the commission firm placed net proceeds in bank with instructions to credit the amount "By direction of: H. [mortgagee], a/c J. [mortgagor]. Deposited by S. [commission firm]. To the following bank: S. [owner of mortgage notes]"—and where advice card from bank in which the proceeds were so deposited to bank owning notes stated: "We credit your account \$4,316.60 [amount of proceeds]. By direction of: H. [mortgagee], a/c J. [mortgagor]"—the bank owning note was required to credit proceeds to mortgagor's account toward payment of mortgage note, and not to mortgagee's account, to be drawn out and used by it as it saw proper. *Stockyards Nat. Bank v. Wilkinson* (Civ. App.) 230 S. W. 1040.

Relation between bank and depositor.—By a deposit in a bank, the relation of creditor and debtor is created. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

The making of a general deposit with a bank creates the relation of debtor and creditor between the bank and the party in whose name the deposit is made. *Meador v. Rudolph* (Civ. App.) 218 S. W. 520.

Application of deposits to debts due bank.—Bank's right of set-off does not apply to special deposits. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

Where bank discounted note made by its vice president and a comaker for accommodation of bank's debtor to whom it had loaned full amount allowed by law, and agreed, through vice president, to apply to payment of such note deposits made by debtor for such purpose, it was chargeable with vice president's knowledge of agreement, the agreement not being inimical to bank's interest as prejudicial to bank's equitable right of set-off of debtor's deposits to his prior indebtedness, since the deposits to which the agreement applied were to be made in the future and for the express purpose of paying the note; and bank's right of set-off would not in any event apply to such special deposits. *Id.*

A bank has a right to apply money in its hands belonging to an insolvent debtor to the obligations due by him to the bank. *Osceola Mercantile Co. v. Nabors* (Civ. App.) 221 S. W. 991.

Payment of check or draft.—Where plaintiff acquiesced in charging against his account check drawn in due course of business, and stolen from him, without his fault, held, that he could not have recourse against defendant, which paid check in first place and transmitted it to bank on which it was drawn. *Cherbonnier v. Citizens' Nat. Bank of Lubbock* (Civ. App.) 199 S. W. 307.

Payment of forged or altered instruments.—Plaintiff, by issuing check, cast on bank duty to pay it, or, if indorsed by payee, duty to ascertain genuineness of indorsement, unless plaintiff knew payee was fictitious person, in which case payment to any holder was authorized. *Commonwealth Nat. Bank v. Hawes* (Civ. App.) 196 S. W. 859.

A bank cannot charge against a depositor the payment of any check with the forged signature of the depositor. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

A bank cannot charge against a depositor the payment of any check upon the forged indorsement of the payee. *Id.*

Where a bank check is drawn in favor of a fictitious payee, whom the drawer in good faith and without fault believes to be a real person, and such check is fraudulently indorsed by another in the name of the payee, the payment thereof cannot operate as payment of any part of the bank's debt to the depositor. *Id.*

While a bank cannot hold the depositor where it pays out money on forged check, yet, where the depositor draws a check in so negligent a manner that it can be raised without exciting the suspicion of a prudent and cautious man, and the bank pays the amount so raised, the depositor and not the bank must bear the loss himself; hence an answer setting up such facts in an action against the bank should not be stricken on exception. *First Nat. Bank of Newsom v. J. C. Walling & Son* (Civ. App.) 218 S. W. 1080.

A telegraph company issuing a draft or order, in effect waiving identification of the payee, by indorsement of its authorized agent that payee was identified by him, is liable to bank paying it, whether or not the person presenting it and indorsing it was the payee. *MacKay Telegraph-Cable Co. v. Fort Worth Nat. Bank* (Civ. App.) 230 S. W. 244.

Special deposits.—Deposit in bank made by contractor to build school through another bank in which he deposited completion payment held a general, not a special, deposit. *Wise v. Johnson* (Civ. App.) 198 S. W. 977.

Where a national bank agreed with defendants, its vice president, and another controlling stockholder in a company, to which the bank already had lent the legal limit, that deposits made by the company after the bank had discounted defendants' paper, executed for the accommodation of the company, would be applied only in payment of such paper, deposits made pursuant to the agreement were special deposits for a particular purpose, not creating the relation of debtor and creditor between the bank and the company. *Goldstein v. Union Nat. Bank of Dallas* (Civ. App.) 216 S. W. 409.

Deposit in bank to credit of another person, to be delivered to such person by bank upon depositor being successful in pending suit against him, was not a special deposit in its restrictive sense, requiring the thing deposited to be safely kept and the identical thing returned, but was a special deposit in the sense that it was for a specific purpose, making bank liable to third party upon payment to depositor in violation of the contract between the parties with reference to the deposit. *Meador v. Rudolph* (Civ. App.) 218 S. W. 520.

Collections.—A bank that held a draft for 27 days without notifying the payee of nonpayment when instructed to give notice by wire was guilty of negligence and liable for resulting loss. *Terrell v. Commercial Nat. Bank* (Civ. App.) 199 S. W. 1133.

In an action to recover for the negligence of a bank in failing to promptly notify drawer of the nonpayment of draft, measure of damages is amount drawer would have recovered on debt from drawee if promptly notified. *Id.*

Unless shown by the evidence that the drawer of a draft would have realized something on a debt from the drawee, but for the negligence of the bank in withholding notice of nonpayment, only nominal damages can be given. *Id.*

In an action against a bank for negligently failing to collect a draft, the measure of damages is compensation for the injury thereby suffered, which is not necessarily the face of the draft. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858.

Where a bank, at plaintiff's request, had forwarded a draft to defendant bank which was accepted and paid by defendant's cashier's check, but defendant subsequently stopped delivery of its check before it was received by the first bank, facts held to support a finding that the first bank merely acted as plaintiff's agent, and was not therefore

a proper party to the suit as a purchaser of the draft. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400.

A bank was the sole agent of the lessor for the reception of money under a lease providing that it should terminate if lessee should fail to begin operations for an oil well on or before a certain date "unless the lessee on or before that date shall pay or tender to the lessor or to the credit of the lessor in the F. Bank, the sum of \$26." *Texas Co. v. Wimberly* (Civ. App.) 213 S. W. 286.

It is not negligence for a correspondent bank which has received a check from another bank for collection, to forward it to the drawee bank for collection, in keeping with its custom and without reason to apprehend that the check would not be duly remitted for, where such bank is the only bank at the place of payment. *Waggoner Bank & Trust Co. v. Gamer Co.* (Sup.) 213 S. W. 927, 6 A. L. R. 613.

When a bank with which a check is deposited has presented it to the drawee bank for payment, and payment is refused, it need thereafter make no further presentment; its ordinary duty, in the absence of instructions, being only to promptly notify the owner of the check of its dishonor and to return the check to him. *Id.*

Where a check drawn by a third party is deposited by the payee in a bank to the payee's credit, the bank is under no absolute obligation to collect it, it being merely charged with the duty of using due diligence for its collection and due care in selection of an agency for the purpose so that, when it forwards the check for collection in accordance with business custom to a reputable correspondent, it will not be liable for negligence if the drawee bank fails to pay it. *Id.*

When a bank with which a check is deposited has presented it to the drawee bank for payment, and payment is refused, it need thereafter make no further presentment. *Id.*

A bank, undertaking the collection of commercial paper sent it by another bank for collection, is liable for any loss resulting to the sending bank from the collecting bank's negligence in failing to make the collection. *Central Exch. Nat. Bank of Waco v. First Nat. Bank* (Civ. App.) 214 S. W. 660.

When a bank undertakes to collect negotiable paper, intrusted to it for that purpose, the relation of principal and agent is thereby established; the bank becoming the agent for collection. *Id.*

Where a note which has been surrendered by the bank to which it has been intrusted for collection, in exchange for a check, as, upon dishonor of the check, been recovered without its vitality or security having been in any way impaired, the bank is not liable to the owner of the note unless to the extent of any actual loss that may have been occasioned by its act. *Id.*

Where an owner of a checking account in a bank draws a check in his wife's name by her consent, she also having a checking account, and delivers such check to another as payment of a debt, and the payee deposits check for collection in a bank which forwards it to a correspondent, but the correspondent fails to present it to drawee bank for payment, and returns it with a notation, "No act," whereupon the original payee institutes a criminal prosecution, the collecting bank and its correspondent are not liable in an action by the payee for false imprisonment unless they could have foreseen or reasonably anticipated the institution of such criminal proceedings. *Cherry v. Preston* (Civ. App.) 221 S. W. 1100.

Absolute owner of a draft was the owner of the money after the draft was collected by a bank. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

Whether title to proceeds of draft collected by bank for depositor is in the bank or the depositor depends on the intention of the parties, but, in the absence of any evidence of intention, the bank takes title immediately upon crediting the depositor with the amount of the proceeds; the bank being authorized by custom to credit depositor therewith. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

A bank which accepts paper for collection acquires no title to the paper, but in such case acts as a collecting agent for the depositor, who retains title. *Id.*

Where a bank credited a depositor of drafts for collection with the amount of the drafts subject to collection, the proceeds thereof, after collection by a correspondent bank while in the hands of another correspondent bank in the process of transmission to the bank with which the drafts had been deposited, belonged to such bank, and not to the depositor; the collection having discharged the condition upon which the credit had been given. *Id.*

Failure of creditor bank to notify its debtor that a note had not been paid until after the death of one to whom the debtor had intrusted funds for its payment and who had misappropriated them, held not actionable negligence available as a defense in an action on the note. *Shaw v. First State Bank* (Com. App.) 231 S. W. 325.

Representation by officers and agents.—The cashier of a bank has apparent power to bind the bank in the usual financial business of the bank. *Reuter v. Nixon State Bank* (Civ. App.) 206 S. W. 715.

It is not within the apparent scope of cashier's authority to speak for the board of directors. *Id.*

The building of a two-story brick building, or the making of a special contract for professional services of an architect, are not the ordinary financial business of a bank within the rule that cashier has apparent authority to bind the bank in such business. *Id.*

A bank must necessarily act through its officers and agents, and, if defendants signed a note by reason of misrepresentations on the part of such officers and agents, their acts must be imputed to and were the acts of the bank, and defendants were, as against the

bank, entitled to the defense of fraudulent representations. *Brady v. Cobbs* (Civ. App.) 211 S. W. 802.

Where one is vice president and general manager of a bank, his knowledge of terms of agreement entered into on behalf of bank by him with makers of note discounted by bank would ordinarily be chargeable to bank. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

If a bank's cashier exceeded his authority from the bank in writing in a false amount in a blank note given by the bank's customer to cover overdrafts, the customer could defeat the bank's suit on the note for such improper amount, the bank being chargeable through its cashier in preference to the customer, who was not benefited by the dual agency of the cashier for himself and the bank. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

The cashier of a bank having large authority is an agent of the bank within the scope of his authority, but when he exceeds it will not be bound. *Id.*

Where a bank's customer made out blank notes to cover overdrafts, in filling in such notes for the amount of the overdrafts the bank's cashier was agent for the customer, and not for the bank. *Id.*

In depositor's action against bank for deposits misappropriated by bank's cashier, who, having paid draft on bank, charged amount thereof against depositor's account without depositor's authority, bank could have avoided liability to depositor for such amount by proving that the depositor actually received the benefit of the payment. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

It was not within the scope of the agency of the cashier of a bank to make loans in the name of the bank for depositors, and the bank was not bound by his acts in making such loans. *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

If a bank had known that its cashier had authority to draw out money deposited in a loan account of plaintiff, the fact would not have charged the bank with notice the cashier was loaning or pretending to loan such money for plaintiff, nor make the bank liable for the cashier's conversion of it. *Id.*

Though a bank knew plaintiff had deposited his money, and that its cashier had authority to draw it whenever he desired, the bank was not charged with knowledge its cashier had authority from plaintiff to lend the money for him, nor that the cashier had appropriated plaintiff's money to his own use, and had forged notes to hide his crime; any action by cashier being adverse to bank, preventing imputation of his knowledge to it. *Id.*

Notice to a cashier of a bank is notice to the bank. *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106.

Notice to a bank officer or one having for the bank general supervision of the business embracing a certain transaction was notice to the bank. *Id.*

The exercise by the president of a bank of the general power to issue its drafts, which power may be expressly given by board of directors or conferred by established custom, and which, if no restriction is placed on it, includes authority to issue drafts in payment of his own debts, is assumed to be lawful in the absence of opposing facts. *Ft. Worth Nat. Bank v. Harwood* (Com. App.) 229 S. W. 487.

— **Individual interest.**—Bank which has discounted note executed to it by its vice president and a third party for the accommodation of bank's debtor, to whom it had loaned full amount allowed by law, cannot recover upon note after having violated its agreement made through vice president to apply to payment of note deposits made for such purpose by debtor; vice president's knowledge of agreement being imputable to bank notwithstanding his personal interest. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

Where bank, having loaned debtor full amount it was permitted by law to loan to one person, discounted note by vice president of bank and third party, executed for accommodation of such debtor under bank's agreement, through such vice president, to apply to payment of note deposits made by debtor for such purpose, vice president's knowledge of agreement was imputable to bank, notwithstanding his personal interest in transaction; such interest not being sufficiently incompatible with that of bank to lead third party to think vice president would withhold information from bank. *Id.*

The bank of which defendant was cashier was not the undisclosed principal in a contract signed by him in his own name, where plaintiff, the obligee, refused to accept the bank's obligation, but demanded the personal obligation of the signers as the principals thereon. *Edwards v. Roberts* (Civ. App.) 222 S. W. 278.

Where there has been collusion between cashier of bank and a depositor to secure services of cashier adversely to the bank, it is not liable for misappropriation by the cashier of funds drawn out under authority of the depositor to be used to detriment of bank by cashier in making individual loans for depositor. *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

Where money is deposited in bank, and the cashier is authorized and paid as an individual by the depositor to act for the depositor in making loans, which acts, if performed by the bank, would be ultra vires, the depositor cannot recover from the bank for the peculations and conversions of the cashier. *Id.*

Where the president of a bank acted as an individual and not as an official of the bank in purchasing defendant's cotton and promising to deposit the proceeds in the bank to his credit, the bank was not responsible to the defendant for his failure to deposit the proceeds to defendant's credit, though he deposited them to his own credit; it not appearing that any of the other officers knew anything about the nature of the transaction until long afterwards. *Hull v. Guaranty State Bank of Carthage* (Civ. App.) 231 S. W. 810.

— **Liability of officer or employé to bank.**—A bank's clerk, who negligently reported a customer's balance, so that the customer drew out more than he was entitled

to, was liable to the bank for damages to it through his negligence, regardless of any liability of the customer. *Commercial State Bank v. Van Hutton* (Civ. App.) 208 S. W. 363.

Accommodation paper.—A bank, as an accommodated party, cannot maintain an action against accommodation makers of note. *Brady v. Cobbs* (Civ. App.) 211 S. W. 802.

Other duties and liabilities.—In suit to recover damages for wrongful failure of defendant bank to make timely remittance in payment of premium on life policy, evidence held insufficient to show that defendant was negligent in not remitting on the day in question. *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 382.

In suit to recover damages for wrongful failure of defendant bank to make timely remittance in payment of premium on life policy, evidence held to show contributory negligence on the part of plaintiffs. *Id.*

In an action against a bank in the nature of conversion of two vendor's lien notes, deposited by plaintiff as collateral for his note, but claimed by defendant also to secure another note on which plaintiff was indorser, evidence held to sustain a finding that the indorsed note had been paid out of the assets of the maker under an agreed transfer and assignment thereof to the bank. *First State Bank of Ben Franklin v. Hamer* (Civ. App.) 210 S. W. 222.

Where after divorce a husband sold land in which his former wife had a half interest as community property, and thereafter the wife sued a bank on its cashier's check indorsed to the husband, and representing half the price of the land, the bank was under no obligation to the foreign executor of the husband's estate, or to the estate itself, to set up limitations against the wife's claim, the executor and estate having been represented by an attorney selected by him, having been fully informed of all facts, and having had opportunity to qualify as executor in Texas and defend the suit. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

There is no rule of law that requires a bank or any one else to withhold funds owing to another person upon the ground that they have knowledge of the fact that some one else has an unsatisfied judgment against such other person. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

The creditor may not apply a payment to a debt arising after payment, without an agreement or direction to such effect. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

When a bank gives unqualified credit for a draft attached to bill of lading, it becomes the owner thereof, and any funds collected thereon, and is not liable for any failure of the shipment to fulfill the terms of the contract between the seller and the purchaser, under U. S. Comp. St. § 8604. *Farmers' State Bank of Kenefick v. A. F. Hardie & Co.* (Civ. App.) 230 S. W. 524.

Where a bank as plaintiff's agent had the defendant bank transmit money to a Chicago bank and wire that bank to pay it to a named person on his delivery of a bill of lading covering 10 automobiles, and the defendant bank had knowledge through a letter from another Chicago bank that the telegram had been misdelivered, and after knowledge thereof did not take steps to inform the original Chicago bank of the bill of lading requirement, and the money sent was paid without securing the bill of lading, and no goods were ever received by the plaintiff in return for the money, the negligence of the defendant bank was the proximate cause of the loss, and it was liable. *Deport Hardware Co. v. First Nat. Bank* (Civ. App.) 232 S. W. 902.

Defendant bank, failing to inform a paying bank of the condition on which the money transmitted was to be paid, could not be relieved from its own negligence by the agreement of another bank as agent of plaintiff to relieve it from any loss in transmitting the money. *Id.*

TITLE 15

BEES

Art.

578s. Establishment of experimental apiaries.

578t. Location.

578u. Assistance, supplies, etc.

Art.

578v. Appropriation.

578w. Same.

578x. Experimental apiaries sales fund.

Article 578s. Establishment of experimental apiaries.—The Director of the Texas Agricultural Experiment Stations of the Agricultural and Mechanical College of Texas shall have power to establish and maintain experimental apiaries for the purpose of experimenting with the culture of honey, and studying honey yield conditions, and other beekeeping problems confronting the beekeepers and the beekeeping industry of this State; such experimental apiaries to be under the care, control, management and direction of the director of the experimental stations, and to be maintained and operated at such places in Texas as said director may direct. [Acts 1919, 36th Leg., ch. 62, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 578t. Location.—In the location of such experiment apiaries, said director may take into consideration any donation of money or other property to be used in the operation and management of such apiaries and may accept any lease of lands upon which to locate such apiaries. [Id., § 2.]

Art. 578u. Assistance, supplies, etc.—The director shall have authority, in the conduct and management of the same, to employ such assistance as may be needed, and to purchase, from time to time, such supplies, equipment and bees as may be necessary in the successful management thereof. [Id., § 3.]

Art. 578v. Appropriation.—There shall be appropriated out of any funds in the State Treasury not otherwise appropriated the sum of six thousand dollars per annum, to be expended in the location and establishment, maintenance and operation of such experimental apiaries. [Id., § 4.]

Art. 578w. Same.—The appropriations herein provided are to be construed as the maximum amounts to be appropriated to and for the purpose of the establishment and maintenance of such experimental apiaries, and no expenditure shall be made, nor obligations incurred, which, added to the expenditures, shall exceed the amounts herein appropriated for the said purpose, except under the provisions of Article 4342, Chapter 2, Title 65, of the Revised Civil Statutes of 1911. [Id., § 5.]

Art. 578x. Experimental apiaries sales fund.—The receipts from the sales of any products or old equipment, shall be deposited in the experiment station treasury, in a fund to be known as the "Experimental Apiaries Sales Fund," to be expended by the director of the Texas Agricultural experiment stations for the purpose of said experimental apiaries, in the same manner and upon the same requisition and voucher system as are expended the appropriations hereinbefore provided. [Id., § 6.]

TITLE 16

BILLS, NOTES AND OTHER WRITTEN INSTRUMENTS

Art.	Art.
579. Liability of drawer, etc., how fixed by suit in district or county court.	587. Assignor, indorser, etc., may be sued, alone, when.
582. Assignee of negotiable instrument may sue in his own name.	588. Assignments, execution of, put in issue, how.
583. Non-negotiable instruments may be assigned.	589. Consideration, want or failure of, a defense, when.
584. Assignee of non-negotiable instrument may sue in his own name.	590. Liability of drawer and indorser of bills and notes, may be fixed by protest.
585. Waiver of diligence not to be shown by parol evidence.	593. [Superseded.]

Article 579. [304] [262] Liability of drawer, etc., how fixed by suit in district or county court.

See *Cruger v. Lindheim* (App.) 16 S. W. 420; *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222.

Necessity to fix liability.—Indorsers on a note secured by vendor's lien are discharged, if the maker is not sued, as required by this article, before expiration of second term of court, and it is not shown that the land is of no value as security for the debt, under art. 1843, providing suit against insolvent maker is unnecessary. *Prince v. Colvin* (Civ. App.) 198 S. W. 637.

Under this article, the remedy of the holder of a promissory note to secure and fix the liability of an indorser by suit against maker is a cumulative remedy, and is not exclusive of the right to fix such liability by protest and notice under the law merchant. *McCamant v. McCamant* (Civ. App.) 203 S. W. 118.

Under this article, failure to sue the maker at the first term discharges the indorser in the absence of proof of the maker's insolvency or other facts excusing the failure to sue.—*Cochran v. Sellers* (Civ. App.) 221 S. W. 351.

Insolvency or nonresidence of maker.—Insolvency of the maker excuses compliance with this article. *McCamant v. McCamant* (Civ. App.) 203 S. W. 118.

Evidence of bankruptcy proceedings against the maker of a note, testimony by the tax assessor and the county clerk that he had no property of record and unsatisfied judgments against him held sufficient to sustain finding that he was insolvent, so that failure to sue him at the first term after the note's maturity did not discharge the indorser. *Cochran v. Sellers* (Civ. App.) 221 S. W. 351.

Bill of exchange.—A check payable at a future date is a "bill of exchange." *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

Time of bringing suit.—In action on notes, wherein limitations was pleaded, the court's definition of "reasonable diligence" in relation to institution and prosecution of suit was not improper, on ground the term, when applied to such institution and prosecution, means and requires a higher degree of care than that which would be exercised by an ordinarily prudent person, under the same or similar circumstances; issuance of citation by a certain date requiring no professional skill on the part of the attorney. *Puig v. Rodriguez* (Civ. App.) 219 S. W. 291.

— **Excuse for delay.**—When suit is instituted by an attorney, plaintiff cannot show reasonable diligence to have citation issued, and so to institute suit by simply showing that she employed an attorney to bring the suit and depended upon him to prosecute. *Puig v. Rodriguez* (Civ. App.) 219 S. W. 291.

Waiver of requirement.—Under this article indorser may waive holder's duty to sue. *McCamant v. McCamant* (Civ. App.) 203 S. W. 118.

Where note contained clause that maker, sureties, indorsers, and guarantors severally waived protest and diligence in bringing suit, failure of plaintiff indorsee to protest the note at maturity, or bring suit at first or second term of court after maturity, was no defense to defendant payee, who transferred the note to plaintiff by indorsement, "Protest and diligence waived." *Archenhold Co. v. Smith* (Civ. App.) 218 S. W. 808.

Art. 582. [307] [265] Assignee may sue in his own name.

5. Right of action by assignee.—Under this article, in an action on an assigned note it was not necessary that the pleader state in detail the circumstances of the transfer of the note, though it was not indorsed. (Per *Boyce, J.*) *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

In an action on a note and lien the fact that plaintiff is not the real owner and holder of the note is not a matter of defense, either in bar or in abatement, and where the note itself shows the rights of plaintiff to sue at law, an inquiry as to whether there was an equitable owner aside from and behind the legal ownership is not essential to the right of defendants, unless there is a matter of defense between defendants and equitable own-

er, and even if it does appear, such defense will not exclude the note and indorsements thereon as evidence. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

In an action on a note and to foreclose a deed of trust to land, a claim that plaintiff sued as payee and owner of the note and recovered as indorsee was without merit, since it was immaterial under what right he was the owner and holder of the note. *Id.*

9. Negotiability.—A check on one bank payable to depositor, and not to order or bearer, and indorsed by the depositor for deposit only to its credit, and deposited in another bank, is not a negotiable instrument. *Sweetwater Ice & Cold Storage Co. v. Continental State Bank of Sweetwater* (Civ. App.) 212 S. W. 740.

Under this article and article 584, a check on one bank payable to drawer, and not to order or bearer, and containing a restrictive indorsement for deposit only, and deposited in another bank, was nonnegotiable and subject to the defense of failure of consideration in the hands of third person to whom the deposit bank transferred it in payment of a draft. *Id.*

13. — Provision for attorney's fee.—Provision for payment of attorney's fees does not render note nonnegotiable. *Lamb v. Hardy*, 109 Tex. 414, 211 S. W. 445.

15. — Special provisions.—Notes given as part payment of bonus to railroad and made conditional upon completion of certain grade before certain time were nonnegotiable, and contractors to whom railroad had transferred notes had no greater rights against makers than railroad itself would have enjoyed. *Wellington Railroad Committee v. Crawford* (Com. App.) 216 S. W. 151.

17. Bona fide purchasers in general.—One who, without knowledge or information of any defense against original holder, purchases note for value before maturity, is protected as an innocent holder. *Commercial Guaranty State Bank v. Crews* (Civ. App.) 196 S. W. 901.

Where a corporation purchased notes from original payee under a contract whereby it only contracted to collect such paper as it could, it was not an innocent purchaser for value before maturity. *National Trust & Credit Co. v. Oliver* (Civ. App.) 203 S. W. 608.

If indorsee of notes on dishonor held on deposit funds of payee company, which had indorsed notes, more than sufficient to pay them, indorsee was under duty to apply funds on obligation created by indorsement of notes, as well as by payee's written guaranty of payment, for which purpose percentage of face value of paper was retained by indorsee, effect of contracts being that payee, indorser, and guarantor agreed that, if makers did not pay on presentment, then it would. *Commercial Security Co. v. Collins* (Civ. App.) 208 S. W. 728.

Where consideration for notes failed, and indorsee of payee company had notice thereof while in possession of funds of payee company reserved to secure notes, it was under duty to satisfy its claim against makers from funds of payee company, and makers are not liable to it. *Id.*

Where, after a bank conveyed a large parcel of land for urban property and received vendor's lien notes for the difference, its assets were taken over by a second bank, and thereafter title to part of the land failed, held, that the second bank could not under the agreement, etc., be deemed a bona fide purchaser of the notes, but must be deemed to have held them for the benefit of the creditors, etc., of the first bank. *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 220 S. W. 354.

19. — Taking as collateral security in general.—When bill or note of third party payable to order is indorsed as collateral security for debt contracted at time of indorsement or before, indorsee is bona fide holder for value in usual course of business, entitled to protection against equities, offsets, and other defenses available between antecedent parties, if the bill or note when transferred as collateral is not overdue. *Ackers v. Frazier* (Civ. App.) 220 S. W. 426.

20. — Taking as security for or in payment of pre-existing debt.—Where plaintiff absolutely transferred negotiable notes by written indorsement to contractor for building a house, and the contractor transferred them to a lumberman before maturity, who purchased in good faith and converted them after taking initial steps to fix lien on the property, from which he desisted after taking the notes, he was an innocent purchaser. *Wilkinson v. Bradford* (Civ. App.) 200 S. W. 1094.

21. — Taking after maturity.—The purchaser of a note from payee after maturity took it subject to all defenses that maker had against payee. *Commonwealth Trust Co. v. Hardee* (Civ. App.) 200 S. W. 201.

One who came into possession of note given as part consideration for goods, and held in trust for benefit of creditors of sellers, after note was due and had notice of the facts, cannot complain that in suit by creditors to realize on the note he was not awarded the residue. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Where sight draft was overdue when purchased by plaintiff, it was subject to the defense of fraud which the drawer had against the payee named in view of this article. *State Nat. Bank v. East Coast Oil Co.* (Civ. App.) 208 S. W. 190.

Sight draft purchased by plaintiff more than six months after its execution and delivery was "past due," although it had not been presented to the drawee for payment. *Id.*

The purchaser of a past-due note is charged with notice of any defense which the maker has, but is not charged with notice of the secret equities of third persons. *Etheridge v. Campbell* (Civ. App.) 215 S. W. 441.

Where plaintiff, after the first of a series of notes had matured, obtained the same, he took them subject to defenses available as against the original holder. *Masterson v. Turnley* (Civ. App.) 220 S. W. 428.

If pledgee of pledgor's notes payable to bearer, and deed of trust to secure notes, was bound by foreclosure of a senior mortgage, subsequent holder who took notes after ma-

turity with notice of nature of transaction between pledgor and pledgee and of senior mortgagee's claim to land as foreclosure sale purchaser was also bound thereby, since such holder could not assert a right which pledgee could not assert. *Masterson v. Ginners' Mut. Underwriters' Ass'n of Texas* (Civ. App.) 222 S. W. 263.

23. Payment of less than face value.—In action on notes originally attached to a contract order and detached by the payee, as permitted by the order, and sold to plaintiff, an innocent holder, for 76 per cent. of the face of the notes until the remainder should be paid by the maker, the holder's recovery should be limited to 76 per cent. of the face of the notes. *Commercial Credit Co. v. Giles* (Civ. App.) 207 S. W. 596.

24. Notice—Actual.—Buyers of notes from payees, knowing of their misrepresentations inducing the making of the contract under which they were given, are not innocent purchasers, though not knowing of the fraudulent intent, or the particular means by which each fraud was perpetrated. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

25. — Constructive notice and facts putting on inquiry.—Recital in note that it was one of series given for stock in company, did not give purchaser notice of any defenses that could be urged against original payees. *Commercial Guaranty State Bank v. Crews* (Civ. App.) 196 S. W. 901.

Where plaintiff bank had actual notice before it acquired notes that sale of stock for which they were given had not brought to corporation any assets as basis for such stock, held it was put upon inquiry as to whether there had been total failure of consideration. *Commonwealth Bank & Trust Co. of San Antonio v. Limburger* (Civ. App.) 199 S. W. 316.

Where eight vendor's lien notes were sold to trust company, indorsed in blank, and, notes being overdue, trust company sent four of them to bank for collection, purchaser of notes was affected with notice that person who sold them to trust company had parted with title, and her purchase did not affect priority of trust company's lien as to remaining four notes. *Bolding v. Bolding* (Civ. App.) 200 S. W. 537.

That the edge of a note assigned showed perforations indicating detachment from some other paper was not notice of alteration or other defects or defenses. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 833.

That note stated that it was part of purchase money for a dredge, title to which was to remain in payee, would not be notice to purchaser that consideration had, or would fail, where dredge was not delivered until four months later. *Harty v. Keokuk Sav. Bank* (Civ. App.) 201 S. W. 419.

Where one acquires negotiable paper from the maker thereof, even before maturity, which bears the indorsement in blank of the payee, the note is not acquired in due course of trade, and such purchaser takes it, not as a bona fide holder, but subject to all outstanding equities. *Southern Commercial & Savings Bank v. Combs* (Civ. App.) 203 S. W. 1169.

Where holder of homestead not fully paid for had title taken in person contracting to erect house thereon, who subsequently conveyed to the owner subject to a vendor's lien, original owner's possession of premises was not sufficient to give bank purchasing vendor's lien note constructive notice of his homestead rights. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

That plaintiff indorsee of note given for stock knew that stock was not to be delivered until notes given therefor had been paid would not prevent his recovery after having in good faith and before maturity paid full value for note. *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

Where purchasers of notes are partners therein, knowledge of one is knowledge of all, as regards their being innocent purchasers. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

Where the agent of a purchaser of notes, as attorney for the payee, knew of the failure of consideration, such knowledge is imputable to the purchaser, and he cannot recover as a bona fide purchaser without notice. *Holmes v. Long* (Civ. App.) 207 S. W. 201.

Where mortgagor's application for loan appointed payees named in mortgage note as her "agents to procure or make a loan for me," third party with notice of such appointment was bound to take notice of the extent of the special authority so granted, and was not warranted in inferring that payees had loaned mortgagor the amount represented by the note, and had the right to transfer note as collateral for a loan from third party to payees; the words "procure" and "make" being synonymous. *Fidelity Trust Co. v. Fowler* (Civ. App.) 217 S. W. 953.

Where the expression of the holder or transferrer's fiduciary character appears from the papers accompanying the note, the purchaser takes it with notice of the transferrer's limited authority to negotiate it. *Id.*

Merely because a bank's draft is issued by its president in payment of his individual debt, the creditor is not as matter of law charged with duty of inquiry as to whether it had been paid for, though the president's power to issue drafts, whether in payment of his own debts or to another, is conditioned on the bank's being paid therefor; the presumption of honesty being indulged. *Ft. Worth Nat. Bank v. Harwood* (Com. App.) 229 S. W. 487.

26. — Notice to corporate officer, agent, or stockholder.—Bank purchasing notes after its officers as officers in another bank had knowledge of failure of consideration, held not an innocent purchaser. *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 195 S. W. 949.

In action on notes given for corporate stock, held, under evidence, that cashier of purchaser bank had such knowledge with reference to consideration as to prevent bank being bona fide holder. *Commonwealth Bank & Trust Co. of San Antonio v. Limburger* (Civ. App.) 199 S. W. 816.

Where an accommodation note was made payable to the agent and attorney in fact of

the bank to which it was delivered and which accepted it, held, that the bank was not an innocent purchaser for value. *Brady v. Cobbs* (Civ. App.) 211 S. W. 802.

27. Evidence.—In action upon notes, evidence held to show that plaintiff was a bona fide holder for value without notice. *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 195 S. W. 231.

In an action to cancel a deed given by plaintiffs on their homestead and to restrain a sale under the vendor's lien, evidence held to require a finding that the holder of the vendor's lien note was not an innocent holder for value. *Sessions v. Sanders* (Civ. App.) 200 S. W. 180.

Evidence held insufficient to show that plaintiff purchaser of note knew or was charged with notice that dredge, for which note was given, had been warranted and might fail to meet warranties. *Harty v. Keokuk Sav. Bank* (Civ. App.) 201 S. W. 419.

In suit by commissioner of insurance and banking on two notes pledged as collateral to a bank in process of liquidation, held, under evidence, that notes were unenforceable, bank not being an innocent purchaser without notice that notes were executed in consideration of shares of stock, contrary to Const. art. 12, § 6. *Patterson v. Onion* (Civ. App.) 202 S. W. 327.

Evidence held to show that defendant bank did not acquire notes in suit in good faith and in due course of business. *Southern Commercial & Savings Bank v. Combs* (Civ. App.) 203 S. W. 1169.

Where plaintiff suing on notes alleged that it acquired them by written transfer, and evidence showed that there was no indorsement or writing, there was nevertheless no variance, in view of art. 1994, as to variances, and this article; production of the note being presumptive evidence of ownership, especially where the original payee was a party. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

Evidence held to sustain finding that transferee of note with notice that transferors were makers' agents with authority "to procure or make a loan" did not act in good faith in taking note. *Fidelity Trust Co. v. Fowler* (Civ. App.) 217 S. W. 953.

In an action of trespass to try title, a finding that purchaser of vendor's lien note, given in a simulated sale of a homestead, had notice of facts sufficient to put a person of ordinary prudence upon inquiry, which if pursued would have led to the discovery of the fact that the purported sale was a simulated transaction, held not warranted by the evidence. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

28. Defenses as against bona fide purchaser.—Where innocent purchaser of vendor's lien note was also a purchaser of property at its sale under trust deed, although sale was void because purchaser had notice that prior deeds were intended as mortgages, he could still foreclose lien of his vendor's lien note to enforce payment of note. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

Where a note for goods was assigned for valuable consideration, before maturity of the first installment, to a bank, without notice of infirmity, plaintiff is entitled to judgment thereon in view of this article and art. 589. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

The maker of negotiable notes attached to a contract order permitting their detachment by the payee would be liable to an innocent holder even though the order contract and notes were revoked in the hands of the payee and it could not maintain an action thereon against the maker. *Commercial Credit Co. v. Giles* (Civ. App.) 207 S. W. 596.

A bill of exchange drawn by a married woman is void and unenforceable in the hands of a transferee, whether before or after maturity, irrespective of whether the transferee paid value without notice. *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

30. — Want or failure of consideration.—If purchaser, who had knowledge that note had been given for machinery, title to which was to remain in payee, also knew or was charged with notice that machinery had been warranted and might wholly fail to meet warranties, he could not become innocent purchaser. *Harty v. Keokuk Sav. Bank* (Civ. App.) 201 S. W. 419.

That consideration for note was sale of stock in corporation which subsequently became insolvent would not be a defense, especially where the note was in the hands of an innocent purchaser for value. *Braley v. Samuels* (Civ. App.) 213 S. W. 684.

31. — Want of delivery.—Negotiable instrument stolen from maker before it has become effective as actual obligation by delivery cannot be enforced by any subsequent innocent holder. *Cherbonnier v. Citizens' Nat. Bank of Lubbock* (Civ. App.) 199 S. W. 307.

Note stolen from the maker before delivery without any negligence on his part cannot be enforced by a subsequent innocent holder. *Commercial Security Co. v. Hull* (Civ. App.) 212 S. W. 986.

33. — Forgery and alteration.—Where order for perfume was given, and buyer signed the note attached to order, and the seller detached note before goods were shipped, contrary to his agreement, and sold note for value without notice of premature detachment, purchaser of note was not prevented from being innocent purchaser even if the order was changed after execution. *Foster v. Iowa City State Bank* (Civ. App.) 201 S. W. 733.

Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration, invalidating the note in hands of an innocent purchaser. *Commercial Security Co. v. Hull* (Civ. App.) 212 S. W. 986.

Where plaintiff purchased a note before maturity for a valuable consideration, without notice of any defect or alteration therein, he was, under this and following articles, entitled

to enforce the instrument against those liable, notwithstanding before negotiation the note was altered by consent of one of the payees and without the consent of the defendant. *Hammer v. Garrett* (Civ. App.) 218 S. W. 812.

34. — **Illegality.**—A note given for issuance of corporation stock in violation of statute is not void and unenforceable by a purchaser in due course before maturity for a valuable consideration and without notice of the infirmity. *Zielinski v. Hernig* (Civ. App.) 195 S. W. 952.

To hold a note founded upon an illegal consideration unenforceable in the hands of a bona fide holder, there must be a constitutional or statutory provision which expressly or by unavoidable inference declares it or the transaction out of which it is a part to be void. *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

Where notes were given a corporation in payment of stock, and the corporation issued the stock, they are void under Const. art. 12, § 6, and are unenforceable even in the hands of an innocent holder. *Masterson v. Turnley* (Civ. App.) 220 S. W. 428.

35. — **Insanity.**—Payee, accepting note to secure husband's debt and deed of trust on wife's land to secure note without knowledge that wife at time of execution of deed of trust was insane, was not protected as an innocent purchaser. *White v. Holland* (Civ. App.) 229 S. W. 611.

Art. 583. [308] [266] Non-negotiable instruments may be assigned.

3. **Expectancies.**—Heirs and legatees may sell and convey their interest in the estate. *Miers & Rose v. Trevino* (Civ. App.) 213 S. W. 715.

4. **Future earnings or profits—Under contracts.**—Assignment of wages to be subsequently earned was void as to any wages thereafter earned by assignor in any other employment than that in which he was engaged at the time the assignment was executed, where subsequent employment by any particular employer was not contemplated by parties in making assignment; such wages having no actual or potential existence at time assignment was entered into. *McKneely v. Armstrong*, 109 Tex. 363, 210 S. W. 192.

When wages to be earned under an existing or known and identified employment are assigned, there may be a reasonable expectation by the parties that the wages will be earned, and, such possibility or expectancy being coupled with an interest, the thing assigned has a potential existence, and the assignment is valid. *McKneely v. Armstrong* (Civ. App.) 212 S. W. 175.

An assignment of "any sum of money due, or which may become due, me as salary or wages for any subsequent month, or months, within the period of four years from the date of this instrument, from any person, firm, or corporation whomsoever for whom I may work," was not valid as to wages earned in an employment other than that in which the servant was when he executed the assignment, and not then anticipated. *Id.*

10. **Rights of action.**—The right of re-entry after condition subsequent broken is not assignable under the English common law. *Perry v. Smith* (Com. App.) 231 S. W. 340.

11. — **On contracts.**—A broker, even pending a suit to recover commissions, may assign his claim to another, either in whole or in part. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

19. **Equitable assignments.**—An equitable or constructive assignment of a fund does not depend upon any particular form of words, but may be created by any language or act making an appropriation of the fund. *C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson* (Civ. App.) 196 S. W. 262.

The assignment, by client to attorney, of note as collateral for a specified indebtedness, did not constitute an equitable assignment of client's interest in the note to the extent of an indebtedness to attorney for professional services not included in specified debt, where parties did not agree that pledged note was to cover such debt. *Thomson v. Findlater Hardware Co.*, 109 Tex. 235, 205 S. W. 831, 2 A. L. R. 1486.

An agreement between a bank and its attorney that attorney's fees should be incorporated in a foreclosure judgment to the extent of 10 per cent. of the principal and interest, held to constitute an equitable assignment to the attorney of so much of the judgment as represented attorney's fees. *People's Sav. Bank v. Marrs* (Civ. App.) 206 S. W. 847.

A transaction by which a bank loaned money to contractors for payment of wages due laborers, which money was so used, held not to constitute an equitable assignment of labor debts, nor subrogate the bank to the laborers' claims against contractor's surety. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

An agreement by which laborers were paid partly in cash and partly in board, but not showing that the laborers agreed that any part of their wages should be paid for groceries, or that they knew such were brought from claimant, does not constitute an equitable assignment of laborers' wages to claimant. *Id.*

20. — **Check or order.**—Acts of contractor to build schoolhouse in drawing checks on funds he had in bank held not to constitute equitable assignment of fund in favor of payees. *Wise v. Johnson* (Civ. App.) 198 S. W. 977.

22. — **Agreement to appropriate or pay.**—An agreement whereby merchants were to furnish to laborers goods for which their employers were to pay from wages due amounted to an equitable assignment of the claims for wages. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

23. **Consideration.**—Assignments by bridge building contractor to surety on his bond of balance retained by county under bridge contract to secure surety against liability on

its bond "in consideration of the execution of said bond" held supported by a valuable consideration. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

25. Consent or acceptance by debtor.—A debtor's consent to an assignment of sums due under a construction contract is unnecessary. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

27. Existence and validity of assignment.—Father's letter to his attorney showing his knowledge of transfer of note by his son, and directing attorney to procure additional security for note for benefit of another, sufficiently showed his ratification of son's transfer of note. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

28. — Right to contest.—If plaintiff, after discovering that the vendor's notes transferred to plaintiff by defendant for plaintiff's property were not good notes and well secured as represented by defendant, tried to sell the notes to third persons, and, as defendant's agent, tried to sell to third persons the land he had conveyed to defendant, he waived the fraud practiced upon him by defendant and ratified the contract. *Kiehn v. Willmann* (Civ. App.) 218 S. W. 15.

29. Priorities between assignments.—Assignment by bridge-building contractor of balance retained by county on his contract, to bank, to secure its advance of a sum which contractor used to pay laborers' wages, was superior in equity to prior assignment of the same fund to contractor's surety to secure it against liability on its bond, which had been previously executed, since surety parted with nothing of value as consideration for the assignment. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

In order that a prior assignment may have precedence over a subsequent assignment, notice of former assignment must have been given to the holder of the fund prior to the subsequent assignment. *Id.*

Where a construction contract authorized the board of road commissioners to retain 15 per cent. of the monthly estimates, and the surety on the contract was subrogated to and had assigned to it the rights of the board, the contractor's assignment of the remaining 85 per cent. gave its assignee rights superior to the board and surety so long as the contractor was carrying on the work and not in default. *O'Neil Engineering Co. v. First Nat. Bank* (Com. App.) 222 S. W. 1091, reversing judgment (Civ. App.) *First Nat. Bank v. O'Neil Engineering Co.*, 176 S. W. 74.

Where contract for the construction of a road authorized the board of road commissioners to retain 15 per cent. of the monthly estimates, and provided that the remainder should be paid on or before the fourth Monday of the month following that in which the work was performed and the warrant for the work done on the previous month, although approved on the 4th day of the month, had not been delivered on the 8th day of the month, when the contractor defaulted and a bank which had an assignment of warrants to become due demanded payment, held, that the board was warranted in retaining the amount because of default, so rights of the surety to which had been assigned all sums retained, etc., were superior to those of the bank. *Id.*

Where equitable assignments are shown to have attached to funds of a contractor in the owner's hands at a time when no notice of lien claimants had been brought home to him, such equitable assignments attach to the funds, and impound them for the benefit of the assignees in the order of the priority of date. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

Where funds due contractor are equitably assigned, impounding dates from the date of the assignment. *Id.*

31. Rights and liabilities of parties in general.—A mortgage, as incident to the debt, passes to the owner of notes secured by it upon their transfer. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

Since a mortgage is only security for a debt and follows it into the hands of any transferee of the note evidencing the debt, a mortgage became valid as soon as notes made payable to maker were indorsed and transferred by him. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

When there is an assignment of a particular fund, the assignee takes the title of the assignor to that which is assigned, but he obtains no greater right in or title to the fund than exists in the assignor. *O'Neil Engineering Co. v. First Nat. Bank* (Com. App.) 222 S. W. 1091, reversing judgment (Civ. App.) *First Nat. Bank v. O'Neil Engineering Co.*, 176 S. W. 74.

32. Rights of assignee as against debtor.—Where a litigant assigns to his counsel an interest in a claim or cause of action, each has the right to adjust or compromise his respective interest, and assignor's adjustment or compromise of entire claim or cause of action is not binding on assignee if the party against whom the claim or cause of action exists had actual or constructive notice of the assignment. *Irby v. Andrews* (Civ. App.) 211 S. W. 290.

A live stock commission merchant, after settlement with and payment to a customer for sale of stock on commission, is not liable to pay outstanding drafts drawn against the funds or proceeds arising from the sale in the absence of notice of any outstanding obligation, such as a draft assigning the fund. *Schweers-Kern Live Stock Commission Co. v. Kothmann* (Civ. App.) 224 S. W. 593.

33. Rights of assignee as against third persons.—Where the consideration for assignment of proceeds of insurance policy was then existing indebtedness of assignor to assignee, assignee is not entitled to protection as innocent purchaser of claim evidenced by policy. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Where party wall contract bound assignees of parties, benefits, as well as burdens, ran with each lot, and subsequent grantee of one who built it at his own cost was entitled to recover part of cost on its use by grantee of adjoining owner. *McCormick v. Stoneheart* (Civ. App.) 195 S. W. 883.

Under party wall agreement, assignee of party whose lot remained vacant, who used wall as party wall and enjoyed benefit of contract, was liable for his share of its cost. *Id.*

If car of lumber, and the proceeds thereof when it should be sold, were assigned to seller of unmanufactured logs by buyer before it was delivered to company which purchased from buyer, proceeds of car belonged to seller of logs, though buyer owed company which purchased from him amount less than price of car, and fact that lumber was afterwards delivered to company purchasing from buyer, which was notified of assignment, would not authorize court to deduct amount owing company by buyer of unmanufactured logs from proceeds received from sale of car of logs by it. *Hickory Jones Co. v. Mettauer* (Civ. App.) 208 S. W. 745.

In view of this article and art. 584, bank having taken valid assignment of cotton receipts issued by public weigher, and having thereby and by agreement with assignor or pledgor of receipts as security acquired title to cotton, under art. 7830, public weigher, on breach of official duty in delivering cotton to assignor or pledgor without requiring surrender of receipts, must respond to bank, in suit in its own name, for its loss. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

Under art. 7828, as amended by Acts 35th Leg. (1918) 4th Called Sess. c. 95, and art. 7829, public weigher, who delivered cotton to owner without taking up cotton tickets, was not liable to bank to which former owner had transferred tickets as collateral without indorsements subsequent to the sale of the cotton, since the tickets, not having been indorsed, were not negotiable instruments in hands of bank under art. 7830, and since the bank as a mere assignee, under arts. 583 and 584, acquired no rights not held by assignor at time of assignment. *Carter v. Farmers' Nat. Bank of Seymour* (Civ. App.) 224 S. W. 265.

Art. 584. [309] [267] Assignee of non-negotiable instrument may sue in his own name.

Construction and operation in general.—In view of art. 583, and this article, bank having taken valid assignment of cotton receipts issued by public weigher, and having thereby and by agreement with assignor or pledgor of receipts as security acquired title to cotton, under art. 7830, public weigher, on breach of official duty in delivering cotton to assignor or pledgor without requiring surrender of receipts, must respond to bank, in suit in its own name, for its loss. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

Equities and defenses between original parties.—Where, in a suit by the assignee of an insured policy, the defense is set up that the property covered by the policy has been conveyed subsequent to such assignment to a third party by the assignor and original holder of the policy in violation of the express terms of the policy, this defense is not invalidated by art. 583 and this article. *Swenson v. Sun Fire Office*, 68 Tex. 461, 5 S. W. 60.

Under art. 582, and this article, a check on one bank payable to drawer, and not to order or bearer, and containing a restrictive indorsement for deposit only, and deposited in another bank, was nonnegotiable and subject to the defense of failure of consideration in the hands of third person to whom the deposit bank transferred it in payment of a draft. *Sweetwater Ice & Cold Storage Co. v. Continental State Bank of Sweetwater* (Civ. App.) 212 S. W. 740.

Action in name of assignor.—A justice of the peace cannot render a judgment binding on the assignees of labor claims sued for in the name of the assignors, unless the assignees are made parties. *Pena v. Baker* (Civ. App.) 207 S. W. 426.

Diligence.—In an action by the holders of a non-negotiable bill of exchange indorsed to them for value by defendants, plaintiffs, under this article and art. 585, must show due diligence to collect the same. *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310.

Art. 585. [310] [268] Waiver of diligence is not to be shown by parol.

Parol evidence inadmissible.—In an action by the holders of a nonnegotiable bill of exchange indorsed to them for value by defendants, plaintiffs, under art. 584, and this article, must show due diligence to collect the same; and where no suit had been brought thereon until the third term of court after the cause of action against such indorser had accrued, and no excuse for such delay had been alleged in the original petition, parol testimony is not admissible to prove that defendants released plaintiffs from their obligation to use such diligence. *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310.

Art. 587. [312] [270] Assignor, indorser, etc., may be sued alone when.

Suit against maker and guarantor not separable.—In view of this article, and art. 1842, as to prerequisites of judgment against indorsers, an action by the payee against the maker, and a guarantor by separate instrument, for delinquent interest and attorney's fees, prior to maturity of the note, is not separable so as to entitle nonresident guarantor to removal of the cause. *Parlin & Orendorff Implement Co. v. Frey* (Civ. App.) 200 S. W. 1143.

Art. 588. [313] [271] Assignment, how put in issue.

Application of statute.—In suit against plaintiff's bank to recover money paid on forged indorsement of check drawn by plaintiff, where plaintiff did not file affidavit charg-

ing indorsement was forgery, genuineness of indorsement was not required to be assumed; this article having no application. *Commonwealth Nat. Bank v. Hawes* (Civ. App.) 196 S. W. 859.

This article, and art. 1906, subd. 9, requiring a denial under oath of genuineness of indorsement or assignment of note, were not intended to dispense with proof of an administrator's authority to sell or assign, as such authority, under art. 3480, depends upon an order of court, so that absence of any verified denial of administrator's assignment thereof to plaintiff did not dispense with proof of its validity. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Necessity of denial under oath.—Under this article, a sworn pleading is necessary to question the genuineness or sufficiency of an indorsement on a note as a transfer thereof. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

General denial insufficient.—Under this article a general denial only will not authorize evidence attacking the validity of the assignment, and, even if such evidence is admitted, it must be disregarded. *Grounds v. Sloan*, 73 Tex. 662, 11 S. W. 898.

Sufficiency of proof.—Under this article, assignment of note by payee company by indorsement of secretary to plaintiff was sufficient to show title in plaintiff to note, sued on by him, no verified plea of non est factum being filed by defendant. *Denman v. Kaplan* (Civ. App.) 205 S. W. 739.

Art. 589. [314] [272] Consideration, failure of, when it constitutes a defense.

Cited, *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

2. Necessity of consideration.—Where defendant induced settlement between father and mother, divorce suit pending between them they contesting title of property, whereby father conveyed community land to defendant under parol trust to reconvey, beneficial title to land being in mother, no consideration was necessary to sustain deed from defendant to her. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245.

The breach of the principal's oral promise without consideration to the broker to complete a contract whereby broker lost commissions from other contracting party did not entitle the broker to damages. *Hume v. Bogle* (Civ. App.) 204 S. W. 673.

In suit to recover damages for wrongful failure of defendant bank to make timely remittance in payment of premium on life policy, where evidence failed to show that agreement to remit on the day in question was based on a valuable consideration, there could be no recovery based upon contract liability. *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 382.

When a claim is based upon a liquidated demand, payment and acceptance of less than the entire sum due, in the absence of some new consideration, does not bar recovery of the balance due, and a receipt or release in full of the balance due is without consideration. *First Texas Prudential Ins. Co. v. Connor* (Civ. App.) 209 S. W. 417.

A mere promise by a carrier to pay for goods lost, for which it was not liable, not in the nature of a compromise, is not binding upon carrier, because without consideration. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 209 S. W. 775.

Oil lease held to have conferred upon the lessee, not an estate in land, but only a license or option to enter upon and develop it for oil and other minerals, to support which option a consideration was necessary. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

A deed from parent to child, or from child to parent need not be supported by a valuable consideration. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

3. Adequacy.—Generally where consideration is sufficient to be denominated valuable, courts do not concern themselves with relative value of properties exchanged. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

Ordinarily, so long as it is something of real value in the eyes of the law, whether or not the consideration is adequate to the promise is immaterial in the absence of fraud, the slightest consideration being sufficient to support the most onerous obligation, since it is competent for the parties to make whatever contract they please in the absence of fraud, deception, or illegality. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

In the absence of fraud or deceit upon the lessors, a recited consideration of one dollar for an oil lease, if actually paid, was sufficient, not only to support the option to develop, but also to support such subsidiary options as the privilege of paying rents instead of drilling, etc. *Id.*

It is not necessary that the consideration for a contract be adequate in point of actual value; the slightest consideration, in the absence of fraud, being sufficient to make the most important agreement binding. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Inadequacy of compensation is not alone sufficient to render a contract invalid. *Id.*

An option given lessee in an oil lease to surrender the lease, after the well has been finished and is producing oil in paying quantities, on the payment of \$100 to the lessor, was sufficiently supported by a consideration, where the lease recited that the sum of \$14.25, paid to lessor, was "in full satisfaction of any and every privilege granted." *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

A valuable consideration will support an option to buy or lease oil lands. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171.

Parties competent and able to agree, and who have agreed upon \$1 as a consideration for an option lease on oil lands, should be held to their agreement, in absence of fraud or some other fact rendering the contract inequitable. *Id.*

Lessee's payment to lessor of \$1 held a sufficient consideration to support oil lease. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

It cannot be said that \$1 was an inadequate consideration for an oil lease, in the ab-

sence of a showing as to the value of the lease. *McKay v. Kilcrease* (Civ. App.) 220 S. W. 177.

An oil lease providing that the lessee might prevent forfeiture from year to year by paying to the lessor \$13.50 a year "until such well is commenced (which must be under two years from date)," held not invalid as giving the lessee the right to perpetually prevent the carrying out of the main purpose of the lease by the payment of yearly rentals without limitation of time. *Id.*

A judgment canceling an oil lease for want of consideration cannot be sustained where it was undisputed that the lease was given in lieu of a former lease for which \$1 was paid. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

An oil and gas lease is not subject to attack as invalid for want of consideration because only \$1 was paid at the time it was procured. *Lone Star Gas Co. v. McCullough* (Civ. App.) 220 S. W. 1114.

One dollar a year, paid upon the execution and delivery of an oil lease covering 2,000 acres, held not so inadequate a consideration as to suggest fraud. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

In the absence of undue influence, or fraud inducing execution of oil and gas lease on royalty, the cash consideration of \$1 will not be treated as a nominal consideration only, but is sufficient to support an option giving the lessee to continue the lease by construction of a well or payment of annual rentals. *Leath v. Humble Oil & Refining Co.* (Civ. App.) 223 S. W. 1022.

The fact that a lessee of 160 acres of oil lands did not bind himself to pay rentals or to drill a well did not render lease void, and the cash consideration of \$32 paid therefor was a valuable and sufficient consideration to support all the rights conveyed, including the unconditional lease for two years and optional continuance for five years by paying stipulated rentals. *Morris v. Texas Pacific Coal & Oil Co.* (Civ. App.) 228 S. W. 981.

Lessee's payment of \$1,000 to lessor on execution of oil lease held sufficient consideration for option in lease to either drill or pay lessor \$1,000 annually in lieu thereof. *Buie v. Porter* (Civ. App.) 228 S. W. 999.

Where a lessee made no down payment as a consideration for execution of an oil, gas, and sulphur lease, though \$300 was the recited down payment, but made the lessor's wife a present of \$10 in view of her coming some distance to execute the lease rather than have the lessee go out to her farm, the lease had only a nominal consideration, and should be considered a mere optional right to acquire an interest in the land. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

A \$1 consideration actually paid is sufficient to support an oil lease, particularly where the leased land is in an undeveloped territory, and one of the apparent material inducements to the execution of the lease is that the territory may be developed. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

4. **Written contract importing consideration.**—See notes under art. 7093.

5. **Sufficiency in general.**—See *Summons-Newsome Co. v. Malin* (Civ. App.) 196 S. W. 281.

Agreement between defendant, father and mother suing for divorce, and other children, resulting in making trust deed whereby legal title to community property was vested in defendant to keep parents out of court or to effect settlement, held sufficient consideration for defendant's subsequent conveyance to his mother. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245.

Submission to physical examination by one who had made "John Doe" application was sufficient consideration to support agreement to issue policy. *Capital Life Ins. Co. of Denver, Colo., v. Driscoll* (Civ. App.) 199 S. W. 872.

A written contract guaranteeing payment of overdue note, held void because without consideration. *Oak Cliff State Bank & Trust Co. v. Conroy* (Civ. App.) 201 S. W. 699.

A sum paid plaintiffs by defendants in advance for option to develop oil lands held not only consideration for privilege extending over first term of six months, but for all rights, conditional and unconditional, conferred, including conditional right to claim extension of option. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

Where D. accepted, in renewal of J.'s note, note signed by J. and L. as principals. D.'s agreement, with L.'s consent, made at the time of extending the renewal note, that D. would let J. work off the debt on D.'s farm, was without consideration, where it did not appear that any advantage accrued to D. on account of such promise. *Lee v. Durham* (Civ. App.) 204 S. W. 1171.

Resumption of marriage relation by wife after separation is not a valid consideration for deed from him to her. *Tanton v. Tanton* (Civ. App.) 209 S. W. 429.

A benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made, is a sufficient consideration. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Where owner of oil leases assigns shares of stock and his interest in certain oil leases in consideration of assignee's agreement to drill test well, and purchaser from assignee of an interest in the contract assumes obligation of drilling well, but after commencing work refuses to continue, whereupon contract is modified so as to permit owner himself to drill well with equipment furnished by such purchaser, the preceding contracts and proceedings constitute a sufficient consideration for modified contract. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

The time and money expended by a life insurance agent in establishing agencies, being contemplated by the parties, constitutes a sufficient consideration for the agent's option to terminate the employment contract upon 90 days' notice. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

The nominal consideration of "one dollar" is sufficient to sustain an option in a gas lease. *Emde v. Johnson* (Civ. App.) 214 S. W. 575.

A conveyance of land may be supported upon marriage contracted by the grantee and the grantor's son. *Hanes v. Hanes* (Civ. App.) 216 S. W. 272.

A loss or detriment to the promisee is a sufficient consideration for a promise. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

Where a landowner's promise to an oil company to hold open her proposal to lease lands to it for a period of 25 days from the date of receipt of abstract by the company was not induced by the idea that the company might incur an expense in having her title examined, the \$25 paid by the company to its attorney for such services was not valuable consideration supporting owner's option to lease. *Id.*

Agreement between original oil lessors and an oil company, assignee of part of the original lease from the lessee, held merely intended to relieve the oil company from hazard of default in payment of rentals on the part of any sublessee other than the company, and to extend the time within which it would be required to drill a well on its quarter section until a certain date; the advance payment accompanying the agreement not constituting sufficient consideration to the lessors to support the original lease in so far as the interest of the company was concerned. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

In the law of contracts, the promisor's motive in making the promise is not a consideration for the promise. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

Recitation in a contract that \$1 was paid as a consideration creates an obligation to pay, if in fact it was not actually paid, and such obligation may be enforced, and will support a contract. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171.

Plaintiff's release of liability for personal injuries, made on a recited consideration of \$1 and defendant's promise to employ plaintiff as a trucker for one day at the usual rate of pay, was without consideration where the \$1 was not paid, and was properly excluded in plaintiff's action. *Fitts v. Panhandle & S. F. Ry. Co.* (Com. App.) 222 S. W. 158, reversing judgment (Civ. App.) *Panhandle & S. F. Ry. Co. v. Fitts*, 188 S. W. 528.

If land is conveyed to be used for immoral purposes, and notes are executed for purchase money, a conveyance of the land by grantee to a third party or a reconveyance to grantors in consideration of cancellation of notes would be valid and binding, and would divest grantee of all title and right to possession; the moral obligation to pay the notes or reconvey being a sufficient consideration. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674.

Where an oil and gas lease recited that it was given in consideration of \$1 and the lessee's agreement to start a well within three-fourths of a mile of the tract, the provision for starting the well, the territory being undeveloped and known as wildcat, is part of the consideration for the lease. *Leath v. Humble Oil & Refining Co.* (Civ. App.) 223 S. W. 1022.

A promise to do or not to do something which would be a detriment to the promisor or a benefit to the promisee is a sufficient consideration to support the contract, even though its performance was dependent upon a condition contemplated by the parties which might reasonably occur, though it had not yet occurred. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

6. Mutual promises.—Seventy dollars cash paid plaintiffs by defendants being adequate consideration for option granted defendants to develop mineral resources of plaintiffs' oil land, contract executed between parties held not subject to cancellation on account of unilateral character; it imposing no obligation on defendants to exercise option. *Griffin v. Bell* (Civ. App.) 202 S. W. 1634.

A contract is unilateral, when one party furnishes no consideration to the other and does not obligate himself to do anything which may result in injury to himself or benefit to the opposite party. *Edwards v. Roberts* (Civ. App.) 209 S. W. 247.

Where there has been partial or full performance of a unilateral contract, such performance operates as a sufficient consideration, and renders the contract binding upon the other party. *Id.*

Conceding that contract for purchase of gravel was unilateral and lacking in mutuality when made, where thereafter appellants incurred considerable expense looking to performance, and paid to appellees or their vendors a considerable sum of money, which was received in part performance, the contract was binding upon all parties. *Id.*

A unilateral contract is not supported by a sufficient consideration, and unless there has been some performance, or other equitable reasons to prevent, either party may declare the contract null and void. *Id.*

A mutual promise is a sufficient consideration, if concurrent in point of time. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

S., under whom appellees claimed, having accepted from appellants numerous payments of money under the contract, and appellees having incurred at least some expense in pursuance of the contract, the contract is not unilateral in the sense that it is not binding upon appellees. *Edwards v. Roberts* (Civ. App.) 212 S. W. 673.

A contract is not void because it is terminable at the option of one of the parties if there is a valid consideration for such option. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

A contract which bound an insurance company to employ an agent for five years, and bound the agent to work for that period unless the contract should be sooner terminated in one of the methods stipulated, and providing for compensation by a percentage on new and renewal insurance premiums, held not void for want of mutuality. *Id.*

A contract between an insurance company and its agent was not rendered unilateral by a stipulation under which the agent could terminate the contract at his option by giving 90 days' notice in writing of his intention to do so, nor was the contract made thereby one at will on the part of the agent. *Id.*

Where members of a truck growers' association entered into a contract for the purchase of onion crates, whereby the first consignment of crates was paid for in cash, additional crates to be paid for at a named figure, the contract, not being separable, and the cash payment being not merely the payment of a pre-existing obligation but a consideration supporting the entire order, was not void for want of consideration and lack of mutuality, regardless of whether it was optional with the truck growers to take additional crates. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

A written contract for the construction of a house was not unilateral and unenforceable because signed only by the person for whom the house was to be constructed, where it was accepted by the other party and acted upon by him by building the house. *Benson v. Ashford* (Civ. App.) 216 S. W. 283.

Under contract whereby plaintiff for consideration of one dollar and a certain per cent. of minerals "does hereby grant and convey to said lessee the oil, gas, sulphur and other minerals under said land," lessee to begin and prosecute the work of mining within a given time, held, the obligations were mutual and not unilateral. *Price v. Biggs* (Civ. App.) 217 S. W. 236.

Stipulation in oil lease, giving lessee the option to terminate lease at any time "in consideration of the money paid at the delivery hereof," held not void for lack of mutuality, where \$160 was paid lessor at time of execution of lease, and \$110 paid as rental thereunder, the payment of such money constituting a valuable consideration for option. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

An agreement founded on a consideration is not void for want of mutuality because one party has an option and the other none. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Where defendant, a landowner who had maintained a waterworks system from a well on his property, sold the well and surrounding land to plaintiff, agreeing that plaintiff might use the pipes so long as he would supply defendant with water, etc., held that the fact that the contract was optional with plaintiff, and not with defendant, did not render it bad for want of mutuality. *Id.*

Mineral lease giving lessee option of commencing a well on the land during the year or paying a rental for privilege of deferring commencement of well for another year held not void for want of mutuality, since lessee, upon failure to commence well during the year, paid lessor a cash consideration for extension of lease for another year. *Tatum v. Fulton* (Civ. App.) 218 S. W. 1088.

Mutual promises may constitute a valuable consideration to support a contract, but to have such effect the promises must not only be mutual, but must also be concurrent, certain, not vague and indeterminate, and must impose a legal liability on each promisor. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Where an oil lessee agreed to commence drilling a well within six months, or to pay to the lessors 25 cents per acre per annum as rentals until a well should be commenced, there was no clear promise on the lessee's part either to drill a well or to pay the specified rentals at any time to serve as consideration for the lease on the theory of mutual promises. *Id.*

An option provision in an oil lease, although unilateral, is binding on the maker, if it is supported by a sufficient consideration paid, and can be enforced to the same extent as any other contract. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

The agreement by an oil lessee to explore for oil or to pay the agreed rental is sufficient consideration for the lease, so as to render the lease enforceable against the lessor. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

An option contract, based on an independent consideration, is not invalid, as unilateral; hence where an oil and gas lease was supported by an independent consideration, an option of abandonment on payment of \$5 is not invalid. *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, reversing judgment *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

An oil and gas lease, granted for valuable consideration, though the sum was small, which gave the lessee the right to prospect on the land and to seven-eighths of oil, etc., found, and also in lieu of the lessee's completion of a well within one year, the right to extend time for completion by making quarterly payments of approximately \$30, is not invalid, even though the lessee had the option of abandonment on payment of a nominal sum. *Id.*

Where an oil and gas lease, executed on an independent consideration, gave lessee option of abandoning the same on payment of \$5, the lease is not invalid, as inequitable or unilateral, where it was distinctly provided that the surrender should not affect existing rights. *Id.*

Contract giving defendant the exclusive right to act as plaintiff's salesman in a certain territory held unilateral and unenforceable, in absence of allegation that defendant bound himself to buy any amount of goods from plaintiff, or that contract was for a definite time and could not be abandoned at will by defendant. *Ft. Smith Couch & Bedding Co. v. George* (Civ. App.) 222 S. W. 335.

Lease conveying the mineral in described land, reciting that "this grant is not intended as a mere franchise," executed in consideration of \$125 paid at time of execution and \$200 to be subsequently paid, and providing for a forfeiture on lessee's failure to drill within specified period and the prevention of such forfeiture for one year by payment of specified amount, held not void for want of mutuality. *Von Hatzfeld v. Haubert* (Civ. App.) 224 S. W. 220.

Oil and gas lease, even though void in the beginning for want of mutuality, will not be held void for want of mutuality after lessee has executed the contract by entering upon land and exploring for oil and gas and by drilling a productive well at considerable expense. *Id.*

An agreement whereby lessors delivered oil and gas lease to bank under agreement that lessees have specified time in which to examine the title held not a mere option lacking mutuality, but an escrow agreement with an irrevocable delivery, not void for lack of consideration; the reciprocal rights and obligations of the parties furnishing a sufficient consideration. *Pearson v. Kirkpatrick* (Civ. App.) 225 S. W. 407.

An agreement whereby lessors delivered oil and gas lease to bank under agreement that lessee have specified time in which to examine the title held not a mere option lacking mutuality. *Id.*

Oil and gas lease, requiring lessee to begin drilling within one year and to prosecute work with reasonable diligence, held not void for want of consideration, such promise by lessee being a sufficient consideration for the rights and interest granted by lessors. *McCaskey v. Schrock* (Civ. App.) 225 S. W. 418.

Where an oil and gas lease purported to be an agreement between a mother and all her children as lessors and the lessee on the other part for a total lump consideration, and did not purport to be a divisible contract whereby the lessee would acquire lease on the undivided interest of each lessor that might execute the instrument if the others did not, the lessee could have refused to be bound after lessors other than the mother and one son refused to execute it, and the mother and son on their part were not bound. *Watson v. Cloud* (Civ. App.) 225 S. W. 807.

In a contract for the sale and purchase of cotton, the buyer's promise to buy is sufficient consideration for the seller's promise to sell, so that the seller cannot avoid liability on the contract on the ground that the stated consideration of \$1 was never paid to him. *Harness v. Luttrall* (Civ. App.) 225 S. W. 810.

Oil and gas lease executed for an independent and valuable consideration of \$621.50 for a definite period of five years: held not void because unilateral or for want of mutuality, whether the right granted the lessee was an option or an interest in land, and regardless of the lessee's right to surrender. *Patton v. Texas Pac. Coal & Oil Co.* (Civ. App.) 225 S. W. 857.

A mineral lease, the consideration of which was recited to be \$1 and an obligation on lessee's part to begin and prosecute the work of putting down wells in the same block in which lessor's lands were situated and on lands in the vicinity within a certain time, such stipulations not having been inserted through fraud, accident, or mistake, held supported by a sufficient consideration, regardless of whether the \$1 was in fact paid or not; the obligations as to prosecution of work being mutual, and not unilateral. *McCaskey v. McCall* (Civ. App.) 226 S. W. 432.

A mutual promise amounts to a sufficient consideration if concurrent in point of time. *Id.*

A lease whose sole consideration was the promise of lessee's agent that a well should be sunk on the premises within a year was void, the promise not being binding on lessee, and no well having been sunk. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

A provision in a lease that the lessee would drill a well on the premises, if a well was drilled within 200 feet of any boundary thereof which produced a stipulated quantity of oil per day for 30 days, is sufficient consideration to uphold the lease. *Id.*

Though there is an implied agreement by an oil lessee to drill on the premises if oil in paying quantities is struck on adjacent premises, an express promise to drill if a well producing specified quantities of oil was drilled within a certain distance of the premises may require drilling under conditions which would not raise the implied promise to drill, and is therefore sufficient consideration to support the lease. *Id.*

Where a contract for the sale of a business required that the cash payment be made within 37 days, an agreement extending the time for such payment because the lessor's consent to the assignment of a lease had not been obtained did not require any new consideration; the mutual promises expressed in the original contract being sufficient to support the extension. *Lewis Bros. v. Pendleton* (Civ. App.) 227 S. W. 502.

A party to a contract to engage in the show business was bound thereby after it had been so far performed by both parties that other party had assumed obligations thereunder, even though the contract was unilateral. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

See *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

Where the oral consideration of an oil and gas lease is development, and the lease fails to impose on the lessee any obligation to develop, lessee acquired no title, but only a right to develop, which may be revoked any time by lessor prior to entry by lessee, assuming that only a nominal consideration has been given for the lease. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

Contract whereby owner conveyed minerals in consideration for a nominal cash payment and grantee's agreement to pay a royalty as the oil is brought to the surface, and whereby it was provided that a well was to be drilled within 30 days or a payment of \$50 a month made at grantee's option, held a unilateral contract, which the grantee might ignore without incurring any liability for damages; the grantor's only right in such case being to claim a forfeiture. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

Agreement by grantee to sink a designated number of wells within a stipulated time would have been a sufficient consideration for the conveyance of minerals. *Id.*

7. Property and rights therein.—A mere belief of a right to land is a sufficient consideration for a deed for a half interest given in settlement of a suit involving title to such land. *Davenport v. Shepherd* (Civ. App.) 197 S. W. 729.

Receipt for property by railroad which "released and relieved" receiver "from all liabilities" was supported by a consideration, and implied a promise to pay liabilities occasioned by negligence of receiver, and could be sued on by injured employé. *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519.

8. Rights under contracts—Subsidiary provisions.—Where, in a contract supported by a sufficient consideration, an option is given to one of the parties, the option is valid and enforceable, though there is no independent or specific consideration therefor. *Blaffer & Farish v. Gulf Pipe Line Co.* (Civ. App.) 218 S. W. 89.

The original consideration for an oil lease will also support an agreement in the lease that the lessee might surrender the lease at any time. *McKay v. Kilcrease* (Civ. App.) 220 S. W. 177.

In a contract for the sale of the fuel oil necessary to operate the buyer's plant during the ensuing year, a provision, stating that in consideration of the purchase of the oil the seller gave the buyer the option to buy the oil needed during the two succeeding years on the terms therein stated, was a valid option for sufficient consideration. *Texarkana Pipe Works v. Caddo Oil & Refining Co. of Louisiana* (Civ. App.) 228 S. W. 586.

9. — Release or abandonment of rights.—Promissory notes executed by defendant to take the place of pre-existing debt due by another to plaintiff are supported by consideration of surrender of the previous note. *Van Wormer v. Gallier* (Civ. App.) 196 S. W. 307.

Where a contract for right to exhibit motion pictures was rescinded by a contract to return films and lobby display, other party to return cow that had been given in part payment for right, the new contract was supported by valid consideration. *Nations v. Williams* (Civ. App.) 203 S. W. 1176.

Where broker without principal's knowledge acted for the other party, her waiver of commission, if the principal would make a certain contract, was no consideration for his promise to make it, since she was not entitled to any commission from the principal. *Hume v. Bogle* (Civ. App.) 204 S. W. 673.

Act of creditor in releasing portion of attorneys' fees stipulated in notes did not constitute consideration for compromise contract of settlement as detriment to him, unless amount agreed to be accepted by him was less than fair compensation for services rendered by attorneys. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

Extinguishment of an old contract to pay for a piano in advertising was a sufficient consideration for a new contract whereby the balance was to be paid in money. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

Services of an attorney, grantee in a deed on condition subsequent, in successfully defending a criminal prosecution against grantor's former husband, with assent of present wife, held sufficient consideration to support grantor's contract to release to attorney her claim to reconveyance of property arising out of happening of condition subsequent. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

In action on promissory notes held by innocent purchaser, release of liability on contract, return of earnest money, and loan of money on sale of stock by payee to maker, held ample consideration for note. *Braley v. Samuels* (Civ. App.) 213 S. W. 634.

Where the owner of cattle covered by a chattel mortgage sold part of the cattle, accepting a part payment of \$150, and the purchaser before delivery resold them to a third party, and it appeared that neither the original purchaser nor his vendee knew of the existence of the mortgage at the time of the sale but that upon obtaining knowledge thereof they agreed with the mortgagee's agent that the proceeds upon sale in a certain market should be paid to the mortgagee, who was thereupon to release the mortgage, the payment of the \$150 constituted a consideration for the agreement to release, since, if the original purchasers had refused to carry out the contract in event that the mortgagee should have insisted on its rights, it could have required the return of the payment, and the agreement to release deprived them of such right, and also because by the agreement the mortgagee, which was the real vendor, relinquished all its rights to such payment. *Lee v. Clay, Robinson & Co. of Texas* (Com. App.) 219 S. W. 1090.

The settlement of a distinctly recognized controversy of the parties to oil lease as to whether lease was subject to forfeiture was a sufficient consideration for a new and modified agreement, providing for forfeiture on failure to drill well within specified time. *Von Hatzfeld v. Haubert* (Civ. App.) 224 S. W. 220.

Cancellation of vendor's lien note before expiration of period of limitation held a sufficient consideration for reconveyance of land to vendor. *Hoard v. McFarland* (Civ. App.) 229 S. W. 637.

A contract of sale, like other contracts, may be modified by agreement of the parties as to any of its terms or conditions, and generally such a contract may be modified without a new consideration, the consideration of the original contract being deemed sufficient, and a sufficient consideration may be found in a release or waiver of claims under the old contract, or a disadvantage imposed on one of the parties, or the mutual agreement of the parties. *Berkman v. D. M. Oberman Mfg. Co.* (Civ. App.) 230 S. W. 838.

10. Pre-existing liability.—Where real estate agents wanted vendor to collect purchaser's first note, and vendor agreed to extension of purchaser's note if purchaser would satisfy brokers, and purchaser satisfied them by giving his note and taking up vendor's note, there was a sufficient consideration for purchaser's note to brokers. *Etter v. Stamp & Eichelberger* (Civ. App.) 204 S. W. 143.

In bank's suit on notes, finding by jury in response to issue that when smaller note was executed defendant was indebted to bank was in effect a finding of consideration for such note. *Gregory v. Corpus Christi Bank* (Civ. App.) 221 S. W. 305.

11. Compromise and settlement.—Where maker of note was solvent, an unperformed promise by payee to accept a lesser sum as full payment was without consideration. *S. A. Pace Grocery Co. v. Guynes* (Civ. App.) 204 S. W. 794.

While consideration is essential to an accord and satisfaction, slight modification of status of parties is sufficient. *Id.*

Where solvent maker of note, not having sufficient funds for payment, borrowed the money, the expense being no greater to borrow only part than to borrow all, such expense was not consideration for agreement to accept a part of debt in full payment. *Id.*

Claim that judgment was based upon false testimony, and that alleged judgment debtor did not owe alleged judgment creditor anything, was sufficient consideration to take the case out of the rule that part payment does not constitute sufficient consideration for promise to release entire claim. *Irby v. Andrews* (Civ. App.) 211 S. W. 290.

Settlement of indebtedness on open account bearing 6 per cent. interest, and execution of notes extending time of payment and providing for 8 per cent. interest, and 10 per cent. increase in the event of collection by an attorney, is supported by a valuable consideration and is binding upon the parties. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 430.

If a lawyer who purchased land at an execution sale believed that he had acquired title under his deed and filed suit against the judgment debtor claiming it as a homestead, there was a valuable consideration for a settlement whereby the land was divided and deeds exchanged. *O'Fiel v. James* (Civ. App.) 220 S. W. 371.

The settlement of a debt for less than its face under a composition of creditors is valid as a complete discharge; and, where the debtor thereafter gave one creditor a note for the amount of the debt, less that paid on settlement, such note was unsupported by consideration. *Irwin v. State Nat. Bank of Ft. Worth* (Civ. App.) 224 S. W. 246.

The settlement of a debt for less than its face under a composition of creditors is valid as a complete discharge; and, where the debtor thereafter gave one creditor a note for the amount of the debt less that paid on settlement, such note was unsupported by consideration. *Id.*

Where a series of notes were given in the settlement of an old obligation for which the makers were liable as sureties, a provision in the last note that in event of payment of the other notes it should be surrendered without payment will be presumed supported by consideration. *Cooper Grocery Co. v. H. T. Hamrick & Co.* (Civ. App.) 229 S. W. 356.

12. Forbearance.—Promise by purchaser at mortgage foreclosure sale to reconvey land to owner upon owner's payment of purchase price, where as a result of such promise owner refrained from having land sold in parcels, by means of which several hundred acres would have been saved from sale, was based upon a good consideration.—*Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Where insurer under a health policy waived its legal right to cancel the policy, upon the execution by insured of a release covering disability caused by hernia, which release became a part of the insurance contract, such waiver constituted a sufficient consideration for the release. *Massachusetts Bonding & Ins. Co. v. Florence* (Civ. App.) 216 S. W. 471.

13. — Extension of time of payment.—Extension of time for payment of debt was sufficient consideration for depositing of shares of stock by father to secure notes of his son. *Pattillo v. Citizens' Nat. Bank of Stamford* (Civ. App.) 197 S. W. 1054.

If there be no outside consideration, a mutual agreement for extension of a note, in order to be valid, must bind both parties, the creditor to forbear the collection of his debt until the stated time, and the debtor to continue to pay interest to such time, and if by the terms of such agreement it should bind only the creditor to forbear, but allow the debtor to discharge the debt at any time and stop running of interest, the agreement is without consideration. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

14. — Forbearance to sue or defend.—Plaintiffs' forbearance to sue corporation on contract to repurchase stock was consideration for note executed by company's president, a large stockholder. *Bass v. Wallace* (Civ. App.) 199 S. W. 506.

17. Benefit to third person.—Where defendant signed note as accommodation, it was not necessary that any consideration pass directly; consideration moving alone to principal being sufficient. *Gilbreath v. Cage & Crow* (Civ. App.) 198 S. W. 972.

Where one person for valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action thereon.—*Allen v. Traylor* (Com. App.) 212 S. W. 945.

18. Performance of legal obligation.—A debtor's payment of a liquidated amount presently due and to which he has no defense that can be urged in good faith or with color of right, is not itself a sufficient consideration to sustain creditor's release of other liquidated claims. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

Agreement that if attorney liable to his client on notes, would continue to pay interest during client's life, notes would be canceled on client's death, was void, as attorney was already obligated to pay interest. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

Where suit which attorneys had agreed to prosecute was abandoned by mutual agreement, attorneys were not required to defend the client in action brought against him by adverse party; and a contract to so do for stipulated fee was based on a good consideration. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

A clause reinstating insured, who was in good health, to the effect that insurer would not be liable for more than the reserve of the policy if the insured should commit suicide within a year, was void for want of consideration, where the policy provided that the company would reinstate the policy at any time upon evidence of "insurability satisfactory to the company and payment of all arrears": such reinstatement being no more than the performance of insurer's legal obligation. *Missouri State Life Ins. Co. v. Hearne* (Civ. App.) 226 S. W. 789.

A promise to do some act which the promisor is otherwise legally obliged to do is not a sufficient consideration to support a contract. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

18½. Evidence.—In action on notes given for price of engine and to foreclose a chattel mortgage lien thereon, evidence held to justify conclusion that engine, as such, had no

value. *Southern Engine & Pump Co. v. Teneha Light & Power Co.* (Civ. App.) 196 S. W. 260.

In action against lumber company for balance due on piling contracts, where plaintiff had received from such company a voucher on its face that it was for balance in full and accord and satisfaction was claimed, evidence held insufficient to show a bona fide dispute as to amount due plaintiff. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

Failure of consideration of note given to corporation which was to acquire land and issue stock to maker, is not shown; there being no evidence that the land will not be acquired and the stock issued. *Kirby v. Arkansas Bank & Trust Co.* (Civ. App.) 222 S. W. 1118.

19. Unenforceable or illegal consideration—What law governs.—A contract valid under the *lex loci* is valid and enforceable elsewhere, subject to the well-established exception that it will not be enforced in a jurisdiction where it contravenes the settled policy of the forum. *Chambers v. Consolidated Garage Co.* (Civ. App.) 210 S. W. 565.

21. — Public policy in general.—Transaction in which person financially interested in railroad loaned money on note of defendant's intestate, who then delivered the money to railroad as a bonus or donation, held not illegal, though railroad then paid plaintiff a debt from the money received. *Handly v. Adams* (Civ. App.) 195 S. W. 888.

That at time of making contract for future delivery seller has not goods in his possession, and has no means of obtaining them for delivery otherwise than by purchasing them after contract is made, does not invalidate contract. *International Life Ins. Co. v. Stuart* (Civ. App.) 201 S. W. 1088.

Although vendor at time of contract had no notice of vendee's intention to dispose of the land by a lottery, if, prior to the execution of vendor's lien notes and deed, he learned of such scheme and participated in it, he could not recover on the notes. *Stone v. Robinson* (Civ. App.) 203 S. W. 1132.

Where vendor, prior to taking vendor's lien notes, learned of vendee's intention to hold lottery in selling the lots, fact that he was to receive none of the profits therefrom was not conclusive that he did not participate in the lottery scheme. *Id.*

Contract by an attorney, grantee in a deed on condition subsequent, successfully to defend a criminal case in consideration of the grantor's releasing him from his obligation to reconvey the property to her on happening of the condition, grantor being first wife of defendant in criminal case, held not void as against public policy, particularly where defendant's second wife acquiesced. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

A contract between a business college and a pupil, requiring the pupil to board in homes approved by the college, is not contrary to public policy. *Castleberry v. Tyler Commercial College* (Civ. App.) 217 S. W. 1112.

22. — Immorality.—Where a valid marriage contract is entered into prior to sexual intercourse, and such intercourse was not the sole consideration therefor, the marriage contract is not void on account of an immoral consideration. *Welge v. Jenkins* (Civ. App.) 195 S. W. 272.

Where grantee immediately conveyed the premises to a third person by whom the house was to be used for purposes of prostitution, and where grantee, by agreement of the parties, was a mere conduit through whom the title was to pass from grantors, who had built house to be used for such purposes, to third person, to circumvent any adverse action arising out of the immoral contract, the transaction, including grantee's execution of deed in trust to secure payment of purchase money, was in contravention of public morals, and therefore an illegal contract. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674.

23. — Inducing fraud.—A secret agreement between realty brokers representing different principals to pool or divide commissions if the transaction is completed is void as against public policy, and deprives them of right to compensation unless the principals know of the agreement and acquiesce, a rule applying though the principals themselves finally conclude the sale on agreed terms. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

An agreement by a broker representing one of the principals to an exchange of land to pay the broker representing the other principal a commission is not unenforceable, under the rule against secret pooling of commissions by realty brokers, where the principal of the broker who was to receive the commission knew of the agreement.—*Id.*

An agreement by a bankrupt with a creditor to pay the entire amount due the creditor in consideration that such creditor should not seek by sequestration proceedings to recover goods sold to the bankrupt by such creditor, but should accept a composition offer, was illegal and void, where the other creditors had no knowledge thereof, and recovery could not be subsequently had from the bankrupt for the balance. *Conway & Duncan v. F. P. Kirkendall & Co.* (Civ. App.) 218 S. W. 34.

26. — Injury to public service in general.—Agreement in advance of forming road district by those automatically becoming members of board as to where roads shall be located held void against public policy. *Tyree v. Road Dist. No. 5 Navarro County* (Civ. App.) 199 S. W. 644.

Any agreement by the commissioners' court, tending to preclude it from full and free exercise of its discretion as to the roads to be improved with the proceeds of bonds voted to be issued for improvement of roads generally, would be against public policy. *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160.

28. — Ousting jurisdiction of courts and obstruction of justice.—Provision of contract that any dispute is to be settled by arbitration is contrary to public policy, and will not oust courts of jurisdiction. *Queiroli v. Whitesides* (Civ. App.) 206 S. W. 122.

29. — **Compounding offenses.**—Defendant, who charged plaintiff with stealing, and, under duress of threats of murder and prosecution, forced him to assign vendor's lien notes, and secured conveyance from buyer from plaintiff, could not keep fruits of duress as against plaintiff on ground both were in *pari delicto* in contracting to stifle prosecution. *Mallard v. Day* (Civ. App.) 204 S. W. 245.

A conveyance of realty by defendant to plaintiff in consideration of dismissal of criminal proceedings based upon the seduction of plaintiff by defendant's son, and of the marriage of defendant's son and plaintiff, is void, and will not form the basis of a suit in trespass to try title. *Hanes v. Hanes* (Civ. App.) 216 S. W. 272.

Money fraudulently or wrongfully obtained from another by the maker of a note is good consideration for promissory notes, chattel mortgages, and the delivery of property in payment therefor. *Theuber v. Marek* (Civ. App.) 222 S. W. 293.

30. — **Restraint of trade.**—In an action and cross-action, where both parties relied upon a contract illegal as a "conspiracy in restraint of trade," neither can recover. *Pennsylvania Rubber Co. v. McClain* (Civ. App.) 200 S. W. 586.

A contract whose main purpose, considered with circumstances and conditions giving rise to its execution, or whose necessary result, was the establishing of a combination or trust, is unenforceable. *Saye v. Garrard* (Civ. App.) 204 S. W. 634.

Evidence held to support finding that contract of sale of business and good will with agreement not to re-engage in the same business in same town while purchaser was in that business therein was not illegal as a combination or trust.—*Id.*

Contract, whereby partner engaged in plumbing and windmill business, retiring from firm in favor of another, agreed not to engage in business in town in competition with his old and the new partner, held not void at common law as against public policy. *Schlag v. Johnson* (Civ. App.) 208 S. W. 369.

32. — **Effect of partial illegality.**—Where contract grows out of and is connected with illegal or immoral act, court of equity will not enforce it; and if contract is in part only connected with illegal transaction, and growing immediately out of it, it is equally tainted by it. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

If a part of an agreement is to use the subject-matter or a part of it for an unlawful purpose, the contract is void. *Bonnie & Co. v. Blankenship* (Civ. App.) 208 S. W. 934.

Where stock of trust company was sold on credit, buyer giving his note, both for price and for amount borrowed from trust company, purchase of stock and borrowing of money being separable transactions, buyer's promise to repay borrowed money was not vitiated by *ultra vires* contract for sale of stock. *Rousseau v. Everett* (Civ. App.) 209 S. W. 460.

A promise made upon several considerations, one of which is unlawful, no matter whether the illegality be at common law or by statute, is void. *Hanes v. Hanes* (Civ. App.) 216 S. W. 272.

Where land is conveyed upon several considerations one of which is illegal, as requiring dismissal of criminal proceedings against grantor's son, but the grantee is not put in possession, and the contract remains executory, a suit for specific performance will not lie. *Id.*

Where a grantor conveyed real property to grantee in consideration of the dismissal of criminal proceedings for seduction of grantee by grantor's son, and of the marriage of the son to grantee, the contract was not divisible, and the conveyance was vitiated by the illegal consideration relative to dismissal of the criminal proceeding. *Id.*

While a promise on several considerations, one of which is unlawful is void, where one for a legal and valuable consideration agrees to perform two acts which are severable, one of which is lawful and the other unlawful, the contract may be enforced as to that for which it was lawful to contract and held void as to the other. *Wicks v. Comves*, 110 Tex. 532, 221 S. W. 938, answering certified questions (Civ. App.) 171 S. W. 774.

33. — **Relief to parties.**—Where deed of trust was executed to secure grantor's indebtedness to grantee, which was incurred by grantor in furtherance of cotton future transactions wherein grantee acted as grantor's agent, the court will refuse to foreclose lien. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

Contract in violation of law or public policy of state will not be enforced. *Bonnie & Co. v. Blankenship* (Civ. App.) 208 S. W. 934.

When money has been paid on an illegal contract, it can be recovered as long as the contract remains executory. *Trammell v. San Antonio Life Ins. Co.* (Civ. App.) 209 S. W. 786.

Though courts will not assist in enforcing illegal contracts, yet where an illegal contract has been executed in whole or in part by the acts of the parties themselves and suit is not brought for the purpose of enforcing the contract itself, the rights and titles thus acquired will be recognized. *Colburn v. Coburn* (Civ. App.) 211 S. W. 248.

The sale of piano to plaintiff for plaintiff's use in conducting an immoral business being an illegal transaction, defendant, in plaintiff's suit to recover possession of the piano as having been taken from plaintiff's possession by force, could not set up that the chattel mortgage on the piano, given by plaintiff to secure notes for the purchase price, gave defendant the power, as assignee of the mortgagee, of seizure and sale. *Id.*

A realty broker, party to a contract to pool commissions with others void as against public policy, held not precluded from invoking the rule avoiding such contract as against the claim of another broker, who represented the other principal, for his share of the commission. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

The doctrine of "he who comes into equity must come with clean hands" will not be applied to enable a party to an illegal contract to set up his own wrong to avoid his obligations, but in such cases the court will close its doors to both parties. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

34. — **Relief to parties not in pari delicto.**—If it is against public policy for an employer to contract to pay a doctor a salary and retain the medical fees allowed by the insurance association under Workmen's Compensation Act, pt. 1, § 7 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246k), physician entering into such a contract is in pari delicto and cannot sue the employer for such fees, having received and retained his salary, since he cannot affirm in part and repudiate in part. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

In an action to recover money paid to an insurance company under its agent's agreement to furnish a loan and policy, which contract was not fulfilled by the company on the ground that it was illegal and ultra vires, the contract being executory, plaintiff could recover, since the parties are not in pari delicto. *Trammell v. San Antonio Life Ins. Co.* (Civ. App.) 209 S. W. 786.

If the issuance by defendant insurance company of stock for plaintiff's note was a violation of Const. art. 12, § 6, plaintiff is as much a party to violation as defendant, and he cannot recover interest paid on note in view of the maxim that "where both parties are equally in fault the condition of the defendant is preferable." *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

A realty company, which acted as mere middleman in bringing together two realty brokers who effected a sale, is entitled to the one-third of the two commissions received by the brokers agreed by them to be paid it for assistance rendered in consummating the sale, though on account of lack of knowledge of their principal, the agreement of the brokers to pool commissions was invalid as against public policy. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

35. — **Further or subsequent agreement.**—Even though an agreement between a mortgagee and another creditor of mortgagor that such creditor should participate with the mortgagee in the mortgage security was illegal under Bankr. Act U. S. § 29b, subd. 5, because given by mortgagee in consideration of such creditor's refraining from instituting bankruptcy proceedings and setting aside the mortgage as an unlawful preference, yet where the agreement was carried out, and title to the mortgaged property vested by foreclosure in mortgagee, the illegality of such agreement was no defense to third parties in their note to such creditor for the full amount of his claim against the mortgagor, which note was given by them as part payment on their purchase from the mortgagee of the property acquired by such foreclosure. *Francklow v. Ullmann, Stern & Krausse* (Civ. App.) 214 S. W. 797.

Though an agreement is made by brokers representing two principals to pool or divide commission, and without the knowledge of the principals, yet a broker may enforce collection of the commission agreed to be paid by his principal if to do so it is not necessary for him to plead and prove violation of the rule against secret sharing or pooling of commissions. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

36. **Failure of consideration.**—Where an injured servant gave a release for his injuries, reciting the consideration of three days' employment, the release was valid and enforceable, although he never presented himself for work, where the employer held himself in readiness to give him employment. *Schaff v. Strickland* (Civ. App.) 198 S. W. 595.

Where defendant, who gave note for automobile represented to be new, discovered that it was old, his giving a renewal note and payment of part of the note after discovering the misrepresentation prevented his pleading failure of consideration in an action on the note. *Adams v. Overland Automobile Co.* (Civ. App.) 202 S. W. 207.

Where a corporation for stock in which defendant gave his note sold its entire assets and abandoned business, the note was not collectible since the consideration failed. *Shield v. Lone Star Life Ins. Co.* (Civ. App.) 202 S. W. 211.

Where a payee transferred notes to a corporation, uncollected notes to be returned to payee, the maker could defend on ground that payee had failed to make good its guaranty on piano for which notes were given, and still retained instrument. *National Trust & Credit Co. v. Oliver* (Civ. App.) 203 S. W. 608.

Where stock was not to be delivered to defendant until notes given therefor were paid, defendant is in no position to plead failure of consideration because of nondelivery of stock in action by indorsee on note first due; nothing having been paid on any of notes. *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

Although plaintiff, who owned land on both sides of stream, had consented for a consideration to defendant's taking water through pipes on plaintiff's land, where consideration had failed, plaintiff would have the right to prevent defendant's use of pipes. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

Under an agreement to turn over stock in consideration that the transferee will pay the debts of the transferor, including a note guaranteed by him, upon a failure of delivery of part of the stock the rights of the owner of the note, as beneficiary, are subject to the equities of the original parties. *American Loan & Mortgage Co. v. American Nat. Bank of Houston* (Civ. App.) 205 S. W. 146.

There is no failure of consideration for note executed by defendant to plaintiff bank for money loaned, with which to buy stock, however valueless the stock, though the money was paid out therefor by plaintiff's cashier; he in such transaction being defendant's accredited agent. *Clardy v. American Trust & Savings Bank* (Civ. App.) 208 S. W. 990.

That consideration for note was sale of stock in corporation which subsequently became insolvent would not be a defense. *Braley v. Samuels* (Civ. App.) 213 S. W. 684.

Where owner's agreement with broker provided that owner's note to broker should be canceled upon purchaser's failure to pay purchase price of notes, and by mutual understanding between owner, broker, and purchaser land trade was canceled and the land reconveyed to the owner, there was no consideration for owner's note to broker; the

consideration therefor having failed. *Gillean v. First State Bank of Barry* (Civ. App.) 219 S. W. 896.

Where the Mexican seller of cattle to Americans reduced the price to the buyers solely in consideration of an export duty claimed by them to be levied by the Mexican government, which duty was in fact not levied, the sole consideration for the reduction of price, embodied in a substituted agreement, failed, and the seller can recover the amount of the reduction. *Barreda v. Craig, Thompson & Jeffries* (Com. App.) 222 S. W. 177, reversing judgment (Civ. App.) *Craig, Thompson & Jeffries v. Barreda*, 200 S. W. 868.

Where inducing consideration for oil and gas lease to lessors was the development of the mineral resources of the land in the section where lessors' land is situated and the covenant on the part of lessee to drill well, lessee's failure to pay the \$1 named as consideration was immaterial. *McCaskey v. Schrock* (Civ. App.) 225 S. W. 418.

Issuance to plaintiff of stock in corporation formed to take over a mine, which corporation had no money paid in and no assets, the mine never having been transferred to the corporation, held without consideration, and therefore not performance of an agreement to transfer to plaintiff, payee of a note, in payment of balance due on note, an interest in the mine or a certificate of stock, for the amount due on the note, in a corporation to be formed to take over the mine. *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

Where mortgage company assumed payment of specified obligations in consideration of a transfer and conveyance of bank stock, and a substantial part of the stock was received, the partial failure of consideration did not invalidate the contract, but was a defense pro tanto thereto. *American Nat. Bank of Houston v. American Loan & Mortgage Co.* (Com. App.) 228 S. W. 169.

Where the buyer within the time provided for in his executory contract, for the purchase of an interest in an oil, gas and mineral lease, approved the title and tendered the balance of the consideration and demanded a deed, but the seller was unable to perform, for the reason that his option contract to purchase from the record owner, which he assigned to the buyer, had expired. The buyer was entitled to recover the amount paid as for failure of consideration. *Wilcox v. Crawford* (Civ. App.) 231 S. W. 1104.

38. Effect of want or failure of consideration.—Plaintiff held unable to ask for cancellation of draft in equity, and to be heard to complain there was failure of consideration in that one of items of account compromised was unfounded, without offering to do what was equitable. *Stacy v. Raywood Canal & Milling Co.* (Civ. App.) 196 S. W. 568.

That the maker of a note did not read it when he signed it, would not preclude him from showing fraud and failure of consideration between the original parties. *Stevens v. Gustine Mercantile Co.* (Civ. App.) 197 S. W. 1126.

Even if surety company's general agent unequivocally promised to pay commissions to local agents, where company was bound to another, it would not be bound by promise, since it would be without consideration. *American Surety Co. v. Sheerin* (Civ. App.) 203 S. W. 1120.

Where owner of land, upon selling it, gave to broker, who had assisted in procuring the purchaser, the owner's note, which was to be surrendered by the broker to the owner if notes representing the first three installments of the purchase price of the land were not paid, and later the land sale was canceled and the land reconveyed to the owner, but the owner's note to the broker was transferred by the latter to an innocent purchaser before maturity, which recovered thereon, the owner was entitled to recover over against the broker. *Gillean v. First State Bank of Barry* (Civ. App.) 219 S. W. 896.

Assuming that \$1 received as consideration for an option to lease oil lands was not sufficient consideration, the question of want of consideration was eliminated by the payment of a rental for the extension of the option. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171.

Acceptance of rentals provided for in an oil lease on failure of lessee to drill a well constituted a sufficient consideration for the optional privileges granted, and made the contract, which originally had only a nominal consideration of \$1, valid. *Broyles v. Gilman* (Civ. App.) 222 S. W. 685.

A note, wholly unsupported by consideration, is unenforceable between the parties, being of no higher effect than any other written obligation. *Irwin v. State Nat. Bank of Ft. Worth* (Civ. App.) 224 S. W. 246.

Art. 590. [315] [273] Liability of drawer, etc., fixed by protest.

See *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222.

In general.—An indorser's liability is contingent upon presentment of note for payment, and in event of nonpayment, protest, and due notice to indorser. *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841.

Strict compliance with conditions upon which indorser's liability is contingent is essential in order to hold the indorser. *Id.*

Time for protest.—Under art. 593, and this article, to fix the liability of the indorser of such paper it should be protested on the last day of grace. *Carey-Lombard Lumber Co. v. First Nat. Bank of Ballinger*, 86 Tex. 299, 24 S. W. 260.

Waiver of protest.—Failure to present a check for payment is no defense, where presentment was not made because of defendant's own request. *Merriman v. Swift & Co.* (Civ. App.) 204 S. W. 775.

The waiving of presentment for payment, protest, and notice does not increase the original liability of the indorser, but merely renders unnecessary the performance of these acts to fix such liability. *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841.

Art. 593. [318] [276] [Superseded.]

See post, art. 6001a[85].

Cited, *Swenson v. Sun Fire Office*, 68 Tex. 461, 5 S. W. 60; *Hamilton Gln & Mill Co. v. Sinker, Davis & Co.*, 74 Tex. 51, 11 S. W. 1056.

Days of grace.—Under this article, a protest on the day that the note by its terms is due is premature and nugatory. *Cruger v. Lindheim* (App.) 16 S. W. 420.

Vendor's lien note due November 15, 1909, held not barred on November 18, 1913, when art. 5695, as amended, took effect, in view of this article. *Tullos v. Mayfield* (Civ. App.) 198 S. W. 1073.

Arts. 5693-5695, as amended in 1913, relating to period of limitations for enforcement of vendor's lien and for recovery of land by a vendor who has reserved title, did not repeal this article, or affect the applicability of this article to notes secured by deeds of trust and mortgages. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

As respects limitations, vendor's lien continued, not only to date of maturity specified in note secured thereby, but also during the three-day period of grace provided for by this article. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

DECISIONS RELATING TO SUBJECT IN GENERAL

3. Execution and delivery.—A bill of sale is not executed until it has been signed and delivered. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

Intent of the grantors in bill of sale is controlling question in determining whether delivery has been made. *Id.*

The validity of a contract for the sale of cotton was not affected by the fact that the seller did not obtain a copy thereof, and it was not a condition to the buyer's recovery, as for seller's breach, that seller had obtained such copy; the general rule as to delivery of written instruments not requiring that a copy or duplicate of a mutual agreement be delivered to each of the parties to render the agreement effective. *Templeman v. Cross* (Civ. App.) 212 S. W. 187.

In action against joint makers of note, in which one of the makers disclaimed having signed note, evidence held to warrant finding that such maker's signature to note was genuine. *Hill v. Liberty State Bank* (Civ. App.) 221 S. W. 328.

Where a note contained a stipulation that under certain contingencies it should be surrendered to the maker without payment, the payee cannot avoid the provision on the theory that it did not sign the same. *Cooper Grocery Co. v. H. T. Hamrick & Co.* (Civ. App.) 229 S. W. 356.

4. Form of note.—A mere recital in a contract order that the purchase price of the goods might be paid in notes attached thereto did not make the payer's obligation a conditional one.—*Commercial Credit Co. v. Giles*, (Civ. App.) 207 S. W. 596.

5. Designation of parties.—Recovery may not be had on a negotiable instrument against an undisclosed principal in no way referred to on the face of the instrument itself. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

7. Designation of time of payment.—Filing of holder's petition in suit on series of notes is prima facie evidence of election to treat them all as due according to privilege given in notes. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

Term "day," as used in enactments or contracts, means 24 hours from midnight to midnight, except where restricted. *Dallas County v. Reynolds* (Civ. App.) 199 S. W. 702.

A note payable in installments, and providing that on default of any installment the entire debt may be declared due, does not become due by the nonpayment of an installment, in the absence of a declaration to that effect by the holder. *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

The only difference between the date of maturity of a paper payable at sight and one payable on demand is that in the former it is a recognized custom to allow three days of grace. *State Nat. Bank v. East Coast Oil Co.* (Civ. App.) 208 S. W. 190.

Where a note given to purchaser by vendor and another, to guarantee vendor's completing title, provided for maturity a year from date, and provided that, "if title is cleared on or before" such due date, "this note becomes null and void, otherwise it shall remain in full force and effect," if such note be deemed a contract of guaranty, it matured at its due date, where title had not then been cleared (although there was then pending an action to clear title by the vendor. *Stamps v. Platt* (Civ. App.) 218 S. W. 47.

Where note given to purchaser by vendor and another, to guarantee vendor's completing title, provided for maturity a year from date, and provided that, "if title is cleared on or before" such due date "this note becomes null and void, otherwise it shall remain in full force and effect," the fact that there was on such due date a suit pending at vendor's expense to clear the title did not prevent the note from maturing at such date, for the only way to avoid its payment in money at maturity was for the vendor to clear the title before the note's due date. *Id.*

Where neither a note nor the contract pursuant to which it was executed fixed a day of payment, the general rule that a promissory note in which no time is specified for payment is due on demand applied, and suit could be brought thereon after payment demanded and refused. *Crenshaw v. Stallings* (Civ. App.) 222 S. W. 653.

Where a series of notes, secured by vendor's lien, provided that, on default in payment of one, the holder might declare all due, suit by an administrator, into whose hands the notes came after default in the payment of the first, is sufficient notice of election to declare the whole series due. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

In compromise of an obligation for which it was liable as surety, defendant executed

a series of 19 notes payable monthly, all of which provided that in event of default plaintiff might declare the entire series due and gave plaintiff the same option if defendant went out of business. The last note provided that, should all of the other notes of the series be paid at maturity, it would be surrendered without payment. For considerable time defendant acquiesced in delays in payment of the notes, and on plaintiff making objection to delay in payment of the ninth note defendant paid all the remaining notes of the series except the last, and sold its business. Held, that, as plaintiff's acquiescence in delay in payment of previous notes was a waiver of its right to declare the entire series due because of delay in payment of the ninth note, and as defendant, instead of again defaulting, paid all of the notes, plaintiff could not declare the last note due because defendant sold its business; the purpose of that restriction being merely to secure payment. *Cooper Grocery Co. v. H. T. Hamrick & Co.* (Civ. App.) 229 S. W. 356.

Where payee of a series of notes payable monthly, which provided that the entire series might be declared due in event of delay in payment of one, acquiesced in delay in payment of several notes, it thus waived its right to declare the next note of the series due, but, if the maker, after objection and attempt to declare succeeding notes due, again defaults, the right revives. *Id.*

That note for amount to be paid as liquidated damages on maker's breach of contract bore no maturity date did not affect its validity, the date of maturity in such case being the date on which maker repudiated the contract, which date was to be ascertained by the evidence. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

A note bearing no maturity date is valid, and is presumed to be due upon demand unless circumstances are connected with it upon its maturity is contingent. *Id.*

9. **Acceptance.**—Acceptance of a draft may be verbal, and need not be in writing. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400; *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

A promise to accept a draft will, under certain conditions, be treated as tantamount to an acceptance. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

An acceptance of a draft may be implied from the drawee's conduct. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400.

10. — **Effect.**—Where the drawer of bill of exchange presents it to his bank which transmits it to defendant bank, which pays it by its cashier's check under an agreement with the drawee, incloses the remittance in an addressed and stamped envelope, and mails it, such action makes defendant's acceptance a finality, depriving both it and the drawee of the right to withdraw the acceptance given. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400.

11. — **Unaccepted bill or check.**—Where the buyer of goods sent his check for an amount he admitted to be due to the seller, the seller can enforce payment of the check without accepting it in full settlement as specified by the buyer, since the buyer is liable for that amount in any event, and his liability for the balance claimed by the seller can be determined in an action to recover the rest of the purchase price. *Bershansky v. Empire Mfg. Co.* (Civ. App.) 230 S. W. 1043.

12. **Validity.**—Under Const. art. 12, § 6, prohibiting the issuance of corporate stock except for property actually received, the giving of a note for stock is not a valid payment, but neither the stock issued nor the note given is void. *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S. W. 977.

13. — **Fraud, duress, and mistake.**—Transactions in which person financially interested in railroad loaned money on defendant's intestate's note, which money intestate then delivered to railroad as a bonus or donation, held not fraudulent, though railroad then paid plaintiff a debt from the money received. *Handly v. Adams* (Civ. App.) 193 S. W. 888.

Bad faith held not shown in transaction whereby one financially interested in proposed railroad loaned money on note which borrower thereupon gave to railroad as gratuity or donation. *Id.*

A settlement by defendant railroad company with plaintiff for the death of her husband held result of fraud and coercion and amount, being inadequate, could not be sustained. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

Buyer, who signs sales contract, thinking it provided for payment of freight charges by seller, when it plainly stated freight was to be paid by buyer, cannot avoid contract, where the mistake is not mutual. *Detroit Steel Products Co. v. Houston Printing Co.* (Civ. App.) 202 S. W. 984.

A contract induced by material fraudulent representations is void. *Bankers' Trust Co. v. Calhoun* (Civ. App.) 209 S. W. 826; *Same v. James* (Civ. App.) 209 S. W. 830.

A mistake of fact is an unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

Where a son fraudulently or wrongfully obtained property from another, both the father and the son are liable on notes and chattel mortgages executed by them in payment of the sums so obtained, though they were executed under threat of criminal prosecution. *Theuber v. Marek* (Civ. App.) 222 S. W. 293.

14. **Alteration.**—Where in the written contract between maker and payee it was agreed that the note might be detached from such contract, such detachment on the perforated lines is not an alteration. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

Where perfumes were sold, and seller's agent entered on margin of order, "One oak

showcase free," such words did not alter written order to which buyer's note was attached. *Foster v. Iowa City State Bank* (Civ. App.) 201 S. W. 733.

Where contract for sale of perfume gave seller authority to detach from order note signed by buyer, when seller approved order and shipped goods, buyer was not released from liability on note by seller's so doing. *Id.*

Any material alteration of an instrument destroys its obligation and renders it unenforceable, and any alteration causing the instrument to speak differently in legal effect from that which it spoke originally is a "material alteration." *Commercial Credit Co. v. Giles* (Civ. App.) 207 S. W. 596.

A contract order for the purchase of goods payable by a series of negotiable notes, providing that the payee might detach the notes from the order, being consistent, contemporaneous agreement, authorized the payee to detach the notes. *Id.*

The payee's detachment of a series of negotiable notes from a contract order permitting their detachment was not a material alteration rendering the notes void. *Id.*

Any alteration causing the instrument to speak different in legal effect from that which it spoke originally is a "material alteration." *Id.*

Retracing with ink pencil signatures to a petition for the organization of county, purpose being to preserve them from obliteration, is not a material alteration. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration. *Commercial Security Co. v. Hull* (Civ. App.) 212 S. W. 986.

A change or alteration of a note by stranger thereto does not change the status of the parties as evidenced by the original instrument, and cannot relieve the maker from his obligation thereunder. *Rus v. Farmers' Nat. Bank of Sealy* (Civ. App.) 228 S. W. 985.
 15½. **Reformation.**—See notes under art. 3687, rule 28.

16. Indorsement and transfer in general.—Indorsement intended to be partial only, and not as to whole amount of note, is void. *Adams v. Kelly* (Civ. App.) 196 S. W. 576.

One exchanging land for other land and certain mortgage bonds had a right to rely on representations of the other party to the effect that the bonds were secured by a first mortgage, and that there were no other liens against the mortgaged property, and it was not necessary, to preserve his cause of action for damages, to make any investigation. *Moore v. Beakley* (Com. App.) 215 S. W. 957.

19. Liability on indorsement.—It is general rule that where indorsement is for transfer only, indorser is not responsible. *Wheelock v. Mayfield* (Civ. App.) 197 S. W. 475.

Where a note is indorsed by the payee in blank, any holder has prima facie the right to institute a suit and recover in his own name. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

Though under an indorsement on a draft, "Pay any bank or banker or order," the indorsee may have sufficient title to support an action against the drawer or acceptor, such right does not render the indorsee liable on its own subsequent indorsement made in furtherance of collection. *Tradesmen's State Bank v. Ft. Worth Elevators Co.* (Civ. App.) 214 S. W. 656.

Where the comaker of a note secured by chattel mortgage was not discharged as a surety he is, as to the mortgagee who had assigned the mortgage and indorsed the note which it secured, the principal debtor, and the payee and indorser of the note was only secondarily liable. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

20. — Compelling resort to security.—In action on notes by security company to which payee company had indorsed, evidence held sufficient to support jury's finding that plaintiff had on deposit with it sufficient money or funds belonging to payee company to pay notes after they were dishonored. *Commercial Security Co. v. Collins* (Civ. App.) 208 S. W. 728.

22. Indorsement without recourse.—Where tenant executed to landlord rent note for specified year, and note was indorsed to bank by landlord, and by such bank without recourse to plaintiff, plaintiff was entitled to judgment on note against tenant and landlord. *Evans v. First Guaranty State Bank of Southmayd* (Civ. App.) 195 S. W. 1171.

Where vendor's lien notes were indorsed without recourse in part payment of stock which was retained as collateral by corporation, held that indorser was not discharged by failure to make him a party to a suit to foreclose lien, and stock was liable for balance due on notes after foreclosure sale. *Cattlemen's Trust Co. v. Cantrell* (Civ. App.) 196 S. W. 354.

Where note was sold and assigned by indorsement on the note "without recourse" and by a further written assignment containing covenant that assignor was owner with the right to sell and assign, "and that there is now owing thereon the principal sum," naming it, with interest, followed by special agreement that no recourse was to be had against assignor as assignor or surety for the payment of the obligation, there was an express, as well as implied, warranty of the debt, which was in no wise impaired by the form of indorsement and assignment. *Newton v. Houston Hot Well Improvement Co.* (Civ. App.) 211 S. W. 960.

An indorser "without recourse in any way" is liable to bona fide holder of note executed by husband and wife, and taken on strength of wife's signature, which was a forgery. *Miller v. Stewart* (Civ. App.) 214 S. W. 565.

27. Liability of guarantor.—A contract of guaranty to pay certain notes and overdrafts, it being duty of creditors to turn over same to an attorney to be selected by guarantors for collection by suit, and, if money should not be made by execution, guarantors were to pay same upon transfer of judgment to them, refusal of guarantors to

reduce the note and overdrafts to judgment, and a denial of liability thereon, was a breach of the contract which authorized the creditors to treat the contract as at an end, except for the purpose of bringing suit thereon for its breach. *Bank of Miami v. Young*, (Com. App.) 208 S. W. 656.

Under a contract of guaranty to pay notes, where it was duty of creditors to turn notes over to attorney to be selected by guarantors for collection by suit, and, if money could not be made by execution, guarantors were to pay same upon the due transfer of the judgment to them, upon refusal of the guarantors to reduce notes to judgment and their denial of liability thereon, the measure of damages was prima facie the face value of the notes. *Id.*

Under a contract of guaranty to pay certain notes and overdrafts, creditors, on failure of debtors to pay, to turn over the same to an attorney to be selected by the guarantors for collection by suit, and, if money could not be made by execution, guarantors were to pay same upon due transfer of the judgment to them, upon refusal of the guarantors to reduce the notes and overdrafts to judgment and their denial of liability thereon, the creditors were not called upon to reduce the notes and overdrafts to judgment, but could recover the face thereof on offering to assign the notes and overdrafts to the guarantors, subject only to any abatement by reason of circumstances of which they could reasonably have availed themselves. *Id.*

The indorsement on the back of a draft by a bank to which it was forwarded for collection, "Pay any bank or banker, all previous indorsements guaranteed," merely guaranteed the genuineness of the prior indorsements and did not guarantee payment of the draft. *Tradesmen's State Bank v. Ft. Worth Elevators Co.* (Civ. App.) 214 S. W. 656.

Since defendant occupies the position of a guarantor who made a separate contract with plaintiff in which the contractors did not join, the court must look to the language of that separate undertaking to ascertain the liability of the guarantor. *Acme Brick Co. v. West* (Civ. App.) 215 S. W. 476.

The guarantor is entitled to a strict construction of his contract, and can stand upon its very terms. *Id.*

Under contract whereby defendant guaranteed that contractors "will pay for the brick under and according to the contract above," defendant would not be liable for damages arising from failure of contractors to promptly receive all brick. *Id.*

See, also, notes under Title 109.

28½. Construction in general.—Where tenant gave landlord rent note for specified year, in landlord's hands note was merely evidence of lease contract, and did not sever notes from realty until it passed out of his hands. *Evans v. First Guaranty State Bank of Southmayd* (Civ. App.) 195 S. W. 1171.

Contract for sale of cattle located in Mexico to be delivered in United States at expense of buyers held to admit of doubt as to intention of parties as to when title should pass, so that construction placed thereon by parties should control. *Craig, Thompson & Jeffries v. Barreda* (Civ. App.) 200 S. W. 863.

In construing contract for sale of land, court must look to all parts of instrument and surrounding circumstances to ascertain intention of parties in making use of particular words and phrases and in making contract as whole. *Bailey v. Burkitt* (Civ. App.) 201 S. W. 725.

Where the particular words exhaust the class, the general words must be construed as embracing something outside the class, as there is nothing ejusdem generis left. *Richardson v. Nesbit* (Civ. App.) 204 S. W. 689.

The law must be read into every contract. *Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. of Texas* (Civ. App.) 204 S. W. 1176.

Two or more writings, executed contemporaneously between the same parties, and in reference to same subject-matter, must be deemed one instrument, and as forming the same contract. *Lawton v. Nesbit* (Civ. App.) 206 S. W. 227.

A proviso or exception incorporated in a written instrument will be construed as a limitation upon the language which precedes it. *Frost v. Smith* (Civ. App.) 207 S. W. 892.

Land contract must be construed as a whole, and cannot be paragraphed and paragraphs construed in severalty without reference to each other, where it is apparent that they are correlated and interdependent. *Davenport v. Sparkman* (Com. App.) 208 S. W. 658.

Negotiable instruments are contracts, and subject to the same rules of construction. *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

Apparently conflicting clauses must be reconciled by a reasonable interpretation, and in case of variance the one which contributes most essentially to the contract is entitled to the most consideration. *Price v. Biggs* (Civ. App.) 217 S. W. 236.

A contract must be construed as a whole, and be given a construction, if it can be reasonably done from the terms used and from the instrument as a whole that will give effect to the manifest intention of the parties. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

Stipulation of contract should not be construed so as to be without any effect, if it is possible to harmonize or give effect to the entire instrument. *Langben v. Crespi & Co.* (Civ. App.) 218 S. W. 144.

In the interpretation of a contract, the instrument should be read and considered as a whole. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

In construing an instrument, every part thereof must be taken to ascertain the intention of the parties to it, and the form used will not so much control as the relation of the parties at the time and their intention. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

A contract fairly open to two constructions, one of which will make it legal and one of which will make it illegal, must always be given the construction which makes it

legal. *Wicks v. Comves*, 110 Tex. 532, 221 S. W. 938, answering certified questions (Civ. App.) 171 S. W. 774.

Where the contract is ambiguous, the practical construction of its terms by the parties themselves becomes material. *Earhart v. Robinson* (Civ. App.) 215 S. W. 973.

The nature of a transaction should be determined with reference to the intention of the parties. *Newcom v. Ford* (Civ. App.) 222 S. W. 591.

The court's only function is to construe the language of the contract in the sense in which such language is ordinarily used, putting itself in the position of a contracting party and keeping in view the nature of the business and the end sought, and determine what contract the parties made, consistently, if possible, with their intention, but not what contract they had in mind to make or thought they had made. *Western Indemnity Co. v. Southern Surety Co.* (Com. App.) 223 S. W. 179, reversing judgment (Civ. App.) *Southern Surety Co. v. Western Indemnity Co.*, 190 S. W. 837.

When a contract is reasonably susceptible of a construction which will make it valid and binding, such construction should be given rather than one rendering it void. *Blackwell v. Scott* (Civ. App.) 223 S. W. 334.

Where two clauses of a contract are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions must be reconciled, if possible by any reasonable interpretation; it being necessary for this purpose to consider the entire instrument and the surrounding circumstances. *Penn v. Hare* (Civ. App.) 223 S. W. 527.

Where two clauses in a contract are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn. *Id.*

The words, "Payable at Marfa, Texas," stamped with a rubber stamp at the head of the written contract at the time of its execution, intended and understood by the parties to constitute a part of the contract, held a part thereof as against objection that it could not be considered a part thereof because the contract was clearly expressed in the body thereof. *Allison v. Hamic* (Civ. App.) 226 S. W. 483.

The most fundamental rule to be observed in the construction of a written instrument of any kind, as an instrument of conveyance, is to ascertain and give effect to the intention of the maker as shown by the language, and to give effect to every part of the writing, if possible without violence to the manifest intention evidenced by the instrument as a whole. *Gray v. Producers' Oil Co.* (Civ. App.) 227 S. W. 240.

Contract should be construed most strongly against the maker. *Pledger v. Business Men's Accident Ass'n of Texas* (Com. App.) 228 S. W. 110.

Intention which is the object sought by construction of a contract, and which, when discovered, governs in determination of rights and obligations of the parties, is not a secret unexpressed intention, but the intention finding expression in the language used. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Com. App.) 228 S. W. 114.

The intention of the parties is to be ascertained as expressed by the language used, but not the intention which may have existed in the minds of the parties, but not expressed by their language. *Slavens v. James* (Com. App.) 229 S. W. 317.

To arrive at the very intention of the parties is the object of investigation and interpretation of any contract. *Barber v. Herring* (Com. App.) 229 S. W. 472.

A contract will not be construed so as to render it invalid if it can be so construed to sustain its validity without violating the accepted canons of construction. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

Where it is clear that a word has been written into an instrument inadvertently, and it is clearly inconsistent with and repugnant to the meaning of the parties as shown by the whole instrument, it will be treated as surplusage and rejected altogether. *Id.*

For a contract to call for construction, it is not necessary that the words to be interpreted shall be themselves ambiguous. *Texas Pac. Coal & Oil Co. v. Harris* (Civ. App.) 230 S. W. 237.

In all rules of construction of contracts, the dominant purpose is to ascertain, if it be possible, what was in the minds of the parties to the contract at the time it was made. *Id.*

A party will be held to that meaning which he knew the other party to the contract supposed the words to bear. *Id.*

Where a contract for the shipment of high density cotton was upon a printed form for the shipment of standard cotton, a provision on the back of the form covering the payment of additional freight if the cotton did not conform to the weight stated for standard cotton is applicable to the shipment of high density cotton, except as to the provision stating the weight. *Elder, Dempster & Co. v. Weld-Neville Cotton Co.* (Com. App.) 231 S. W. 102.

29. **Construction as to parties—Joint or several.**—Evidence that deeds recited that interest accruing on purchase-money notes was to be grantors' support while they lived and should be paid until grantors both died, and that notes were unconditional in terms, sustains finding that surviving payee was entitled to entire interest. *Shropshire v. Alvarado State Bank* (Civ. App.) 196 S. W. 977.

30. — **Principals, sureties, or guarantors.**—Fact that notes were given as part payment upon a joint contract of sale and lease of a ranch by plaintiff to defendants constitutes an alleged surety on one of notes a principal maker. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341.

Where one who was not a mere indorser, but a principal maker, places his name upon a note to serve purposes of his own, he is not entitled to the rights of a mere indorser or surety. *Id.*

Printed notice on paper on which contract was written that defendant was responsible only as broker held not to prevent liability on the contract where no principal was disclosed. *Dorman v. Boehringer* (Civ. App.) 195 S. W. 669.

Where J. gave T., as payment or security for note he owed him, note payable by W. and M. to J., J. did not become principal obligor on the W. and M. note, by indorsing it, or afterwards signing a renewal, in order to get an extension of time, but was only surety thereon. *Wilson v. Thompson* (Civ. App.) 202 S. W. 341.

32. Accommodation parties—Relation to other makers.—A bank, as an accommodated party, cannot maintain an action against accommodation makers of note. *Brady v. Cobbs* (Civ. App.) 211 S. W. 802.

33. — Liability.—That note was given to payees merely for purpose of having it indorsed by them to aid in the further negotiation of the note to some other person did not, in absence of agreement that note should be discounted by payees and no other person, release accommodation maker from liability upon theory that it was never delivered to payees, and therefore never became a valid obligation against accommodation maker, where accommodation maker's credit was extended for the purpose of enabling the other makers to procure money. *Rabb v. Seidel* (Civ. App.) 218 S. W. 607.

Where several persons jointly interested in property transferred the property to a third person, who executed notes, the transaction being for the accommodation of one of the grantors, the grantee, upon the deed of conveyance being declared a mortgage, was entitled to have the entire property applied to payment of the notes before being required to respond personally thereon. *Harris v. Hamilton* (Com. App.) 221 S. W. 273, reversing judgment (Civ. App.) 185 S. W. 409.

35. Collateral agreements.—An agreement that, if plaintiff attorney would continue to attend to business of payee as he had done, notes given by attorney to payee would be canceled at payee's death, held too uncertain to warrant specific performance. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

An agreement that certain notes were to be paid only from damages recovered by the maker from his vendor of premises, and if the court should hold the maker not entitled to damages the notes should be canceled and surrendered to the maker without payment, held valid. *Sides v. Knox* (Civ. App.) 203 S. W. 65.

Where a payee sued on notes and contract with maker that the notes should be paid only out of a special fund to be recovered by maker as a set-off against his vendor's mortgage, evidence that the claim was disallowed, and that through error the maker did not pay the full amount of the mortgage and costs upon foreclosure, is insufficient to entitle plaintiffs to recover. *Id.*

Where notes and mortgage for purchase price of engine were delivered by defendant buyer on condition that they should not be effective until plaintiff seller demonstrated engine to defendant's satisfaction, and defendant accepted it in writing, held that notes and mortgage never became effective, where defendant did not accept the engine, but notified plaintiff that he would not do so. *J. I. Case Threshing Mach. Co. v. Street* (Civ. App.) 216 S. W. 426.

In a proceeding wherein one against whom judgment was had on a note executed by him sought to recover the amount of the judgment from a third person, who had agreed to discharge the note and to purchase stock for which the note was given, evidence held sufficient to sustain a finding that there was an agreement to purchase the stock and to discharge the note executed therefor. *Reeves v. Anderson* (Civ. App.) 217 S. W. 745.

38. Extension and agreements to extend.—In an action on notes and to foreclose vendor's lien securing the same, evidence held insufficient to establish an agreement that, on payment of a portion of the notes, the remainder should be extended as a second lien, etc., there being nothing to show that defendant accepted any proposals as to such arrangement. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

40. — Effect.—Agreement extending time for payment of notes, providing in part that maker shall "pay off and discharge said indebtedness as evidenced by said notes * * * according to their face, tenor, and effect" on a date mentioned, held not to affect acceleration of maturity clause in notes. *Earhart v. Robinson* (Civ. App.) 215 S. W. 973.

42. Defenses against payee.—In the absence of an agreement to do so, no duty rests upon a creditor to notify his debtor that the debt has not been paid, although past due, so that the fact that the creditor did not notify the debtor that a note had not been paid until after the death of a third party to whom defendant had intrusted funds for its payment, and who had misappropriated them, did not avail as a defense in an action on the note. *First State Bank of Abilene v. Shaw* (Civ. App.) 214 S. W. 442.

43. Payment, tender or release.—Consideration is necessary in order to bind owners of notes to a verbal release of the maker. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

A notice by consignee subsequent to shipment of goods to postpone the filling of the order does not invalidate or impair a note given prior to shipment for the price thereof. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

Defendant, with money received as a gift from his uncle, discharged a note, secured by a mortgage on certain personal property. To prevent the second mortgagee from foreclosing, defendant placed the note in his uncle's private box at the bank, with which he did business. Instead of having the note marked paid, defendant requested the holder to indorse it without recourse. Held that, as it was the intention of defendant to discharge the note, and as the moneys which he used for that purpose were his own, the note was not a valid asset in the hands of the uncle, notwithstanding defendant's purpose to deceive other creditors, and so it did not pass to a legatee under the uncle's will. *Oberthier v. Oberthier* (Civ. App.) 200 S. W. 1165.

Where at maturity of note to bank by husband and wife, wife notified bank of her desire to pay it, and bank asserted intention not to surrender collateral, her separate property, and pledged to secure such note, unless separate debt of husband to bank were also paid, formal tender by wife of amount due on her note was not necessary. *Texas Bank & Trust Co. v. Kelly* (Civ. App.) 202 S. W. 357.

Agreement to pay costs, transfer one note to plaintiff, and give credit on another held by defendant on which he was surety held compromise and settlement of suit, although defendant failed to enter credit on latter note; the allowance of credit being effective by mere agreement, without entry thereof on the note. *Bost v. Barringer* (Civ. App.) 202 S. W. 791.

Where the descriptive words of a compromise agreement pleaded by defendants in suit upon a note exhausted claims arising upon a contract, the rule of *ejusdem generis* did not apply to the release of all claims or demands of every kind and character against the estate of the deceased maker of note. *Richardson v. Nesbit* (Civ. App.) 204 S. W. 689.

A tender by the maker to the payee of a note does not constitute a tender as to the holder of the note, where the maker knows that the payee no longer has any authority in the matter. *Thomas v. Derrick* (Civ. App.) 207 S. W. 140.

A waiver of tender, like the tender itself, to be binding must be made on the date payment is due. *Miller v. Poff* (Civ. App.) 217 S. W. 399.

A contract of release of liabilities entered into between a group held to include a release of individual personal notes from one to another, and not to imply only the release of such claims as were held by the signers collectively or as a group. *Nesbit v. Richardson* (Civ. App.) 223 S. W. 595.

The payment of a note or other obligation is complete when money intended for its payment or discharge has reached the hands of an agent authorized to receive it. *Shaw v. First State Bank of Abilene* (Com. App.) 231 S. W. 325.

44. — **Application of payments.**—Where a company solicited its controlling stockholders to execute a demand note to be discounted for its benefit with a national bank, agreeing to make deposits with the bank to be applied solely to payment of the note, to which the bank agreed, and subsequently sufficient deposits were made to pay off the note, though the bank wrongfully applied them to another debt, the bank cannot recover against the accommodation makers on the note, which, in legal contemplation, has been paid. *Goldstein v. Union Nat. Bank of Dallas* (Civ. App.) 216 S. W. 409.

45. — **Recovery of payments made.**—Buyer's failure to make complaint in writing 10 days after he had begun operating engine, as required by contract, held not to defeat his right to show failure of consideration, and to have cancellation and recovery of amount paid. *Southern Engine & Pump Co. v. Teneha Light & Power Co.* (Civ. App.) 196 S. W. 260.

46. — **Agreement to pay note and novation.**—"Novation" is execution of a new obligation for an existing one either between same or different parties, the consideration being discharge of old contract. *Guaranty State Bank of Timpson v. Wm. D. Cleveland & Sons* (Civ. App.) 195 S. W. 939.

Purchase-money notes, purchased by defendant pursuant to agreement with vendee to carry debt, held not novated, merged, and extinguished by subsequent transactions between parties interested, evidenced by judgment, deeds, and notes canceled by later decree, so as to deprive defendant of right to recover on them. *Nobles v. Long* (Civ. App.) 202 S. W. 752.

Where holders of notes against newspaper publishers made contract whereby one of the holders was to sell advertising space, collect proceeds, and divide proceeds among holders to apply on notes, the contract merely provided method of payment of notes and was not a novation. *Pyle v. Park* (Civ. App.) 214 S. W. 652.

Contract whereby first party agreed to make collections and make monthly payments of a portion of amount collected to second party, to apply toward payment on notes held by latter against third party, did not create trust relation between first and second parties requiring first party to apply collections to payment of second party's notes to bank with which he had deposited third party's notes as collateral. *Id.*

Before a purchaser of land, who had assumed, as part of the consideration, a deed of trust thereon, can be proceeded against personally on the secured notes, the land which is the primary fund for payment thereof must be exhausted by sale under the deed of trust. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Com. App.) 231 S. W. 738.

47. — **Evidence.**—In suit for specific performance of oral contract to cancel notes given by plaintiff, an attorney, to his client, since deceased, evidence must show affirmatively that plaintiff comes with clean hands, that contract was beneficial to deceased, and that plaintiff has performed fully and fairly. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

Evidence held to sustain judgment for cancellation of deed of trust on ground that note secured was paid either to bank which owned it or to its authorized agent. *Turner v. Gregory* (Civ. App.) 203 S. W. 615.

The presumption that a note which has long been past due has been paid is not a conclusive presumption, and the fact that the vendor holding such note conveyed the land on which he retained a lien to another is sufficient to authorize a finding that the note had not been paid. *Rooney v. Porch* (Civ. App.) 223 S. W. 245.

In action on note, evidence held to sustain finding that plaintiff did not agree to take an interest in a mine, nor accept certificate of shares in a corporation formed to take over the mine, in payment of balance due on note. *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

50. **Attorney's fees—Right in general.**—If notes given as part of purchase price of land provide for payment of attorney's fee, if suit is brought, it is not error to award at-

torney's fees in the vendor's action for the price. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

In a suit on a promissory note, attorney's fees may be allowed, notwithstanding the absence of proof as to amount agreed upon for collection. *Van Wormer v. Gallier* (Civ. App.) 196 S. W. 307.

Where contract for payment of money provides for reasonable attorney's fees, "when incurred," such fees are incurred when it becomes necessary to place claim in hands of attorneys for collection. *Schutz v. Dabney* (Civ. App.) 204 S. W. 342.

In action on notes, held that, on the pleadings, judgment for attorney's fees was not erroneous on the ground that there was no showing when the notes were placed in the hands of attorneys, and no proof that plaintiff had promised to pay the attorneys, or that the attorney's fees were reasonable. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

In an action on a note brought by trustee to whom it had been indorsed, where judgment went for plaintiff, it was proper to enter judgment for attorney's fees, despite defendant's contention that there was no evidence, either that the note had been placed in the hands of an attorney for collection, or that the amount allowed was reasonable. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

Where a purchaser of an oil lease executed notes for a portion of the purchase price which stipulated for an attorney's fee, the vendor is entitled in an action against him for deceit in which the purchaser did not recognize the obligation of the notes to claim the attorney's fee provided for by the notes, though the purchaser recovers damages for deceit, which are to be offset against his liability for the balance of the purchase money. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

51. — **Nature of claim.**—Obligations to pay attorney's fees, stipulated in notes, are contracts for indemnity only, and obligee is entitled to collect only a fair amount as fees, though less than per cent. stipulated. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

52. — **Against whom recoverable.**—Where a chattel mortgagee indorsed and transferred the notes secured by the mortgage, it was obligated as indorser, to pay the face value thereof and no more, and, in a suit against it by the transferee, was not liable for attorney's fees provided for only in the mortgage. *Fulwiler Electric Co. v. Finance Corporation of Illinois* (Civ. App.) 211 S. W. 267.

53. — **Placing with attorney for collection.**—If mortgage notes are delivered to trustee under trust deed to institute foreclosure proceedings as such trustee and not as attorney for collection, holders of notes are not entitled to attorney's fees stipulated for in notes. *Oak Cliff State Bank & Trust Co. v. Conroy* (Civ. App.) 201 S. W. 699.

An attorney having a paper for collection is not precluded from acting as trustee in the instrument creating the lien on the security, and the fact that he acted as such trustee would not prevent him from collecting the attorney's fees provided for on the face of the note. *Gunter v. Merchant* (Com. App.) 213 S. W. 604.

54. — **Bringing suit.**—In a suit on a promissory note, attorney's fees may be allowed as provided for in the note, without allegations and proof that it was necessary to place the same in the hands of attorneys for collection. *Van Wormer v. Gallier* (Civ. App.) 196 S. W. 307.

56. — **Tender to avoid.**—Plaintiff in an action on notes providing for attorney's fees is not entitled thereto; the action being prematurely brought, and defendant having made tender when notes were due. *Brooks v. Long* (Civ. App.) 199 S. W. 510.

Where notes given for purchase price of land contained only the usual stipulations regarding payment of attorney's fees, refusal of vendor and payee to accept payment of the first note when it became due, at which time the maker of the notes and his vendee were ready and able to pay, estopped the payee from claiming attorney's fees. *Eason v. Fowler* (Civ. App.) 207 S. W. 958.

57. — **Amount.**—Under sale contract providing that if claim arising from buyer's failure to accept goods should be placed with attorneys for collection the buyer should pay 10 per cent. on contract price of goods as attorney's fees, held, that such fees should be computed on the actual amount sought for the breach. *Early-Foster Co. v. M. M. Graves Co., Inc.* (Civ. App.) 201 S. W. 214.

Where a note bearing 10 per cent. interest, provided for the costs of collection, including attorney's fees, and there was evidence that plaintiff had agreed to pay his attorney the usual fee of 10 per cent., which was a reasonable sum, it was not error to allow an attorney's fee of 10 per cent., instead of 6 per cent. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

58. — **Reasonableness.**—Though a provision in a note for the payment of 10 per cent. as attorney's fees in case the note is placed in the hands of an attorney, or suit is brought, is in the nature of a contract for indemnity rather than liquidated damages, the amount so fixed may be recovered, in the absence of pleading and proof that it is unreasonable or unconscionable. *Marti v. Wooten* (Civ. App.) 217 S. W. 447.

59. **Right of action on note.**—A creditor of sellers by reducing debt to judgment, after creation of trust in note, held not to have elected to pursue a different remedy than that which he had by virtue of agreement between sellers and buyers, whereby trust was created in favor of sellers' creditors in note given as part consideration for the goods. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Where plaintiff failed to schedule note in bankruptcy proceeding and inferentially concealed it from trustee, he could not, after having been adjudged a bankrupt, maintain suit on note and foreclose mortgage securing it, without showing that trustee had not elected to claim note, or refused to do so. *Perkins v. Alexander* (Civ. App.) 209 S. W. 789.

Where plaintiff sold a saloon business to defendants and had the note for the price

made payable to a liquor company to which he expected to sell it, there was no election of remedies, preventing suit on the note, by first suing the liquor company for the price of the business sold, but merely a mistake of remedy. *Wahl v. Ramsey* (Civ. App.) 218 S. W. 559.

Where plaintiff sold a saloon business to defendants and had the note for the price made payable to a liquor company, to which he expected to sell the note, he was the equitable owner, and could sue on the note in his own name. *Id.*

Holder of legal title to note in trust for another could sue thereon in his own name, or the suit could be brought in the name of the beneficial owner. *Rabb v. Seidel* (Civ. App.) 218 S. W. 607.

64. Conversion of note.—Where notes were delivered to a contractor, who agreed to build a house, pay the owner a certain sum, and buy the material of a lumberman who signed the contractor's bond, in absence of allegation that the lumberman did not intend to perform, plaintiff could not recover from the lumberman as for conversion of the notes. *Wilkinson v. Bradford* (Civ. App.) 200 S. W. 1094.

The measure of damages for the conversion of a negotiable note is the amount prima facie due on the face of the note. *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424.

If one converts a note to his own use, the measure of damages is prima facie the face value of the note, and it devolves upon the defendant to show that it was of less value. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

TITLE 17

BLACKLISTING

Article 594. Discrimination.

See *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181.

Wrongful discharge.—When employer assigns grounds for discharge of employé, he cannot afterwards justify it on other grounds which were not at the time made basis of termination of contract. *Levy v. Jarrett* (Civ. App.) 198 S. W. 333.

TITLE 18

BONDS—COUNTY, MUNICIPAL, ETC.

Chap.	Chap.
1. General provisions and regulations as to the issue of bonds.	3. Funding, refunding, and compromise of indebtedness.
2. Particular provisions and regulations as to issue of bonds.	4. Sinking funds—investments, reports, regulations, and penalties.

CHAPTER ONE

GENERAL PROVISIONS AND REGULATIONS AS TO THE
ISSUE OF BONDS

Art.	Art.
605. Election on bonds required.	613. Bonds to be based on and limited by taxable values.
606. Proposition submitted, how.	619. Conditions precedent, etc.
610. Courthouse, jail, bridge, and road bonds, authorized.	625. Certificate of Attorney General, etc.

Article 605. Election on bonds required.

In general.—The powers of commissioners' courts in relation to the building of county roads, except as to the limits of taxation therefor, are governed wholly by general laws, following the command of Const. art. 11, § 2, particularly this article and arts. 606, 610, 2241, and art. 2242, which follows the amendment of Const. art. 8, § 9, limiting the amount of levy. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Submission to taxpayers.—This article and arts. 786, 787, 2912, as respects time during which polls shall be open and when they shall close, are directory. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

In view of this article and art. 2912, held, that bond election is not invalidated by holding polls open until 7 p. m., in spite of arts. 786, 787, as to election of mayor and aldermen. *Id.*

Under the referendum provisions of the Ft. Worth charter, only qualified electors paying property taxes may vote at an election to issue bonds, and the bond issue cannot be attacked on the ground that the electors were restricted to such persons. *City of Ft. Worth v. Cureton*, 110 Tex. 590, 222 S. W. 531.

Result of election submitting to qualified voters of city the selection of a park site to be purchased with the proceeds of bonds authorized held merely advisory; the city council not being bound by its result, but entitled to disregard the same and make such purchase of lands for parks as appealed to its judgment. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

Where the commissioners' court a few days before an election on the proposition to issue road bonds entered an order specifying that certain roads should be constructed, but such order was not included in the official notices, the fact that voters relied on the order and were thus induced to vote for issuance of the bonds does not deprive the commissioners' court of authority to repeal the order and dispose of the proceeds of the bonds in improving other roads. *Strength v. Black* (Civ. App.) 226 S. W. 758.

Where prior to an election on the proposition to issue road bonds the commissioners' court made an order reciting that if the issue should carry particular roads should be improved, the order was provisional, and may be altered, repealed, or amended by the court, for, under this article and art. 619, bonds can issue only after an election authorizing them, and hence, until executed, the commissioners' court had power to alter or repeal such order. *Id.*

Issuing warrants.—Instruments reciting that they are warrants issued to contractor for labor and material, and constituting orders upon the county treasurer to pay such contractor, and intended to be warrants, are simply warrants and not "bonds" within statutes regulating issuance of bonds. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

The commissioners' court of a county can, under art. 2241, subd. 8, issue interest-bearing warrants maturing annually in future years, limited only by Const. art. 11, § 7, in spite of this article and art. 610, relating to bonds. *Id.*

Art. 2241 empowers the commissioners' court of county which has not adopted art. 6966 to build a road and create an indebtedness to be paid by interest-bearing warrants in future years, although a bond issue under this article and art. 610, for such purpose, has been voted down in an election. *Id.*

Evidence of indebtedness of a county to a contractor in form of negotiable bonds, with interest coupons attached, for construction of courthouse, but designated "county courthouse warrants," in view of minutes of commissioners' court disclosing its intention, were warrants, and not bonds. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Counties cannot borrow money to erect a courthouse by issuing warrants and selling them in advance of contracting legal indebtedness for the courthouse, but can borrow

the money only by issuing bonds with the approval of the taxpayers. *Ashby v. James* (Civ. App.) 226 S. W. 732.

Art. 606. Proposition submitted, how.—The proposition to be submitted for the issuance of bonds shall distinctly specify the purpose for which the bonds are to be issued, the amount thereof and the rate of interest, and shall further state the maturity of the bonds to be issued, or that the bonds may be issued to mature serially within any given number of years, not to exceed forty years, within the discretion of the governing body issuing the same. All elections heretofore held wherein the proposition or propositions submitted provide that the bonds should be issued to mature serially within any given number of years within the discretion of such governing body, or to mature in a certain number of years, are hereby validated, and such bonds may be issued to mature serially, the maturity thereof not to extend beyond the time stated in the proposition submitted and to otherwise conform to the proposition voted on at such election. Provided that this Act shall not apply to any city where the authority to issue its bonds under Chapter 9 Acts Thirty-seventh Legislature is at this time in litigation. [Acts 1899, p. 258, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 23, § 1, amending art. 606, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. Took effect Aug. 21, 1921. Ch. 9, Acts 37th Leg., referred to, is set forth, post, as arts. 881, 882, 882a, 925, 925a.

Form of submission.—Under this article the commissioners' court in submitting proposition for issuance of bridge bonds must state the purpose in the order for election and in the notice of election. *Moore v. Coffman*, 109 Tex. 93, 200 S. W. 374.

Where commissioners' court in submitting question of bond issues stated purpose to build bridges, and furtherance stated specific locations, statement of locations could not be disregarded as surplusage, but was essential part of purpose of bonds. *Id.*

Under this article and arts. 627-633, the purpose of an election for issuance of county bonds for roads can be determined only from order of commissioners' court for election and from the notices therefor, and commissioners' campaign statements cannot be considered. *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160.

If a bond election vote is cast on notice of one kind of bonds, bonds with different terms are not authorized. *City of Amarillo v. W. L. Slayton & Co.* (Civ. App.) 208 S. W. 967.

Under this article and art. 629, requiring that the proposition submitted to the electors of a county for the issuance of bonds for road construction, as authorized by art. 637a, subds. 3, 4, as amended by Acts 36th Leg. (1919) c. 38, shall distinctly specify the purpose for which the bonds are to be issued, and that notice of such election shall be given, it is necessary that the purposes of the election should appear in the official notice, so where the purpose stated was to determine whether bonds should be issued to the amount of \$1,750,000 to purchase improved roads, etc., and construct others, an order of the commissioners' court, made a few days before election, specifying that if the bond issue should carry, certain roads should be improved, which was not incorporated in the election notice, will not control disposition of the funds derived from the bond issue. *Strength v. Black* (Civ. App.) 226 S. W. 758.

Where plaintiff had agreed to dispose of a city's bonds upon their approval by plaintiff's attorneys and the proposition submitted to the voters stated that the issue was "not to exceed \$75,000," plaintiff's attorneys were justified in refusing to approve of the bonds because of a Court of Civil Appeals case deciding that such a submission did not comply with the statute where the Supreme Court on appeal held the decision of such proposition unnecessary, but did not disaffirm the opinion thereon. *Grant v. City of Mineral Wells* (Civ. App.) 230 S. W. 854.

Art. 610. [877] Courthouse, jail, bridge, and road bonds, authorized.—The County Commissioners' Court of any county in this State is hereby authorized and empowered to issue the bonds of said county for the following purposes:

1. For the erection of the county court house and jail, or either, for the purchase of suitable sites within the county and the construction of buildings thereon, as schools or homes for dependent and delinquent boys and girls, or for either one or both of said sexes, as said Commissioners' Court may determine.

2. For the purchasing or constructing bridges for public purposes, within the county or across a stream that constitutes a boundary line

of the county, or for the purpose of improving and maintaining the public roads in the county; provided, that this article shall not be construed as authorizing the Commissioners Court to issue bonds for any of said purposes without submitting the same to a vote of the people of said county as provided in the preceding articles of this chapter; provided, further, that when the commissioners' court deem it advisable to issue bonds for both the purchase or construction of bridges, and the improvement and maintenance of the public roads, both questions may be submitted and voted on as one proposition. [Acts 1911, p. 204, § 1; Acts 1921, 37th Leg., ch. 47, § 1, amending art. 610, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect March 21, 1921.

Powers of commissioners.—Under this article, a county has no authority to issue bonds for the erection of a jail and courthouse combined, which is to be permanently used as a jail only, and to be used as a courthouse only until a separate courthouse shall be built. *Nolan County v. State*, 83 Tex. 182, 17 S. W. 823.

— **Issuance of warrants.**—Art. 2241 empowers the commissioners' court of county which has not adopted art. 6966 to build a road and create an indebtedness to be paid by interest-bearing warrants in future years, although a bond issue under this article and art. 605 for such purpose has been voted down in an election. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

The commissioners' court of a county can, under art. 2241, subd. 8, issue interest-bearing warrants maturing annually in future years, limited only by Const. art. 11, § 7, in spite of this article and art. 605, relating to bonds. *Id.*

This article, authorizing commissioners' courts to issue negotiable county bonds for public road purposes, did not amount to an annulment of the court's authority to issue nonnegotiable county warrants for the same purpose. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

This article authorizing commissioners' courts to issue negotiable bonds for constructing county roads, and previous statutes, permitting them to issue nonnegotiable interest-bearing county warrants, relate to using the county's credit in distinctly different ways and evidencing its debt by instruments of a clearly different nature, both as to legal import and effect, and hence are not so antagonistic as to warrant the construction that the later act repeals the former acts. *Id.*

Art. 613. [880] Bonds to be based on and limited by taxable values.—The issue of bonds under this chapter shall be based upon the taxable values of the county according to the last approved assessment, and shall be limited as follows: courthouse and jail bonds shall be limited to an amount not exceeding two per cent. of said taxable values; bridge bonds shall be limited to an amount not exceeding one and one-half per cent. of said taxable values. In determining the amount of the bonds of the respective kinds to be issued, previous indebtedness for said several purposes shall be considered. The total indebtedness of any county shall not be increased by any issue of bonds to a sum exceeding five per cent. of its said taxable values. [Acts 1893, p. 112; Acts 1920, 36th Leg. 3d C. S., ch. 54, § 1, amending art. 613, Rev. Civ. St. 1911.]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 619. [918d] Conditions precedent, etc.

Cited, *Strength v. Black* (Civ. App.) 226 S. W. 758.

Examination by Attorney General.—Suit, to restrain issuing of bonds for improvement of a public highway, was properly dismissed, where at time petition was filed bonds were in the hands of the Attorney General for examination under art. 632, it being the duty of the Attorney General, under this article, to pass upon questions raised by petition. *Smith v. Reaves* (Civ. App.) 208 S. W. 545.

Where plaintiff sued to recover a good faith deposit made on a contract to dispose of a city's bonds after refusing the bonds because of his attorney's adverse opinion, the contract providing for acceptance upon his attorney's approval only, where the grounds of objection were entertained seriously by the Attorney General the matter being a debatable question upon which attorneys might differ as to the bond issue's legality, the opinion cannot be condemned as unfounded or wanting in good faith. *Grant v. City of Mineral Wells* (Civ. App.) 230 S. W. 854.

Art. 625. [918f] Certificate of Attorney General, etc.

Cited, *City of Amarillo v. W. L. Slayton & Co.* (Civ. App.) 208 S. W. 967.

Effect of certificate.—County bonds, authorized under this article, which makes a certificate of approval of the Attorney General and their due registration prima facie evi-

dence of their validity, are essentially negotiable securities. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

DECISIONS RELATING TO SUBJECT IN GENERAL

Bona fide purchasers.—Where bona fide purchasers held municipal bonds reciting their issuance under specified city ordinance recorded in certain book, etc., the city is estopped from claiming that bonds were issued under a subsequent ordinance. *City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

A mayor authorized to issue municipal bonds held authorized to insert a recital that their issuance was pursuant to a specified ordinance. *Id.*

CHAPTER TWO

PARTICULAR PROVISIONS AND REGULATIONS AS TO THE ISSUE OF BONDS

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| <p>1. FOR PUBLIC ROADS—CONSTRUCTION AND MAINTENANCE OF</p> <p>Art.
627. Power to issue road, etc., bonds and levy tax for interest and sinking fund.</p> <p>628. Election for; propositions, restrictions and requirements; provisions as to interest.</p> <p>629. Notice of election.</p> <p>630. Time, place and manner of holding election.</p> <p>631. If election carried by two-thirds vote, bonds to be issued.</p> <p>632. Bonds, term, interest, examination, registry, custody; sale; disposition of proceeds; disbursement, regulation of.</p> <p>633-636.</p> <p>637. District accepting provisions to be body corporate; powers.</p> <p>637a. County may issue bonds to compensate district for bonds issued; election; tax.</p> <p>637b. Use of and exchange of bonds for outstanding bonds.</p> | <p>Art.
637c. Denominations of bonds; interest rate; maturity; sale.</p> <p>637d. Political subdivision not be created out of territory of district having outstanding road bonds.</p> <p>637g. Issue of bonds where district bonds have been issued, etc.</p> <p>637h. Cancellation or revocation of bonds issued.</p> <p>637hh. Previous bond elections not invalidated.</p> <p>638. Road district not liable for torts.</p> <p>639. County commissioner to be ex officio road superintendent; powers.</p> <p>640. Bids to be taken on contract work; contract to be let to lowest and best bidder; right to reject.</p> <p>641. County operating under special road tax law, may take advantage of provisions.</p> |
| | <p>2. FOR CAUSEWAYS, VIADUCTS, BRIDGES, ETC., CONSTRUCTION AND MAINTENANCE AND USE OF</p> <p>655. May condemn land of railway, etc.</p> |

1. PUBLIC ROADS—CONSTRUCTION AND MAINTENANCE OF

Article 627. Power to issue road, etc., bonds and levy tax for interest and sinking fund.

See *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Purpose of issue.—Under art. 606 and this and following articles, the purpose of an election for issuance of county bonds for roads can be determined only from order of commissioners' court for election and from the notices therefor, and commissioners' campaign statements cannot be considered. *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160.

Disposition of proceeds.—In view of this chapter, relating to the creation of road districts, and arts. 637, 638, relating to suits by and against them, and article 639, relating to their power to contract, a road district fund, derived from the sale of bonds legally issued for maintaining roads, is subject to payment of damages for breach of contract made by the proper officers to carry out the authorized purposes for which the bonds were voted. *Horn v. Matagorda County* (Com. App.) 213 S. W. 934.

Contractors having contracts with road districts or other public corporations have the same ordinary remedies as are open to parties to private contracts.—*Id.*

That a road district fund derived from the sale of bonds may become subject to recoveries for breach of contract, and so be dissipated without accomplishing the purposes for which raised, is no defense to an action against the district by a contractor for breach of contract, the taxpayers having their remedy against the officers acting for the district. *Id.*

Districts which may issue bonds.—Under Const. art. 3, § 52, as amended in 1904, providing that any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the state or any defined district, may upon vote of two-thirds of the taxpayers issue road bonds, the term defined "district" means a

defined area in a county, and less than a county, etc., although under the section a county, as well as a defined district, may issue road bonds, construction of roads being a county purpose; the limitations as to amount of taxes which could be levied being removed, not only from road district, but from counties. *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

Art. 628. Election for; propositions, restrictions and requirements; provision as to interest.

See *Bell County v. Hines* (Civ. App.) 219 S. W. 556; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Cited, *Meuly v. State*, 26 Tex. App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Blackwell v. State*, 29 Tex. App. 194, 15 S. W. 597.

Powers of commissioners.—Where, after district road bonds had been issued, under this article and arts. 631, 632, the commissioners' court, on voter's petition, made order determining that the bonds could not be sold at par, repealing the order authorizing their issuance and canceling the bonds, mandamus would not lie, nearly five years thereafter, to compel reissuance of the bonds. *Jackson v. McAllister* (Civ. App.) 196 S. W. 671.

Where district roads bonds are issued under this article and arts. 631, 632, the commissioners' court, as incidental to the express power over roads given by art. 2241, and the "control" and "custody" of the bonds given by art. 632, has power to determine the manner and methods to be adopted in order to effect a sale, and when it is not reasonably possible to sell them at par. *Id.*

Art. 629. Notice of election.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting. *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Purpose of issue.—Under art. 606 and this article, requiring that the proposition submitted to the electors of a county for the issuance of bonds for road construction, as authorized by art. 637a, subsds. 3, 4, as amended by Acts 36th Leg. (1919) c. 33, shall distinctly specify the purpose for which the bonds are to be issued, and that notice of such election shall be given, it is necessary that the purposes of the election should appear in the official notice, so where the purpose stated was to determine whether bonds should be issued to the amount of \$1,750,000 to purchase improved roads, etc., and construct others, an order of the commissioners' court, made a few days before election, specifying that if the bond issue should carry, certain roads should be improved, which was not incorporated in the election notice, will not control disposition of the funds derived from the bond issue. *Strength v. Black* (Civ. App.) 226 S. W. 758.

Art. 630. Time, place and manner of holding election.

See *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Art. 631. If election carried by two-thirds vote, bonds to be issued.

See *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Powers of commissioners.—Where district roads bonds are issued under this article and arts. 628, 632, the commissioners' court, as incidental to the express power over roads given by art. 2241, and the "control" and "custody" of the bonds given by art. 632, has power to determine the manner and methods to be adopted in order to effect a sale, and when it is not reasonably possible to sell them at par. *Jackson v. McAllister* (Civ. App.) 196 S. W. 671.

Two-thirds vote.—In suit to contest election on issuance of bonds by road district, held, that court properly decreed attempted creation of district was null and void, thus declaring true result of election, at which more than one-third of voters voted against proposition. *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

In suit contesting election as to whether road district should issue bonds, evidence held to support findings that 23 voters, returned as voting for issuance of bonds and levy of tax, in fact voted against issuance and levy. *Id.*

Art. 632. Bonds, term, interest, examination, registry, custody; sale; disposition of proceeds; disbursement, regulation of.

See *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Sale of bonds at discount.—Where, after district road bonds had been issued, under this article and arts. 628, 631, the commissioners' court, on voter's petition, made order determining that the bonds could not be sold at par, repealing the order authorizing their issuance and canceling the bonds, mandamus would not lie, nearly five years thereafter, to compel reissuance of the bonds. *Jackson v. McAllister* (Civ. App.) 196 S. W. 671.

Sale of bonds on credit.—Under Loc. & Sp. Acts 33d Leg. (1913) c. 70, providing that road district bonds should be sold to the highest bidder for cash, a sale and purchase of the bonds partly on credit, or deferred installment payments, was void. *People's Guaranty State Bank of Tyler v. Castle* (Civ. App.) 218 S. W. 519.

Where bank bought road district bonds under Loc. & Sp. Acts 33d Leg. (1913) c. 70, partly on credit or deferred installment payments, and obtained title to the bonds and

sold them to another bank, the first bank, even though the sale and purchase of the bonds was void, was liable in debt to the county for the bonds. *Id.*

Where bank bought road district bonds under Loc. & Sp. Acts 33d Leg. (1913) c. 70, partly on credit, or deferred installment payments, and sold the bonds to another bank, the sale by the road district and purchase of the bonds by the first bank being void because on credit, the liability of the bank to the county was in the nature of a debt, and an order to presently command the delivery of any money by such bank to the depository of the county could not exist; no money being actually on deposit in the bank. *Id.*

Custody and control of bonds.—Where district roads bonds are issued under this article and arts. 628, 631, the commissioners' court, as incidental to the express power over roads given by art. 2241, and the "control" and "custody" of the bonds given by art. 632, has power to determine the manner and methods to be adopted in order to effect a sale, and when it is not reasonably possible to sell them at par. *Jackson v. McAllister (Civ. App.) 196 S. W. 671.*

Suit, to restrain issuing of bonds for improvement of a public highway, was properly dismissed, where at time petition was filed bonds were in the hands of the Attorney General for examination under this article; it being the duty of the Attorney General, under art. 619, to pass upon questions raised by petition. *Smith v. Reaves (Civ. App.) 208 S. W. 545.*

Diversion of fund.—If proposition on which county bonds were voted specified the roads to be improved, commissioners' court could be enjoined by taxpayer from diverting funds to other roads. *Grayson County v. Harrell (Civ. App.) 262 S. W. 160.*

Any agreement by the commissioners' court, tending to preclude it from full and free exercise of its discretion as to the roads to be improved with the proceeds of bonds voted to be issued for improvement of roads generally, would be against public policy. *Id.*

As the law constitutes the commissioners' court a board to designate the particular roads of a locality to be improved with the proceeds of road bonds, an order, made prior to election, which designated the particular roads to be improved at any subsequent time, if fairly done, may be changed, and no previous contract would prevent. *Strength v. Black (Civ. App.) 226 S. W. 758.*

Expenditure of funds.—Under the special road law of Navarro county, the discretion with reference to the handling of funds from road bonds of road district No. 1 and road district No. 12 is lodged solely in the road board of such districts, and the road boards of such districts are given exclusive care and management of the expenditure of such funds. *Montfort v. Commissioners' Court of Navarro County (Civ. App.) 226 S. W. 424.*

Arts. 633–636.

See *Garrett v. Commissioners' Court of Limestone County (Civ. App.) 230 S. W. 1010.*

Art. 637. District accepting provisions to be body corporate; powers.

See arts. 7020½–7020½k.

Cited, *Jackson v. McAllister (Civ. App.) 196 S. W. 671*; *Garrett v. Commissioners' Court of Limestone County (Civ. App.) 230 S. W. 1010.*

Nature and liability of road districts and boards of road districts.—The board of a road district under Sp. Acts 33d Leg. c. 95, held a "quasi public corporation." *Tyree v. Road Dist. No. 5 Navarro County (Civ. App.) 199 S. W. 644.*

Upon contracts within the scope of the powers of road districts or other public corporations duly made by their proper officers, such corporations are liable in the same manner as private corporations or natural persons, and such contracts cannot be breached with impunity, even when the Legislature has assumed to authorize it. *Horn v. Matagorda County (Com. App.) 213 S. W. 934.*

Art. 637a. County may issue bonds to compensate districts for bonds issued; election; tax.—Whenever in any political subdivision or defined districts in any county in this state bonds have been issued under the authority of Chapter 2, Title 18, Revised Civil Statutes of Texas of 1911, or any amendments thereto, or under authority of any special county road law, and thereafter bonds are voted by the entire county for the purposes hereinafter authorized, such political subdivisions or defined districts first issuing bonds may be fully and fairly compensated by the county in an amount equal in value to the amount of district bonds issued by such districts, and which shall be done in the form and manner hereinafter prescribed:

(1) It shall be the duty of the commissioners court, upon the presentation of a petition signed by two hundred and fifty resident property taxpaying voters of the county, whether residing in such road district or districts, or not, to order an election under the provisions of Chapter 2, Title 18, Revised Civil Statutes of Texas, 1911, to determine whether or not the bonds of such

county shall be issued for road construction purposes as authorized by subdivision 3 and 4 of this article.

(2) Such county bonds to be issued in such an amount as may be stated in the petition and order of the commissioners court, but within the limitations of the constitutional and statutory provisions; and at such election there shall also be submitted to the resident property taxpaying voters of the county the question as to whether or not a tax shall be levied upon the property of said county subject to taxation for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof.

(3) Where such road district or districts have by the requisite vote of the qualified property taxpaying voters thereof authorized the issuance of bonds, and the same have not been issued and sold, or, if sold and the proceeds have not been expended, at the time the election is to be ordered for the entire county, then the proposed county bonds shall be issued for the following purpose: "The issuance of County bonds for the construction of district roads and the further construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, throughout such county." If the proposition to issue such county bonds for said purpose shall receive the necessary favorable vote as is now provided by law, and said bonds shall have been approved and issued, then so much of the bonds so issued by the county as may be necessary to fairly and fully compensate such road district or districts shall be set aside by the commissioners court for that purpose; provided, that in the event such district bonds have not been issued and sold, then so much of the bonds so issued by the county as may be necessary to fairly and fully compensate such road district or districts shall be set aside by the commissioners court for that purpose; provided, that in the event such district bonds have not been issued and sold, then so much of the bonds so issued by the county as may be necessary to fairly and fully compensate such road district or districts shall be set aside for that purpose, and the same shall be sold and the proceeds applied to the construction, maintenance and operation of the roads within and for such road district or districts as contemplated by the election or elections theretofore held within and for such road district or districts, and such unsold district bonds shall thereupon become totally void, and it shall be the duty of the commissioners court of such county to immediately cancel and destroy such unsold district bonds; provided, however, that in the event such district bonds have been sold, then an exchange of a like amount of said county bonds may be made with the holder or holders of said district bonds as provided in subdivision 1 of Article 637b of this chapter, but if the commissioners court should find that such exchange cannot be made, then so much of the county bonds as may be necessary shall be transferred and placed to the credit of the interest and sinking fund account of such road district or districts in conformity with the procedure prescribed by subdivision 2 of Article 637b hereof.

(4) Where such road district or districts have issued bonds for the construction of public roads therein and the proceeds derived from the sale of the bonds have been applied to the construction of roads within and for such districts, then such district roads may be merged into and become a part of the general county system of public roads and such road district or districts shall be fully and fairly compensated by the county in an amount equal in value to the amount of bonds outstanding against such road district or districts at the time the bonds are issued by the county, and the proposed county bonds shall be issued for the following purpose: "The issu-

ance of county bonds for the purchase of district roads and the further construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, throughout such county." In the event the proposition to issue such county bonds shall receive the necessary favorable vote as is now provided by law, and said bonds shall have been approved and issued, then so much of the bonds so issued by the county as may be necessary for that purpose shall be set aside and exchanged for a like amount of outstanding district bonds, or the same may be transferred and placed to the credit of such road district or districts for the purpose of paying and retiring such district bonds as the same may mature. [Acts 1917, 35th Leg., ch. 203, § 2, adding art. 637a; Acts 1919, 36th Leg. 2d C. S., ch. 38, § 1, amending art. 637a.]

Took effect July 25, 1919.

See *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

Purpose of issue.—Under arts. 606, 629, requiring that the proposition submitted to the electors of a county for the issuance of bonds for road construction, as authorized by subsds. 3, 4, of this article, as amended by Acts 36th Leg. (1919) c. 38, shall distinctly specify the purpose for which the bonds are to be issued, and that notice of such election shall be given, it is necessary that the purposes of the election should appear in the official notice, so where the purpose stated was to determine whether bonds should be issued to the amount of \$1,750,000 to purchase improved roads, etc., and construct others, an order of the commissioners' court, made a few days before election, specifying that if the bond issue should carry, certain roads should be improved which was not incorporated in the election notice, will not control disposition of the funds derived from the bond issue. *Strength v. Black* (Civ. App.) 226 S. W. 758.

Art. 637b. Use of and exchange of bonds for outstanding bonds.—

If the proposition to issue such county bonds shall receive the necessary favorable vote as is now provided by law, and said bonds shall have been approved and issued, the taxes theretofore levied and collected in any road district or districts shall from that date be dispensed with as hereinafter provided, and the bonds so set apart by the commissioners court shall be used exclusively for the purpose of constructing the roads in any such subdivisions or districts or for the purpose of purchasing or taking over the improved roads in any such subdivisions or districts, as the case may be. The exchange of such county bonds for such outstanding district bonds shall be made in one of the following methods, to wit:

(1) An exchange of said bonds may be made with the holder or holders of any outstanding district bonds. The agreement for such exchange shall be evidenced by order of the commissioners court authorizing the same and by the written consent of the holder or holders of such district bonds, properly signed and acknowledged, as provided for the acknowledgment of written instruments by the laws of this state, which said order of the commissioners court, written agreement properly executed by the holder or holders of such district bonds, together with the county bonds to be given in exchange, shall be presented to and approved by the Attorney General of the State and shall bear his certificate of approval before the exchange is finally consummated. When such exchange of county bonds for district bonds shall have been consummated, it shall be the duty of the commissioners court to cancel and destroy said district bonds, and thereafter no tax shall ever be levied or collected therefor under the original election in such subdivisions or districts and the sinking funds then on hand to the credit of any such subdivisions or districts shall be passed to the sinking fund account of the county.

(2) In the event the exchange of the county bonds for the outstanding district bonds cannot be made as hereinabove provided for, it shall then be the duty of the commissioners court, at as early a date as practicable, to deposit with the county treasurer for the credit of the interest and sinking fund ac-

count of such road district or districts an amount of county bonds equal in value to the amount of outstanding district bonds. The order of the commissioners court authorizing the deposit of county bonds for the credit of the interest and sinking fund account of such road district or districts, together with the county bonds so authorized to be deposited, shall be presented to and approved by the Attorney General of the State and shall bear his certificate of approval before such deposit of county bonds shall be made and credit passed to such road district or districts. After such county bonds shall have been deposited for the credit of the interest and sinking fund accounts of any such road district or districts the sinking fund then on hand to the credit of such road district or districts shall be passed to the credit of the sinking fund account of the county and the commissioners court shall no longer levy and collect the taxes provided for under the original election for said bonds in such road district or districts, but in lieu thereof the said court shall, from the taxes levied for the purpose of providing the necessary interest on the county bonds hereinabove provided for, pay annually the interest on said county bonds deposited for the credit of such road district or districts, detaching the coupon therefor, and said payment of interest shall be passed to the credit of the interest account of such road district or districts as the owner or owners of said county bonds, and the funds so realized by said road district or districts shall be used by the commissioners court for the purpose of paying the interest on all such outstanding district bonds. It shall also be the duty of the commissioners court to set aside annually, from the taxes levied to provide the necessary sinking fund for such county bonds, the necessary sinking fund for the retirement of said county bonds and upon the maturity of said county bonds the commissioners court shall pay said bonds in full and said payments shall be passed to the credit of the sinking fund of such road district or districts and the funds so realized by said road district or districts shall be used by the commissioners court to pay in full all outstanding district bonds. [Acts 1917, 35th Leg., ch. 203, § 2, adding art. 637b; Acts 1919, 36th Leg. 2d C. S. ch. 38, § 1, amending art. 637b.]

Art. 637c. Denominations of bonds; interest rate; maturity; sale.—The county bonds issued for the purpose contemplated in subdivisions three and four of Article 637a shall be issued in similar denominations, bearing the same rate of interest, having the same date or dates or maturity and with similar options of payment as the outstanding district bonds, it being the intent hereof that said county bonds shall in every respect be similar to said district bonds, except they shall be county obligations instead of district obligations, and shall be dated on a date after the date of the election at which they were authorized; and the county bonds issued in excess of the amount required to exchange, offset and retire said outstanding district bonds shall be issued and sold in the manner now provided by law and may mature serially or otherwise at the discretion of the commissioners court and may run for a term not to exceed forty years and such bonds shall bear not more than 5½% interest per annum, and the proceeds thereof shall be credited to the available road fund of the county and shall be expended by the commissioners court in constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes or in aid thereof throughout such county. The issuance and sale of the bonds herein authorized and the levy and collection of taxes therefor shall be conducted as now required by law, except as herein otherwise provided; and provided further that the necessary expense incident to the issuance of said bonds may be paid

out of the proceeds from the sale thereof. [Acts 1917, 35th Leg. ch. 203, § 2, adding art. 637c; Acts 1919, 36th Leg. 2d C. S., ch. 38, § 1, amending art. 637c.]

Art. 637d. Political subdivision not to be created out of territory having outstanding bonds.—Where a political subdivision or defined road district of a county has heretofore been established and issued bonds or is hereafter established and issues bonds, no political subdivision or defined road district shall thereafter be created or established overlapping the same territory or embracing any part thereof while any of the bonds of such political subdivision or defined road district are outstanding and unpaid, except as hereinabove provided for the county as a whole:

Provided that in the event the boundaries of any defined road district hereafter created or established overlap or embrace any part of the territory or area of another defined road district or road districts theretofore created or established, such road district shall be invalid only as to that portion thereof which overlaps or embraces any part of the territory of a defined road district or road districts theretofore established, and it shall be the duty of the commissioners court of the county in which such conflicting road districts are situated to pass a nunc pro tunc order accurately defining the boundaries of the subsequently created road district in conformity to the boundaries of such contiguous road district or road districts.

Provided further that all defined road districts in this state heretofore attempted to be established where the territory already embraced therein overlaps any portion of the territory embraced within the boundaries of another defined district or road district theretofore formed or established are validated in all respects, except as to that portion thereof which overlaps or embraces any part of the road district or road districts first created or established, and it shall be the duty of the commissioners court of the county in which such districts are situated to pass a nunc pro tunc orders accurately defining the boundaries of the road district attempted to be created or established so as to conform to the boundaries of the contiguous road district of road districts;

And provided that all regular and proper proceedings and orders had made in the issuance of bonds or proposed bonds in such defined road districts attempted to be established prior to the taking effect of this Act are hereby in all things validated, ratified and confirmed; provided that this Act shall in no way affect or repeal any provision of any special road law heretofore enacted for any county. [Acts 1917, 35th Leg., ch. 203, § 2, adding art. 637d; Acts 1918, 35th Leg. 4th C. S., ch. 18, § 1.]

Explanatory.—The act amends "article 637d of section 2, chapter 203, General Laws of the Regular Session of the 35th Legislature." The act took effect March 20, 1918.

Art. 637g. Issue of bonds where district bonds have been issued, etc.—Where any county in this State has already voted bonds for the purpose of purchasing or taking over district roads in any road district or districts within such county, and it shall appear that at the time such county election was held any one or more of such road district or districts has not issued and sold the road district bonds theretofore authorized by a vote of the qualified voters therein, then the commissioners court of such county may issue the county bonds already authorized in the election held throughout the county for the purpose of purchasing or taking over such district roads, and such county bonds so issued shall as to amount, rate of interest, date or dates of maturity, and options of payment conform in every respect

to such district bonds as described in the order of the commissioners court ordering the election at which such district bonds were authorized. If such district bonds have been sold but no roads have been constructed within and for such road district or districts, then such county bonds shall be issued for an amount equal in face value to the amount of said district bonds and the issuance thereof shall conform in every respect to the provisions and requirements of either subdivision 1 or subdivision 2 of Article 637-b hereof. The county, for and on behalf of such road district or districts, shall then proceed with the construction of such district roads, and the district roads so constructed shall be merged into and become a part of the general county system of public roads; provided, that the provisions of this Article shall apply only to such county road bond elections that have been ordered and held prior to the taking effect of this Act. [Acts 1919, 36th Leg. 2d C. S. ch. 38, § 2, adding art. 637g.]

Art. 637h. Cancellation or revocation of bonds issued.—In the event any bonds heretofore voted or that hereafter may be voted by an[y] county or political subdivision or defined district of any county, under the provisions of Chapter 2, Title 18, Revised Civil Statutes of Texas of 1911, and amendments thereto, or under authority of any special county road law, shall have remained unsold and the Commissioners Court shall find that the bonds cannot be legally sold in conformity with the law, then it may, or, upon petition of a two-thirds majority of the qualified property tax-paying voters of such county or political subdivision or defined district thereof, as shown by the records in the office of the County Tax Collector, shall, order an election for the purpose of submitting the question of the cancellation and revocation of said bonds to a vote of the qualified property taxpaying voters of such county or political subdivision or defined district thereof and the said election shall be ordered, held and conducted in the same form and manner as that at which such bonds may have been originally voted and authorized, and in the event the result of such election for the cancellation and revocation of such unsold bonds shall show that two-thirds of the qualified resident property taxpaying voters of such county or political subdivision or defined district of such county voting at such election have voted for the cancellation and revocation of such unsold bonds, the result of such election shall be duly declared by the commissioners court of the county in which such election shall have been held, the returns of such election and the result thereof duly entered of record in the minutes of the commissioners court of such county and immediately thereupon such unsold bonds shall become totally null and void and it shall thereupon become the duty of the commissioners court to cancel and destroy such unsold bonds by burning and shall forward a certified copy of their minutes showing such destruction and [can]cellation to the Comptroller of Public Accounts, who shall thereupon cancel the registration of said bonds, as shown on the records of his office. It shall further be the duty of the commissioners court of such county immediately to re-adjust all existing tax levies to properly meet the conditions resulting from the cancellation and revocation of such unsold bonds and to relieve the taxpayers of such county or political subdivision or defined districts of such county of any further or existing tax levy previously made for the purpose of paying the interest on said bonds and providing a sinking fund for the redemption thereof; provided that where any taxes have been levied and collected in the name of the county or political subdivision or defined district thereof in anticipation of the sale of

such bonds, such taxes so far as unexpended shall in the event of the cancellation and revocation of such unsold bonds and on order of the commissioners court duly entered of record be returned to the taxpayers ratably after deducting the compensation of the tax assessor, tax collector and county treasurer in connection therewith, and any other claims properly chargeable against such taxes and proper receipts for all sums so refunded to be taken and filed by the County Treasurer. Provided further that in the event a two-thirds majority of such qualified resident property taxpaying voters voting at said election be not in favor of the proposition for the cancellation and revocation of such unsold bonds, the result of such election shall nevertheless be declared and entered of record in the same manner as though the result thereof had shown a two-thirds majority for the cancellation and revocation of such bonds. [Id., § 2, adding art. 637h.]

Art. 637hh. Previous bond elections not invalidated.—Nothing in this Act shall be construed as invalidating any bond elections previously ordered or held within and for any county in this state or any political subdivision or defined district of any county under the provisions of Chapter 2, Title 18, Revised Civil Statutes of Texas of 1911, and amendments thereto, or under authority of any special county road law. [Id., § 3.]

Art. 638. Road district not liable for torts.

See *Horn v. Matagorda County* (Com. App.) 213 S. W. 934; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Art. 639. County commissioner to be ex officio road superintendent; powers.

See *Horn v. Matagorda County* (Com. App.) 213 S. W. 934; *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Art. 640. Bids to be taken on contract work; contract to be let to lowest and best bidder—Right to reject.

See *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

Powers of board.—Navarro County Road Law 1913, § 23, as to "when * * * board shall begin its construction, or let its contract for the construction," construed, in view of sections 19, 20, 26, 30, 32, 34, and 35, to permit road district board to improve roads by contract awarded upon competitive bids or by purchasing material and employing labor and having work done under its own supervision. *Edens v. Road Dist. No. 1 of Navarro County* (Civ. App.) 211 S. W. 791.

In action to enjoin construction of road ordered by road district under Navarro County Road Law 1913, evidence held to show that the board in ordering road and letting contract substantially complied with the law. *Id.*

Evidence held insufficient to show flagrant and gross abuse of discretion and authority, or willful intention of committing wrong, by board of road district in ordering construction of certain road. *Id.*

Road district board has discretionary power to locate and construct pike roads which can be interfered with by injunction only where action sought to be enjoined is so arbitrary and devoid of merit as to be fraudulent, and the result of gross abuse of discretion implying not merely error of judgment but perversity of will, passion, prejudice, partiality, or moral delinquency. *Id.*

Submission to competition.—Art. 2268a, requiring commissioner's court, before entering into a contract requiring the expenditure of \$2,000 or more, to submit the contract to competitive bids, held not applicable to county's contract with civil engineers for professional services in connection with the construction and maintenance of public highways and roads in proceedings under Rev. St. tit. 18, c. 2, as amended in 1917, in view of this article and arts. 1460-1498, 2571, 5535, 5972, and 1498c, and in view of the purpose of the statute, and the absurdity of letting contracts for professional services of a technical nature through competitive bidding. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

Rights of subcontractor.—Under contract authorizing road district to withhold certain percentage of amount due contractor, and, if road cost more than contract price, to apply retained amount on excess cost, a subcontractor of an insolvent contractor who failed to finish his contract, is not entitled to be paid from retained amount until roads covered by contract have been completed. *Johnston v. Cobb & Gregory* (Civ. App.) 213 S. W. 354.

Art. 641. County operating under special road tax law, etc.

Constitutionality of special law.—Special road district law held constitutional. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

2. CAUSEWAYS, VIADUCTS, BRIDGES, ETC., CONSTRUCTION AND MAINTENANCE AND USE OF**Art. 655. May condemn land of railway, etc.**

See *Barnes v. State* (Cr. App.) 230 S. W. 986.

CHAPTER THREE**FUNDING, REFUNDING AND COMPROMISE OF INDEBTEDNESS****1. GENERAL POWERS OF FUNDING, REFUNDING AND COMPROMISING DEBTS.**

Art.

656. Debts may be funded, when and how.

657. Old bonds of legal issue may be substituted by new.

3. RAILROADS, ETC., SUBSIDY BONDS, ETC.—COMPROMISE, ADJUSTMENT AND REFUNDING OF.

Art.

679. Bonds sold and exchanged, how.

685. Assessment of taxes and compensation of assessor.

695. Compromise by vote of the people; notice of election, how given.

1. GENERAL POWERS OF FUNDING, REFUNDING AND COMPROMISING DEBTS**Article 656. [890] Debts may be funded, when and how.**

See *Barnes v. State* (Cr. App.) 230 S. W. 986.

Art. 657. [883] Old bonds of legal issue may be substituted by new.

See *Barnes v. State* (Cr. App.) 230 S. W. 986.

3. RAILROAD, ETC., SUBSIDY BONDS, ETC.—COMPROMISE, ADJUSTMENT AND REFUNDING OF**Art. 679. [910] Bonds sold and exchanged, how.**

Cited, *Moses v. Dibrell*, 2 Civ. App. 457, 21 S. W. 414.

Art. 685. [915] Assessment of taxes and compensation of assessor.

Cited, *Mitchell v. Zurn* (Com. App.) 221 S. W. 954.

Compensation of assessor.—The general tax law allows, as compensation to the assessor of state and county taxes, a percentage on the valuation of property assessed, "two-thirds" of which to be paid by the state, and one-third by the county. Gen. Laws 1889, p. 89, authorizing counties to fund their indebtedness, provides that "all taxes levied under this act shall be assessed and collected in the same manner, and by the same officers whose duty it is to assess and collect the state tax, and they shall receive for their services one-fourth the rate of commissions allowed for assessing and collecting the state tax." Held, that the assessor levying a tax to meet the funded indebtedness of a county is entitled to receive, as compensation, one-fourth of the rate paid by the state for like services under the general tax law. *Commissioners' Court of Wilbarger County v. Perkins*, 86 Tex. 348, 24 S. W. 794.

Art. 695. [901] Compromise by vote of the people; notice of election, how given.

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

CHAPTER FOUR

SINKING FUNDS—INVESTMENTS, REPORTS, REGULATIONS
AND PENALTIES

Art. 698. Sinking fund of county, city, town, school district or school community to be invested in United States, state, city or town bonds, provided, etc.	Art. 700. Draft on sinking fund not to be honored by treasurer except for interest, redemption or investment.
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Article 698. Sinking fund of county, city, town, school district or school community to be invested in United States, state, city or town bonds, provided, etc.—The Commissioners Court of any county, the city council of any incorporated city or town, and the board of trustees of any independent school district, or any other school district or school community, in the State of Texas, are authorized and empowered, whenever they may deem it advisable, to invest any sinking fund or sinking funds now on hand or hereafter acquired for the redemption and payment of any outstanding bonds of such county, city or town, or independent school district, or any other school district or school community, in bonds of the United States, war-savings certificates and certificates of indebtedness, issued by the Secretary of the Treasury of the United States and in bonds of the State of Texas, of any county of the State of Texas, or of any incorporated city or town; provided, that no such bonds shall be purchased which, according to their terms, mature at a date subsequent to the time of maturity of the bonds for the payment of which such sinking fund was created; and provided, further, that in the event any commissioners court, city council or board of trustees is unable to purchase any securities of the character above mentioned, which mature at a date prior to the time of maturity of the bonds for the payment of which such sinking fund was created, then they are authorized, in their discretion, to invest such funds in the bonds of any independent school district, or of any other school district or school community authorized to issue bonds, under the same restrictions as herein mentioned. [Acts 1905, p. 25, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 75, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 700. Draft on sinking fund not to be honored by treasurer except for interest, redemption or investment.

Application.—Where a county treasurer defaulted, and it is impossible to ascertain which funds were depleted, his successor cannot be compelled by mandamus to pay the full amount of funds due to a drainage district although he may have wrongfully paid orders from other funds: this article and art. 2608, being inapplicable. Nueces County Drainage Dist. No. 2 v. Garrett (Civ. App.) 202 S. W. 1000.

TITLE 19

BRANDS, TRADE-MARKS, ETC.

Art.

703. Trade-marks, etc.

706a. Dairies and milk distributors may acquire trade-mark or trade-name.

706b. Confusion with other mark or name to be avoided.

706c. Restraining unlawful use of mark or name.

Art.

706d. Etching or blowing mark or name on bottles.

706e. Duty of county clerk to record mark or name; effect of record; fee.

706f. Transfer of mark or name; record; fee.

Article 703. [308a] Trade-marks, etc.

Trade-names.—Words, such as "Union Painless Dentists," may become so associated with the business or avocation of certain persons in a certain locality, as to lose their primary meaning and come to signify the business carried on by such persons and constitute a trade-name. *Aultz v. Zucht* (Civ. App.) 209 S. W. 475.

That the same name may have been used in other cities by other persons will not deprive users of protection against its use in the city in which it has been used exclusively by them until it has come to stand for their business. *Id.*

Evidence held to support finding that the words "United Painless Dentists," in view of circumstances surrounding their use, were so similar to the words "Union Painless Dentists" as to mislead the public and to make the use thereof constitute unfair competition. *Id.*

That partners in the dental business under a trade-name permitted a corporation organized by them to use such name in the business of dealing in and manufacturing dental supplies, which constituted no competition with their practice of dentistry, did not prevent them from asserting their right to the use of such name in conducting the dentistry business, as against persons infringing thereon in conducting the dentistry business. *Id.*

Nature and essentials of trade-mark rights.—An article need not be actually manufactured by the owner of the trade-mark, it being enough that it is manufactured under his supervision and according to his directions, thus securing both the right of the owner and the right of the public. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

A trade-mark, patent, or copyright is property in the sense that it has a commercial value, and may be sold as other property, but it is not an article of commerce in the sense that it may be consumed by the purchasing public. *Id.*

Legislation by Congress.—Where Congress has legislated under U. S. Const. art. 1, § 8, providing for monopolies in the matter of patent rights, trade-marks, and copyright, no state can nullify its acts. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

Restrictions upon assignees.—The owner of a patent right, copyright, or trade-mark, having the exclusive right to manufacture and sell the article protected thereby, and being under no legal obligation to grant such right to another, may impose upon his assignee such restrictions as he may see proper, and to which his assignee will agree, including the price at which the article may be sold, the territory in which it may be manufactured and sold, the material that may be used in its manufacture or in connection therewith. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

Restrictions upon vendees.—The owner of an article protected by patent, copyright, or trade-mark, when he has manufactured and sold the same, cannot impose restrictions upon his vendee as to the future sale of the same, since, having parted with his ownership therein, it enters the channels of trade as an article of commerce, and is thereafter beyond his control. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

Art. 706a. Dairies and milk distributors may acquire trade-mark or trade-name.—Any person, firm or corporation engaged in the dairying business, or in the distribution or sale of milk requiring the use of bottles, may file in the office of the County Clerk of the county in which it is expected such person, firm or corporation will sell or distribute milk, a fac simile or description of the name or names, trade name, mark or design used by such person, firm or corporation for advertising purposes, and cause such fac simile or description to be published in a public newspaper published in such county for three successive weeks, and the act of filing and publication shall operate to secure to such dairyman, milk distributor or milk dealer, sole and exclusive right to use in said county or counties said name or names, trade name, mark or design. [Acts 1921, 37th Leg., ch. 81, § 1.]

Explanatory.—Sections 5 and 6 impose criminal penalties, and are set forth, post, as arts. 1396e, 1396f, Penal Code. The act took effect 90 days after March 12, 1921, date of adjournment.

Art. 706b. Confusion with other mark or name to be avoided.—No name or names, trade name, mark or design shall be filed by the County Clerk as aforesaid that could probably be mistaken for a name or names, trade name, mark or design already of record, provided further that all persons, firms or corporations now using a name or names, trade name, mark or design shall have thirty days time after this law takes effect in which to file such name, or names, trade name, mark or design under provision of this Act before the same can be claimed by others. [Id., § 2.]

Art. 706c. Restraining unlawful use of mark or name.—Any person, firm or corporation having adopted a name or names, trade name, mark or design, as provided herein, may proceed by suit to enjoin the use of said name, or names, trade name, mark or design by any other person, firm or corporation, and all courts having jurisdiction thereof shall grant injunction to restrain the unlawful use thereof. [Id., § 3.]

Art. 706d. Etching or blowing mark or name on bottles.—Any person, firm or corporation engaged in the dairying business or the sale or distribution of milk, who shall have filed with the County Clerk of the county in which they may be engaged in the distribution or sale of milk, a name or names, trade name, mark or design as herein provided, may cause to be engraved, etched, blown in or impressed or otherwise produce, upon the bottles owned by said person, firm or corporation such name or names, trade name, mark or design, and when such name or names, trade name, mark or design is so impressed upon a bottle such bottle shall be prima facie the property of the person, firm or corporation which may appear upon the record of the office of the County Clerk of such county to be the owner of such name or names, trade name, mark or design, either as the original owner or transferee, as herein provided. [Id., § 4.]

Art. 706e. Duty of county clerk to record mark or name; effect of record; fee.—Upon the filing with the County Clerk of such fac simile or description, as herein provided, it shall become the duty of the County Clerk to record the same in a well-bound book and index the same under the name of each owner and also under the trade name, and shall furnish to such owner a certificate containing a description of same, which said certificate shall be prima facie evidence that the person or persons therein named is the owner of said name or names, trade name, mark or design; provided the clerk shall be paid a fee of one dollar for recording such trade mark or name as herein provided for. [Id., § 7.]

Art. 706f. Transfer of mark or name; record; fee.—Any owner of a name or names, trade name, mark or design recorded as herein provided who desires to convey or assign same shall do so by a written assignment duly acknowledged, and filed with said County Clerk, which said assignment shall refer to the book and page where said original is recorded, and the clerk shall upon the filing of said assignment record same and index same as an original and note on the margin the fact of the assignment and refer to book and page where such assignment is recorded, and furnish to the assignee of said name or names, trade name, mark or design a certificate of ownership; provided the clerk shall receive for recording such transfer, such fees as are now provided by law for similar services. [Id., § 8.]

TITLE 20

CARRIERS

- Chap.
 1. Duties and liabilities of carriers.
 2. Bills of lading certified, etc.
 3. Disposition of unclaimed or perishable property by carriers.

- Chap.
 4. Connecting lines of common carriers.
 5. Pipe lines.

CHAPTER ONE

DUTIES AND LIABILITIES OF CARRIERS

- Art.
 707. Common law shall govern, except, etc.
 708. Carriers can not limit their responsibilities.
 709. Bound to carry goods, when.
 710. Must give bill of lading.

- Art.
 711. Liability as warehousemen, etc.
 712. Diligence as to delivery.
 713. Shall forward in good order, etc.
 714. Shall feed and water live stock, unless, etc.

Article 707. [319] [277] Common law shall govern, except, etc.

Cited, Gulf, C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

4. Carriage of passengers—What law governs.—The Carmack Amendment did not apply where a railroad sold ticket to passenger covering three railroad lines and one bus line, and the passenger was injured while on the bus line, and only the initial carrier was liable, the subsequent carriers being liable only for their own negligent acts. Gray v. Colorado Southern Ry. Co. (Civ. App.) 204 S. W. 347.

9. — Commencement and termination of relation.—Intending passenger has right to go to station within reasonable time before train's departure, and road owes him duty to exercise ordinary care. Baker v. Williams (Civ. App.) 198 S. W. 808.

Holder of ticket, who intended to board train, held entitled to rights of passenger. Texas & P. Ry. Co. v. Aiken (Civ. App.) 202 S. W. 811.

One intending to become a passenger, who was injured in the depot and who subsequently boarded train, presumed to have paid fare. Ft. Worth & D. C. Ry. Co. v. Brown (Civ. App.) 205 S. W. 378.

One who goes to railway depot a reasonable time before scheduled departure of train, with intention of paying fare and boarding train, is a passenger even prior to purchase of ticket. Id.

A passenger who jumped off train and was killed on following day, held not a passenger at the time of injury, but a trespasser. Chicago, R. I. & G. Ry. Co. v. Sears (Com. App.) 210 S. W. 684.

10. Tickets.—A carrier cannot be compelled to transport passengers over any line other than its own, unless it has voluntarily contracted to so do, either expressly or impliedly. McAdoo v. McClure (Civ. App.) 232 S. W. 348.

15. — Transportation by connecting carrier.—Where initial carrier sold passenger ticket on three lines of railroad and on one bus line, and passenger was injured while riding in the bus, the driver of which was employed for such purpose by the railroad, the passenger's husband had a cause of action against the initial carrier for such injuries. Gray v. Colorado Southern Ry. Co. (Civ. App.) 204 S. W. 347.

17. Duties as to transportation—Accommodations during transit.—A paralytic refused permission to ride in a baggage car in his wheel chair, held not entitled to damages. Missouri, K. & T. Ry. Co. of Texas v. Nelson (Civ. App.) 195 S. W. 1176.

18. — Discharging and setting down passengers.—Carrier held to owe no duty other than to safely carry passenger to place called for by ticket. Walls v. Kansas City, M. & O. Ry. Co. of Texas (Civ. App.) 195 S. W. 868.

A passenger relying on a statement of a train porter, held not guilty of contributory negligence in being carried past station. Houston E. & W. T. Ry. Co. v. Thorn (Civ. App.) 197 S. W. 778.

Failure to stop train at a station at which it was not scheduled to stop, held not actionable. Gulf, C. & S. F. Ry. Co. v. Sanderson (Civ. App.) 216 S. W. 286.

Negligence, though not the sole cause of an injury, is a proximate cause, if it was one of several causes and was a prominent or efficient cause. Southern Traction Co. v. Glenn (Civ. App.) 220 S. W. 798.

20. Action for breach of contract to carry—Sufficiency of evidence.—Evidence held to authorize finding of negligent carriage beyond destination. Southern Traction Co. v. Glenn (Civ. App.) 220 S. W. 798; Houston E. & W. T. Ry. Co. v. Thorn (Civ. App.) 197 S. W. 778.

Evidence held to raise issue of contributory negligence of passenger put off at wrong station. Gulf, C. & S. F. Ry. Co. v. Gentry (Civ. App.) 197 S. W. 482.

In an action against a carrier for refusing to transport a passenger, the evidence did not warrant a recovery for doctor's bills where the doctor to whom plaintiff said she owed the bill denied attending her on account of any sickness contracted at the time in question, or any knowledge of such sickness, or any charge for such service. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

21. — **Damages.**—As to recovery for injury sustained from exposure in riding horseback to destination, see *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482. \$79 damages for being carried past a station about a mile, held justified by evidence. *Houston E. & W. T. Ry. Co. v. Thorn* (Civ. App.) 197 S. W. 778.

Passenger carried beyond destination held entitled to damages for trouble, loss of time, and expenses, and resulting injuries and sickness, but the damages recoverable are limited to those which are proximate and not remote or contingent. *Gulf, C. & S. F. Ry. Co. v. Nichols* (Civ. App.) 198 S. W. 328 denying recovery to a woman carried by her station who became so frightened and excited as to result in illness.

See, also, *Nevill v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 211 S. W. 523.

In an action against a carrier to recover for mental suffering caused to children by being carried five miles past their destination, so that they were compelled to walk back, there could be no recovery for mental suffering alone, in the absence of proof of any physical injury. *Texas Electric Railway Co. v. Price* (Civ. App.) 213 S. W. 1092.

Interurban railroad, negligent in not stopping its car for passenger at station in town containing a hotel, held not liable for injuries received by passenger in walking to other town. *Eastern Texas Electric Co. v. Reagan* (Civ. App.) 228 S. W. 366.

Where passenger, on failure of interurban car to stop for him at station at small town containing a hotel without making an effort to secure lodging walked 10 or 12 miles to other town, he was contributorily negligent, precluding him from recovering damages from railroad. *Id.*

22. **Personal injuries—Care required in general.**—Carrier is not insurer against personal injury. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638; *Trinity & B. V. Ry. Co. v. McDonald* (Com. App.) 208 S. W. 912.

In the treatment of passengers awaiting trains the carrier owes high degree of care. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

Instruction that carrier is required to exercise the "highest degree of care possible" for safety of passengers demands too much. *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Com. App.) 207 S. W. 84.

For negligence to be actionable, the injury must be observable and preventable, except when declared by positive law. *Trinity & B. V. Ry. Co. v. McDonald* (Com. App.) 208 S. W. 912.

23. — **Elevators.**—As electricity will at times be cut off, the mere stopping of an elevator thereby is not a wrongful act toward a passenger, where there was no physical injury. *Mills v. Robinson* (Civ. App.) 208 S. W. 351.

24. — **Freight or mixed trains.**—One who accepts passage on freight train accepts consequent inconvenience of traveling thereon. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

25. — **Care as to persons intoxicated or under disability.**—Passenger's mental disability not observable, and unknown to carrier, held to impose no added duty of caring for him. *Chicago, R. I. & G. Ry. Co. v. Sears* (Com. App.) 210 S. W. 684.

Failure of employes to care for mentally incompetent passenger, held not actionable. *Id.*

When a passenger, to the knowledge of the carrier becomes unable to care for himself by reason of mental incapacity, it is the carrier's duty to exercise a high degree of care for his safety. *Stewart v. Houston & T. C. Ry. Co.* (Civ. App.) 229 S. W. 577.

27. — **Persons to whom liable.**—A carrier owes possessor of drover's pass high degree of care. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128; *Roberts v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 229 S. W. 954. See, also, *Yoes v. Texas & P. Ry. Co.* (Civ. App.) 211 S. W. 311.

One going to station to ascertain time of arrival of train he desired to take, held entitled to recover for injuries. *Baker v. Gohman* (Civ. App.) 226 S. W. 691.

28. — **Acts or omissions of employes.**—Holder of drover's pass, held entitled to recover for mortification and humiliation endured because of profane and abusive language used toward him. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

Where one employed to repair an elevator talked of the danger of the elevator's falling, in the presence of a passenger, causing her injury from fright, the master was not liable. *Mills v. Robinson* (Civ. App.) 208 S. W. 351.

Carrier is generally liable for injury caused by employe's negligence in opening or closing car door without warning passenger. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

A carrier is liable for its servant's violation of its duty to protect a passenger in all cases, and also in cases where the servant's own act, even though beyond the scope of his authority, as a conductor's act in exhibiting an automatic pistol, injures the passenger. *Texas Midland R. R. v. Monroe*, 110 Tex. 97, 216 S. W. 383.

A carrier is liable for assaults and insults by its employes. *Wright v. Schaff* (Civ. App.) 228 S. W. 333.

A carrier responsible for any conduct of its employes which results either in wanton or negligent injury of the passenger. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

The conductor was not negligent in temporarily obstructing the aisle by standing therein, bending over to speak to some one, as a woman passenger approached, walking to the rear, and lost her balance before she reached him as she halted to wait for him to

let her pass. *Steed v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 714, affirming *Gulf, C. & S. F. Ry. Co. v. Steed* (Civ. App.) 209 S. W. 772.

29. — **Acts of fellow passengers or third persons.**—A railroad which permits an express company to use its depot and platform is liable for injuries to persons, if it knew, or should have known of the negligent handling of the express company's trucks. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

A carrier must use high degree of care to protect passengers on train from stoning by boys. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 200 S. W. 263.

A passenger waiting at depot for train held entitled to protection against assault and robbery. *Missouri, K. & T. Ry. Co. of Texas v. Silber* (Civ. App.) 209 S. W. 188.

Carrier is bound to exercise the established degree of care to guard its passengers against assaults and other unlawful acts of fellow passengers. *Texas & P. Ry. Co. v. Baker* (Com. App.) 215 S. W. 556.

31. — **Condition and use of premises.**—When it is shown that a seat in a railway depot is in an unsafe condition, and that plaintiff, an intending passenger, was injured thereby, a finding of negligence was justified without further evidence as to the length of time the condition had existed and the carrier's knowledge thereof. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

It is the duty of a carrier of passengers to provide safe and suitable premises. *Id.* See, also, *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

32. — **Taking up passengers.**—A railroad does not owe to one riding on a drover's pass duty of starting its caboose from depot platform, or furnishing light for his safety; but time should be given him to get aboard, or, if there is insufficient time, he should be so informed, and forwarded by another train. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

A carrier does not as a matter of law owe a passenger the duty of assistance in entering its cars, unless conditions exist showing that such assistance is necessary or is desired. *Bird v. Schaff* (Civ. App.) 206 S. W. 711.

Where defendant's employé, having transportation, was killed by one of defendant's interurban cars while crossing the track to board the same, the absence of statute or ordinance regulating the speed of cars passing the station was immaterial, the operatives of the car owing the duty of using ordinary care to discover and avoid injuring persons at the station. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

33. — **Sufficiency and safety of means.**—A carrier must use that high degree of care which very cautious persons generally use under such circumstances to prevent injury to passengers; and this pertains, not only to construction of roadbed, tracks, equipment, and appliances, but to the examination and maintenance thereof. *Hines v. Parry* (Civ. App.) 227 S. W. 339.

34. — **Management of conveyances.**—It is not negligence for a train to accelerate speed suddenly while approaching a station. *Vivian v. San Antonio, U. & G. R. Co.* (Civ. App.) 196 S. W. 267.

Train employé, in closing door, is charged with the duty of exercising that high degree of care and vigilance to prevent injury to passenger that a very prudent, cautious, and competent person would have exercised; failure to exercise such care constituting negligence imputable to the carrier. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

35. — **Setting down passengers.**—Partial blindness of a passenger does not require presence of an attendant to keep him from leaving the moving train, but only presence of assistance to alight when the train stopped. *Vivian v. San Antonio, U. & G. R. Co.* (Civ. App.) 196 S. W. 267, holding a trainman's remark, "Well, we are here," was not an invitation to alight, while the train was moving.

Injury in alighting at conductor's invitation. *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Com. App.) 207 S. W. 84.

When safe and proper facilities for alighting are furnished, carriers are not required to assist passengers in ordinary cases to alight, but if the circumstances make it reasonably apparent that assistance is needed, it is the carrier's duty to render assistance. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344, reversing *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

It is railroad's duty to furnish such steps as will enable a woman passenger to alight in safety, and, if the steps are defective or unsafe, to render such assistance to her as will make the use of steps as safe as the safest known. *Id.*

A railroad owes an alighting passenger that high degree of care which a very prudent and cautious person would exercise under the circumstances. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344.

36. — **Care as to persons accompanying passengers.**—One who went on a depot platform to meet a passenger and was injured by falling over the tongue of an express truck held entitled to recover for the negligent handling of the truck. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

Railroad held bound to observe custom, and allow one who had seen his wife and daughter aboard the train reasonable time to alight. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

A railroad company's duty to a passenger's escort alighting from a moving train and falling on its track used by a switch engine does not arise from its license to pedestrians to use a foot path in crossing its track, but its operatives owe him the duty to use ordinary care to discover his presence and to avoid injuring him. *St. Louis Southwestern Ry. Co. of Texas v. Watts*, 110 Tex. 106, 216 S. W. 391.

37. — **Proximate cause of injury.**—Railroad's failure to furnish train with toilet having bowl or pan at the bottom of stool held not to render it liable for injury to pas-

senger's eye from small hard substance blown through opening in stool. *Trinity & B. V. Ry. Co. v. McDonald* (Com. App.) 208 S. W. 912.

To constitute "actionable negligence," the injury must be a natural and probable consequence of the negligence complained of, and must be such that it should have been foreseen in the light of attending circumstances. *Chicago, R. I. & G. Ry. Co. v. Sears* (Com. App.) 210 S. W. 684.

Conductor's act in temporarily obstructing aisle held not proximate cause of woman passenger's fall as she halted to wait for him to let her pass. *Steed v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 714.

Transfer company held liable for injuries to passenger of bus where one of the proximate causes thereof was the negligence of the bus driver in leaving the horses unfastened, though an automobile backed against one of the horses. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

40½. — **Operation by federal government.**—See *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 219 S. W. 252; *Hines v. Parry* (Civ. App.) 227 S. W. 339.

41. — **Limitation of liability.**—Stipulation in pass exempting company from liability for negligence is void. *Galveston, H. & S. A. Ry. Co. v. Mullen* (Civ. App.) 198 S. W. 409 deciding that such holding did not contravene due process provisions of federal and state Constitutions.

A drover's pass stipulating against liability for failure to set the passenger down at a station is valid. *Roberts v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 229 S. W. 954.

A ticket stating that in selling ticket for passage over other lines the selling carrier acted only as agent and was not responsible beyond its own line held valid notwithstanding failure to disclose names of other carriers for which such company acted as agent. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

Passenger ticket providing that carrier in selling ticket "for passage over other lines" acted as agent and was not responsible beyond its own line, and containing coupon entitling buyer to free transportation by bus between two depots on transfer from one train to the other, held to preclude recovery against such carrier for injuries sustained during transportation by such bus; the words "over other lines," within limitation of liability, not being restricted to railroad lines. *Id.*

47. — **Sufficiency of evidence.**—Evidence held insufficient to sustain a finding that slippery condition of steps was proximate cause of passenger's fall. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

Evidence held to support recovery by holder of drover's pass. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

Evidence held to authorize finding of negligence in that seats had not been properly inspected. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 201 S. W. 417.

Evidence held to authorize finding that railroad's failure to hold train a reasonable length of time at station, to enable plaintiff to alight, was proximate cause of his injuries. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

Evidence held to show negligence in closing car door. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

Testimony held to warrant finding that porter was negligent when he projected his knee over step box. *Ft. Worth & D. C. Ry. Co. v. Courtney* (Civ. App.) 214 S. W. 839.

In an action by a passenger injured in stepping from lower step of passenger coach to platform, as result of her foot catching on the edge of a board or box covering certain wires or switching apparatus, evidence held to warrant a finding of negligence. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

Evidence that car was running about 40 miles an hour, on a dark and stormy night, when the motorman might have anticipated that some one might be crossing the track to board the car, which was to stop on signal only, held to sustain a finding of negligence proximately causing death. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

Finding of negligence in leaving gangplank on platform a position held justified by the evidence. *Id.*

In an action for death of one who had left train and was walking along a path to the public road when injured at a defective culvert, evidence held insufficient. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

In an action for injuries when caught in an elevator, evidence held to show the accident occurred practically as claimed. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

48. — **Damages.**—Evidence held to support jury finding of \$333 as damages for mental and physical suffering of shipper in connection with boarding of caboose, and \$666 as damages for injuries in attempting to alight. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

Submitting to jury as element of damages plaintiff's diminished earning capacity held not error though he was then receiving same salary. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 201 S. W. 417.

Instruction, authorizing recovery for physical injury and suffering in the past and for damages to health in the future, was not erroneous. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

Plaintiff held not entitled to damages for humiliation suffered by the use of obscene, vulgar, and profane language by men in the station agent's office, adjoining waiting room. *Ft. Worth & R. G. Ry. Co. v. Bryant* (Civ. App.) 210 S. W. 556.

Where train employees negligently failed to stop train upon passenger's signal, it was passenger's duty to exercise ordinary care to prevent injury to himself. *Nevill v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 211 S. W. 523.

Testimony held not to warrant finding that plaintiff was suffering from ovarian disease prior to her injury in alighting from train. *Schaff v. Wright* (Civ. App.) 214 S. W. 945.

49. — **Excessive damages.**—\$5,000 held not excessive. *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983.

\$6,000 for injury to foot of man 42 years of age, held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 201 S. W. 417.

\$1,500 damages to assaulted passenger for humiliation and mental distress and her resultant nervous condition held not excessive. *Southern Traction Co. v. Coley* (Civ. App.) 211 S. W. 265.

\$500 for bodily pain resulting from a sprained ankle held excessive to the extent of \$250. *Baker v. Williams* (Civ. App.) 213 S. W. 986.

\$2,000 damages to a married woman, who fell in alighting and broke a rib, dislocated a rib, and twisted her spine, held not excessive. *Ft. Worth & D. C. Ry. Co. v. Courtney* (Civ. App.) 214 S. W. 839.

\$15,000 damages held not excessive for injuries to arm and shoulder. *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644.

\$5,500 damages for sprains and fractures of wrists, which permanently impaired the usefulness of hand, held not excessive. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

51. **Contributory negligence of and assumption of risk by person injured.**—An intending passenger, injured in sitting down between two other passengers in what appeared to be a seat, held not negligent as a matter of law. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

52. — **Entering conveyance.**—It is not want of ordinary prudence for minor to attempt to board street car without assistance of escort at hand. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

Railroad company held not liable to one injured while seeking to enter train. *Magee v. Missouri, K. & T. Ry. of Texas* (Civ. App.) 222 S. W. 636.

53. — **In transit.**—Son of consignee of express, injured by being thrown when driver ran express wagon into telephone pole, held not negligent in riding on top crates. *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

54. — **Leaving conveyance.**—Shipper alighting from caboose held not negligent. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

Attempting to leave train, after placing his wife and daughter on board. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

Passenger, negligent in not looking to see the position of the step box. *St. Louis, S. F. & T. Ry. Co. v. Gibson* (Civ. App.) 211 S. W. 263.

Elevator passenger who tried to leave the elevator when it was stopped held not guilty of negligence contributing to his injuries when the operator shut the door on his foot and leg. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

55. — **Acts by permission or direction of carrier.**—Passenger held entitled to assume conductor was not exceeding his authority and was not inviting him to alight at an unsafe place. *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Com. App.) 207 S. W. 84.

61. — **Sufficiency of evidence.**—Evidence held insufficient to show that shipper, riding on drover's pass, was negligent in alighting from moving train. *Texas & N. O. R. Co. v. Tillman* (Civ. App.) 197 S. W. 1128.

In an action by a passenger injured in stepping from lower step of passenger coach to platform, as result of her foot catching on the edge of a board or box covering certain wires or switching apparatus held jury was warranted in finding that plaintiff was not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

63. **Ejection of passengers and intruders.**—Passenger who voluntarily leaves a train on the advice of the conductor, upon discovery that she has forgotten her ticket, cannot recover as for ejection. *Southern Kansas Ry. Co. of Texas v. Wallace* (Com. App.) 206 S. W. 505.

64. — **Defective or invalid ticket or pass.**—Condition of pass, held not available to relieve road from payment of damages caused by negligence in ejecting plaintiff's wife, road having refused to recognize pass. *Galveston, H. & S. A. Ry. Co. v. Mullen* (Civ. App.) 198 S. W. 409.

Where a passenger left a town in Texas to go to a town in Oklahoma, and on his return paid cash across the state line to a point where he intended to stop, but did not do so, the conductor has a right to eject him when on continuing his return trip he refused to pay other fare than mileage from a Texas mileage book, not good for "an interstate journey or any portion thereof." *Chicago, R. I. & G. Ry. Co. v. Edwards* (Civ. App.) 232 S. W. 356.

67. — **Place and manner of ejection.**—Railroad liable to trespasser injured when required to get off a train moving 15 miles an hour. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 198 S. W. 795.

Evidence held not to show an unlawful assault or wrongful exercise of authority in accomplishing ejection. *Samaritano v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 230 S. W. 1049.

75. **Actions for wrongful ejection—Sufficiency of evidence.**—Evidence held to support verdict for a passenger for injuries when employé threw him from moving train. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 198 S. W. 795.

77. — **Damages.**—\$2,000 damages to aged passenger ejected six miles from station, held excessive, and reduced to \$1,000. *Houston E. & W. T. Ry. Co. v. Snow* (Civ. App.) 201 S. W. 224.

Mere retention of conductor, after knowledge he has wrongfully ejected passenger, does not require allowance of exemplary damages. *Texas & N. O. R. Co. v. O'Connor* (Civ. App.) 201 S. W. 437.

\$500 damages to passenger ordered to vacate berth, held excessive, and reduced to \$250. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 219 S. W. 252.

78. **Baggage.**—Samples of traveling salesmen. See *Texas & N. O. R. Co. v. Levy* (Civ. App.) 199 S. W. 513.

79. — **Demand by and delivery to passenger.**—Where a passenger who saw that his trunk would be damaged by a rain moved it to the station platform, that fact did not establish a delivery relieving the carrier of liability for its subsequent care. *Hines v. Robey* (Civ. App.) 225 S. W. 201.

80. — **Loss or injury.**—A carrier's liability for the loss of baggage is not limited to such personal effects as passenger may reasonably need for his personal use. *Pullman Co. v. Uribe* (Civ. App.) 225 S. W. 189, involving theft of money. See, also, *Texas & N. O. R. Co. v. Levy* (Civ. App.) 199 S. W. 513 involving samples of merchandise.

82. — **Limitation of liability.**—One checking a grip is not bound by a printed notice on the ticket limiting the liability of the carrier in case of negligent loss, unless he has knowledge of such limitation and assents thereto. *Lancaster v. Sanford* (Civ. App.) 225 S. W. 808.

84. — **Sufficiency of evidence.**—Evidence of the precautions taken to protect baggage at station held not to show as a matter of law that the carrier was guilty of no negligence, as warehouseman. *Hines v. Robey* (Civ. App.) 225 S. W. 201.

Testimony of plaintiff, suing for loss of a trunk, held insufficient to sustain finding in her favor for \$202 as the value of its contents. *Hines v. Talbert* (Civ. App.) 229 S. W. 679.

86. **Palace cars and sleeping cars.**—Negligence of porter, in temporarily leaving car with door closed, and a woman passenger alone therein, held not proximate cause of any injury to her from fright on her unsuccessful effort to open door. *Pullman Co. v. Gutierrez* (Civ. App.) 198 S. W. 1065.

Sleeping car company's agreement to indemnify railroad construed. *Gulf, C. & S. F. Ry. Co. v. Scripture* (Civ. App.) 210 S. W. 269.

Sleeping car company held not entitled to demand contribution from railroad for the passenger's damages. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

Rules of corporations cannot justify negligence. *Id.*

Sleeping car company held liable for negligence in transferring passenger from one sleeper to another. *Id.*

A sleeping car company is not an insurer of personal effects belonging to a passenger, but only required to use reasonable diligence or care in seeing that property of passengers is not purloined or stolen. *Pullman Co. v. Bullock* (Civ. App.) 231 S. W. 1112.

If a porter steals a passenger's diamond left under his pillow, the carrier, in contemplation of law, is guilty of negligence, and liable for its value. *Id.*

A passenger going from his berth to the washroom and leaving his diamond under his pillow was not guilty of contributory negligence as a matter of law. *Id.*

89. — **Action for damages.**—In a passenger's action against a sleeping car company for the loss of a diamond stickpin, evidence held sufficient to show that defendant's porter was guilty of the theft of plaintiff's diamond stud. *Pullman Co. v. Bullock* (Civ. App.) 231 S. W. 1112.

92. — **Damages.**—\$30,000 damages to passenger contracting tuberculosis, held not excessive, where he was only 46 years old and was incapacitated from work and had been earning \$4,000 a year. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

Where a passenger was compelled to vacate a drawing room and take a cold berth in a sleeper, where she contracted a cold, causing neuralgia which affected her teeth and required the removal of two of them, and as a result of such sickness she was unable to pursue her occupation of music teacher, the damages on account of the injury to and loss of teeth and the loss of earnings were the proximate result of the negligence of the carrier. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599 holding a verdict of \$2,000 was not excessive.

93. **Carriage of live stock—Duties and liabilities in respect to transportation in general.**—Where the carrier undertook to bed the stock it was liable for failure to exercise ordinary care to perform such duty. *Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

Carrier of live stock held under duty of loading them, but not liable for damages resulting from overloading or rough handling by shipper's agent who undertook to and did load them. *Massey v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 409.

If shipper's agent merely assisted in loading cattle under train conductor's control, carrier is liable for negligently overloading the car, but not for rough handling of the cattle by the shipper's agent when not authorized by the conductor. *Id.*

94. — **Connecting carriers.**—See notes under art. 731.

98. — **Food and water.**—See notes under art. 714.

99. — **Duties in respect to delivery.**—Arrival of train carrying shipment of live stock, in the switching yards of the carrier three or four miles from the stockyards which is destination of the shipment, is not a delivery completing the shipment. *Gulf, C. & S. F. Ry. Co. v. Gross* (Civ. App.) 204 S. W. 693.

Where a shipment of cattle was filled by the shipper's directions to a consignee in care of a third person, delivery by the carrier to the third person is equivalent to delivery to the consignee. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

100. — **Delay in transportation or delivery.**—Carrier of live stock is required to use ordinary care to transport shipment with reasonable dispatch. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

101. — **Excuses for delay.**—Where carrier knows, when cattle are received for shipment, that washout exists, but fails to advise shipper or stipulate against the consequences thereof, but promises prompt shipment, carrier cannot excuse delay caused by the washout as unavoidable casualty or act of God. *Gulf, C. & S. F. Ry. Co. v. Gross* (Civ. App.) 204 S. W. 693.

A carrier cannot justify 17 hours' delay, on the theory that it was complying with the federal law, prohibiting the working of a train crew more than 16 hours at one time. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Civ. App.) 207 S. W. 166.

If the negligence of a railroad carrying live stock concurred with an act of God in causing floods as a proximate cause of injury, to the stock by delay, and the injury would not have occurred without the negligence of the railroad, the road is liable. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208, involving shipment delayed by wreck and washout of bridges.

102. — **Loss or injury in general.**—A recovery cannot be had from a carrier for injuries to live stock, which were the proximate result of weakness at the time the stock were tendered for carriage, yet the carrier after receiving them is in duty bound to exercise ordinary care and to transport them with reasonable dispatch, and, if guilty of negligence or unreasonable delay, which proximately results in injury, it is liable, though the results were more disastrous than if the cattle had been in good condition. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781; *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 546; *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891. See, also, *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793; *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

Where injury to live stock is produced by negligence of the carrier concurring with another cause from which it is exempt from liability by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for its full amount. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Civ. App.) 216 S. W. 457; *Kansas City, M. & O. Ry. Co. of Texas v. Blackstone & Slaughter* (Civ. App.) 218 S. W. 552.

A carrier is not responsible for injuries resulting from the natural vice or the nature and propensities of the animals carried. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853.

The damage from each cause of injury should be apportioned. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Civ. App.) 216 S. W. 457.

A carrier is not liable for injury to cattle which were received by it in bad condition and which were handled without negligence. *Leon v. Hines* (Civ. App.) 223 S. W. 239.

Where by the exercise of ordinary care by the carrier notice could have been brought home to the shipper of unusual conditions making loss from delay probable, thereby affording the shipper an opportunity to protect himself by dealing with such conditions, the existence of the conditions constitutes no defense to the carrier for the delay where no such notice has been given. *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891.

103. — **Stock awaiting transportation.**—Where horses to be shipped were overheated in a "cutting out" process made necessary by the railroad's negligence in permitting water troughs to overflow, rendering the pen muddy, such road was liable for consequent injuries to the horses in transit. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Civ. App.) 216 S. W. 457.

A carrier held not liable for loss of hogs from eating poison on premises adjoining its shipping pens, but not under its control. *Lancaster v. Pitzer* (Com. App.) 228 S. W. 923 reversing *Lancaster v. Pitzer* (Civ. App.) 211 S. W. 313.

105. — **Contributory negligence of owner.**—If negligence of plaintiff shipper in placing vicious bulls unconfined in a car together contributed to injury to them, he could not recover, and his negligence need not have been sole proximate cause of injury. *St. Louis, B. & M. Ry. Co. v. Moss* (Civ. App.) 203 S. W. 777.

A shipper aware of the condition of the bedding in the cars accepted as bedded, is estopped to claim improper bedding as cause of injury. *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793.

But testimony of shipper's agent that cars were not properly bedded, and that he knew that cattle could not properly be shipped in unbedded cars for long distances, did not show contributory negligence as a matter of law, in the absence of evidence as to distance. *Beaumont, S. L. & W. Ry. Co. v. Milby* (Civ. App.) 204 S. W. 444.

107. **Actions against carriers of live stock—Parties.**—Consignee and another who did not buy an interest in cattle until they reached their destination would have no right to recover against carriers for cattle killed and injured in transit. *Ponder v. Crenwelge* (Civ. App.) 203 S. W. 1125.

As to shipper's right to recover damages against carrier as affected by sale of cattle. See, *Ft. Worth & D. C. Ry. Co. v. Hill* (Civ. App.) 213 S. W. 952.

110. — **Weight and sufficiency of evidence.**—Evidence held insufficient to establish negligent handling and delay. *San Antonio & A. P. Ry. Co. v. Hinnant* (Civ. App.) 206 S. W. 860; *St. Louis, B. & M. Ry. Co. v. Moss* (Civ. App.) 203 S. W. 777; *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853; *Baker v. Nance* (Civ. App.) 211 S. W. 615; *Panhandle & S. F. Ry. Co. v. Arnett* (Civ. App.) 219 S. W. 232.

In an action for damages from unreasonable delay and rough handling, evidence held sufficient to sustain verdict for plaintiff. *Schaff v. Fancher* (Civ. App.) 215 S. W. 861; *Baker v. Brown* (Civ. App.) 210 S. W. 312; *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

Allowance of damages by reason of extra feed held not supported by evidence. Lancaster v. Whittle (Civ. App.) 210 S. W. 334; Kansas City, M. & O. Ry. Co. of Texas v. Clett (Civ. App.) 216 S. W. 682.

Evidence showing that cattle in carrier's exclusive control, were sound when delivered to carrier and upon arrival were injured, made prima facie case of negligence. Ft. Worth & R. G. Ry. Co. v. Bryson & Burns (Civ. App.) 195 S. W. 1165.

Evidence of shipper that animals were strong enough to make trip, and that they died before they reached their destination, and that the car in which they were loaded was improperly bedded, and not a safe car to transport cattle, was sufficient to show carrier's negligence. Galveston, H. & S. A. Ry. Co. v. Booth (Civ. App.) 209 S. W. 198.

Railroad's failure to explain delay is of itself clothed with probative force on the question of whether delay was unreasonable. Baker v. Brown (Civ. App.) 210 S. W. 312.

Shipper not required to prove negligence to the satisfaction of the jury, but only by a preponderance of the evidence. Gulf, C. & S. F. Ry. Co. v. Helms Bros. (Civ. App.) 210 S. W. 853.

Testimony as to death of mare from lockjaw, held insufficient. Ft. Worth & R. G. Ry. Co. v. Fleming (Civ. App.) 212 S. W. 233.

Evidence held sufficiently definite and certain as to the number and kind of animals injured and the amount of damages to sustain a verdict for plaintiff. Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero (Civ. App.) 212 S. W. 981.

Evidence held insufficient to show negligence in failing properly to ventilate the box car in which plaintiff's horses were shipped. Gulf, C. & S. F. Ry. Co. v. Culwell (Civ. App.) 216 S. W. 457.

In action for damages from shrinkage in live stock because of negligence in keeping stock confined in cars without water pending delay in transportation, evidence held not to justify finding of an increased market value during the delay. Kansas City, M. & O. Ry. Co. of Texas v. Clett (Civ. App.) 216 S. W. 682.

Evidence held to warrant a finding that delay was due not to act of God, but to negligence in construction of bridges damaged by floods. Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter (Civ. App.) 217 S. W. 208.

Evidence held sufficient to warrant finding that damage to sheep from being kept in muddy pens was due to carrier's negligence. *Id.*

Evidence that cattle were delivered to defendant railroad and by it delivered to consignee in unclean pens sufficiently establishes that the railroad placed them in the pens, at least in the absence of an explanation by defendant. Hines v. Davis (Civ. App.) 225 S. W. 862.

In an action for damages to a shipment of hogs, evidence held sufficient to warrant a finding of negligence in failure to properly bed the car and to drench the hogs with water, whereby some of the hogs died. Panhandle & S. F. Ry. Co. v. Griffith (Civ. App.) 226 S. W. 688.

113. — **Damages.**—Measure of damages to a shipment of live stock is difference between the value of the animals at destination had they been properly and promptly transported and their value as actually delivered. Galveston, H. & S. A. Ry. Co. v. Gibbons (Civ. App.) 202 S. W. 352; Gulf, C. & S. F. Ry. Co. v. Gross (Civ. App.) 204 S. W. 693; Gulf, C. & S. F. Ry. Co. v. Helms Bros. (Civ. App.) 211 S. W. 597; St. Louis & S. F. R. Co. v. White, 110 Tex. 585, 222 S. W. 963, affirming judgment (Civ. App.) 160 S. W. 1128; Lancaster v. Tudor (Civ. App.) 222 S. W. 990; Hines v. Edwards (Civ. App.) 228 S. W. 1117; Texas & P. Ry. Co. v. Prunty (Sup.) 230 S. W. 396.

As to damages for loss of prize money caused by delay in transportation of animals intended for exhibition, see Kansas City, M. & O. Ry. Co. v. Bell (Civ. App.) 197 S. W. 322.

Amount of damage sustained by shipper of cattle from carrier's negligence in transit, plus 6 per cent. interest from date of loss, is correct measure of shipper's damage at date he recovers judgment against carrier. International & G. N. Ry. Co. v. Reed (Civ. App.) 203 S. W. 410.

For negligent delay in loading live stock for shipment, the elements of damage would include, both the value of the lost weight and the depreciation in value of the remaining weight. Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Civ. App.) 207 S. W. 570.

Measure of damages for injuries to animals in transit is difference between their market value at destination, if transported without negligence, and their real and intrinsic value at destination in the condition in which they were delivered; the evidence being there was no market value. Gulf, C. & S. F. Ry. Co. v. Helms Bros. (Civ. App.) 210 S. W. 853. Cost of feed and care after injury, and price afterwards received for animals at a point other than destination, had no proper place in applying the true measure of damages. Gulf, C. & S. F. Ry. Co. v. Helms Bros. (Civ. App.) 210 S. W. 853. See, also, Lancaster v. Whittle (Civ. App.) 210 S. W. 334.

If on account of delay cattle were damaged in appearance and lost in weight by reason of "loss of fill," reasonably in contemplation, such loss of fill may properly be shown as affecting market value. Texas & P. Ry. Co. v. West Bros. (Civ. App.) 214 S. W. 808.

116. **Liability for damage to goods by mob.**—Under this article, carrier is not liable for depreciation in the value of goods, resulting solely from inevitable delay in their transportation, caused by a mob of rioters. Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45, overruling 12 S. W. 677.

Art. 708. [320] [278] Carriers can not limit their responsibility.

See Gulf, C. & S. F. Ry. Co. v. Levi (Sup.) 12 S. W. 677.

Cited, Hendrick v. Walton, 69 Tex. 192, 6 S. W. 749; St. Louis, B. & M. Ry. Co. v. Marcovich (Com. App.) 221 S. W. 582.

½. Repeal.—This article, was not repealed by implication, by art. 5714. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51.

1. Nature of right and of restriction.—Statute inapplicable to railroad's leasing building site on right of way and contracting against liability for loss to lessee occasioned by fire. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

5. — Carriage of live stock.—Carrier cannot escape liability for failure to perform its duty to furnish suitable cars because the shipping contract required the shipper to bed, inspect, and accept the cars. *Mexico Northwestern Ry. Co. v. Williams* (Com. App.) 229 S. W. 476; *Mexico Northwestern Ry. Co. v. Williams* (Civ. App.) 208 S. W. 712.

Under this statute that part of a contract between a railroad company and a shipper of live-stock which attempted to relieve the company of liability for all loss or damage, except such as arose from the willful negligence of its servants, and provided that, as a condition precedent to the shipper's right to recover damages for any loss, he should give notice in writing of his claim at a certain place, and in a certain time, was not valid. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

Although initial carrier limited its liability to its own lines, where it did not require connecting carrier to furnish an unloaded car, it was liable, whether injuries to shipment of horses due to defect in its car occurred on its lines or on lines of connecting carrier. *St. Louis Southwestern Ry. Co. of Texas v. Morehead* (Civ. App.) 207 S. W. 336.

Where carrier had taken charge of cattle under contract stipulating that it would not be responsible for overloading, refusal to instruct jury not to consider damages caused by overloading of cattle held error. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

9. Interstate and foreign commerce.—The statute does not apply to an interstate or foreign shipment, but only to shipments beginning and ending within the state. *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; *Missouri Pac. Ry. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 19 S. W. 459. See, also, *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070; *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified *Chicago, R. I. & G. R. Co.* (Sup.) 226 S. W. 140; *Mexico Northwestern Ry. Co. v. Williams* (Com. App.) 229 S. W. 476.

Even as respects interstate shipment carriers cannot contract against liability for its negligence. *Wells Fargo & Co. v. Sprague* (Civ. App.) 199 S. W. 657.

The law of Canada governs as to right of carrier to limit liability in case of loss in United States of baggage of passenger traveling on a ticket for transportation from Canada to Texas and return. *Woodbury v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 209 S. W. 432.

The liability of a carrier for loss of goods received under a contract for export to foreign country is governed by the law of the forum; Congress not having exercised its power to regulate such matter, the Hepburn Act and the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) applying only when the shipment is from one state to another. *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Provision in contract for interstate shipment of live stock that in consideration of lower rate no action against the carrier shall be maintained unless commenced within six months, valid. *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, judgment modified *Chicago, R. I. & G. R. Co.* (Sup.) 226 S. W. 140.

Stipulation held a regulation affecting rates. *Id.*

In the absence of action by Congress, the subject-matter of the liability of common carrier for loss or injury to property transported in foreign or interstate commerce belongs to that class of regulations which the states may control. *Mexico Northwestern Ry. Co. v. Williams* (Com. App.) 229 S. W. 476.

State law applied to shipment of live stock from Mexico to Texas. *Id.*

10. Negligence or misconduct.—In the absence of proof to the contrary, it will be presumed that the loss of and injury to goods in an intrastate shipment was caused by the negligence of the carriers, so that the limitation of liability in the contract is not valid under this article. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

16. Limitation of amount of liability.—Under this statute, a railroad company which transports goods within the state but fails to deliver them, is liable for their value at destination less transportation charges, although the bill of lading provides that, in event of loss, the value or cost at the point of shipment shall govern the settlement. *Gulf, C. & S. F. Ry. Co. v. Booton* (App.) 15 S. W. 909.

Provision in bill of lading as to the value of the property being that at point of shipment, having reference only to loss or damage, does not affect measure of damages for conversion. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Art. 709. [321] [279] Bound to carry goods, when.

See *St. Louis & S. W. Ry. Co. v. Kay* (Civ. App.) 23 S. W. 91; *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190.

Contract with shipowner.—Charterer, held not liable for failure to furnish cargo pursuant to contract with vessel owner. *Prince Line, Limited, of Newcastle, England, v. Steger* (Civ. App.) 210 S. W. 223.

As to breach of a contract to furnish cargo, see *Elder, Dempster & Co. v. Weld-Neville Cotton Co.* (Com. App.) 231 S. W. 102.

Art. 710. [322] [280] Must give bill of lading.

1. **Bills of lading in general.**—A railroad company incurs the penalty by giving a bill of lading for lumber describing it as "a car-load" only, when the shipper demands that the weight be stated. *Texas & P. Ry. Co. v. Cuteman* (App.) 14 S. W. 1069.

Where original carrier's agent, pursuant to consignee's letter, reshipped goods over defendant railway, advising consignee thereof, held sufficient compliance with statute. *Ft. Worth & D. C. Ry. Co. v. Bone* (Civ. App.) 195 S. W. 244.

Carrier held entitled to have bill of lading reformed to correct mistake. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

5. **Construction and operation of bill.**—Mere fact that weighing of wheat was done by a third person did not relieve carrier of liability when it delivered less quantity, where it accepted such weight and entered it on the bill of lading. *Baker v. H. Dittlinger Roller Mills Co.* (Civ. App.) 203 S. W. 798.

Where carrier proves that it delivered all the wheat received which was carefully weighed and checked at destination when it was found to weigh less than the bill of lading states, the carrier is not liable for the discrepancy. *Id.*

Bill of lading having covered interstate shipment, its provisions and stipulations, under consideration by court of Texas, must be construed and given such effect as given by federal courts. *Houston E. & W. T. Ry. Co. v. Houston Packing Co.* (Civ. App.) 203 S. W. 1140.

A receipt taken by a carrier for goods is prima facie, but not conclusive, proof of delivery. *Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co.* (Civ. App.) 207 S. W. 167.

Shipment from one state to another, is an "interstate shipment" as between carrier and shipper, though the bill of lading indicated it was intrastate. *Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 211 S. W. 347.

Shipping receipt and bill of lading, held insufficient to establish delivery to the carrier of all the goods that were in the boxes when the owner, some time before, delivered them to the storage company for storage. *Hines v. Warden* (Civ. App.) 229 S. W. 957.

7. **Negotiability and transfer of bill.**—As to novation, see *Guaranty State Bank of Timpson v. Wm. D. Cleveland & Sons* (Civ. App.) 195 S. W. 939.

Bank to which shipper of cotton by shipper's order bills, indorsed and delivered to bank with drafts on purchasers in favor of bank, bank crediting amount of drafts to shipper on books, held to have become vested with title as owner or pledgee. *Hubbell, Slack & Co. v. Farmers' Union Cotton Co.* (Civ. App.) 196 S. W. 681.

Indorsement held not a guaranty of payment of draft, nor the quantity or quality of the goods, the fact that they exist, or the genuineness of the bill of lading. *Tradesmen's State Bank v. Ft. Worth Elevators Co.* (Civ. App.) 214 S. W. 656.

Bank acquiring title to draft with bill of lading attached, held entitled to proceeds as against consignee compelled by Food Administration, to receive shipment not as guaranteed. *F. A. Kadane & Co. v. Security Nat. Bank* (Civ. App.) 219 S. W. 506.

Transfer of bill of lading with attached draft to bank, and giving of credit by bank and drawing thereon by shippers, held to pass title of shipment. *Officer v. F. & M. Nat. Bank of Hobart* (Civ. App.) 230 S. W. 226.

8. — **Bona fide purchasers.**—Where a carrier issued a bill of lading, complying with arts. 715, 716, in exchange for initial carrier's bill of lading, routing over its lines to destination, and same was transferred to an innocent purchaser for value, it became incontestable under art. 719, and the carrier was liable for loss of shipment by delayed transportation, although it did not receive shipment until long after issue of bill of lading, because routing was changed without its knowledge. *Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 206 S. W. 126.

Plaintiff held an innocent holder for value of a bill of lading. *Id.*

Where bill of lading issued by carrier and attached to draft drawn on purchaser of carload indicated that shipment was intrastate carrier is estopped from asserting interstate character of shipment as against purchaser who paid draft without knowledge that carload was originally shipped from another state. *Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 211 S. W. 347.

Where drawee of drafts with forged bills of lading attached pays payee who is innocent holder for value, it cannot thereafter, on discovering that goods have not been shipped and that bills of lading are fictitious, recover its loss from payee. *Howe Grain & Mercantile Co. v. A. E. Crouch Grain Co.* (Civ. App.) 211 S. W. 946.

Where bank, payee of drafts with bill of lading attached, upon receiving drafts gave the drawer unconditional credit on its books for the amount of the drafts, the bank was owner and holder of the drafts, and not merely the drawer's collecting agent, though it might have applied amount upon drawer's pre-existing debt, or upon nonpayment might have claimed right to charge amount back against drawer. *Id.*

Where drawer in transferring drafts to payee bank assigned bills of lading purporting to be issued to drawer, bank, in forwarding drafts, with attached bills of lading, to drawee, was not a guarantor of signatures attached to bills of lading. *Id.*

Connecting carrier issuing bill of lading for interstate shipment, held liable to innocent purchaser, who paid draft, notwithstanding shipment was transported by another carrier due to change in routing. *Missouri, K. & T. Ry. Co. of Texas v. Plano Milling Co.* (Com. App.) 231 S. W. 100.

9. **Contracts for transportation.**—Where seller authorized railroad to allow buyer to inspect goods without advance payment of draft and delivery of bill of lading, without stipulating in what particular place and manner the inspection should be made, the railroad did not violate instructions by placing the car containing the goods on the privately

owned track of buyer adjacent to buyer's warehouse for the purpose of enabling buyer to properly inspect goods. *Pittman-Harrison Co. v. Fox Bros.* (Civ. App.) 228 S. W. 579.

10. — **Authority of agents and employes.**—A railroad station agent has authority to contract to furnish freight cars at a certain time and place. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

Where a railroad's agent exceeded authority in issuing bill of lading purporting to bind the road to transport over connecting lines property it had not and never afterwards acquired possession of, but the road, by attempting to perform, adopted its agent's act, it was liable for damage resulting from negligent failure to transport and deliver within reasonable time. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833.

It was within the scope of the authority of a railroad's agent to issue a bill of lading binding it to take up a carload of corn from its connecting carrier and to continue the carriage from its destination under bill of lading issued by the original carrier to a new destination. *Id.*

12 $\frac{1}{2}$. **Interstate shipment.**—Where grain was shipped from Missouri to a point in Texas, and the Texas purchaser, on paying the draft with bill of lading attached, sold the grain to a purchaser in another part of Texas, and defendant railroad company before arrival of the shipment issued a bill of lading for transportation to the new destination, that shipment was interstate. *Missouri, K. & T. Ry. Co. of Texas v. Plano Milling Co.* (Com. App.) 231 S. W. 100.

13. **Delivery to carrier.**—Issuance of bill of lading by a carrier adds nothing to the binding force of the contract of carriage, and verbal agreement to accept and transport a car of designated freight, which is being loaded when the agreement is made, becomes a complete acceptance of the shipment when the loading is finished. *Hines v. Steele* (Civ. App.) 224 S. W. 606, holding acceptance of shipment of cotton complete despite additional loading.

14. **Ownership, custody, and control of goods.**—The owner of material may sue a carrier for delay during transit, although shipment was made in another's name, *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

The shipper of goods consigned to himself with draft attached to bill of lading, not having parted with the ownership, may sue the carrier for delivering them to another without payment of the draft. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Persons authorized to take possession of contents of car held to have sufficient possession to authorize suit against carrier for conversion. *Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co.* (Civ. App.) 200 S. W. 420.

When goods are delivered to a carrier at the point of delivery to be transported to another point, they become the property of the buyer. *Lee v. Gilchrist Cotton Oil Co.* (Civ. App.) 215 S. W. 977.

15. **Transportation and delivery by carrier.**—The consignee is obliged to accept goods when duly tendered by carrier, although damaged in transportation if not rendered totally valueless. *Houston & T. C. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

Drafts attached to bills of lading amount to positive instructions to carrier to collect before delivering goods. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Instructions for change in destination of freight must emanate from party who is real owner, or one who has authority to divert; otherwise carrier alters destination at its peril. *Texas Midland R. Co. v. Cummer Mfg. Co.* (Civ. App.) 207 S. W. 617.

16. **Delay in delivery.**—Where buyer accepted engines shipped by defendant by paying draft attached to bill of lading, railway company, and not defendant, was liable for delay occurring thereafter. *J. I. Case Threshing Mach. Co. v. Lochridge & Denny* (Civ. App.) 195 S. W. 266.

20. **Presentment of bill of lading before delivery.**—Where shipping company, knowing Mexican law required delivery to custom house, induced plaintiff to ship lumber with bill of lading with draft attached, agreeing to surrender lumber only on surrender of bill of lading, and delivered lumber to custom house, which delivered it without bill of lading, the company was liable for the loss. *South Texas Lumber Co. v. Wolvin Line* (Civ. App.) 199 S. W. 1129.

The carrier delivering goods shipped without production of the bill of lading and payment of the draft attached is liable for conversion. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Hepburn Act, see *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

21. **Liability for failure or refusal to deliver.**—Under the statute, a carrier is liable for misdelivery made in good faith and without negligence, unless error was caused by consignor. *Missouri Iron & Metal Co. v. Texas & P. Ry. Co.* (Civ. App.) 198 S. W. 1067.

Mere nondelivery of property lawfully in possession will not constitute conversion, as there must be a demand and refusal. *Panhandle & S. F. Ry. Co. v. Talmage* (Civ. App.) 206 S. W. 862.

A carrier which delivered cotton to a compress company instead of the named consignee, taking a receipt from it to hold it for the consignee, was guilty of a conversion and liable for its destruction by fire while so held by the compress company. *Hines v. Jordan* (Civ. App.) 228 S. W. 633.

Where, at the time of trial, railroads had been returned to private ownership, the Director General is no longer a proper party to a cause of action for conversion, arising during federal control, but the action should proceed against the agent designated by the President pursuant to Act Cong. Feb. 28, 1920, and the United States is not a proper party except through said agent. *Id.*

24. **Actions for failure to deliver or misdelivery—Sufficiency of evidence.**—Evidence that person to whom delivery was made acted for consignee partnership in transactions with consignor, etc. held prima facie proof of such person's authority to receive goods. *Missouri Iron & Metal Co. v. Texas & P. Ry. Co.* (Civ. App.) 198 S. W. 1067.

Evidence of market value of shipment of fruit, held insufficient to support recovery. *Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co.* (Civ. App.) 200 S. W. 420.

In action by consignee of hay against railroad for damages from failure to permit adequate inspection, evidence held to show notation on bill of lading. "Allow inspection," is universally understood by shippers and railroads to mean side-door inspection. *Houston, E. & W. T. Ry. v. Ratcliff* (Civ. App.) 202 S. W. 525.

Evidence held insufficient to prove that the goods taken under attachment were those shipped by plaintiff. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 217 S. W. 737.

In an action involving issue of whether shipper had instructed railroad to deliver shipment, evidence held to sustain finding for shipper. *St. Louis Southwestern Ry. Co. of Texas v. Waskom Coal Co.* (Civ. App.) 220 S. W. 280.

Finding that the consignee did not waive misdelivery held warranted. *Hines v. Jordan* (Civ. App.) 228 S. W. 633.

25. — **Damages.**—The market value of goods at the time and place of conversion is the measure of damages. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254; *Panhandle & S. F. Ry. Co. v. Talmage* (Civ. App.) 206 S. W. 862.

26. **Loss or injury to goods.**—Railroad held not liable for loss of oil by reason of the valve being open when the top of tank was removed at destination; the tank being filled by plaintiff. *Houston & T. C. R. Co. v. Oriental Oil Co.* (Civ. App.) 198 S. W. 601.

Where precooling of refrigerator cars took place after delivery of fresh vegetables to carrier, negligence in precooling and icing cars is attributable, not to shipper, but to carrier. *Wells Fargo & Co. v. Sprague* (Civ. App.) 199 S. W. 657.

Common carrier is not insurer against injury occasioned by the fault of complaining party. *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606.

If a carrier receives the quantity of wheat stated in the bill of lading, and delivers a less quantity, it is liable for the difference. *Baker v. H. Dittlinger Roller Mills Co.* (Civ. App.) 203 S. W. 798.

When a common carrier receives goods for shipment, it insures their delivery in accordance with bill of lading, unless the loss is occasioned by act of God, or of a public enemy, or by reason of inherent defect or vice of goods or animals, or on account of fault of consignee. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 209 S. W. 775.

Carrier on changing routing of shipment without notation on bill of lading, held not an insurer of arrival in good condition at new destination. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833, holding connecting carrier's delay proximate cause of injury.

27. — **Character and value of goods.**—A carrier is not liable for injury to a shipment because of the inherent vice of the article. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 230 S. W. 764; *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606; *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070.

Railroad accepting perishable goods requiring cars and equipment of a peculiar kind, undertakes, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipment, and that it will properly use them in the transportation of such property. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

30. — **Commencement, duration, and termination of liability.**—Delivery of cotton to carrier for transportation held sufficient to make its liability as a carrier attach at the time of fire. *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.* (Civ. App.) 212 S. W. 814; *Galveston, H. & S. A. Ry. Co. v. Compania Hulera de Monclova* (Civ. App.) 204 S. W. 236; *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190; *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.* (Civ. App.) 212 S. W. 814; *Hines v. Steele* (Civ. App.) 224 S. W. 606.

Ordinarily a carrier's liability for injury to a shipment will cease when goods are refused by consignee, although damaged. *Houston & T. C. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

If carload of apples was not rendered worthless in transit, it was consignee's duty to accept on arrival, and if he wrongfully refused, he should suffer loss incident to further holding of apples until they could be legally disposed of by railway. *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

Where something required by law, or contract, remains to be done by the shipper after the goods are put into the hands of the carrier, before they are transported, the carrier does not become liable until the goods are ready for shipment, a rule which does not require the shipper to give notice that the shipment is ready for transportation, where the carrier has already been informed that it will be by the time the carrier can move, and has agreed to transport it. *Hines v. Steele* (Civ. App.) 224 S. W. 606.

Where cattle have been placed in defendant's pen for immediate shipment over defendant's railroad, and part of them have actually been placed on the cars, the cattle are in the custody of defendant as a carrier, and not as a warehouseman. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568.

Where a seller of wheat shipped it by rail to his order, with a draft and bill of lading attached, and the carrier delivered it to a wharf company, which was the agent of the purchaser authorized to receive it, the carrier thereafter owed no legal duty relative to

the protection of the wheat. *Ft. Worth Elevators Co. v. Keel & Son* (Civ. App.) 231 S. W. 481.

31. — **Deviation.**—Where agent of carrier consented to cause diversion of shipment and secured change in destination, and by negligently giving erroneous directions concerning consignee caused loss, carrier was liable. *Texas Midland R. Co. v. Cummer Mfg. Co.* (Civ. App.) 207 S. W. 617 holding on rehearing that failure of carrier correctly to designate new consignee was not proximate cause of loss.

32. — **Directions of shipper.**—When shipment is in charge of owner's representative, and carrier obeys his instructions, it is not liable for resultant damage. *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606.

35. — **Act of God, vis major, or inevitable accident.**—An act of God, which releases carrier, is one resulting from such force in nature as could not reasonably have been foreseen and provided against (Words and Phrases, vol. 1, p. 118). *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 269 S. W. 775, holding carrier liable for loss of goods, where, after storm had begun and water was rising, carrier could by use of reasonable diligence have removed goods to a place of safety.

Storm held proximate cause of loss of shipment by fire. *Ft. Worth Elevators Co. v. Keel & Son* (Civ. App.) 231 S. W. 481.

40. **Action for loss or injury—Sufficiency of evidence.**—Evidence held insufficient to show negligence on the part of a carrier. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 230 S. W. 764; *Galveston, H. & S. A. Ry. Co. v. John Muennink & Son* (Civ. App.) 195 S. W. 613; *Texas Midland R. Co. v. Cummer Mfg. Co.* (Civ. App.) 207 S. W. 617.

Evidence held to show that defendant, sued for the loss of cotton by fire, had accepted such cotton for transportation, to initiate liability as carrier. *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190; *Hines v. Steele* (Civ. App.) 224 S. W. 606.

Evidence held sufficient to establish consignee's contention as to destination of goods shipped. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 198 S. W. 814, 816.

Evidence held to show that side-door inspection of hay was permitted consignee, a reasonable inspection under custom. *Houston, E. & W. T. Ry. v. Ratecliff* (Civ. App.) 202 S. W. 525.

Evidence held insufficient to show that there was no leakage in a car carrying wheat. *Baker v. H. Dittlinger Roller Mills Co.* (Civ. App.) 203 S. W. 798.

The requirement that the consignee to recover for loss of goods must show that they were delivered to the carrier does not require the proof to be such as to shut out every possibility of error, but requires only such proof as will convince a reasonable man. *Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co.* (Civ. App.) 207 S. W. 167, holding proof sufficient.

Evidence held to show carload of rice became wet and was damaged during transportation. *Texas & N. O. R. Co. v. Pipkin* (Civ. App.) 209 S. W. 757.

Evidence held to show compress company was defendant's agent for receiving and loading cotton. *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.* (Civ. App.) 212 S. W. 814.

In action for loss of goods by fire while awaiting transportation, plaintiff makes a prima facie case of negligence by proof of delivery of the goods to the carrier and non-delivery by the carrier at destination. *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Testimony that goods were delivered by warehousemen to initial carrier in good order, coupled with a bill of lading acknowledging receipt of the goods apparently in good order, was sufficient to show delivery to initial carrier in good order. *Baker v. Lyons* (Civ. App.) 218 S. W. 1090.

Evidence held to support judgment for shortage in coal delivered. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

41. — **Damages.**—Where injury to goods in transit does not render them worthless, the shipper refusing to accept them, while not entitled to recover their value, may recover for the injury. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Carrier notified that delay would cause plaintiff's employes to be idle, held liable for special damages. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

Railroad may set off amount due as freight charges. *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

In action for damages to carload of apples, measure of damages is difference in market value of apples in condition in which they arrived and value at time and in condition they would have arrived but for carrier's negligence. *Id.*

Where plaintiff did not receive carload of apples in damaged condition, so that expense of retailing was not incurred, market value of apples, if sold at retail, was not proper measure of recovery from railroad. *Id.*

In an action for damages from delay or detention, the actual injury to the property is the measure of damages. *Panhandle & S. F. Ry. Co. v. Talmage* (Civ. App.) 206 S. W. 862.

Where railroad had no notice of any special or contract price and the consignee buyer refused to accept shipment because not delivered within a reasonable time, held that damages sustained by seller and consignor was the difference between the market value of the goods including freight charges at the time they should have been delivered and their market value at the time plaintiff afterwards disposed of them. *Houston & T. C. R. Co. v. Westbury* (Civ. App.) 208 S. W. 383.

The measure of damages for loss of household goods is their actual or reasonable value at destination as distinguished from a fanciful or sentimental value. *Hines v.*

Warden (Civ. App.) 229 S. W. 957. See, also, *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

When household goods in use are injured while being transported by a carrier, the measure of damage is the difference in the actual value just prior to and just subsequent to the injury. *Empire Transfer & Storage Co. v. Botto* (Civ. App.) 232 S. W. 347.

Art. 711. [323] [281] Liability as warehousemen, etc.

Carrier as warehouseman.—Railroad held liable, as a carrier, and not as warehouseman. *Galveston, H. & S. A. Ry. Co. v. La Tolteca Cia de Cemento Portland, S. A.* (Civ. App.) 204 S. W. 1016; *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190.

Where a carrier repaired automobile injured in shipment, and consignee then refused to accept it, the company thereafter held it only as warehouseman. *Houston & T. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

Carrier becoming a warehouseman is liable as such for permitting a shipment to remain in a leaky car, though the carrier has no depot or warehouse at the place of destination. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

Under this and the next article, an initial carrier who contracts to transport the goods to destination and there deliver to consignee is liable as warehouseman for damages to goods while remaining in the car in which they were shipped, after their transportation by a connecting carrier. *Id.*

Cotton compress as agent.—Where a railroad without a suitable warehouse unloaded cotton at a compress company's warehouse, and placed it in charge of the manager, the compress company was the agent of the railroad, and the negligence of its employes causing destruction of the cotton by fire is attributable to the railroad. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465.

Consignees of cotton by rail were bound by the custom and usage of the railroad in making delivery of cotton at a compress company's warehouse. *Id.*

Notice.—Under arts. 281, 282, a railroad company remains liable as a common carrier for goods not discharged from its car, though a third person has agreed with the consignee to unload them, and the car is at the place of discharge; there being no agreement by the consignee to receive the goods on the car, and no notice, or diligence to give notice, of the arrival of the car at that place. *Missouri Pac. Ry. Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398.

Written notice to the consignee of goods from the carrier of their arrival is not necessary, where the consignee has actual notice of the fact. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465.

The carrier issuing a through bill of lading which, under this article, makes it liable until the goods are delivered, may bind itself to transport beyond its own line under article 731, but its liability as carrier is limited under article 712, if it uses due diligence to notify the consignee and the goods are not taken by the consignee within a reasonable time after such notice, after which time the carrier is liable only as warehouseman. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

Where the consignee's agent was notified of the arrival of the goods but did not attempt to remove the goods for four days thereafter, a reasonable time for removal had expired, and the carrier was liable only as warehouseman. *Id.*

Art. 712. [324] [282] Diligence as to delivery.

Notice.—See notes under art. 711.

Consignee of cotton who intends to sell it to other dealers at destination, cannot hold railroad to strict liability as carrier after due notice that it had been unloaded at compress company's warehouse, when he fails to show any effort to relieve the railroad of its responsibility; the railroad being liable under art. 712, only as a warehouseman. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465. See, also, *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

Art. 713. [325] [283] Shall forward in good order, etc.

Commencement of liability as carrier.—See note 30 under art. 710.

After cattle have been delivered to and accepted by a railroad company for immediate shipment, the company is liable as a common carrier for damages to the cattle from the time of delivery to it, though statute provides that the shipment shall be considered as having commenced from the time of signing the bill of lading (*East Line & R. R. Ry. Co. v. Hall*, 64 Tex. 615, followed. *Texas & P. Ry. Co. v. Nicholson*, 61 Tex. 495, and *Gulf, C. & S. F. Ry. Co. v. McCorquodale*, 71 Tex. 46, 9 S. W. 80, distinguished). *International & G. N. R. Co. v. Dimmit County Pasture Co.*, 5 Civ. App. 186, 23 S. W. 754.

Art. 714. [326] [284] Shall feed and water live stock.

Duty and liability of carrier in general.—If the stock is transported in cars not properly constructed for feeding and watering, then it becomes the duty of the carrier to furnish places where the stock may be unloaded, watered, and fed, without injury, in any kind of weather. *International & G. N. Ry. Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

The term "fill," used in relation to shipments of live stock, means feeding and watering stock just prior to sale so as to increase their weight and thus enhance their value. *Texas & P. Ry. Co. v. West Bros.* (Com. App.) 207 S. W. 918.

Where railroad's agents, knowing that train was delayed, refused to permit shipper to unload stock for feed and water, and where because of such refusal the stock stood in

cars at certain station for about 17 hours without water, the railroad was negligent, even though the delay was unavoidable. *Kansas City, M. & O. Ry. Co. of Texas v. Clett* (Civ. App.) 216 S. W. 682.

Sufficiency of evidence.—The evidence should clearly establish the grounds for the recovery of penalty. *Good v. Galveston, H. & S. A. Ry. Co.* (Sup.) 11 S. W. 854, 4 L. R. A. 801, holding evidence insufficient.

CHAPTER TWO

BILLS OF LADING CERTIFIED, ETC.

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| | Art. | |
| 715. Certain common carriers, etc., to issue bills of lading and certify, etc. | 720. | Carriers liability in case of delivery of goods without taking up, etc., "order" bill of lading. |
| 716. Requisites, etc. | | |
| 719. Bills of lading issued by authorized agent, to be held act of carrier, etc.; liability thereon; effect of certificate, etc. | 724. | Duties and powers of railroad commission. |

Article 715. Certain common carriers, etc., to issue bills of lading and certify, etc.

Cited, *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833.

Bills of lading.—*Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 206 S. W. 126; notes under art. 710.

Art. 716. Requisites, etc.

Bill of lading.—See *Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 206 S. W. 126.

Connecting carriers.—See *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552; notes under art. 731.

Art. 719. Bill of lading issued by authorized agent, to be held act of carrier, etc., liability thereon; effect of certificate, etc.

Cited, *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833.

Negotiability and transfer.—See notes under art. 710.

Rights of innocent purchaser. *Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co.* (Civ. App.) 206 S. W. 126.

Art. 720. Carrier's liability in case of delivery of goods without taking up, etc., "order" bill of lading.

Delivery by carrier.—See notes under art. 710.

If a shipment be under a shipper's order bill of lading, it is a conversion by carrier to turn the car over to the consignees before payment of the draft. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Art. 724. Duties and powers of railroad commission.

Cited, *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833.

CHAPTER THREE

DISPOSITION OF UNCLAIMED OR PERISHABLE PROPERTY BY CARRIERS

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| Art. | | Art. |
| 725. Unclaimed freight may be sold, when and how. | | 729. Carriers shall sell perishable property, when. |
| 726. Notice of such sale. | | |

Article 725. [327] [285] Unclaimed freight may be sold, when and how.

See *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

Art. 726. [328] [286] Notice of such sale.

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting. *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

Conversion.—A sale of a shipment of goods as perishable, without the statutory notice is a conversion. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163; *Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co.* (Civ. App.) 200 S. W. 420.

Art. 729. [331] [289] Carrier shall sell perishable property, when.

Conversion.—If goods shipped be perishable, and the carrier sells in conformity with the statute, it is not liable for conversion if it tenders the balance of proceeds of sale, after deduction for demurrage and advertising charges. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

A verdict for carrier should not be permitted, it appearing it sold the goods under the statute as to perishable property, and, after demurrage and advertising charges, has a balance belonging to plaintiff. *Id.*

Sale without statutory notice is a conversion. *Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co.* (Civ. App.) 200 S. W. 420.

CHAPTER FOUR

CONNECTING LINES OF COMMON CARRIERS

Art.	Art.
731. Connecting lines of common carriers defined.	732. Liability of such connecting lines.

Article 731. [331a] Connecting lines of common carriers defined.

—All common carriers in this State, over whose transportation lines, or parts thereof, is transported any freight, baggage or other property received by either of such carriers for shipment or transportation between points in this State, on a contract for carriage recognized, acquiesced in, or acted upon by such carriers shall, with respect to the undertaking and matter of such transportation be considered and construed to be connecting lines; and such lines shall be deemed and held to be agents of each other, each the agent of the others, and all the others the agents of each, and shall be deemed and held to be under a contract with each other and with the shipper, owner and consignee of such property for the safe and speedy transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers. The provisions of this Act shall apply whether the routine of such freight, baggage or other property be chosen by the owner or his agents, or by the initial carrier to whom such property is delivered and in any suit brought hereunder, the rights, duties, liabilities of the parties shall be determined by the initial contract executed by and between the owner, shipper or his or her duly authorized agents and the initial carrier, unless it be proved that a subsequent contract supported by a valuable consideration moving to the owner or shipper, in addition to that of the initial contract, was executed by such owner, shipper or his or their duly authorized agents with a subsequent connecting carrier handling the shipment, and the transportation of a caretaker shall not be deemed to be such valuable consideration. In any of the courts of this State, any bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carrier as herein defined and prescribed, notwithstanding any stipulations or attempted stip-

ulations to the contrary by such carrier, or either of them and any stipulation contained in any contract contrary to any of the provisions of this Act shall be void. [Acts 1895, p. 186, § 1; Acts 1919, 36th Leg., ch. 165, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Through shipment and duties and liabilities of initial carriers in general.—Shipment having been on a through bill of lading, each of the carriers is responsible for damages to the goods in transit. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

In action against carrier for refusing to forward goods via a connecting line, an erroneous statement of route in billing does not excuse defendant, who knew such statement was erroneous and refused to forward for other reasons. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

Carrier was liable for negligence in diverting shipment, resulting in loss of the goods, though negligence of agent was not sole cause of loss, but concurred with that of connecting carrier. *Texas Midland R. Co. v. Cummer Mfg. Co.* (Civ. App.) 207 S. W. 617.

In suit against initial carrier for damages to shipment of cattle, held, there was no "through shipment" within the statute. *Galveston, H. & S. A. Ry. Co. v. Lock* (Civ. App.) 209 S. W. 181.

A bill of lading in which the blanks left for stations named on the railroad company's line were not filled, held a contract for through shipment between points within the state within the meaning of the statute, notwithstanding the bill provided it was not to be treated as a through shipment to a point off company's road. *Missouri, K. & T. Ry. Co. of Texas v. Baker Bros.* (Civ. App.) 210 S. W. 244.

Bill of lading, showing destination of live stock beyond issuing carrier's own line held not to bind carrier to transport shipment beyond its own lines. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

Where a connecting carrier transporting a shipment of live stock delivers it to another road acting as its agent, and not as a connecting carrier, to be switched to stockyards for unloading at destination, the initial carrier is liable for injuries sustained during such switching operations; the destination of the shipment being the stockyards, and not the railroad yards. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Civ. App.) 212 S. W. 981.

A carrier should notify a shipper of stock of a crowded and congested condition at a connecting point which would cause delay in shipments, and, failing to do so, such congested condition would be no excuse for delay in shipment. *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

Carrier, having contracted to deliver a shipment of stock to certain parties at a certain point, could not delegate its duty to provide proper facilities for delivering the stock in question to a switching company and thereby escape liability for the negligence of the switching company, under art. 6687. *Id.*

Switching company, although a transportation company, held not a connecting carrier. *Id.*

Where carrier undertook transportation and delivery of stock at a certain point and employed a switching company as its agent and instrumentality to make the delivery, the switching company was its agent for whose negligence it was as much liable as for negligence occurring on its own line, and it was liable for damages to the cattle and loss occasioned by unreasonable delay. *Id.*

Liability as warehouseman. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 223 S. W. 668.

Rights, duties and liabilities of connecting and terminal carriers.—Shipper not bound by waybill made out for the convenience of connecting carrier. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 198 S. W. 814, 816.

Connecting carrier by acting on bill of lading for a through shipment issued by the initial carrier, receiving the goods, and not issuing a bill of lading of its own, makes it its own. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Where cattle were shipped by initial carrier and other connecting carrier, the initial carrier was liable for the entire damages sustained in the shipment; but each of the connecting carriers was liable only for such damages as may have resulted in consequence of its own negligence. *Ft. Worth & D. C. Ry. Co. v. Hill* (Civ. App.) 213 S. W. 952.

To recover from a terminal carrier damages caused by preceding carriers, plaintiff must show shipment on a contract for through carriage, recognized, acquiesced in, or acted upon by the carriers. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

A terminal carrier was not liable at common law for shortage in the quantity of oats in a car as stated in a diversion order issued by it on the original bill of lading, where the loss occurred before the car was delivered to it, and it is not made liable for such loss by any statute, whether the shipment was interstate or intrastate. *Lancaster v. Smith* (Civ. App.) 226 S. W. 460.

Notice of special damages.—Under the statute, notice to initial carrier that hogs shipped on through bill of lading are to be exhibited binds connecting carrier. *Kansas City, M. & O. Ry. Co. v. Bell* (Civ. App.) 197 S. W. 322.

Under joint contract for shipment of hogs, knowledge of one carrier that they are for exhibition purposes binds other. *Id.*

The statute is inapplicable to carrier transporting hogs under separate contract, and such carrier is not bound by knowledge of carrier from whom it received shipment. —*Id.*

Interstate commerce.—On the adoption of the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa), all laws and regulations of the various states affecting interstate transportation of freight were superseded, and the federal control under the amendment became exclusive. *Missouri, K. & T. Ry. Co. v. Miller* (Civ. App.) 211 S. W. 543.

The terminal carrier cannot waive provision as to damages of the standard form bill of lading issued as required by an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa). *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Civ. App.) 212 S. W. 208.

Consignees held entitled to recover from terminal carrier for damage only on basis stipulated by bill of lading. *Id.*

Terminal carrier held required to respond only for such damages as occurred to the shipment on its own line. *Id.*

Consignees' damages must be apportioned. *Id.*

Where a shipment of live stock is interstate, the terms of the original bills of lading issued by the initial carrier cover the entire transportation and the liability of the initial carrier, notwithstanding that new bills of lading are issued by the connecting carrier. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Civ. App.) 212 S. W. 981.

Interstate shipment, see *Quanah, A. & P. Ry. Co. v. Collier* (Com. App.) 215 S. W. 838.

Railway Company paying for such switching services, and issuing a through bill of lading to the shipper held the initial carrier, within the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa), and was liable for damages to the shipment in transit. *Houston E. & W. T. Ry. Co. v. Houston Packing Co.* (Civ. App.) 221 S. W. 316.

Limitation of liability to carrier's own line.—Where a road acting as agent of initial carrier switched shipment of poultry from initial carrier's tracks at destination to place of business of shipper, the initial carrier was liable, for damage from delay and rough handling in switching, though bill of lading limited liability to damage on own line. *Panhandle & S. F. Ry. Co. v. Wright-Herndon Co.* (Civ. App.) 195 S. W. 216.

A shipper's order bill of lading which provided that the rights of shipper and all carriers transporting the grain were to be fixed thereby as to the entire transportation between points necessitating the use of two connecting lines, is a "through bill of lading," within the statute making carriers jointly liable, notwithstanding it stipulates otherwise. *Ft. Worth & D. C. Ry. Co. v. Kemp* (Civ. App.) 207 S. W. 605.

Where defendant initial carrier, which refused to enter into contract for through shipment, required a contract limiting liability to damage occurring on its own lines, and agreed only to transport to the end of its lines, there could be no recovery for loss or injury occurring on lines of connecting carrier. *Galveston, H. & S. A. Ry. Co. v. Lock* (Civ. App.) 209 S. W. 181.

Initial carrier may limit its liability for damages to loss or injury to shipments occurring on its own line of railway. *Id.*

Where live stock was shipped over the lines of connecting carriers, but each carrier made an independent contract with the shipper, the initial carrier, limiting its liability to its own line, was not liable for damages accruing upon the lines of the connecting carriers. *Chicago, R. I. & G. Ry. Co. v. Hallam* (Civ. App.) 211 S. W. 809.

Initial carrier held liable for connecting carrier's negligent failure to promptly notify consignee of car's arrival notwithstanding a contrary stipulation in bill of lading. *Galveston, H. & S. A. Ry. Co. v. Zemurray* (Civ. App.) 215 S. W. 157.

Where cattle were shipped over three lines under a contract that "the carrier shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, and in no event shall one carrier be liable for the negligence of another," such contract "to inure to the benefit of all carriers," the liability of a connecting carrier was confined to such damages as might result from its own negligence, and there was no joint liability. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

The initial carrier was liable for the entire damage, where cattle were lost while the shipment was in its hands and there was shrinkage by reason of delay on all of the lines. *Id.*

Where initial carrier limited its liability to damage occurring on its line and did not receive goods on through contract, it was not jointly liable under the statute with connecting carriers for damages to shipment during transportation; art. 1830, subd. 25, providing for apportionment of damage between the carriers, being applicable in such case. *Crenweige v. Ponder* (Com. App.) 228 S. W. 145.

Pleading.—See notes under art. 1827.

Sufficiency of evidence.—Terminal carrier's O. K. on goods received from connecting carrier, the same being damaged when received by consignee, held to show that damage occurred while goods were in terminal carrier's possession. *Ft. Worth & D. C. Ry. Co. v. Bone* (Civ. App.) 195 S. W. 244.

In action for damages to horses shipped, from rough handling and delay, evidence held to sustain verdict against initial carrier as well as connecting carriers. *Galveston, H. & S. A. Ry. Co. v. Gibbons* (Civ. App.) 202 S. W. 352.

Art. 732, does not relieve party suing of the burden of alleging and proving the negligence of other connecting line upon which the cause of action is based. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In an action against an initial carrier for connecting carrier's negligent delay in delivery of a car of fruit, evidence held sufficient. *Galveston, H. & S. A. Ry. Co. v. Zemurray* (Civ. App.) 215 S. W. 157.

Art. 732. [331b] Liability of connecting lines.—For any damage for injury or damage to, or loss or delay of, any freight, baggage or other property sustained anywhere during the transportation over connecting liens or either of them, as contemplated and defined in the next preceding Article of this Chapter, either or all of such connecting carriers as the person or persons sustaining such damage may elect to sue therefor in this State, shall be held liable to such person or persons. The provisions of Article 1830, subdivision 25 of the Revised Civil Statutes of 1911, allowing an apportionment of damage, shall not be applicable to suits brought by such person or persons under the provisions of this Act, except upon the plaintiff's request. Any carrier or carriers held liable under the provisions of this Act, shall be entitled in a proper subsequent action to recover the amount or any loss, damage or injury it has been required to pay under this Act, from the carrier or carriers through whose negligence, the loss, damage or injury was sustained, together with all costs of suit; and for the purpose of such recovery, it shall only be necessary that the carrier against whom judgment was had to show, which carrier or carriers caused the loss or damage and produce satisfactory evidence, that the judgment rendered against it has been paid; and in this latter action between the carriers, the provisions of Article 1830, subdivision 25 shall be applicable. [Acts 1895, p. 186, § 2; Acts 1919, 36th Leg., ch. 165, § 2.]

See *Kansas City, M. & O. Ry. Co. v. Bell* (Civ. App.) 197 S. W. 322; *Ft. Worth & D. C. Ry. Co. v. Kemp* (Civ. App.) 207 S. W. 605; *Galveston, H. & S. A. Ry. Co. v. Lock* (Civ. App.) 209 S. W. 181; *Chicago, R. I. & G. Ry. Co. v. Hallam* (Civ. App.) 211 S. W. 809; *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552; *Galveston, H. & S. A. Ry. Co. v. Zemurray* (Civ. App.) 215 S. W. 157; *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043; *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

CHAPTER FIVE

PIPE LINES

Article 732½. Certain persons, etc., declared to be common carriers.

Right of way.—Corporations operating public pipe lines being common carriers may use way reserved in plat and deed. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

TITLE 21

CERTIORARI

Chap.

1. Certiorari to the County Court.

Chap.

2. Certiorari to Justices' Courts.

CHAPTER ONE

CERTIORARI TO THE COUNTY COURT

Art.

733. Certiorari to county court, issued when.

734. Application for.

Art.

739. Citation as in ordinary cases.

740. Trial de novo, judgment to be certified below.

Article 733. Certiorari to county court, issued when.Cited, *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.**Jurisdiction of district court.**—Writ may issue to correct inheritance tax proceedings in county court. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.On certiorari by wards to review sale of ward's land on application of guardian, it cannot be determined whether or not an order of a certain date recited in deed to purchaser was in fact never made; and a finding as to the existence of the order is surplusage. *Scawind v. Goodman* (Com. App.) 221 S. W. 579, reversing judgment (Civ. App.) *Goodman v. Schwind*, 186 S. W. 282.— **Discretionary power of court.**—Certiorari to set aside a guardian's sale of ward's land because he became clerk of the probate court, held not a matter of right. *Schwind v. Goodman* (Com. App.) 221 S. W. 579, reversing judgment (Civ. App.) *Goodman v. Schwind*, 186 S. W. 282.— **Persons interested.**—Purchasers of lands partitioned, held adversely interested. *Reynolds v. Prestidge* (Civ. App.) 228 S. W. 358.**Art. 734. [333] [291] Application for.****Pleading.**—An order confirming administrator's sale of land for one-fourth of its actual value is so grossly unjust to the heirs as to be subject to revision by certiorari, though petition for certiorari does not allege fraud or mistake. *Lee v. Benzes* (Civ. App.) 209 S. W. 768.Petition for certiorari to revise proceedings for partition of a decedent's estate held not subject to general demurrer. *Reynolds v. Prestidge* (Civ. App.) 228 S. W. 358.There is no misjoinder of causes of action, though the right of petitioner under the will to land partitioned to others is asserted. *Id.*— **Amendment.**—An amendment, alleging that there was no order of a certain date, is abandonment of the cause of action for relief from such order. *Schwind v. Goodman* (Com. App.) 221 S. W. 579, reversing judgment (Civ. App.) *Goodman v. Schwind*, 186 S. W. 282.— **Parties adversely interested.**—Purchasers of lands partitioned. *Reynolds v. Prestidge* (Civ. App.) 228 S. W. 358.**Art. 739. [338] [296] Citation as in ordinary cases.**— **Parties adversely interested.**—Purchasers of lands partitioned. *Reynolds v. Prestidge* (Civ. App.) 228 S. W. 358.**Art. 740. [339] [297] Trial de novo; judgment to be certified below.****Trial de novo.**—The proceedings in the district court are not collateral attacks upon the decision in the probate court, and the latter may be reviewed without the probate court having an opportunity to correct its errors. *Linch v. Broad*, 70 Tex. 92, 6 S. W. 751.The district court is confined to facts alleged, as well as grounds of error specified, in the application. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.— **Amendment.**—Trial amendment presenting additional grounds properly refused. *Lee v. Benzes* (Civ. App.) 209 S. W. 768.— **Consolidation of writs.**—Consolidation proper. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

CHAPTER TWO

CERTIORARI TO JUSTICES' COURTS

<p>Art. 742. Certiorari to justices' courts. 743. On order of the county or district court or judge. 745. Affidavit of sufficient cause. 746. What application for certiorari must show.</p>	<p>Art. 748. Bond with sureties required. 754. Motion to dismiss at first term. 756. Judgment of dismissal. 759. New matter may be pleaded, etc. 760. Trial de novo.</p>
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Article 742. [341] [299] Certiorari to justices' courts.

Discretion of court.—Certiorari to review a justice court judgment is not granted as a matter of right. *Chicago, R. I. & G. Ry. Co. v. Boyce* (Civ. App.) 206 S. W. 112.

Mandamus.—Writs of mandamus will not be issued where there is a clear legal remedy, as by certiorari, by which the statute authorizes a cause to be removed from justice court to the county court. *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

Art. 743. [342] [300] On order of the county or district court or judge.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 745. [344] [302] Affidavit of sufficient cause.

Necessity and requisites of affidavit.—An affidavit by one not shown to be petitioner's attorney, or to have knowledge of facts alleged in petition, is insufficient. *Chicago, R. I. & G. Ry. Co. v. Boyce* (Civ. App.) 206 S. W. 112.

Art. 746. [345] [303] What application for certiorari must show.

Want of jurisdiction.—Where petition for certiorari merely states the value of the property involved, and not what plaintiff in his pleading in a justice court alleged it to be, and there is no claim of fraud, it will be presumed that plaintiff stated a case within the jurisdiction of the justice court. *Brown v. Green* (Civ. App.) 204 S. W. 357.

Injustice to applicant.—Petition held to show prima facie, that an injustice had been done by justice's judgment rendered in petitioner's absence without his negligence. *Nelson v. Hart* (Civ. App.) 23 S. W. 831.

Petition for certiorari to justice court alleging that uncontradicted evidence showed plaintiff in replevin was owner and entitled to possession of diamond in question, held to set forth substance of facts showing that injustice had been done. *Hall v. Collier* (Civ. App.) 200 S. W. 880.

A petition for certiorari to the justice court should state sufficient facts to show that another trial would probably result in a different judgment, so that mere general averments of no liability are insufficient. *Chicago, R. I. & G. Ry. Co. v. Boyce* (Civ. App.) 206 S. W. 112.

Negligence of applicant.—A petition for certiorari to review a justice court default judgment showing an alleged excuse for absence from the trial, but setting up no sufficient excuse for failure to appear or answer, is insufficient. *Chicago, R. I. & G. Ry. Co. v. Boyce* (Civ. App.) 206 S. W. 112.

Petitioner for certiorari, held not chargeable with his attorney's neglect to present and sustain plea of privilege. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

Negligence of defendant's attorney in allowing default judgment to be entered, does not defeat defendants' right to certiorari. *Hill v. Pavelka* (Civ. App.) 209 S. W. 709.

Art. 748. [347] [305] Bond with sureties required.

Cited, *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

Necessity and requisites of bond.—A condition, that the applicant shall prosecute his suit to effect, will be stricken out as surplusage. *Nelms v. Draub* (Civ. App.) 22 S. W. 995.

Art. 754. [353] [311] Motion to dismiss at first term.

Grounds for dismissal.—Motion to dismiss certiorari must be confined to statutory grounds. *J. I. Case Threshing Mach. Co. v. Lochridge & Denny* (Civ. App.) 195 S. W. 266.

Hearing of motion.—Neither petition for dismissal of certiorari directed to justice of peace nor court's order as to time when writ was ordered can be contradicted by affidavit or oral evidence. *J. I. Case Threshing Mach. Co. v. Lochridge & Denny* (Civ. App.) 195 S. W. 266.

Art. 756. [355] [313] Judgment of dismissal.

Dismissal as reviewing judgment below.—Final judgment rendered by justice of the peace, vacated when a petition for certiorari was granted by county court, is not revived by the dismissal of the cause by the county court. *Texas Novelty Advertising Co. v. Bay Trading Co.* (Civ. App.) 206 S. W. 729.

Art. 759. [358] [316] New matter may be pleaded, etc.

New cause of action, defense, set-off or counterclaim.—Plea of sheriff, proceeded against for not turning over to execution creditor money collected under execution, acknowledging the collection, but averring that he had applied the money on an execution against such creditor, not setting up any cause of action against plaintiff, is not one of "set-off" or "counterclaim," but is a permissible new plea in confession and avoidance (quoting Words and Phrases, Set-Off; see, also, Words and Phrases, First and Second Series, Counterclaim). *Branscum v. Reese* (Civ. App.) 219 S. W. 871.

In suit in justice court by a bank on a check against the maker and the payee, who had deposited the check for collection, it having been lost, the maker refusing to give a new one, so that the bank charged back the payee's account, the evidence showing that defendant maker was liable on the check to defendant payee, and both the bank and the payee having secured judgments against him, by amending his pleadings in the county court, asking judgment in his favor against defendant maker for the amount of the check, defendant payee sought neither to enlarge nor change defendant maker's liability, and the amendment was proper under this article. *R. W. Taylor & Co. v. Ferguson* (Civ. App.) 226 S. W. 1102.

Art. 760. [359] [317] Trial de novo.

Trial de novo.—Where justice of peace sent up record on certiorari on one defendant's petition, and writ was properly issued, reciting that both defendants had petitioned, court acquiring jurisdiction of entire cause. *J. I. Case Threshing Mach. Co. v. Lochridge & Denny* (Civ. App.) 195 S. W. 266.

Where plaintiff took nonsuit against one defendant, who had removed case on certiorari, this did not affect writ as to other defendant. *Id.*

TITLE 21 A

CHILD AND ANIMAL PROTECTION

CHAPTER TWO

PREVENTION OF CRUELTY TO ANIMALS

Article 761p. Enforcement of lien; sale.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

TITLE 22

CITIES AND TOWNS

Chap.	Chap.
1. General provisions relating to cities.	10. Streets and alleys.
2. Officers and their election.	11. Street improvements.
3. Duties and powers of officers.	11a. Parks.
4. General powers and duties of the city council.	12. Public utility corporations, rates and charges—regulation by council, etc.
5. Corporation courts.	14. Towns and villages.
6. Taxation.	15. Commission form of government.
7. Assessment and collection of taxes.	16. Abolition of corporate existence.
8. Fire department.	17. Cities having more than 5,000 inhabitants—Adoption and amendment of charter.
8a. Firemen, policemen, and fire alarm operator's pension fund.	18. Consolidation of cities.
9. Sanitary department.	

CHAPTER ONE

GENERAL PROVISIONS RELATING TO CITIES

Art.	Art.
762. Cities, towns and villages may accept provisions of this title.	773c. Effect of adoption of amendment.
764. General powers of the corporation.	773d. Revenues of annexed city or town.
770. May purchase, construct, and operate systems inside or outside limits, and regulate, etc.	776a. Validating incorporation.
773. Limits of corporation to remain the same until extended, etc.	781. Adjoining inhabitants may become part of city, how.
773a. Cities of 100,000 and 150,000 may amend their charters so as to extend limits.	783a. Cities on navigable streams and under special charters may extend limits; may acquire land for improvement of navigation, etc.
773b. Same; submission to voters.	783c. Cities may lease oil or mineral lands.

Article 762. [381] [340] **Cities, towns and villages may accept the provisions of this title.**—Any incorporated city, town or village in this State containing 600 inhabitants or over, including those incorporated under Chapter 14 of this Title, or Chapter 11 of Title 18 of the Revised Statutes of 1895, and other laws, general and special, and any incorporated city, town or village of whatever population containing one or more manufacturing establishments within the corporate limits, and which may be subject to the provisions of the Act known as "Chapter 23 of the Acts of the Regular Session of the 34th Legislature, Page 38," which was approved by the Governor on February 25th, 1915, or any amendments thereto, may accept the provisions of this Title relating to cities and towns, in lieu of any existing Charter, by a two-thirds vote of the Council of such city, town or village, which action by the Council shall be had at a regular meeting thereof, and entered upon the journal of their proceedings, and a copy of the same, signed by the Mayor and attested by the Clerk or Secretary under the corporate seal, filed and recorded in the office of the Clerk of the County Court in which such city, town or village is situated, and the provisions of this Title shall be in force, and all acts theretofore passed incorporating said city, town or village which may be in force by virtue of any existing Charter, shall be repealed from and after the filing of said copy of their proceedings, as aforesaid. When such city, town or village is so incorporated as herein provided, the same shall be known as a city or town, subject to the provisions of this Title relating to cities and towns, and vested with all the rights, powers, privileges, immunities and franchises therein conferred.

[Acts 1881, p. 115; Acts 1885, p. 57; Acts 1915, 34th Leg., ch. 34, § 1; Acts 1919, 36th Leg., ch. 66, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

See *Bartlett v. State* (Civ. App.) 222 S. W. 656; *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

Application.—A town incorporated under title 22, c. 14, which formerly provided for the organization of a "town or village" containing 200, and less than 1,000, inhabitants, cannot reorganize under this chapter, even though it has increased to more than 1,000 inhabitants. *Harness v. State*, 76 Tex. 566, 13 S. W. 535.

Effect of special charter.—Provisions of city charter specially granted to city by Legislature have the same force and effect as any other positive statutory law of the state. *Cawthon v. City of Houston* (Civ. App.) 212 S. W. 796.

Art. 764. [383] [342] General powers of the corporation.

See *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

2. Power of legislature.—The Legislature has power to grant cities special charters, and clothe them with authority to carry out the purposes of the charter, provided that the power granted shall not violate any provisions of the Constitution, or be in derogation of any general law of the state, and are reasonable and not arbitrary and oppressive. *Ex parte Stallcup*s (Cr. App.) 220 S. W. 547.

4. Powers—In general.—Municipalities or other legislative instrumentalities may exercise only such legislative powers as are expressly or by implication delegated to them by the Legislature. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

A city has no vested rights in powers conferred upon it or its officers for civil, political, or administrative purposes. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

7. — Incidental.—A municipal corporation possesses powers necessarily or fairly implied in or incident to powers expressly granted and powers essential to accomplishment of declared purposes of corporation, not simply convenient, but indispensable, and any reasonable doubt as to existence of power is resolved by courts against corporation. *Choice v. City of Dallas* (Civ. App.) 210 S. W. 753.

15. Contracts—For lighting, water supply, etc.—It is the duty of municipal governments to furnish citizens with water, lights, streets, and other public conveniences necessary for their protection and benefit; but it may contract with some other person or corporation to perform that service for it. *Neal v. San Antonio Water Supply Co.* (Civ. App.) 218 S. W. 35.

23. Provision for payment of debts.—A warrant evidencing an attempt by a city to incur a debt without at the same time complying with the constitutional provision requiring the levy of a tax to meet interest and sinking fund is absolutely void. *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330.

Debts for the ordinary current expenses of a city payable within a year out of the incoming revenues do not come within the purview of Cost. art. 11, § 7, providing that no debt shall be incurred unless provision is made for levying and collecting a tax to pay the interest and provide sinking fund, and hence a warrant given for fire hose with the intention that it be paid out of the current revenues did not come within the purview of such constitutional inhibition. *Id.*

In an action on a warrant in payment of purchase price for hose, evidence held to justify a finding that the purchase price was to be paid out of current revenues of the city for the year. *Id.*

23½. Proprietary or governmental capacity.—In hauling sand with its teams and distributing it generally, the city of Houston was undoubtedly acting in its proprietary capacity, and in adjusting claims for damages arising therefrom it continues to act in that capacity, and the courts recognized the distinction between proprietary and governmental capacity. *Cawthorn v. City of Houston* (Com. App.) 231 S. W. 701.

27. Actions by or against.—A claim for salary on ground of illegal discharge is not of the class of claims of which under the charter notice must be given as a condition precedent to right to sue. *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191.

While remedies, remedial rights, and process are subject to legislative control, to construe a law, requiring presentation of claim to the city council for redress precedent to suit for injunction for irreparable injury, would make it invalid, as amounting to a denial of all remedy. *El Paso Union Passenger Depot Co. v. Look* (Civ. App.) 201 S. W. 714.

El Paso City Charter, § 71, providing that no suit of any nature shall be maintained against the city, without averring and proving previous application to city council for redress being in derogation of common-law right, must be strictly construed. *Id.*

As provisions requiring notice are in derogation of common right and should be construed with reasonable strictness and not extended by implication, the provision in the *San Antonio charter* that before the city should be liable for damages of any kind the person injured or some one in behalf of such person shall give written notice held to apply to personal injuries, and not injuries to property. *City of San Antonio v. Pfeiffer* (Civ. App.) 216 S. W. 207.

A municipal corporation can seek protection of the public rights by injunction in a court of equity on the same footing as private persons and corporations may seek redress. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63.

The provision of *Houston City Charter*, art. 9, § 11, that before suing the city and within 90 days after personal injury, party shall have the mayor and city council notified

of the injury, is in derogation of common law, and should be construed with reasonable strictness, and applies to city employees as well as others. *Cawthorn v. City of Houston* (Com. App.) 231 S. W. 701.

Such provision will be upheld, and must be strictly complied with, and is only a prerequisite to the assertion in court of a claim of liability by the injured party. *Id.*

In a personal injury action against the city, where the negligence complained of resulted in the caving in of a sand bank upon the plaintiff while he was hauling sand for the city, such provision is applicable. *Id.*

The mayor and commissioners of the city are not prohibited from waiving the requirement and they should be permitted to do so, a waiver being the voluntary relinquishment of a known right. *Id.*

A city commissioner authorized by the mayor and commissioners to approach a claimant for personal injuries and offer him a compromise and invite him to their office to discuss it, may be deemed authorized to waive strict compliance therewith. *Id.*

Whether or not the mayor and council intended to waive strict compliance with such requirement, where the mayor and commissioners, through their agent, one of the commissioners, so conducted themselves so as to lull claimant into a sense of security and cause him to think they were waiving such charter provision, the city is estopped to assert noncompliance therewith. *Id.*

Under such provision, notice is a condition precedent to right of action, so that plaintiffs, suing the city, must affirmatively allege the prescribed notice, if applicable to the facts pleaded, unless the city has waived the provision or become estopped from asserting it. *Id.*

Art. 770. May purchase, construct and operate systems inside or outside limits, and regulate, etc.

Personal injuries.—Galveston City Charter, § 47, exempting the city from personal injury liability, is limited to injuries caused by or in the prosecution of public improvements within the city, and does not extend to an injury occurring outside the city to a servant assisting in constructing a water main authorized by section 34, paragraph R. *Leslie v. City of Galveston* (Civ. App.) 226 S. W. 438.

Art. 773. [384] [343] Limits of corporation to remain the same until extended, etc.

Extension of limits.—The town of Nacogdoches was reincorporated in 1859, and its corporate organization kept up at intervals till 1882. In 1887, steps were taken as for the original incorporation of a city or town, with boundaries larger than those of the original town. Held, that the corporation created in 1859 could not be presumed to be dissolved by the failure to elect officers; and that as Rev. St. art. 340, provides the only manner in which a city or town may surrender its corporate existence, and reincorporate under the general law, and article 343 provides that the boundaries of such a city shall remain as they were fixed by the former charter, unless additional territory be afterwards annexed in the manner therein prescribed, the proceedings had in 1887 did not create a corporation, nor dissolve the one previously existing. *State v. Dunson*, 71 Tex. 65, 9 S. W. 103.

Power of Legislature to extend city limits could by statute be delegated to the voters of the city. *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

Art. 773a. Cities of 100,000 and under 150,000 may amend their charters so as to extend limits.—Any city having a population of one hundred thousand and under one hundred and fifty thousand, as shown by the last United States census, shall have the power and authority to amend its charter so as to extend its boundary limits by annexing additional territory adjacent and contiguous to such city where the territory so annexed does not include any incorporated city or town having more than five thousand inhabitants according to last United States census. [Acts 1921, 37th Leg., ch. 101, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 49, § 1.]

Explanatory.—Took effect Nov. 15, 1921. Sec. 5 of the act repeals all laws in conflict. The title, but not the enacting part, purports to amend Acts 1921, 37th Leg., ch. 101.

Art. 773b. Same; submission to voters.—The Legislative or governing body of any city having a population of one hundred thousand and under one hundred and fifty thousand, may, upon its own motion, and shall upon the petition of at least ten per cent. of the qualified voters of said city as shown by the last preceding general election, submit such proposed amendment to a vote of the qualified voters of such city of one hundred thousand or more population, which election shall be held as provided by Chapter 147 of the Acts of the Regular Session of the Thir-

ty-third Legislature. [Vernon's Ann. Civ. St. 1914, art. 1096a], [Acts 1921, 37th Leg., ch. 101, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 49, § 2.]

Art. 773c. Effect of adoption of amendment.—In the event such amendment is adopted by a majority vote of those voting at such election and such annexed territory shall include any incorporated city or town of five thousand inhabitants, or less, then, from and after the adoption of such amendment, the incorporation of such city or town of five thousand inhabitants or less, shall be abolished and shall cease to exist and all record books, public property; public buildings, money on hand, credit accounts and other assets of the annexed incorporated city or town shall become the property of said larger city and shall be turned over to the officers thereof, and by such annexation the offices existing in the smaller municipality shall be abolished and the persons holding such offices shall not be entitled to further remuneration or compensation.

All legal outstanding liabilities of such smaller city shall be assumed by the enlarged city, and whenever such annexed city or town shall have on hand any bond funds for public improvements and not already appropriated or contracted for, such money shall be kept in a separate special fund and devoted to public improvements in the territory for which such bonds were voted, and shall not be diverted or used for any other purpose. [Acts 1921, 37th Leg., ch. 101, § 3; Acts 1921, 37th Leg. 1st C. S., ch. 49, § 3.]

Art. 773d. Revenues of annexed city or town.—After such annexation all claims, fines, debts and taxes due or payable to the annexed city or town shall thereupon become due and payable to said larger city and shall be collected by it; provided that in the event taxes for the current year shall have been duly assessed prior to said annexation, then, the amount so assessed shall remain as the amounts due and payable from the inhabitants of such annexed city or town for such current year. [Acts 1921, 37th Leg., ch. 101, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 49, § 4.]

Art. 776a. Validating incorporations.—That each charter and each act of incorporation adopted by the qualified voters of cities of over five thousand inhabitants that have incorporated under Chapter 147, page 307, Acts of the Regular Session of the 33rd Legislature, 1913, prior to December 15, 1915, and filed in the office of the Secretary of State, the population of which was less than five thousand inhabitants, as shown by the United States Census of 1910, but which, at the time of the adoption of the charter or act of incorporation, was in excess of five thousand inhabitants according to an official census taken under the direction and supervision of the city council, be and the same are hereby validated and are hereby declared to be in full force and effect the same as if adopted in strict compliance with the requirements of said Chapter 147, page 307, Acts of the Regular Session of the 33rd Legislature, 1913, and this Act shall take effect and be in force from and after its passage. [Acts 1918, 35th Leg. 4th C. S., ch. 68, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Proceedings not validated.—This act cannot validate an amendment to a home rule charter extending the boundaries of the city which was unconstitutional. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084.

Art. 781. [574] [503] Adjoining inhabitants may become part of city, how.

See *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.
Cited, *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

Manner of voting.—Under this article, the vote need not be by ballot, but may be by any method satisfactory to the voters and the council. (*Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. 742, followed.) *State v. City of Waxahachie*, 81 Tex. 626, 17 S. W. 348.

Art. 783a. Cities on navigable streams and under special charters may extend limits; may acquire land for improvement of navigation, etc.

Construction of railroad.—This article does not authorize a city upon passage of an ordinance thereunder to construct a steam railroad along a street included in the extended limits. *City of Orange v. Rector* (Civ. App.) 205 S. W. 593.

Art. 783c. Cities may lease oil or mineral lands.—Any town or City in this State, which has been, or may hereafter be chartered or organized, under the General Laws of Texas, or by Special Act or Charter, in which said City or town may own oil or mineral lands, shall have the power and right to lease such oil or mineral lands for the benefit of such town or city, provided that such town or city shall not lease for such purposes any street or alley or public square in said town or city, or any land therein dedicated by any person or persons to public uses in such town or city; and provided further that no well shall be drilled within the thickly settled portion of any city or town, nor within two hundred (200) feet of any private residence. [Acts 1919, 36th Leg., ch. 117, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

CHAPTER TWO

OFFICERS AND THEIR ELECTION

Art. 784. Municipal government to consist of certain officers to be elected, etc.	Art. 795. Resignation of officers.
785. Manner of electing officers, etc.	796. Power of city council to remove officers.
786. Election and term of office of mayor and aldermen.	797. Vacancy how filled.
787. Time of holding election, and returns thereof.	801. City council composed of mayor and aldermen, etc.

Article 784. [387] [344] Municipal government consists of what.

Cited, *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

Reduction of salary.—In view of this article, and art. §16, as to salaries of city officers, council could not reduce salary of city attorney, which had been fixed by ordinance after adoption of commission plan of government, the charter of which provided that present city attorney should hold over. *City of Brownsville v. Kinder* (Civ. App.) 204 S. W. 446.

Letting office to highest bidder.—A city charter, if it purports to authorize the letting by contract to the highest and best bidder of the office of city treasurer, etc., to that extent is unconstitutional. *City of Corpus Christi v. Mireur* (Civ. App.) 214 S. W. 528.

Art. 785. [388] [345] Manner of electing officers, etc.

See *State v. Goodwin*, 69 Tex. 55, 5 S. W. 678; *Janks v. State*, 29 Tex. App. 233, 15 S. W. 815.

Art. 786. [389] [346] Election, etc., of mayor and aldermen.

See *Kempen v. Bruns* (Civ. App.) 195 S. W. 643; note under art. 787.

Art. 787. [390] [347] Time of holding election, and returns thereof.

Statute directory.—In view of arts. 605, 2912, this article, and art. 786, as to time during which polls shall be open and when they shall close, are directory. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Bond elections.—In view of arts. 605, 2912, held, that bond election is not invalidated by holding polls open until 7 p. m., in spite of this article and art. 786. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Art. 795. [563] [492] Resignation of officers.

See *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; note under art. 797.

Art. 796. [564] [493] Power of city council to remove officers.

Removal—Grounds.—In an action by a removed city officer to recover salary, the burden is upon such officer, to show that reasons for his dismissal, filed by the mayor in compliance with the provision of the city charter, were not the true reasons. *Braden v. City of San Antonio* (Civ. App.) 216 S. W. 282.

In an action against a city for salary by its marshal removed by the mayor, evidence tending to show that he was removed for political reasons and not for incompetency, as stated by the charges filed in accordance with charter, held sufficient to sustain verdict for marshal. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

— **Proceedings for removal.**—Where a clerk of a corporation court was removed by the mayor and the removal was thereafter approved by the council, the removal was then effective even though the removal by the mayor was improper by reason of the failure to have reasons for the removal filed at such time. *Braden v. City of San Antonio* (Civ. App.) 216 S. W. 282.

When paper containing the reasons of the mayor of a city for removing the city marshal was placed in the hands of the city clerk for filing as required by the charter, the mayor had complied with the law, and failure of the clerk to file the paper did not render the removal or discharge illegal. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

Removal of employes.—The right of a municipal corporation is the same in regard to removal of its employes as is that of an individual or private corporation in the absence of statute. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

Art. 797. [396] [352] Vacancy, how filled.

See *Janks v. State*, 29 Tex. App. 233, 15 S. W. 815.
Cited, *tates v. Goodwin*, 69 Tex. 55, 5 S. W. 678.

Resignations.—This article recognizes that resignations may be made; and the election by the city council, of one holding the office of secretary, to the office of recorder, is a sufficient acceptance of his resignation from the former office to enable him to qualify for the latter. *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

Art. 801. [399] [355] City council composed of mayor and aldermen, etc.

See *Jones v. State* (Cr. App.) 23 S. W. 796.

CHAPTER THREE

DUTIES AND POWERS OF OFFICERS

Art. 806. Powers of the mayor.	Art. 812. Powers of city council over officers.
809. Duties and powers of the marshal.	812a. Cities of over 150,000 may fix salaries
809a. Certain cities may dispense with office of marshal, etc.	of certain officers.

Article 806. [403] [359] Powers of the mayor.

Institution of suits.—A suit, begun by the mayor of a city for an injunction to restrain the construction of a proposed warehouse encroaching on a street, which suit was thereafter approved and order prosecuted by the council at a called meeting, is sufficiently authorized by the city. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63.

Removal of officers.—Under power in charter for mayor to discharge appointee for any reason he may deem sufficient, discharge for unfitness is valid if mayor thinks him unfit, though he be fit. *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191.

Power given a mayor by charter to appoint to office carries with it power to discharge, subject to limitations in the charter. *Id.*

That an appointee discharged by mayor was fit, and that there were political reasons for discharge, does not prove the mayor believed him fit, making discharge for unfitness invalid. *Id.*

That a mayor has political reasons for which he might desire the discharge of an appointee, but which under the charter he cannot make for such reasons, does not prevent him making the discharge for another reason. *Id.*

Art. 809. [407] [483a] [363] Duties and powers of the marshal.

See *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443.

Art. 809a. Certain cities may dispense with office of marshal, etc.

Suits against constable.—In a suit for injunction based on an alleged unlawful execution sale by a constable, who had been subsequently appointed town marshal, a complaint failing to show that such constable had qualified as town marshal, and acted as such, held not to state a cause of action; it affirmatively appearing that such constable was acting under the provisions of this article. *Torno v. Hochstetler* (Civ. App.) 221 S. W. 623.

Art. 812. [411] [367] Powers of city council over officers.

Employment of attorney.—A city may, in its discretion, employ any available attorney to represent it before the courts, regardless of what duties may have been assigned to the city attorney. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63.

Art. 812a. Cities of over 150,000 may fix salaries of certain officers.—That the municipalities of this State, having a population of more than one hundred and fifty thousand according to the last United States census next preceding the fixing of such salaries or compensations or the enactment of the ordinances prescribing and fixing the same, organized under any special Act of this State or under and by virtue of Constitutional provisions of this State, shall have, and there is hereby delegated to them, respectively, power and authority, acting by and through their respective governing authorities, to fix and prescribe from time to time, and to alter, modify and change the same, a salary or compensation of not exceeding the following sum or amount, anything in any charter of such municipality or any special law to the contrary notwithstanding, to-wit:

(1) An annual salary or compensation to be paid the city or corporation judge not exceeding four thousand dollars; city attorney not to exceed six thousand dollars, and city auditor not to exceed four thousand dollars. No salary or compensation of said officers shall be decreased after being fixed and prescribed by said governing authorities during the term of office for which he is elected or appointed. [Acts 1920, 36th Leg. 3d C. S., ch. 21, § 1.]

Took effect June 17, 1920.

CHAPTER FOUR

GENERAL POWERS AND DUTIES OF THE CITY COUNCIL

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| <p>Art.
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Art.	Art.
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879. To appropriate revenues, and for what purposes; to issue bonds, etc.	884. Interest and sinking fund tax to be levied, interest paid and bonds sold, etc.
880. City bonds shall specify what.	890. May pass ordinances to fund debt, etc.
881. Bonds shall be signed, etc., and payable where and when.	
882. Same; interest; maturity; payment; purposes of issue.	

Article 816. [569] [498] Salary of officers shall be fixed by city council, etc.

Right to salary.—For a city officer illegally discharged to recover salary, it is not necessary for him to tender his services. *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191.

Reduction of salary during term.—In view of arts. 816 and 784, council could not reduce salary of city attorney, which had been fixed by ordinance after adoption of commission plan of government, the charter of which provided that present city attorney should hold over. *City of Brownsville v. Kinder* (Civ. App.) 204 S. W. 446.

Appropriation for salary.—Where ordinance appropriated money "until further commanded by order of the city council" to pay city attorney's salary, it must be presumed that the appropriation was made within this article, and was intended to provide for payment of officers to be elected in the following year. *City of Brownsville v. Kinder* (Civ. App.) 204 S. W. 446.

Art. 817. [464] [418] Power to pass, etc., ordinances, etc., and other powers.

1. **Not subject to judicial control except, etc.**—A city council, when acting upon subjects over which it has the power to legislate, is an entirely independent lawmaking body, and cannot be interfered with or subjected to inquiry by the courts as to its motives, reasons, or purposes in enacting ordinances. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

Where the purpose of bonds was to enable the city issuing them to acquire and improve lands for public parks, the matters of how much of the fund was to be spent for the purchase of lands, and how much for their improvement as parks, were of necessity within the control of the city council, whose discretion in the premises is free from judicial control. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

4. **Ordinances—In general.**—An ordinance is not a "law" in one sense of the word, but is a local law emanating from legislative authority and operative within its sphere as effectively as general law of the sovereignty (citing *Words and Phrases*, vol. 6, p. 502; *Second Series*, vol. 3, p. 77). *Choice v. City of Dallas* (Civ. App.) 210 S. W. 753.

Under Charter of the City of Beaumont, §§ 34, 41, 45, 76, purchase and improvement by city of land for public park with funds raised by sale of interest-bearing bonds are acts of a permanent nature legislation in regard to which must be evidenced by ordinance duly passed by the city council, and not by its mere resolution. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

5. — **Enactment.**—It was not necessary that an ordinance regulating jitney busses be read at three regular meetings of board of commissioners, etc., as required by city of Dallas charter in the case of ordinances granting franchises; such ordinance not granting a franchise. *City of Dallas v. Gill* (Civ. App.) 199 S. W. 1144.

In view of Dallas City Charter, art. 3, subd. 1, art. 2, § 8, subd. 7, art. 2, § 8, subd. 27, and art. 8, § 1, as to powers of board of commissioners and of voters under initiative and referendum, ordinance for licensing jitneys, passed on referendum, held invalid as invading powers of board. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

7. — **Amendment.**—San Antonio ordinance of August 27, 1917, regulating automobiles used for hire, is not invalid as seeking to amend an ordinance by reference to its title. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

Const. art. 3, § 36 prohibiting amendment or revival of statutes by reference to title, held inapplicable to municipal ordinances. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

8. — **Repeal.**—Laredo city ordinance of May 19, 1883, providing for payment of bonds by revenue derived from taxation, sale of lots, etc., was not repealed by unconstitutional ordinance of December 22, 1883, providing that entire amount be raised by tax levy of 45 cents per \$100 in violation of constitutional amendment limiting such levies to 25 cents per \$100. *City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

A city has power to abolish by ordinance a particular street stand for vehicles established by prior ordinance, in the absence of a showing of unreasonableness. *Ex parte Stallcup*, 87 Cr. R. 203, 220 S. W. 547.

9. — **Validity in general.**—San Antonio ordinance of August 27, 1917, regulating automobiles used for hire, is not invalid for failure to state, either in preamble or body the existence of an emergency. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

That board of commissioners may act arbitrarily under authority granted by city charter or an ordinance does not render ordinance void. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

A city ordinance, unless expressly authorized by the Legislature, must be reasonable. *Invader Oil & Refining Co. of Texas v. City of Ft. Worth* (Civ. App.) 229 S. W. 616.

9½. — **Title.**—The requirement that the title of an act shall embrace its subject does not apply to municipal ordinances. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

Rules testing the constitutionality of statutes, in regard to stating the purpose of statute in the caption thereof, are not generally applied to city ordinances. *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222.

A caption "An ordinance providing for the proper care of West Hill Cemetery, making it a misdemeanor for persons other than employés of the city of Sherman to do any work therein for the purpose of digging graves or dressing and keeping the lots therein. And prescribing a penalty therefor," does not state a double purpose. *Id.*

10. — **Partial invalidity.**—Laredo city ordinance of December 22, 1883, is entirely void, since provision authorizing tax levy of 45 cents per \$100 in violation of constitutional limitation, is an inseparable part of ordinance all of whose provisions are connected in subject-matter. *City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

Invalidity of ordinance regulating business of pawnbrokers and junk dealers as to penalties imposed upon pawnbrokers, held to render it void both as to pawnbrokers and junk dealers. *Ex parte Goldburg*, 82 Cr. R. 475, 200 S. W. 386.

11. — **Police regulations in general.**—Ordinance prohibiting picketing for the purpose of persuading persons from entering places of business to transact business is not unreasonable, vague, or uncertain. *Ex parte Stout*, 82 Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277.

El Paso charter, § 2, empowering city to protect health, life, and property, and to preserve order and security of city and inhabitants, gave power to prohibit loitering or walking back and forth in front of places of business for purpose of persuading persons from entering. *Id.*

Ordinance regulating business of junk dealers, requiring books of record, reports to chief of police, keeping of each lot separate for two days, and restricting business to hours between 6 a. m. and 7:30, etc., held invalid for unreasonableness. *Ex parte Goldburg*, 82 Cr. R. 475, 200 S. W. 386.

Legislature may confer upon municipal corporations, by special charter, police powers necessary for protection of public health, safety, and morals. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

Ordinances authorizing policemen of a city to make arrests without warrant for all violations of law, passed under the charter of the city empowering it to pass such ordinances, are legal. *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 1071.

17½. — **Jitney busses.**—See *City of Dallas v. Gill* (Civ. App.) 199 S. W. 1144; note under art. 870.

18. — **Conflict with statute.**—Ordinance allowing a moving picture show to remain open on Sunday cannot suspend Pen. Code 1911, art. 302, prohibiting them to run on Sunday with certain films. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

A business authorized or regulated by state law cannot be prohibited by ordinance, otherwise than by grant of power in its charter and in accordance with state law or constitutional provisions. *Ex parte Goldburg*, 82 Cr. R. 475, 200 S. W. 386.

Municipal ordinances on subject as to which there is no state law cannot prescribe penalties, unless authorized by state law, and without express charter authority to levy penalties ordinance must conform to any general statute authorizing penalties. *Id.*

Penalties under ordinances which are same as state law must conform strictly to penalties prescribed by state law, and cannot exceed them, and must not conflict with state law or Constitution. *Id.*

Ordinance of city of El Paso imposing penalty for violation of ordinance regulating pawnbrokers different from that imposed by Pen. Code 1911, art. 641, held void, as to penalty imposed; there being no charter authority therefor. *Id.*

A city by its ordinance cannot set aside the state penal laws prohibiting houses of prostitution. *Levy v. State*, 84 Cr. R. 493, 208 S. W. 667.

See *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634; *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404; *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209; *City of San Antonio v. Besteiro* (Civ. App.) 209 S. W. 472.

21. — **Right to question validity.**—One charged with operating an automobile for hire without a license in violation of an ordinance was in no position to question the validity of the ordinance by reason of the authority therein given to revoke the license. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

Art. 818. [559] [488] Style of ordinances.

Enacting clause.—Under charter of city of Brownsville, requiring that ordinances begin with words "Be it ordained by the city of Brownsville," an ordinance so beginning was not void because it did not begin "Be it ordained by the council of the city of Brownsville." *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

Art. 819. [557] [486] Ordinances, when and how published.

Application.—City ordinance requiring construction of sidewalks by owner or by city at his expense held not to impose penalty or forfeiture within this article. *City of Lampasas v. Huling* (Civ. App.) 209 S. W. 213.

Art. 821. [558] [487] Published ordinances admissible in evidence.

Ordinances admissible—Regulating speed, etc., of train.—In view of this article, the testimony of the mayor and secretary of a city that an ordinance, limiting the speed of trains, was passed, published, and recorded was sufficient to authorize its admission. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

Evidence of ordinance.—It was not error to permit the mayor of the city to testify that an ordinance introduced in evidence was in force and effect at a specified time. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

In city's suit to recover from property owner cost of constructing cement sidewalk, where agreed facts stated that the ordinance was passed by city council on given date, and city put in evidence book of minutes of council which set out ordinance in full and showed it was duly passed, proof of enactment of ordinance was sufficient. *City of Lampasas v. Huling* (Civ. App.) 209 S. W. 213.

Art. 824. [568] May prescribe duties of officers, etc.

Cited, *Gross v. City of Lampasas*, 74 Tex. 195, 11 S. W. 1086.

Art. 833. [458] [412] May prevent and punish the keeping of disorderly houses, etc.

Conflict with state law.—See *Levy v. State*, 84 Cr. R. 493, 208 S. W. 667; notes under art. 817.

Art. 838. [448] [404] May do, etc., to promote health and suppress disease.

Cited, *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 126.

In general.—The power to require licenses for the protection of the public health, decency, and morals may be exercised by the state directly, or it may be done indirectly by a municipal corporation created by the state and clothed with such authority. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Power granted to municipalities and other agents of government to prescribe rules for prevention of diseases and the preservation of health is not a delegation of authority which is prohibited by the Constitution. *Id.*

Vaccination of school children.—An ordinance, in a city with 30 per cent. Mexican population, denying children the right to attend school unless vaccinated for smallpox, was not unreasonable, although at the time there was only one case of smallpox in the town. *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S. W. 303.

Under this article, council had power to pass ordinance denying children right to attend school unless vaccinated for smallpox. *Id.*

Such ordinance was not inconsistent with the law for compulsory education exempting from its requirement "any child whose bodily condition is such as to render attendance inadvisable." *Id.*

And it did not deprive pupils or parents of liberty or property without due process of law, under Const. U. S. Amend. 14, and Const. Tex. art. 1, § 19, nor violate Const. Tex. art. 1, § 6. *Id.*

Power to pass ordinances concerning vaccination to prevent disease may be delegated to a municipal corporation. *Zucht v. King* (Civ. App.) 225 S. W. 267.

A city, under its broad powers to enforce vaccination, may require vaccination of all school children for smallpox, even though there is no epidemic. *Id.*

A health regulation of a city, requiring school children to be vaccinated against smallpox, is not open to inquiry by the courts as to its reasonableness, any more than the reasonableness of an act of the Legislature. *Id.*

Ordinance requiring that all school children be vaccinated against smallpox, is not invalid as denying any pupil rights and privileges without due process of the law of the land. *Id.*

Such ordinance is not invalid as dealing with a special class, the classification being reasonable, notwithstanding conditions in Mexican quarter of the city and crowding together of people in street cars, jitneys, theaters, churches, passenger depots, etc. *Id.*

That other pupils are not vaccinated and are permitted to attend school under similar circumstances, contrary to the ordinance, only shows that the officers are not performing their public duty, and cannot affect the validity of the ordinance. *Id.*

The welfare of the many is far superior to those who resist enforcement of an ordinance requiring vaccination against smallpox, and fear of one declining and resisting its enforcement that vaccination would endanger his health is immaterial as far as validity of the ordinance is concerned. *Id.*

Regulation of barber shops.—The requirement of an ordinance that no sleeping or living room shall be kept or maintained in connection with any barber shop, or place where the trade of barbering is conducted, is not unconstitutional as denying due process

of law or equal protection of the law. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

It was not necessary that an ordinance, permitting health officer to deny license to a barber having an infectious, contagious, or communicable disease, give a definition of such diseases. *Id.*

An ordinance providing for the licensing of barbers by health officer is not rendered unconstitutional by reason of the fact that it provides for an appeal to an illegal tribunal, the courts still being open to any barber seeking a redress for any supposed wrong. *Id.*

An ordinance providing for the regulation and inspection of barber shops and appliances, and the periodical examination of persons engaging in the occupation of a barber to ascertain if they are free from any infectious, contagious, or communicable disease and any venereal disease in a communicable form, and requiring the payment of license fees to cover the cost of inspection, does not deny due process of law nor equal protection of the law. *Id.*

Such ordinance held not unreasonable. *Id.*

When a power to license is given by a city ordinance the intendment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated. *Id.*

Art. 844. [453] [408] May define nuisances and punish persons guilty thereof, etc.

Nature of nuisance.—Anything that works hurt, inconvenience, or damage, or which is done to the hurt of the lands, tenements, or hereditaments of another, is a nuisance, and it is not necessary that the annoyance should endanger health; it being sufficient if it occasion that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

"Nuisance at law" is act, thing, or omission, or use of property in and of itself a nuisance, permissible under no circumstances; "nuisance in fact" is one which becomes nuisance by reason of circumstances. *Shamburger v. Scheurrer* (Civ. App.) 198 S. W. 1069.

The construction and maintenance of a filling station where gasoline and oil are stored in large quantities and vehicles are required to cross the sidewalk is not a nuisance per se. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

Power to define and abate nuisances in general.—A city ordinance declaring it a misdemeanor punishable by fine to keep stallions, etc., within the city limits for service, is invalid, such keeping not being a nuisance per se, and its prohibition, therefore, not being authorized by arts. 383, 403, or 408. *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057.

Provision of an ordinance that certain buildings shall be and are declared a nuisance would not invalidate a further provision prescribing procedure for determining whether a building is in fact a nuisance. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

Under Galveston Charter 1905, and ordinance enacted pursuant thereto, held, board of commissioners had power after full and fair hearing to declare a dilapidated wooden building a nuisance and order an abatement, although building was erected before establishment of fire limits, in view of powers given by this article. *Id.*

A city council has power to declare what shall be a nuisance, and to abate the same and to impose fines upon parties who may continue or suffer nuisances to exist. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

The abatement of a nuisance by a city must be limited by its necessity, and no unnecessary injury to property must be permitted. *Id.*

Neither a city by ordinance nor the Legislature of the state has constitutional authority to denounce as a nuisance any business otherwise lawful and to prohibit the same, unless such a business constitutes a nuisance in fact. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

Art. 845. [447] [403] May abate nuisances.

See *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057; note under art. 844.

Unnecessary abatement.—That the owner of stables permits filth to accumulate therein, so as to constitute a nuisance, does not authorize the municipality to destroy the buildings themselves, such destruction not being necessary to abate the nuisance arising from the filth, in view of arts. 845 and 846. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

Art. 846. [450] [405] May compel the cleansing of premises.

See *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240; note under art. 845. Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 847. [459] [413] May require owner of drain, sink, etc., to fill up, cleanse, etc., the same, and punish for failure to do so.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 848. [451] [406] May direct the location of certain establishments, etc.

Gasoline filling stations.—A city ordinance relative to the construction and maintenance of gasoline filling stations, providing that any person, firm, or corporation violating any provision should be deemed guilty of a misdemeanor, etc., was penal in effect, and to be construed strictly against accused and favorably and equitably for him. *Invader Oil & Refining Co. of Texas v. City of Ft. Worth* (Civ. App.) 229 S. W. 616.

A city ordinance relative to the construction and maintenance of gasoline filling stations should not be held to operate against and affect an oil and refining company, which had obtained all permits necessary for erection of a filling station prior to passage of the ordinance. *Id.*

Reference in section 3 of ordinance of city of Fort Worth regulating the construction and maintenance of gasoline filling stations to consideration by the commissioners of how long existing filling stations have been in operation, and consent or acquiescence in their location by adjacent owners, etc., held to be filling stations already in operation, but which had not secured permit under any ordinance. *Id.*

Art. 849. [452] [407] May regulate the burial of the dead, etc.

Cemetery.—The powers of municipal bodies, under legislative authority, to adopt reasonable regulations with reference to public cemeteries, cannot be questioned. *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222.

The validity of regulations promulgated by a municipal corporation with reference to public cemeteries, like other police regulations where not exceeding constitutional limitations, is tested by their reasonableness as applied to the subject to which they relate. *Id.*

Regulations concerning public cemeteries are sustained upon the view that their enactment is to preserve the public health. *Id.*

An ordinance of a city making it a misdemeanor for one to dress and take care of graves and lots in a public cemetery for compensation, without the consent of the superintendent thereof, was unconstitutional, because not uniform in its application to all owners of lots, no condition being specified as to how the consent of the superintendent should be gained. *Id.*

Such ordinance was also unreasonable and unconstitutional, being an unlawful restriction upon a useful and harmless avocation. *Id.*

The right to enter a cemetery for the purpose of burying the dead, under reasonable restrictions and regulations, is accompanied by the right to care for the grave, subject to like reasonable regulations, and to employ an agent for such purpose. *Id.*

Art. 851. [445] [401] May tax, etc., dogs.

Regulating running at large.—An ordinance entirely prohibiting owners of dogs from allowing them to run at large is valid. *Pettus v. Weyel* (Civ. App.) 225 S. W. 191.

Uncertainty of an ordinance in prescribing the conditions under which an owner of dogs may let them run at large does not invalidate it, since exceptions from an offense previously stated need not be prescribed with the same certainty as that necessary to state the offense. *Id.*

Art. 854. Control over streets, alleys, etc.; work on streets by inhabitants; vacation of alleys.

See *Bordagas v. Higgins*, 1 Civ. App. 43, 19 S. W. 446; note under art. 857.

4. **Law of the road.**—Violation of city ordinance prohibiting an automobilist from passing a standing street car constituted negligence per se. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

The duty under a city ordinance for a vehicle turning from its course at a street intersection to yield right of way to a vehicle keeping a straight course is not qualified so as to authorize making the turn merely, because, viewed from the standpoint of the driver, it reasonably appeared to him to be safe. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

11. **Control over streets and sidewalks thereon.**—City given absolute control of its streets by Legislature may wholly prohibit use of its streets for prosecution of any private business or grant use with such restrictions as it deems proper. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

A portion of a public road, being by incorporation or extension of a city embraced within its limits, is thereafter a street of the city, with all the rights of the county therein, and no longer subject to county control. *Feris v. Bassett* (Civ. App.) 227 S. W. 233.

Land claimed by individuals, if once a county road, having by extension of a city become a street thereof, subject to its exclusive control, the county is neither a necessary nor proper party to suit to enjoin interference with possession and use thereof. *Id.*

15. **Grant of franchises and privileges in streets—Power of city.**—Rights to run over the streets of a city to be granted to motorbus operators under the terms of proposed ordinances held not to come within the meaning of the term "franchise," as used in Dallas City Charter, § 8, subd. 2, giving the city power to confer on any person or corporation franchises or rights to use the property of the city to furnish any general public service, etc. *McCutcheon v. Wozencraft* (Civ. App.) 230 S. W. 733.

16. — **Construction of grant.**—Ordinance under which plaintiffs secured their license to operate jitneys gave them no vested right to use of streets, and later ordinance confining jitneys to certain streets was valid. A citizen has no vested rights in statutory privileges exemptions. A revocable license to operate jitneys upon streets of city is not a contract which vests rights protected by constitutional prohibition against impairment of contracts. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

17/2. — **Violation of rights.**—In action against city for ploughing up plaintiff's pipe lines, held, that allegation and proof of contract granting exclusive privilege to operate water system was unnecessary to give plaintiff a remedy for conversion or wrongful injury to property, so that court erred in sustaining general exception to petition and entering judgment thereon. *Templeton v. City of Wellington* (Civ. App.) 207 S. W. 186.

While no action will lie if in order to maintain it plaintiff requires aid from an illegal transaction, the fact that defendant city permitted water system equipment in its streets, whether under a void contract or by permission, did not authorize a wanton or willful injury to it. *Id.*

Art. 854a. Charter may authorize sale of squares, parks, streets, etc.

Rights of city's vendor.—If a city has authority to sell its parks, the sellers of land to the city for park purposes have no vested right in the maintenance of a park on the land. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

Art. 855. [426] [382] May prevent the incumbering of streets, etc., and cause unsafe buildings to be removed, etc.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 856. [550] [479] City council may cause dangerous buildings, etc., to be removed.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Removal of buildings.—In proceedings to enjoin board of city commissioners from demolishing a certain dilapidated wooden building and for a writ of mandamus to compel granting of applications to repair said building, held, that court did not err in directing verdict for defendants; there being no evidence which would justify a conclusion that board acted arbitrarily. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

In proceeding to enjoin board of city commissioners from demolishing a certain dilapidated wooden building, evidence of proceedings of board relative to inspection of building, notices issued and served upon owners, etc., held pertinent and material upon question whether act of board was arbitrary. *Id.*

Where buildings of plaintiffs, landlord and tenant, were so dilapidated as to render them menace to public safety in their tendency to promote fires, and therefore were a public nuisance, city and officials under ordinance could lawfully remove them, after due notice to and hearing of plaintiffs. *Defferari v. City of Galveston* (Civ. App.) 208 S. W. 188.

City ordinances, empowering mayor and other officials on due notice and hearing to remove buildings within fire limits of city which are in such condition of dilapidation as to be nuisance in tendency to promote fires, are valid. *Id.*

That a city council declares that buildings are a nuisance in fact is not a final determination of the question, but the owner may have it adjudicated in a suit for damages. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

If city council, in the exercise of its powers to abate a nuisance, destroys or authorizes the destruction of buildings which in fact are not a nuisance, the municipality is liable for damages sustained by the owner. *Id.*

That the owner of stables permits filth to accumulate therein, so as to constitute a nuisance, does not authorize the municipality to destroy the buildings themselves, such destruction not being necessary to abate the nuisance arising from the filth, in view of *Vernon's Sayles' Ann. Civ. St. 1914, arts. 845 and 846*, giving the city the power to compel the cleansing of the premises. *Id.*

Art. 857. [420] [376] May construct bridges, etc., sewers, sidewalks, etc.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Liability of city in respect to sewers and drains—In general.—If a sewerage plant could not be constructed and operated, however compelling the necessity for it, without doing injury to the property of a citizen, then the city must stand the loss, and is bound to compensate the citizen for the damage suffered. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

— **Defects in sewers and drains.**—Evidence held sufficient to show that defendant city had notice, or in the exercise of ordinary care should have had notice, of defective condition of manhole into which plaintiff pedestrian fell and to warrant finding that plaintiff was not negligent, and was not acting in violation of the spirit of an ordinance forbidding use of street by pedestrians. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

— **Nuisance in general.**—Municipality is liable for its torts or creation of nuisance in construction and operation of its sewage disposal plant, whether or not careless or neg-

ligent in such construction or maintenance. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

In action against defendant town for damages due to maintenance of septic tank, evidence held sufficient to make an issue whether alleged nuisance existed and was regularly occurring and permanent. *Town of Jacksonville v. McCracken* (Civ. App.) 197 S. W. 309.

Evidence that death of plaintiff's son was caused by alleged nuisance held sufficient for submission of question to jury. *Id.*

The construction and operation of a sewerage system by a city was a nuisance, where it made a citizen's place undesirable as a residence and decreased its value. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

— **Sewer polluting water course.**—A municipal corporation may be enjoined from maintaining and operating a sewage disposal plant or tank which is too small to care for the sewage flowing into it, thereby polluting a stream, where the structure can be so enlarged or added to as to stop the continuance of the nuisance; for in operating a sewer a city exercises a corporate power, as distinguished from a governmental function. *City of Pittsburg v. Smith* (Civ. App.) 230 S. W. 1113.

— **Notice of defect and of claim for damages.**—City of Dallas Charter, art. 14, § 11, requiring written notice of injury as a condition precedent to a suit against a city for such injury, is valid. But the requirement is in derogation of common right, and will be construed with reasonable strictness, and not extended by implication beyond its own terms or held to apply to such damages as are not within its clear intent. Notice is a condition precedent though the injury was the result of an act of the city itself. *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

Construction of sidewalks.—Under Rev. St. 1879, arts. 375, 376, which regulate the construction of sidewalks in cities, and fix the liability of the owners of the abutting property, assessments for sidewalks, when imposed by a city ordinance, are special taxes, for which the homestead may be sold, as other lands. *Bordages v. Higgins*, 1 Civ. App. 43, 19 S. W. 446.

Under this article, the city council has power to provide that the lien on the abutting property for the cost of construction may be enforced by suit in a court of competent jurisdiction. (20 S. W. 184, reversed.) *Bordages v. Higgins*, 1 Civ. App. 43, 20 S. W. 726.

A city ordinance declared the cost of a sidewalk a lien on the property, and provided for its sale in the manner provided for other tax sales, but reserved any right or authority the city might have to collect the assessments by suit. Held, that a suit to enforce the city's lien by sale of the property was not authorized by this article. *City of Bonham v. Preston* (Civ. App.) 23 S. W. 391.

Legislature could authorize municipal corporation to charge owner of city lot with cost of constructing sidewalk in front of it, without reference to whether lot was benefited by improvement or not; such action not amounting to taking of property without due process. *City of Tyler v. Cain* (Civ. App.) 204 S. W. 473.

Ordinance requiring construction of sidewalks was not void because it undertook to make cost of construction with legal interest and cost of collection, a personal claim against property owner; statute so authorizing. *City of Lampasas v. Huling* (Civ. App.) 209 S. W. 213.

Ordinance providing for construction of cement sidewalks by the property owner, or, on his default, by the city, under supervision of public improvement committee of city council at owner's expense, held not void as delegation of council's legislative powers. *Id.*

Such ordinance, together with notice served on defendant owner, held sufficient in their description of kind and grade of sidewalk required. *Id.*

Art. 860. [444] [400] May establish pounds, etc.

Invasion of authority by county.—Legislature, by special charter granted City of Dallas (Sp. Acts 30th Leg. c. 71), having given it right and authority to control, regulate, restrain, and prohibit running at large of stock within its bounds, as well as control of streets and public grounds, county cannot invade its territory in attempt to exercise authority by a local option election. *Cowand v. State*, 83 Cr. R. 298, 202 S. W. 961.

Art. 860a. May prevent keeping animals for breeding purposes.—The city council of any duly incorporated city or town shall have the authority to pass such ordinance or ordinances as may be necessary to prevent any person, corporation or association of individuals from keeping for breeding purposes a jack, bull or stallion within the corporate limits of such city or town, and may prescribe such penalty for the violation of such ordinance or ordinances as they may deem sufficient and necessary for their proper enforcement. [Acts 1919, 36th Leg., ch. 75, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 861. [442] [398] May prevent, etc., horse-racing, etc.

Fixing maximum speed.—It is within the province of the legislative officials of city to fix a maximum speed on the city streets, provided such speed is not in excess of that

provided by the laws of the state. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

Art. 863. [460] [414] May control, etc., the laying of railway tracks, etc.

Rights of franchise holder.—Street railway having valid franchise to use city streets has such an interest in the use of the city streets that it may sue to restrain the use thereof by jitneys licensed under alleged invalid ordinance. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

Effect of non-observance, etc., upon liability of railroad.—The violation of a statute or ordinance regulating the speed of electric cars is negligence per se. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

Art. 865. [418] [374] To provide city with water, etc.

Municipal plants—Liability for injuries.—Under deed to right of way for city water supply pipe line, giving right to repair pipe line under waters of pond on grantor's land, city was liable for damages from unnecessarily draining pond entirely, if the pipe line could have been repaired without draining all the waters and killing fish. *Town of Jacksonville v. Ragsdale* (Civ. App.) 202 S. W. 774.

— **Conveyance to city of riparian rights.**—Under the rule that when a thing is granted everything essential to its beneficial use passes, a city in its corporate capacity held a riparian proprietor, and entitled to riparian rights in a stream which it had dammed for a municipal water supply, such rights, if not existing otherwise, having been conveyed to, and having vested in, the city by conveyance from persons under whom parties in possession adversely to the city claimed through subsequent conveyances. *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532.

A city to which riparian owners conveyed land with the right to erect a dam for reservoir purposes, the conveyance reserving to the grantors and their assigns the right to use water in the stream as they might deem fit, held entitled to priority in its use for its inhabitants of water for domestic purposes, though not to sell to railroads, when the stream was so low on account of drouth that there was sufficient water for such use alone, as against subsequent grantees of the riparian owners claiming the right to use water for irrigation, and therefore entitled to injunctive relief. *Id.*

Deed from riparian proprietors to city of land whereon to erect a dam for reservoir purposes held not to have reserved to the grantors and their assigns the right to use the waters in the stream or bayou for irrigation purposes, which use might deprive the city of power to supply its inhabitants with water for domestic uses. *Id.*

Art. 869. [427] [383] May tax, etc., certain occupations.

Regulation of stallions.—A city ordinance declaring it a misdemeanor punishable by fine to keep stallions, etc., within the city limits for service, is invalid, such keeping not being a nuisance per se, and its prohibition, therefore, not being authorized either by Rev. St. arts. 403, 408, empowering cities to abate nuisances or by article 333 empowering cities to "regulate" occupations and callings. *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057.

Art. 870. [430] [386] May license, etc., hackmen, and prescribe their compensation, etc.

Regulation of hackmen, jitneys, etc.—Validity.—City given absolute control over its streets by Legislature has power to prohibit use of jitneys on any street or confine their use to certain streets. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

An ordinance prohibiting jitneys, other than those operating from A. to U., from using certain streets, is not an unwarranted discrimination rendering ordinance invalid. *Id.*

San Antonio ordinance of August 27, 1917, regulating and licensing automobiles used for hire, other than jitneys, is not unconstitutional. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

A municipal corporation has the same power of regulation over automobiles used for hire on special trips as over regularly licensed jitneys operated over fixed routes. *Id.*

Under Dallas City Charter, art. 2, § 2, subd. 1, article 2, § 3, subds. 24, 33, and article 2, § 7, subd. 4, an ordinance regulating and licensing jitney busses and requiring a surety bond by the operators was valid. *City of Dallas v. Gill* (Civ. App.) 199 S. W. 1144.

Requirement that applicants for licenses to operate automobiles for hire should furnish bond or indemnity insurance in the sum of \$10,000 held not unreasonable on its face. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

It was not improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes, and in another ordinance for the licensing of service cars confined to no particular route. *Id.*

An ordinance requiring a license to operate automobiles for hire was not rendered invalid by a provision therein giving authority to revoke the license. *Id.*

An ordinance forbidding jitneys within a certain zone does not create a monopoly, in violation of Const. art. 1, §§ 1, 26, in favor of street railways. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

Nor does it in violation of Const. art. 1, §§ 17, 19, and Const. U. S. Amend. 14, take property and privileges, without due compensation or process of law, of jitney companies which, under former ordinances and statutes, made investments in the business; their

use of the streets being the exercise of a mere license revocable at the will of the licensor. *Id.*

Ordinance of Dallas of August 2, 1918, entitled one regulating local street transportation, and excluding from a certain zone regular lines of jitneys, held not in conflict with or repugnant to Acts 35th Leg. c. 190, creating a state highway department, or chapter 207, regulating operation of motor vehicles, in view of section 25 of the former (Supp. 1918, art. 7012½h), and section 23 of the latter, reserving to local authorities power to license and regulate the use and operation of vehicles for hire. *Id.*

An ordinance regulating use of streets by jitneys, passed in the exercise of delegated power, is not void as exercise of legislative power reserved by Const. art. 3, § 1, to the state. *Id.*

The exercise by city of powers delegated to it under authority of provisions of the Constitution to regulate local street transportation is not in violation of the state's right of government provided for by Const. art. 1, § 1, even if it has application to the state's internal affairs. *Id.*

Plaintiffs' business of leasing or hiring driverless automobiles to the general public held to be of a public nature, to contemplate and in fact make use of the streets of defendant city, and to affect the public welfare, so as to be subject to license and reasonable regulation by the city, under art. 7012½h, and Vernon's Ann. Pen. Code Supp. 1918, art. 820r, and San Antonio Charter, §§ 90, 98, 99. *City of San Antonio v. Besteiro* (Civ. App.) 209 S. W. 472.

The business of renting driverless automobiles to the public for temporary use over the streets of defendant city is not the "private use" by an individual of his property over which the police power of the city cannot be exercised. *Id.*

The streets of a city are controlled and under the supervision of the city for the benefit of its inhabitants, and those who live within its limits have a right to carry on business in a legitimate way, and unless an ordinance relating to use of streets by passenger motor vehicles violates some guaranteed rights of the citizens or some law of the state, it cannot be held unreasonable or arbitrary. *Ex parte Stalleups*, 87 Cr. R. 203, 220 S. W. 547.

The right of a railroad company to grant exclusive privilege to one company to solicit transfer of passengers and baggage upon its own grounds was not affected by a city ordinance attempting to establish hack stands and provide other regulations relating to the subject, since the city's authority under the statute could extend no further than to its streets and public ways and to regulations, if any necessary, tending to afford travelers with sufficient accommodation; there being no claim of any insufficiency in this case. *Clisbee v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 230 S. W. 235.

— **Liabilities for injuries.**—Under city ordinance owner of jitney bus and surety on bond, held liable for injuries to pedestrian from defective condition of bus when driven by servant of person operating for owner on percentage basis. *Western Indemnity Co. v. Berry* (Civ. App.) 200 S. W. 245.

Review of reasonableness of regulation.—City having authority to regulate operation of automobiles for hire, the court cannot declare its regulations unreasonable, unless such unreasonableness is clearly apparent. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

Art. 872. [431] [387] May license, etc., billiard tables, etc.

Ordinances—Validity—Pool rooms.—The power a city has to prescribe the hours during which the business of pool halls may be conducted depends on its charter. *Ex parte Perkins* (Cr. App.) 226 S. W. 411.

Under this article, constituting part of the charter of the city of Bowie, the city is without power to prescribe the hours during which the business of pool halls may be conducted, the charter excluding the idea it was intended to confer power to regulate amusements licensed by the state, and not named in the charter. *Id.*

— **Saloons.**—Ordinance of city establishing saloon district was not void because it failed to provide penalty for violation. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

When authorized by its charter, a municipal corporation may by ordinance duly enacted designate the localities within its corporate limits wherein the sale of intoxicating liquors licensed under the state law may be sold and make it unlawful to sell elsewhere within the bounds of the city, and the Constitution does not restrict the power of the Legislature to prescribe a penalty for refusal to observe such city regulations. *Tertetto v. State*, 86 Cr. R. 188, 215 S. W. 329.

Art. 877a. May issue warrants to meet current expenses; interest or discount; limit of amount.—Any incorporated city or town in this State, whether incorporated under the General Laws of this State, or incorporated by special charter adopted in the manner provided by law, and having a population of 161,000 or more according to last U. S. census, may, through its board of commissioners of city council, provide for the payment of its current expenses for any current fiscal year, or for any portion of such fiscal year, by the issuance of warrants drawn against the current revenues of said city or town for such fiscal year, and if no funds are available to pay such warrants at the time of the issuance thereof, the board of commissioner or city council of such city or town

may provide for the payment of interest upon such warrants, or may provide for the payment of a discount thereon; provided that such interest or discount shall never exceed an amount equal to six per centum per annum upon the face of such warrants for the period of time intervening between the date of the issuance of such warrants and the time of payment thereof, and provided further that in no event shall the board of commissioners or city council provide for the issuance of warrants upon which interest or discount is to be paid, in excess of eighty per cent. of the estimated revenues of said city or town for such fiscal year after the deduction of all interest upon the bonded indebtedness of such city, or town, to be paid out of the revenues for such fiscal year, and such sums as may be required to be paid into any sinking fund or into any special fund or any special trust fund of said city or town, out of its revenues for such fiscal year. Such warrants shall be dated and numbered consecutively as they are issued, and shall become a lien upon the revenues of said city or town for such fiscal year, available for the payment thereof, and shall be paid consecutively according to their respective dates and numbers as funds for the payment thereof become available. [Acts 1921, 37th Leg. 1st C. S., ch. 15, § 1.]

Sec. 2 repeals all laws in conflict. The act took effect Aug. 18, 1921.

Art. 878. [416] [372] Power to provide special funds for special purposes, etc.

Cited, *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

Diversion of funds.—Under this article, the city has no power to loan money realized from the sale of water-works bonds, and the bondsmen of the city treasurer are entitled to an injunction restraining him from carrying out an agreement to loan such fund. *City of Bonham v. Taylor*, 81 Tex. 59, 16 S. W. 555.

Art. 879. [466] [420] To appropriate revenues and for what purposes; to issue bonds, etc.

Limitation of amount.—In ascertaining the amount of bonds outstanding under this article, those issued in aid of a railroad are to be included, and a sum of money in the city treasury applicable to the bonds could not properly be deducted. *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207.

Art. 880. [467] [421] City bonds shall specify, what.

Interest and sinking fund.—Provision of statutes with relation to issuance of city bonds, which specifically requires the city to provide a fund to pay interest and create a sinking fund, has no application to a case where no bonds were issued, but the debt simply evidenced by city warrants. *American Roads Machinery Co. v. City of Ballinger* (Civ. App.) 210 S. W. 265.

Where certain high school bonds issued by a city were to bear interest from May 1, 1914, it was proper that provision should be made to pay interest and create a sinking fund for the year 1914, though the bonds were not sold until June, 1915. *Concho Camp, No. 66, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

Diversion of proceeds.—Bonds issued by a city by virtue of an election pursuant to ordinance for the acquisition and improvement of lands either within or without the city for public parks could not be used for any other purpose. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

Land purchased by city with bonds issued solely for the acquisition and improvement of lands for parks became impressed with park purposes, and cannot be used by the city for any other purpose, though the deed to the city was a general warranty deed without reservations and without covenants dedicating the lands to park purposes. *Id.*

Having sold land to a city for a valuable consideration, with no covenant dedicating it to any special purpose, though the land was paid for with park bonds, the sellers parted with all their interest, and had no vested right in the improvement of the land for park purposes and in the maintenance of a park on it. *Id.*

Art. 881. [468] [422] Bonds shall be signed, etc., and payable where and when, etc.—Said bonds shall be signed by the Mayor and countersigned by the City Secretary, and payable at such place or places, as may be fixed by ordinance of the City Council or governing body of

the city or town. [Acts 1875, p. 256, § 78; Acts 1921, 37th Leg., ch. 9, § 4.]

Explanatory.—Sec. 6 of the act repeals Rev. Civ. St. 1911, arts. 881, 882, and art. 925, as amended, and all laws in conflict.

Art. 882. Same; interest; maturity; payment; purposes of issue.—Any city or town providing for improvements mentioned in the two preceding Sections [Arts. 925, 925a], shall have the power to issue coupon bonds therefor in such sum as it may deem expedient, to bear interest not exceeding six per cent. per annum, and to mature serially or otherwise, not exceeding forty years from their date, and shall provide for payment of the interest on, and principal of bonds heretofore issued and of all bonds issued under this Act, except for indebtedness incurred prior to September 25, 1883, out of the taxes herein authorized, and the limitations now provided by law upon the amount of bonds that such cities may issue, shall not apply to bonds issued under this Act. Within the meaning of this Act shall be included building sites and buildings for the public free schools and institutions of learning within such cities and towns which have assumed or may hereafter assume the exclusive control and management of the public free schools and institutions of learning within their limits, and the cities and towns hereinbefore mentioned may issue coupon bonds therefor under the terms of this Act. [Acts 1909, 2 S. S., p. 444; Acts 1921, 37th Leg., ch. 9, § 3.]

Explanatory.—Sec. 6 of the act repeals Rev. Civ. St. 1911, arts. 881, 882, and art. 925, as amended, and all laws in conflict.

Art. 882a. Same; submission to voters; approval and registration; validation.—Nothing in this Act shall be construed to authorize the issuance of such bonds without submitting the same to a vote of the qualified property taxpaying voters as now required by law, and such bonds shall be submitted to the Attorney General for approval and to the Comptroller for registration, as now required by law; and all elections held in such cities and towns at which any such bonds were authorized to be issued prior to the taking effect of this Act, are hereby validated, and such bonds may be issued under the terms of this Act; and nothing in this Act shall be construed to in any manner affect any school tax heretofore voted in any such city or town in accordance with any previously existing law. [Acts 1921, 37th Leg., ch. 9, § 5.]

Art. 884. [483] Interest and sinking fund tax to be levied, interest paid and bonds sold at not less than par.

Sale of bonds.—On stipulation in bid for purchase of city bonds that transcript of proceedings leading up to issuance of bonds should be satisfactory to bidder's attorney, where attorney's opinion was unfavorable there was no obligation on bidder. *City of Amarillo v. W. L. Slayton & Co.* (Civ. App.) 208 S. W. 967.

Attorney's unfavorable opinion is assailed by city as fraudulent, or mere pretense, burden is on city to prove such matter or matters of fact. *Id.*

Bidder's good-faith money was not forfeited to city if the condition was not complied with by furnishing attorney transcript of proceedings leading up to bond issue which should satisfy him. *Id.*

Objection of attorney that notice of election provided that bonds amounting to \$50,000 payable serially, one to forty years, should be issued, while two series actually were issued, one for \$40,000, from one to forty years, and one for \$10,000, one to ten years, held not trivial. *Id.*

Evidence held insufficient to justify finding that bidder's attorney acted in bad faith. *Id.*

Evidence held not to show want of good faith on the part of plaintiff in referring the legality of the bonds to attorneys named, nor want of good faith on the part of such attorneys, the plaintiff being legally entitled to terminate the contract on their opinion regardless of motive. *Grant v. City of Mineral Wells* (Civ. App.) 230 S. W. 854.

Where plaintiff sued to recover a deposit made to show good faith in carrying out a contract to dispose of the defendant city's bonds subject to the approval of plaintiff's attorneys, if they in good faith rendered an opinion that the bonds were invalid and plaintiff in good faith acted thereon plaintiff could recover, even though the objection to the bond issue be groundless, there being no reservation for approval by any other at-

torney or official body, and no proof that plaintiff was negligent in selecting a qualified attorney. *Id.*

Art. 890. [465] [419] May pass ordinances to fund debt, etc.

See *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207; note under art. 879.

CHAPTER FIVE

CORPORATION COURTS

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| <p>Art.
903. Corporation court created.
904. Jurisdiction.
921. Appeals to what court; trial de novo; appeals, how governed.</p> | <p>Art.
922. Until organization of corporation courts, municipal court as now established has jurisdiction, but thereafter abolished.</p> |
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Article 903. Corporation court created.

See *Taylor County v. Jarvis* (Com. App.) 209 S. W. 405.

Art. 904. Jurisdiction.

See *Taylor County v. Jarvis* (Com. App.) 209 S. W. 405.

Art. 921. Appeals to what courts; trial de novo; appeals, how governed.

Power of legislature.—Under Const. art. 5, §§ 1, 5, 16, 19, 22, the Legislature, by the charter of the city of Texarkana, section 131, defining powers and duties of corporation court of the city and section 144, as amended by Loc. & Sp. Laws 31st Leg. c. 96, and Sp. Laws 33d Leg. c. 65, had power to limit the right of appeal to the Court of Criminal Appeals from the corporation court, by stipulating that, unless fine exceeds \$25, the judgment of the corporation court shall be final. *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934.

Appellate jurisdiction.—In view of Const. art. 5, §§ 1, 22, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 903, 904, 921, and Code Cr. Proc. 1911, arts. 101, 894, 897, an appeal may be taken to county court from corporation court, upon conviction of violation of a city ordinance, not constituting an offense defined by the Penal Code. *Taylor County v. Jarvis* (Com. App.) 209 S. W. 405.

Art. 922. Until organization of corporation courts, municipal court as now established has jurisdiction, but thereafter abolished.

Cited, *Johnson v. State*, 32 Cr. R. 353, 22 S. W. 406.

CHAPTER SIX

TAXATION

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| <p>Art.
923. Ad valorem tax.
924. May levy and collect tax for improvements, buildings, etc.
925. Cities of 5,000 or less may levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, etc.
925a. Cities of over 5,000 may levy taxes for interest, sinking fund, current</p> | <p>Art.
expenses, improvements, etc., limitation.
926. Cities of 10,000 inhabitants and over to levy and collect tax; validating act.
928. Occupation tax.
931. Power of city council to provide for assessing, etc., taxes.
937. Taxes for payment of indebtedness.</p> |
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Article 923. [484] [425] Ad valorem tax.

Cited, *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689.

Strict construction.—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Power to levy.—Municipalities have no inherent power to tax. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Property taxable.—The charter of the city of Austin held to authorize taxation of personal property situated within its borders. *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

Vessels, derricks, horses, and wagons used in business of dredging and marketing mud shell, permanently situated at places other than city of Galveston, under control of agents of owner permanently residing at such places, were not subject to Galveston's personal property tax under Galveston City Charter, § 54, though Galveston was place of owner's residence, and though tugboats were registered for port of Galveston under U. S. Comp. St. § 7719, and discharged cargoes thereat, and though property was not taxed at place of its situs. *City of Galveston v. Haden* (Civ. App.) 214 S. W. 766.

Art. 924. [485] May levy and collect tax for improvements, buildings, etc.

See *Concho Camp, No. 66, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

Tax for support of schools.—In view of arts. 924, 925, a tax to pay off bonded indebtedness for erection of school buildings was not a school tax, within the meaning of Const. art. 7, § 3, limiting amount of levy of school taxes. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Where, by Sp. Laws (1st Call. Sess.) 1913, c. 14, creating the Gonzales independent school district, which included all of the lands within the city of Gonzales as well as additional territory, school property in the city of Gonzales passed to the new district subject to a necessary tax of 17 cents per \$100 to satisfy bonds issued by the city under authority of this article, held, that the 17-cent tax was a tax within Const. art. 7, § 3, and as the taxing power of the city was restricted by article 8, § 9, to 25 cents for city purposes and 25 cents for the erection of public buildings, the district could not levy taxes up to the 40-cent limit authorized, but was restricted to 33 cents. *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

Art. 925. [486] [425c] Cities of 5,000 or less may levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, etc.—The City Council or governing body of any city or town in this State having a population of five thousand or less shall have power by ordinance to levy, assess and collect an annual ad valorem tax sufficient to meet the interest and sinking fund on all indebtedness legally incurred prior to the adoption of the Constitutional Amendment of September 25, 1883, regarding the power of cities and towns to levy and collect taxes, etc., and may also levy, assess and collect such taxes as such City Council or governing body may determine, not to exceed for any one year one and one-half per cent of the taxable property of such city or town, for current expenses and for the purpose of construction or the purchase of public buildings, water works, sewers, and other permanent improvements, within the limits of such city or town, and for the construction and improvement of the roads, bridges and streets of such city or town within its limits. [Acts 1909, 2 S. S. p. 444; Acts 1917, 35th Leg. 3d. C. S., ch. 14, § 1; Acts 1921, 37th Leg., ch. 9, § 1.]

Explanatory.—Presented to Governor on 11th day of February, A. D. 1921, but not signed by him nor returned, with objections, within time prescribed by Constitution, and thereupon became a law without his signature.

Constitutionality.—If this article, as amended is invalid in so far as it applies to cities constituting independent school districts which have extended their limits for school purposes, such invalidity does not invalidate the amended section when applied to a city constituting an independent school district of the same boundaries. *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Amount dependent on valuation of property, etc.—Where municipal liability may be paid from cash on hand or a special fund, no debt is incurred within Constitution, limiting tax which may be levied to pay certain municipal debts, since object of limitation is merely to prevent exorbitant taxation. *City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

Tax of 45 cents per \$100 levied by city of Laredo, violates constitutional amendment of 1883 (see Acts 18th Leg. p. 133) limiting such taxation to 25 cents per \$100. *Id.*

Assessment of benefits held not invalid, because property will thereby be subjected to a tax in excess of the constitutional limit. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Where Const. art. 11, § 5, constitutes city's grant of power to levy taxes, it can levy them to extent of 2½ per cent. of taxable property, and deal with funds as provided by charter. *Williamson v. Cayo* (Civ. App.) 198 S. W. 643.

In view of arts. 924, 925, a tax to pay off bonded indebtedness for erection of school buildings was not a school tax, within the meaning of Const. art. 7, § 3, limiting amount of levy of school taxes. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Under Const. art. 7, § 3, exempting from the limitation on the amount of school district tax incorporated cities or towns constituting independent districts, and the amendment of this article, a city acting as independent school district can issue bonds for school buildings exceeding the amount of city indebtedness limited by Const. art. 8, § 9. *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

In view of arts. 882, 924-926, and 937, levies to pay off funding bonds and obtain funds to pay off a judgment on street improvement bonds held not to have constituted limitation on the power of the city to levy taxes for street improvements to the extent of 15 cents on the \$100. *Concho Camp, No. 66, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

Art. 925a. Cities of over 5,000 may levy taxes for interest, sinking fund, current expenses, improvements, etc.; limitation.—The City Council or governing body of any city in this State having more than five thousand inhabitants, unless otherwise provided in its special charter granted by the Legislature or adopted by the people, shall have power by ordinance to levy, assess and collect an annual ad valorem tax sufficient to meet the interest and sinking fund on all indebtedness legally incurred prior to the adoption of the Constitutional Amendment of September 25, 1883, regarding the power of cities and towns to levy and collect taxes, etc., and may also levy, assess and collect such taxes as such City Council or governing body may determine, not to exceed for any one year two and one-half per cent. of the taxable property of such city, for current expenses and for the purpose of construction or the purchase of public buildings, water works, sewers, and other permanent improvements, within the limits of such city, and for the construction and improvement of the roads, bridges and streets of such city within its limits. [Acts 1921, 37th Leg., ch. 9, § 2.]

Explanatory.—Sec. 6, of the act repeals Rev. Civ. St. 1911, arts. 881, 882, and art. 925, as amended, and all laws in conflict.

Art. 926. [487] [426] Cities of 10,000 inhabitants and over to levy and collect tax; validating act.

See *Werner v. City of Galveston*, 72 Tex. 22, 7 S. W. 726; *Concho Camp, No. 66, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

Application of tax.—Under Rev. St. art. 426, a city of more than 10,000 inhabitants, which had no special charter, was authorized to levy a tax of one half of 1 per cent. for protection against fire, one fourth of 1 per cent. for improving the streets, and one fourth of 1 per cent. for paying its outstanding indebtedness, where the whole levy did not exceed the statutory limit, since the application of the tax fund is left to the discretion of the city authorities, in the absence of special statutory directions. *Muller v. City of Denison*, 1 Civ. App. 293, 21 S. W. 391.

Art. 928. [490] [429] Occupation tax.

Constitutionality—Discrimination.—An ordinance requiring barbers to pay a license for purpose of inspection, etc., was not discriminatory because a higher charge was made in proportion against shops with a small number of chairs than against those with a greater number, such difference in proportion showing rather that the inspection of a small shop would cost more in proportion than the inspection of a large shop. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

— **Tax for revenue.**—When a power to license is given by a city ordinance the intentment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Art. 931. [493] [432] Power of city council to provide for assessing, etc., taxes.

When two-thirds vote required.—Cities incorporated under arts. 1006-1017, cannot levy special tax for local improvements evidenced by paving certificates unless ordinance levying tax be consented to by two-thirds of aldermen elected in view of this article. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

Art. 937. [498] [437] Taxes for payment of indebtedness.

See *Concho Camp, No. 66, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106. Cited, *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

CHAPTER SEVEN

ASSESSMENT AND COLLECTION OF TAXES

Art.	Art.
938. Power of city council to provide for collection of taxes.	943. Unrendered property shall be ascertained, etc., by assessor.
938a. City may authorize county assessor to act for city.	944. Assessment for back taxes.
938b. Duties of county assessor.	956a. City may direct institution of suit for recovery of delinquent taxes; costs and fees.
938c. County tax collector shall collect city taxes.	958. Assessor and collector shall make deed to purchaser of property sold for taxes; effect of deed, right of redemption, etc.
938d. Mode of assessment.	961. Certain provisions of general tax law applicable, when.
938e. Commissions of assessor and collector.	
941. Assessor and collector, powers, duties, bond, etc.	

Article 938. [499] [438] Power of city council to provide for collection of taxes.

Suits for taxes—Limitation.—Under a city charter providing four-year limitation against tax suits from time taxes become due, the taxes for each year form a separate cause of action. *Young v. City of Marshall* (Civ. App.) 199 S. W. 1180.

Art. 938a. City may authorize county assessor to act for city.—Any incorporated city, town or village in the State of Texas is hereby authorized by ordinance to authorize the county assessor of the county in which said city, town or village is located to act as tax assessor for said city, town or village, or authorize the tax collector of the county in which said city, town or village is situated, to act as tax collector for said city, town or village. [Acts 1921, 37th Leg., ch. 62, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 938b. Duties of county assessor.—When an ordinance is passed making available the services of the county tax assessor to such city, town or village, it shall be the duty of the tax assessor of the county in which said city, town or village is situated to assess the taxes for said city and perform the duties of tax assessor for said city, town or village according to the ordinances of said city, town or village and according to law. [Id., § 2.]

Art. 938c. County tax collector shall collect city taxes.—When an ordinance is passed availing such city, town or village of the services of the county tax collector, it shall be the duty of said collector of the county in which said city, town or village is situated to collect the taxes and assessments for said city, town or village and turn over as soon as collected to the city depository of said city, or other authority authorized to receive such taxes or assessments, all taxes or moneys collected for said city, town or village according to the ordinances of said city, town or village and according to law, less his fees hereinafter provided for, and shall perform the duties of tax collector of said city, town or village. [Id., § 3.]

Art. 938d. Mode of assessment.—The property in said city, town or village taking advantage of this Act shall be assessed at the same value as it is assessed for county and state purposes. [Id., § 4.]

Art. 938e. Commissions of assessor and collector.—When the county assessor and county collector are required to assess and collect the taxes in any city, town or village, they shall respectively receive one per cent. of the taxes collected for assessing and collecting the same. [Id., § 5.]

Art. 941. [410] [366] Assessor and collector, powers, duties, bond, etc.

Bond—Sureties not released, etc.—The giving of a new bond by the city assessor, pursuant to Rev. St. 1879, art. 366, does not release the sureties on the bond already existing from liability for defaults of the principal to that date. *Loyd v. City of Ft. Worth*, 82 Tex. 249, 17 S. W. 612.

Description of property.—Description of property in municipal tax assessment held sufficient under the rule that description is sufficient when it furnishes the means by which the property can be identified from the description itself or by the use of the extrinsic evidence. *City of San Antonio v. Terrill*. (Civ. App.) 202 S. W. 361.

Sufficiency of a tax assessment description is measured by same rules as apply to conveyances and partition decrees. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

Art. 943. [503] [443] Unrendered property shall be ascertained, etc., by assessor.

Cited, *State v. Dunson*, 71 Tex. 65, 9 S. W. 103.

Description of unrendered property.—A tax assessment description of unrendered land held sufficiently definite to support a tax judgment, where owners readily identified and rendered it for taxation under same description, except that acreage and value of land was decreased. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

Art. 944. [504] [444] Assessment for back taxes.

See *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

Power to assess.—Sp. Laws 1909, c. 90, amending the charter of the city of Austin and giving the city assessor authority to have any property omitted from assessment listed and assessed according to the rule of taxation of the years it was omitted, covers all omitted property, whether the omission was made before or after the passage of the law; for the word "heretofore," therein used, should be read "theretofore." *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

The city had legal authority to make, in 1917, a back assessment of securities of a casualty insurance company for the years 1914, 1915, 1916. *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

The city of Austin, under its charter (art. 12, § 2, subd. 24), as amended March 24, 1909, had authority to authorize property to be listed and assessed according to the rate of taxes only for the years it had "heretofore" been operated, without authorizing or providing for the assessment or collection of the taxes. *Texas Fidelity & Bonding Co. v. City of Austin* (Civ. App.) 211 S. W. 818.

Under its charter the city of Austin had power to make, for a period of more than two years back, assessments of securities of a fidelity and bonding company, also doing a casualty insurance business, deposited with the state treasurer as required by Acts 28th Leg. c. 127 (Rev. St. 1911, art. 1121, subd. 37) and Acts 32d Leg. c. 117 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4942a-4942z), which had been omitted from taxation. Id.

Notice.—A property owner cannot complain that notice was not given him by a municipality that his property was placed on its assessment rolls for prior years as property omitted to be taxed during such years, where he does not claim that the value of the property was improperly assessed, or that any injury was suffered from the failure to give notice. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

Interest and penalties.—Taxpayer was not liable for interest or penalties on back taxes, where he could not have paid the taxes because collector refused to accept payment therefor unless payment was also made of taxes erroneously assessed; a tender of such taxes having been unnecessary, because position taken by collector rendered it a useless proceeding. *City of Galveston v. Haden* (Civ. App.) 214 S. W. 766.

Personal judgment.—Where unrendered land was assessed in husband's name until 1909, and was then rendered in his wife's name, it will be presumed that wife did not acquire title until that year, and no personal judgment for taxes prior to 1909 can be had against her. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

Art. 956a. City may direct institution of suit for recovery of delinquent taxes; costs and fees.—In addition to any other methods now provided by law for the collection of delinquent taxes, any incorporated city or town, having complied with the foregoing provisions of this chapter and any ordinances which such city or town may have adopted under the provisions of this chapter, may direct its city attorney, or having no city attorney may employ a special attorney and direct such attorney to file suit on behalf of such city or town in the district court of the county in which such city or town is situated for the recovery of any and all taxes delinquent and due on property situated within the limits, together with the interest, penalties and cost of suit, including and it shall be entitled to recover as a part of the costs of such suit, the same

fees for such attorney or special attorney for the bringing of such suit as are now by law provided for and allowed county and district attorneys for the bringing of suits on behalf of the State and county for the collection of delinquent taxes; provided that in no case shall such city or town be liable for such fees. [Acts 1920, 36th Leg. 3d C. S., ch. 29, § 1, adding art. 956a, Rev. Civ. St.]

Took effect 90 days after June 18, 1920, date of adjournment. See notes under arts. 7683-7700.

Art. 958. [518] [447] Assessor and collector shall make deed to purchaser to property sold for taxes; effect of deed, right of redemption, etc.

Lien on personal property.—By this article, Legislature made taxes levied and assessed by proper officers of towns and cities, incorporated under general law, a lien upon personalty within town or city, similar to lien for taxes on realty given by Const. art. 8, § 15. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

Arts. 2853 and 2861 did not make applicable to independent school districts that part of this article making taxes levied and assessed by cities and towns lien on personal property against which tax is assessed. *Id.*

Art. 961. [5198] [4760] Certain provisions of general tax law applicable, except, etc.

See *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

CHAPTER EIGHT

FIRE DEPARTMENT

Art.	Art.
965. City council may regulate and control the erection of wooden buildings.	971. May control, etc., the storing of gunpowder, etc.
	975. May provide regulations for extinguishing of fires.

Article 965. [523] [453] City council may regulate and control the erection, etc., of wooden buildings.

Cited, *Gray v. S. T. Woodring Lumber Co.* (Civ. App.) 197 S. W. 231.

Fire limits—Regulations as to buildings.—Ordinance making it unlawful, "except when otherwise ordered by the board of commissioners," to erect wooden buildings within certain limits, is valid, and confers power upon commissioners, by issuing building permit, to authorize building of wooden structure within limits specified. *Focke, Wilkens & Lange v. Heffron* (Civ. App.) 197 S. W. 1027.

Galveston Charter 1903, conferring power upon board of commissioners to establish fire limits and to regulate erection of buildings and to remove same after proper proceedings, held not to be discriminatory per se against individual citizen. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

Under *Galveston Charter 1905*, held board of commissioners had power to adopt ordinance declaring buildings within fire limits which became dilapidated nuisances and prescribing procedure for determination whether a building has in fact become a nuisance. *Id.*

That board of commissioners granted permission for repair upon some wooden buildings within fire limits of city held irrelevant on issue whether they abused their discretion in denying defendants right to repair their building. *Id.*

A prohibition against erection of wooden buildings within fire limits of an incorporated city, or removal of such buildings by proper authorities when found to be nuisances in the manner provided by law, is not an unreasonable taking of private property for public use within purview of Const. U. S. or Texas Constitution. *Id.*

Art. 971. [529] [459] May control, etc., the storing of gunpowder, etc.

Explosives as nuisances.—The storing of highly dangerous explosives in a public place or near a private residence may or may not constitute an abatable nuisance, such question depending upon the manner in which the business is conducted. *McGuffey v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 211 S. W. 335.

Oil and gasoline tanks situated in a thickly built portion of a city, in close proximity to many wooden buildings, held to constitute a private nuisance. *Id.*

Art. 975. [533] [463] May provide regulations for extinguishing of fires.

Offering reward.—Charter of city of Dallas, authorizing city to make ordinances necessary to protect life and property, and by section 4, subd. 1, empowering it to provide means for protection against fires, etc., impliedly authorized an ordinance passed to obtain a lower insurance rate, offering a reward for arrest for and conviction of arson as a "means of protection against fire" (citing Words & Phrases, First Series, vol. 5, p. 4454; Second Series, vol. 3, p. 353). *Choice v. City of Dallas* (Civ. App.) 210 S. W. 753.

CHAPTER EIGHT A

FIREMEN, POLICEMEN, AND FIRE ALARM OPERATOR'S PENSION FUND

- Art. 978½. Board of trustees; members; appointment.
- 978½a. Election of board; terms of offices.
- 978½b. Organization of board; custody of fund; annual report.
- 978½c. Statement of desire to participate in fund to be filed with authority to deduct portion of salary for fund.
- 978½d. Deductions from wages; amount, etc.
- 978½e. Meetings of board; orders on fund; records; quorum; manner of voting.
- 978½f. Custody of moneys provided for fund.
- 978½g. Persons entitled to share in fund.
- 978½h. Retirement from service; length of service; pension from fund; amount.

- Art. 978½i. Same; disabilities incurred in line of duty; pension from fund; amount.
- 978½j. Payments from fund; to widows or children; amount.
- 978½k. Same; to father, mother, etc.; amount.
- 978½l. Determination as to right to retirement and pensions.
- 978½m. Medical examination of pensioner.
- 978½n. Who are members of fire, police, etc., forces.
- 978½o. Expenditure of public funds.
- 978½p. Pensions not assignable and exempt from garnishment, etc.
- 978½q. When act effective.
- 978½r. Partial invalidity of act.

Article 978½. Board of trustees; members; appointment.—In all incorporated cities and towns in this State, having a population of over 10,000 according to the U. S. census of 1910, having a fully or partly paid fire department or police department, the mayor, of said city or town and two members of the city council, or commissioners, and two citizens of said city or town, to be designated by the mayor, the chief of police, and the chief of the fire department, and their successors in office, are hereby constituted a board of trustees of the Firemen, Policemen, and Fire Alarm Operator's Pension Fund, to provide for the disbursement of the same and to designate the beneficiaries thereof as hereinafter directed, which said board shall be known as the Board of Firemen, Policemen, and Fire Alarm Operator's Pension Fund, Trustees of, Texas. [Acts 1919, 36th Leg., ch. 10, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 978½a. Election of board; terms of offices.—The Board hereinabove named shall hold their office until the next general election in such city or town for municipal officers, and until their successors shall have been elected or appointed, and qualified, and at each succeeding general election in such city or town for municipal officers, the persons elected or appointed to such offices, and who shall have qualified, shall constitute such Board for the ensuing two years. [Id., § 2.]

Art. 978½b. Organization of board; custody of fund; annual report.—They shall organize as said Board by choosing one of their number as chairman, and by appointing a secretary, and the treasurer of said city or town shall be ex-officio treasurer of said fund. Such Board of Trustees

shall have charge of and administer said fund and shall order payments therefrom in pursuance of the provisions of this Act. They shall report annually during the month ofto the governing authority of such city or town the condition of the Firemen, Policemen, and Fire Alarm Operator's Pension Fund, and the receipts and disbursements on account of the same with a full and complete list of the beneficiaries of said fund and the amounts paid them. [Id., § 3.]

Art. 978 $\frac{1}{2}$ c. Statement of desire to participate in fund to be filed with authority to deduct portion of salary for fund.—Each fully paid fireman, policeman, and fire alarm operator and other persons herein designated as members of either of said departments, in the employment of such city or town, who desires himself or his beneficiaries, as hereinafter named, to participate in said fund, shall file a statement in writing with the city clerk of such city or town of his desire to participate in said fund, and authorizing said city or town to deduct 1 per cent. of his wages due him by such city or town each month, such money so deducted to become and form a part of the fund hereinafter designated and known as the Firemen, Policemen, and Fire Alarm Operator's Pension Fund. [Id., § 4.]

Art. 978 $\frac{1}{2}$ d. Deductions from wages; amount, etc.—There shall be deducted by such city or town from the wages of each fireman, policeman, and fire alarm operator, and other persons herein designated as members of either of said departments, employed by such city or town, 1 per cent. of the wages earned by such fireman, policeman, and fire alarm operator, and all other persons designated as members of either of said departments, who has filed his application as provided in section 4 of this Act, which money so deducted shall be deposited with the treasurer of such city or town to be placed in the fund known as the Firemen, Policemen, and Fire Alarm Operator's Pension Fund; and all donations made to said fund by any person or persons or corporations, and rewards received by any member of either of said departments, and all funds received from any source, shall be deposited by such city or town with the treasurer of such city or town and placed in said fund known as the Firemen, Policemen, and Fire Alarm Operator's Pension Fund. [Id., § 5.]

Art. 978 $\frac{1}{2}$ e. Meetings of board; orders on fund; records; quorum; manner of voting.—The Board herein provided for shall hold monthly meetings on theof each and every month of each year, and upon the call of its president or chairman at such other times as he deems necessary. It shall issue orders signed by the president or chairman and secretary to the persons entitled thereto of the amount of money ordered paid to such persons from such fund by said Board, which order shall state for what purpose such payment is to be made; it shall keep a record of its proceedings, which records shall be a public record; it shall at each monthly meeting send to the treasurer of said city or town a written or printed list of persons entitled to payment from the fund hereinbefore provided for, stating the amount of such payment, and for what granted, which list shall be certified to and signed by the president or chairman and secretary of such Board, attested under oath. The treasurer of said city or town shall thereupon enter a copy of said list upon the book to be kept for that purpose, and which book shall be known as the Firemen, Policemen, and Fire Alarm Operator's Pension Fund Board of Texas, and the said Board shall direct payment of the amounts named therein to the persons entitled thereto out of said funds. A majority

of all of the members of said board herein provided for shall constitute a quorum, and have power to transact business; provided, however, no money belonging to said fund shall ever be disbursed for any purpose without a vote of a majority of all of the members of the Board of Trustees, which shall be taken by the yeas and nays, and the vote of each member so voting entered upon the proceedings of the board. [Id., § 6.]

Art. 978 $\frac{1}{2}$ f. Custody of moneys provided for fund.—All moneys provided for said fund by this Act shall be paid over to and received by the treasurer of such city or town for the use and benefit of the Firemen, Policemen, and Fire Alarm Operator's Fund of such city or town, and the additional duties thus imposed upon such treasurer shall be and comprise additional duties for which he shall be liable under his oath and bond as such city or town treasurer, but he shall receive no compensation therefor. [Id., § 7.]

Art. 978 $\frac{1}{2}$ g. Persons entitled to share in fund.—Any person who at the taking effect of this Act and the establishment of said fund, or thereafter, who shall have been duly appointed and enrolled in the fire department, police department, or fire alarm operator's department of any such city or town, to which application is made for participation in said fund by such person and who has filed his written application hereinbefore provided for within thirty days after the taking effect of this Act and the organization of such Board, or who shall file his application as herein provided within thirty days after becoming a member of said fire department, police department, or fire and police alarm operator's department of said city or town, and who shall have allowed the deductions from his salary as herein provided for, as well as the beneficiaries hereinafter named in the event of his death, shall be entitled to participate in said fund as provided in this Act. [Id., § 8.]

Art. 978 $\frac{1}{2}$ h. Retirement from service; length of service; pension from fund; amount.—Whenever any member of the fire department, police department or fire alarm department of any such city or town who shall have contributed a portion of his salary, as provided in this Act, shall have served twenty years or more in either of said departments of such city, he may be entitled to be retired from said service upon application, and shall be entitled to be paid from such funds a monthly pension of one-half of the salary received by him at the time of his retirement, provided the board shall approve such application for retirement. [Id., § 9.]

Art. 978 $\frac{1}{2}$ i. Same; disabilities incurred in line of duty; pension from fund; amount.—Whenever any member of the fire department, police department or fire alarm operator's department of any such city or town, and who is a contributor to said fund as hereinbefore provided, shall become so permanently disabled through injury received, or disease contracted, in the line of duty, as to incapacitate him for the performance of duty, or shall for any cause, through no fault of his own, become so permanently disabled as to incapacitate him for the performance of duty, and shall make written application therefor, and said application shall be approved by a majority of the Board of Trustees hereinbefore provided for, he shall be retired from the service thereof and be entitled to receive from the said fund 50 per cent. of the monthly wages received by such fireman, policeman, or fire alarm operator, or other person herein described as a member of either of said departments, at the time he be-

came so disabled; to be paid in monthly installments on the first day of each month. [Id., § 10.]

Art. 9781½j. Payments from fund; to widows or children; amount.—In case of the death of any member of the fire department, police department or fire alarm operator's department of any such city or town, resulting from disease contracted, or injury received while in the line of duty, or from any other cause through no fault of his own, and who at the time of his death or retirement was a contributor to said fund or a portion of his salary, as hereinbefore provided, before or after retirement from the service thereof, leaving a widow or a child, or children under 18 years of age, the widow shall be entitled to receive from the said Firemen, Policemen, or Fire Alarm Operator's Pension Fund an amount not exceeding 25 per cent. of the monthly wages received by such member immediately preceding his death, and the children of said deceased under 16 years of age shall receive in the aggregate 25 per cent. of the monthly wages of such deceased immediately prior to his death, to be equally divided between them, and when any child shall reach 16 years of age then such child shall no longer participate in the division of said 25 per cent. of the wages of said deceased but the said 25 per cent. shall be paid to his remaining children, if any, under 16 years of age, in equal parts until they respectively become 16 years of age, and in no case shall the amount paid to any one family exceed the amount of 50 per cent. of the wages earned by the deceased immediately prior to the time of his death; provided that upon re-marriage of any widow or the marriage of any child granted a pension under the provisions of this Act, such pension shall cease, and the pension granted to or for any child or children under the age of 16 years shall cease upon their reaching 16 years of age; provided further that no widow, child, or children, of any deceased member of the said fire department, police department, or fire alarm operator's department of any such city or town, resulting from any marriage contract subsequent to the date of retirement of said member, shall be entitled to a pension under the provisions of this Act. [Id., § 11.]

Art. 9781½k. Same; to father, mother, etc.; amount.—In case of the death of any member of the fire department, police department, or fire alarm operator's department from injuries received or disease contracted while in the line of duty, or from any cause through no fault of his own, who was a contributor to said fund and entitled to participate in said fund himself, who shall die leaving no wife or children, but who shall leave surviving him a dependent father or mother, brother or sister, which said father, mother, brother or sister, were wholly dependent upon said person for support, then such dependent father, mother, sister and brother who were wholly dependent on him, shall be entitled to receive in the aggregate the sum of 50 per cent. of the wages earned by said deceased immediately prior to his death, to be equally divided between those who were wholly dependent on said deceased, so long as they are wholly dependent, and the said Board of Trustees shall have the power and authority to determine the facts as to the dependency of said parties and each of them, and as to how long the same exists, and may at any time upon the request of any contributor to this fund reopen any award made to any of said parties and discontinue such pension as to all or any of said parties as it may deem proper and the findings of said Board in regard to such matter and as to all pensions granted under this Act shall be final and conclusive upon all parties seeking a pension as

a dependent of said deceased, or otherwise until such award of the trustees shall have been set aside or revoked. [Id., § 12.]

Art. 978½l. Determination as to right to retirement and pensions.—The said board shall consider all cases for the retirement and pension of members of the fire, police, and fire alarm operator's department rendered necessary or expedient under the provisions of this Act, and all applications for pensions by widows and children under 16 years of age, and of dependent father, mother, brother or sister, and the said trustees shall give written notice to persons asking a pension to appear before said board and give such evidence under oath as he, or they, may desire and may introduce testimony of witnesses, and any person who is a member of either of said departments and who is a contributor to said fund, as hereinbefore provided, may appear either in person or by attorney and contest the application for participation in said fund by any person claiming to be entitled to participate therein and may offer testimony in support of such contest and the president or chairman of said board shall have power and authority to issue process for witnesses and administer oath to said witnesses to examine any witness as to any matter effecting retirement or a pension under the provisions of this Act. Such process for witness shall be served by any member of the police, fire, and fire alarm operator's departments and upon the refusal or neglect of any witness to attend and testify when required, he or she may be compelled to attend and testify, as in any judicial proceeding, and any witnesses knowingly making a false statement to the said board on any material matter shall be guilty of perjury and punished accordingly as provided in the laws of this State. [Id., § 13.]

Art. 978½m. Medical examination of pensioner.—The said board, in its discretion, at any time may cause any person receiving any pension under the provisions of this Act, who has served less than 20 years, to appear and undergo a medical examination as the result of which the said board shall determine whether the relief in said case shall be continued, increased, decreased, or discontinued. Should any person receiving relief under the provisions of this Act, after due notice, fail to appear and undergo the examination prescribed herein, the said board are authorized in their discretion to reduce or entirely discontinue such relief. [Id., § 14.]

Art. 978½n. Who are members of fire, police, etc., forces.—All fire, police, and fire alarm operators and superintendents in the employ of any such city or town, and who have filed their application for participation in said fund and have contributed a portion of their salary, as hereinbefore provided for other members of such fire or police departments, shall be considered, and are hereby declared to be members of the fire, police, and fire alarm operator's department, respectively, of such city or town, and they and their beneficiaries shall have the same rights and privileges as are herein granted to other members of the fire and police departments of such cities. [Id., § 15.]

Art. 978½o. Expenditure of public funds.—No funds shall be paid out of the public treasury of any such incorporated city or town, in carrying out any of the provisions of this Act, except on a majority vote of the voters of such town or city. [Id., § 16.]

Art. 978½p. Pensions not assignable and exempt from garnishment, etc.—The amount, or amounts, awarded to any person under the

provisions of this Act, shall not be liable for the debts of any such person or persons and shall not be assignable and shall be exempt from garnishment or other legal process. [Id., § 16a.]

Art. 978 $\frac{1}{2}$ q. When act effective.—No person shall be entitled to receive any compensation under the provisions of this Act until on or after January 1, 1920. [Id., § 17.]

Sec. 18 repeals all conflicting laws.

Art. 978 $\frac{1}{2}$ r. Partial invalidity of act.—If any of the provisions of this Act shall ever be held to be unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the constitutionality or validity of any portion of this Act which may be given reasonable effect without the provisions so declared unconstitutional or invalid. [Id., § 19.]

CHAPTER NINE

SANITARY DEPARTMENT

Art.	Art.
979. City council may appoint health physician, etc.	997. No license until examination passed
984. Cities of 35,000 inhabitants may cleanse city, etc. Power of council to have city cleansed, etc.	997a. Application of act.
	998. [Repealed.]

Article 979. [537] [467] City council may appoint health physician, etc.

Powers of health officers.—In an ordinance regulating barbers, and providing for a license and physical inspection, etc., the commissioners of the city of San Antonio were vested with the authority, under City Charter, § 99, to place the power of deciding what may be an "infectious, contagious, or communicable disease" to its health officer. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

An ordinance, giving health officer power to deny a barber infected with disease, etc., a license, need not provide that any barber seeking redress for any supposed wrong might invoke the aid of some court, since adequate remedies for all wrongs are provided by the laws of the state. *Id.*

The board of health of the city of San Antonio is the public agency through which the city council acts to determine the necessity arising to put the ordinance concerning vaccination of school children against smallpox in effect as to its provisions, and there is no delegation of legislative power to the board of health. *Zucht v. King* (Civ. App.) 225 S. W. 267.

Art. 984. [542] [472] Cities of 35,000 inhabitants may cleanse city, etc.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 997. No license until examination passed.—The licenses shall not be issued to any person to carry on or work at the business of plumbing, or to act as an inspector of plumbing, until he shall have appeared before an examining or supervising board for examination and registration, and shall have successfully passed the required examination. [Acts 1897, p. 236; Acts 1919, 36th Leg., ch. 134, § 1, amending art. 997, Rev. Civ. St. 1911.]

Explanatory.—Took effect 90 days after March 19, 1919, date of adjournment. The title and enacting part of the act make no mention of adding an article to be known as 997a.

Art. 997a. Application of act.—Provided, that the provisions of this act shall not apply to cities of less than five thousand inhabitants. [Acts 1919, 36th Leg., ch. 134, § 1.]

Art. 998. [Repealed by Acts 1919, 36th Leg., ch. 134, § 2.]

CHAPTER TEN

STREETS AND ALLEYS

<p>Art. 999. Power of city council to have streets, etc., graded, etc.</p> <p>1000. Estimate of cost of improvements shall be made, etc.</p> <p>1001. Property levied on and sold for improvements, when and how, etc.</p>	<p>Art. 1002. Suit against owner of property for improvement tax, when, etc.</p> <p>1003. Condemnation of property.</p> <p>1004. Condemnation of property by private corporations.</p> <p>1005. Rules for condemning property for railways followed.</p>
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Article 999. [544] [474] Power of city council to have streets, etc., graded, etc.

See *Bordages v. Higgins*, 1 Civ. App. 43, 20 S. W. 184.

Cited, *Bordages v. Higgins*, 1 Civ. App. 43, 20 S. W. 726; *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

3. Assessments—Constitutionality.—Provisions of Dallas charter for assessing benefits for street improvement held not invalid, because making the assessment conclusive without a trial by jury. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

6. Costs, how assessed—Abutting property.—In assessing a third of the costs of a paving improvement against a landholder, the fact that the city does not pay one-third of the costs, because by ordinance a traction company pays for part of the street, does not invalidate the assessment under the statute. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

8. Liability of city for injury to property.—In a suit for damages caused by change of grade of street, where value of premises was \$3,500, verdict for \$1,500 for damages to the real property and for \$1,000 for discomfort and \$500 for suffering of plaintiff's wife was excessive, and should be reduced to the amount allowed for injury to the real estate. *City of Ft. Worth v. Ashley* (Civ. App.) 197 S. W. 336.

In suit for damages to plaintiff's property due to defendant city's acts and omissions in paving streets whereby surface water was diverted to where it collected in front of plaintiff's lot, evidence held to warrant the jury in finding that defendant city was negligent in the respects stated. *City of Greenville v. McAfee* (Civ. App.) 230 S. W. 752.

9. Liability for defective streets—Duty to repair.—It is the duty of a city to see that its streets be made and maintained in a reasonable safe condition for use by the public. *City of Dallas v. Halford* (Civ. App.) 210 S. W. 725.

9½. — Persons to whom liable.—A city's duty to keep its streets in a reasonably safe condition is not limited to the protection of travelers in the ordinary mode of traveling, but extends to one traveling in an unusual or infrequent mode, if he is not thereby guilty of contributory negligence. *City of Austin v. Schlegel* (Civ. App.) 228 S. W. 291.

In a suit for injuries to one riding on the fire wagon, based, not on the theory that the city furnished plaintiff an improper place to ride or that its employe, the driver, was negligent, but upon the city's negligence in repairing its streets, a defect in which caused plaintiff to be thrown from the wagon, it was immaterial how or why plaintiff was riding on the wagon, unless it was contributory negligence for him to do so. *Id.*

Where the driver of a fire wagon slowed up in response to plaintiff's signal to permit plaintiff to mount the wagon, he thereby invited plaintiff to ride on the wagon, and the city owed plaintiff, as such invitee, the same duty with respect to the care of its streets as it did to the other occupants of the wagon. *Id.*

10. — "Streets" as to which liable.—In an action for injuries on a sidewalk, where the evidence showed that the street was one of the public thoroughfares, that the city had assessed and collected taxes on the abutting lot, and that one of its duly constituted officers had fixed the grade for the pavement put down in front of a lot adjoining the abutting lot, there was prima facie proof that the walk was a public sidewalk of the city and under the supervision and control of its duly constituted officers. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

11. — Responsibility for defects.—A city is charged with the legal duty to exercise ordinary care to see to it that a place used as public sidewalks is kept in a reasonably safe condition for pedestrians, even though the city has never attempted to construct a sidewalk at such place. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

If it was the duty of a city to erect and maintain a barrier on a street at a point where a jitney bus left the street and plunged into a ravine, it is immaterial to the city's liability under the facts whether the ravine was private or municipal property. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

12. — Care required.—A city is under the legal duty to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for public travel. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

15. — Notice of defect or obstruction.—City of Dallas Charter, art. 14, § 11, requiring actual knowledge or written notice to city of defect in public street, highway, or grounds or public works of city causing damage to "person or property" at least 24

hours prior to injury, and requiring "person injured" to give notice of injury before city shall be liable for "damages of any kind," construed to require notice of injury only in case of personal injury, and not in case of injury to property. *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

16. — **Precautions against injury.**—It is the duty of a city to erect railings or barriers along its streets at places where they are necessary to make the same safe for drivers in the use of ordinary care. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

17. — **Proximate cause of injury.**—Where plaintiff was injured by collision with team of horses caused to run away by fall of wheel into hole negligently permitted to remain in city street, by which fall the doubletree became unfastened and fell on one of the horses, frightening them, it could not be said as matter of law that the city's negligence was not the proximate cause of plaintiff's injuries. *City of Ft. Worth v. Patterson* (Civ. App.) 196 S. W. 251.

One is liable for consequences of negligent act which, in probable and natural course of events, results in injury, notwithstanding injury could not have been reasonably contemplated. *Id.*

Intervention of unforeseen and unexpected cause alone is not sufficient to relieve a wrongdoer from consequences of negligence, if such negligence directly and proximately co-operates with the independent cause in the resulting injury. *Id.*

Intervention of independent cause interrupting continuity of train of results flowing from negligent act and of itself alone in regular sequence causing injury, will render the negligent act nonactionable. *Id.*

Neither instinctive act of an unreasoning animal nor the impulsive, involuntary act of a sentient being, directly brought about by a negligent act, will break line of causation of consequences for which the negligent actor is liable. *Id.*

Negligence of defendant city through its contractor for street repair in failing to plug a pipe causing a sinking or depression at the top of an abandoned catch-basin held not the proximate cause of injury to a female pedestrian who stepped there and fell to her injury. *Peterson v. City of Houston* (Civ. App.) 224 S. W. 580.

That driver of a jitney bus was negligent, which negligence concurred with that of the city in not erecting a barrier in causing the car to leave the street and plunge into a ravine, does not relieve the city of liability for injuries to a passenger. the driver's negligence, concurring with the negligence of the city, having been the proximate cause of the accident. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

18. — **Contributory negligence of person injured.**—If a pedestrian knows of an obstruction across a sidewalk, and fails to use ordinary care, and is injured thereby, his negligence bars recovery. *Butler v. City of Conroe* (Civ. App.) 218 S. W. 557.

20. — **Notice of claim for injury.**—See *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

Notice of injury to mayor and city council by Houston City Charter, § 11, cannot be waived by street and bridge commissioner, or by any commissioner or number of commissioners or member of city council, but, if subject to waiver, can be waived only by the city council and the mayor jointly. *Cawthon v. City of Houston* (Civ. App.) 212 S. W. 796.

That injured party was invited to present claim for damages to city council, but failed to so do because of inability to get council together, does not constitute waiver. *Id.*

That plaintiff's injury was due to negligence of street and bridge commissioner of city, and that the commissioner had actual knowledge of the injury, did not dispense with written notice, the purpose of notice being not merely to notify city of the fact of the injury, but to give city the information required to be conveyed by the notice. *Id.*

21. — **Sufficiency of evidence.**—In an action against a city by a jitney bus passenger, injured when the car left the street and plunged into a ravine, evidence held sufficient to sustain the jury's finding that plaintiff did not know or fully appreciate and understand the dangers incident to the use or attempted use of the street at the particular point by vehicular traffic. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

Evidence held sufficient to sustain the jury's finding that the city's negligence in failing to erect a barrier at the point was the proximate cause of the accident and the injuries complained of. *Id.*

Art. 1000. [545] [475] Estimate of cost of improvements shall be made, etc.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 1001. [546] [476] Property levied on and sold for taxes for improvements, when and how, etc.

Cited, *City of Bonham v. Preston* (Civ. App.) 23 S. W. 391; *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 1002. [547] [477] Suit against owner of property for improvement tax, when, etc.

Cited, *City of Bonham v. Preston* (Civ. App.) 23 S. W. 391; *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Art. 1003. [548] Condemnation of property.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

In general.—A condemnation proceeding could be instituted by a city only by petition presented to the judge of the county court describing the land, giving the names of the owners, etc., the petition being that which would give jurisdiction. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Power of eminent domain in general.—In suit to enjoin city of Dallas from taking property for public improvement, the city must allege and prove an effort to agree on the compensation with the property owner. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Under Dallas charter as to condemning property, property owner held entitled to invoke equitable jurisdiction of district court on question of whether effort was made to agree with the property owners. *Id.*

Until the statutes requiring notice to the landowner are complied with, the commissioners in a city's condemnation proceedings have no authority to assess damages or to make a report, and the county court has no jurisdiction to declare condemnation. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Constitutionality of statutes.—Act April 8, 1889, entitled "An act to amend an act to regulate the condemnation of property for water mains, is unconstitutional in so far as it authorizes the condemnation of land for reservoirs for waterworks. *Adams v. San Angelo Waterworks Co.*, 86 Tex. 485, 25 S. W. 605.

Provisions of Dallas charter for condemning property for street improvement held not invalid, because making the award conclusive without a trial by jury. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Charter held not to authorize the taking of property without a hearing or trial before a legally constituted tribunal. *Id.*

Charter held not to authorize the taking of property without adequate compensation, or the absorbing of the compensation by offsetting the cost of acquiring the property. *Id.*

Not invalid, because making the award conclusive without an appeal. *Id.*

Provision for appointment of special commissioners to determine damages held constitutional and authorized under further provision that statute as to condemnation by railroads shall govern, unless otherwise provided therein. *Id.*

Compensation—Necessity.—Damages to land on dry waterway from discharge from city's septic sewer tank, operated under legislative authority, were not taking, damaging, or destroying of property for public use, required by Const. art. 1, § 17, to be adequately compensated, where such discharge did not constitute nuisance. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

— **Measure.**—Where land is taken by a city for a waterworks, the measure of damages is the market value of the land taken and the difference, if any, of the market value of the remainder of the tract just before and after the condemnation thereof. *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

The expense and value of any labor necessary to restore improvements on remaining land and injury to the land to its use as a homestead were proper for consideration by the jury in determining the market value, but it was improper to permit the jury to consider these elements of damage for any other purpose than to determine the difference in market value before and after the taking. *Id.*

When an unlawful entry on land has been made by a city, and the land is afterwards condemned by the city, the owner is entitled to recover the value of the part taken as of the date of trial, and the damages which will be caused to the remainder of the land by reason of the condemnation of part. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

Where a city, before proceeding to condemn land, destroyed the sidewalk adjacent thereto, such destruction was an independent tort, as much as any improper or negligent construction on the land would have been, and no recovery therefor can be had by the property owners in the city's condemnation proceedings. *Id.*

If a sidewalk had been destroyed under condemnation proceedings by a city, involving the appropriation of the lot to which it was appurtenant, the owners of the lot could recover for its appropriation, whether viewed as having given added value to the land taken or to the entire lot. *Id.*

In ascertaining damages to property affected by street improvement, the special benefits to the particular property should be considered, while general benefits to the public should be excluded, and that other property on the same street was damaged or benefited in the same way would not exclude such damages or benefits from consideration. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

Where a city condemned a portion of a lot on which permanent improvements had been erected, leaving the owner insufficient area to accommodate the entire building as it existed, the owner can recover as part of her damages the value of the portion of the improvements taken or the cost of removal and reconstruction of the building to conform to the new size of the lot. *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911.

— **Evidence.**—In a proceeding by a city to condemn land for a waterworks, evidence held insufficient to sustain a verdict of the jury as to the amount of damage suffered. *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

In a suit against a city for damages resulting from street improvement and to recover for land alleged appropriated by the city, evidence held to justify the jury's finding that no part of plaintiffs' land was taken and appropriated. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

— **Notice of claim.**—In action for overflow of land caused by change in grade of city street, held, plaintiff was entitled to recover without giving notice of claim as required by charter in view of Const. art. 1, § 17. *City of Ft. Worth v. Ashley* (Civ. App.) 197 S. W. 307.

Art. 1004. [548] Condemnation of property by private corporations.

See *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

Appointment of commissioners.—Despite Charter of the City of Dallas, art. 11, § 5, appointment of commission in the city's condemnation proceeding, under art. 6508, was not invalid for lack of agreement between the parties as to the commissioners, though the application should state a failure to agree or an excuse therefor, as by showing that the landowner is a minor. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Art. 1005. [549] Rules for condemning property for railroads followed.

Necessity of report.—County court entertaining a city's condemnation proceedings without a report of the commission, after first acquiring jurisdiction under the statutes, could not condemn the land. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Appeals.—The rule with reference to the condemnation of property for waterworks by cities is the same as that for the condemnation of rights of way by railroads, and a city may deposit the amount of an award and prosecute an appeal to the county court, although the landowner files an acceptance of the award (arts. 1003–1005, 6504–6523, 6527, 6530). *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

DECISIONS RELATING TO SUBJECT IN GENERAL

Title and rights of abutting owners.—Where landowner fenced small portion of adjoining city street with knowledge that such street had been publicly used for about 27 years, city is not estopped from soon thereafter disputing right of landowner to maintain such inclosure. *Newton v. City of Dallas* (Civ. App.) 201 S. W. 703.

— **Remedies as to obstructions.**—The means of free egress and ingress through an alley to a lot and buildings thereon is as much property as the lot itself, and is a right appurtenant to the lot, and the existence of an alley, being an inducement to purchase, enters into the consideration as between grantor and grantee, and an encroachment on the alley constitutes a particular injury, to the special damage to the lot owner, different from that suffered by the general community. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

— **Damages.**—In suit to have strip of land declared a street and for damages, evidence held to show that plaintiff had suffered no such damages as alleged. *Swilley v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 1001.

Liability of persons other than city for defects in streets.—In action against waterworks company for injuries received when plaintiff stepped into hole in sidewalk, where cut-off box had been placed, evidence held insufficient to show defendant installed box or left it in unsafe condition at time of accident. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

Where railway terminal company had been granted permit by city to construct sewer, company owed to public duty to see that refilling was properly tamped, in compliance with ordinance to leave street or sidewalk in as good order as before. *Houston Belt & Terminal Ry. Co. v. Schepelman* (Civ. App.) 203 S. W. 167.

Not relieved from liability for personal injuries to pedestrians from defects in refilling excavations because city had taken over sewer system. *Id.*

Evidence held to justify finding that defect in sidewalk causing injury did not exist prior to construction of sewer. *Id.*

Evidence held to show that construction company did not leave street and sidewalk in good condition. *Id.*

Water supply company under contract to furnish water, giving the company the exclusive control of the repairing and installing of pipes and appurtenances, including curb cock box between mains and property lines, but providing that it should not be liable for damages not growing out of its own independent, unlawful acts, was not liable for injuries to pedestrian from curb cock box negligently installed by owner. *Neal v. San Antonio Water Supply Co.* (Civ. App.) 218 S. W. 35.

Negligence in use of street.—Where driver pushed flagman on track causing latter's injury, defendant must have been guilty of negligence proximately causing injury either alone or concurrently with railway to be held liable. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

It is duty of all persons rightfully on street to use care not to injure other persons rightfully there. *Id.*

Traveling public have no right to go across railway crossing without using ordinary care to avoid injuring flagman. *Id.*

In an action for personal injuries resulting from defendant's automobile colliding with plaintiff's wagon on a city street, evidence held insufficient to justify a finding that the driver of the car was negligent in the manner charged. *Pace v. Moore* (Civ. App.) 210 S. W. 238.

Although automobile dealers allowed their demonstrator to use demonstration car for his own enjoyment, they would not be liable for injury done by him while so driving

the car; he not being in the master's business in such driving any more than any one who might hire or borrow the car. *Van Cleave v. Walker* (Civ. App.) 210 S. W. 767.

They would not be liable for accident occurring to third person while demonstrator was returning the car to the garage; for the fact that it was demonstrator's duty to return the car after such use would not make his acts in doing so acts within his employers' service, but the return would be but an incident to the use. *Id.*

In action against automobile owner for injuries caused by driver's negligence, evidence held insufficient to show that driver was engaged in owner's business at time of accident, *Parmele v. Abdo* (Civ. App.) 215 S. W. 339.

In action by jitney passenger for injuries from collision with defendant's automobile, evidence held to support verdict for plaintiff. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

In an action by plaintiff, who was run down by an automobile, evidence held to warrant findings that plaintiff was free from negligence, while the driver of the motorcar was negligent. *Merchants' Transfer Co. v. Wilkinson* (Civ. App.) 219 S. W. 891.

In an action for personal injuries through being struck by defendant's automobile operated by its driver, evidence as to whether the driver was acting within the scope of his employment held insufficient to support a verdict for plaintiffs. *City Service Co. v. Brown* (Civ. App.) 231 S. W. 140.

— **Contributory negligence.**—If flagman at railway crossing failed to use ordinary care in keeping lookout and warning driver of wagon, which negligence proximately caused flagman's injury latter could not recover damages therefor. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

If driver did not exercise ordinary care, thereby forcing crossing flagman into danger, and to save driver's life flagman acted upon impulse of moment and was injured thereby, flagman will be excused from contributory negligence. *Id.*

One stepping from a sidewalk to board a street car is not required to anticipate that an automobile would approach and attempt to pass the entrance into the street car in violation of a city ordinance. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

A pedestrian who left curb to enter street car was not negligent in turning from street car back in direction of curb, being terrorized by wrongful act of automobilist in passing a standing street car in violation of a city ordinance. *Id.*

— **Damages.**—An award of \$5,000 in favor of plaintiff, who was struck by an automobile, cannot, where there was no claim of passion or prejudice on the part of the jury, be held excessive merely because plaintiff received more salary after the accident than he did before. *Merchants' Transfer Co. v. Wilkinson* (Civ. App.) 219 S. W. 891.

CHAPTER ELEVEN

STREET IMPROVEMENTS

Art.	Art.
1006. Powers acquired by accepting benefits of this chapter, and by whom.	1014. Governing body may correct mistake, etc.; in assessment proceedings, etc.; may reassess, etc.
1008. Governing body to order improvement of highways, etc.	1015. Suit to set aside or correct assessment.
1009. Cost of improvements, how paid, etc.; assessments.	1016. Referendum on adoption of provisions of this chapter; ordinances to carry out same.
1010. What cost assessed against railroad, etc., special tax lien enforceable, how.	1017. Provisions of this chapter cumulative; subordinate to special charter.
1011. Cost how assessed; certificates; costs; attorneys' fees; liens.	1017a. Special assessment or reassessment where other assessment was erroneous or void; procedure.
1012. No lien on exempt property; owner personally liable, etc.	
1013. Notice and hearing before assessment, etc.; no assessment in excess of benefit.	

Article 1006. Powers acquired by accepting benefits of this chapter, and by whom.

See *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

Cited, *Fest v. Western Paving Co.* (Civ. App.) 218 S. W. 1079.

Effect of amendment of charter.—The powers granted under this chapter were not lost to a city adopting amendments under the Acts of 1913, c. 147 (arts. 1096a–1096i) by the provisions of such statute, notwithstanding that the powers granted by this chapter were not copied into the amendments adopted. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

Art. 1008. Governing body to order improvement of highways, etc.

Ordinance or resolution for improvement.—Where the statutory requirements with respect to hearing and notice of a hearing before levy of assessments for public improvements were complied with (art. 1013), the inadvertent omission of the passage of a reso-

lution by the city council ordering the improvement, as required by a procedural ordinance, did not invalidate the assessment. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Entry of judgment on minutes.—Where a city charter does not provide that a judgment of the board of commissioners of a city providing for a street improvement shall be entered on the minutes, the failure to enter such formal judgment is not conclusive that it was not in fact rendered. *City of Ft. Worth v. Capps Land-Co.* (Civ. App.) 205 S. W. 491.

Power to contract.—Inhibition of Const. art. 11, § 5, and of Abilene Charter, art. 4, § 4, held not to prohibit city's contracting for repairs to or for permanent improvements of streets, same to be paid for at completion out of available funds then on hand. *Sayles v. City of Abilene* (Civ. App.) 196 S. W. 1000.

Art. 1009. Cost of improvements, how paid, etc.; assessments.

Assessment against abutting property—Amount.—The three-fourths of the cost of paving a street which can be assessed against property owners under this article, is three-fourths of the entire cost of the paving, though a street car company was compelled by its franchise to pave part of the street. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444.

The requirement that the cost be paid partly by the city, if mandatory, is satisfied by the payment for paving the street intersections only where the assessment against the street car company under art. 1010 reduced the cost to the abutting owners below three-fourths of the total cost. *Id.*

An answer alleging that the property owners were required to pay two-thirds of the entire cost of paving between street intersections, the street car company paying the other third, which was more than it was required to pay under its franchise, and the city paying only for paving the street intersections, with no showing of relative costs of the intersections, so that it could not be determined whether the portion assessed against the property owner exceeded three-fourths of paving company was not required to do, does not raise the issue whether the entire paving, or only that which the street car company was not required to pave, was the basis for determining the proportion assessable against the owners. *Id.*

Art. 1010. What cost assessed against railroad, etc.; special tax lien; enforceable, how.

See *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444; note under art. 1009.

Art. 1011. Cost, how assessed; certificates; costs; attorney's fees; liens.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Validity of statutes.—Provisions of Dallas charter as to assessing benefits for street improvement held not invalid, because making the assessment conclusive without an appeal. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Power of city.—A city may levy special assessments for a public improvement before the compensation to be paid for private property to be taken or damaged is ascertained. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Under this act, city is not authorized to assess benefits and levy special paving tax against owners of property in one district for purpose of paying paving contractor for paving streets in another district. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

City cannot assess property owners for benefits to reimburse it for funds derived from sale of bonds voted by taxpayers for paving streets and expended by city in paying for improvements made on such streets. *Id.*

Where a city charter made it the duty of the board of commissioners to order a street paved whenever the owners of 60 per cent. of the property abutting thereon should present a written petition therefor, and provided that assessment should be paid in five installments, and a petition for paving signed by the owners of more than 60 per cent. was filed, the board of commissioners cannot disregard it, and, acting under their general authority, order improvement and provide for payment of the assessment within 30 days after acceptance of the work. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

Under a city charter authorizing proceedings to assess the cost of street improvements against benefited property and its owners, if the amount is not agreed upon, it is unnecessary to show that the city made efforts to secure agreement with the property owners before proceeding to make the assessments. *City of Dallas v. Atkins*, 110 Tex. 627, 223 S. W. 170, affirming judgment (Civ. App.) 197 S. W. 593.

An assessment ordinance making entire assessment for improvements in street due when engineer should certify that he accepted the work, and, if not paid at that time, deferred installments should bear interest, did not conflict with statutes. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Adoption of ordinance.—Cities incorporated under this act cannot levy special tax for local improvements evidenced by paving certificates unless ordinance levying tax be consented to by two-thirds of aldermen elected in view of article 931. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

Assessments—Validity.—Assessment of benefits held invalid as to property owners with whom city had agreed to make no assessment in consideration of donation of land,

where in reliance thereon property owners did not offer evidence as to the value of the land. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Though the contract for paving a street called for pavement to the south line of an intersecting street, and the pavement constructed extended only to the north line, held that, as the contract made the charter and ordinances of the city a part thereof, and all of the proceedings by the board of commissioners, etc., showed that the pavement was to extend only to the north line of the intersecting street, the assessment for such paving was not open to attack on that ground. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

Where an assessment for street paving was invalid ab initio because the board of commissioners of the city attempted to act under their general authority without following the provisions applicable because property owners had petitioned for the improvement, the fact that act of the board did not prejudice one holding a mortgage on abutting property held not to validate the assessment. *Id.*

Where assessment was against "M. and children" the reference to children held not mere surplusage, and the court by a recital in its judgment in an action on the certificate was not justified in treating the entire proceedings as if they had been actually conducted on the theory that M. was the sole owner, merely because an assessment against M. alone would have been binding on all the owners. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

— **Joint assessment.**—Assessment of benefits without separating interests of life tenants and owners of fee, or interests of different joint owners, held improper. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

An assessment against joint owners of property for benefits to it by street improvements must separate the amount of the liability of each owner. *City of Dallas v. Atkins*, 110 Tex. 627, 223 S. W. 170, affirming judgment (Civ. App.) 197 S. W. 593.

Statutes relating to assessments for improvements contemplate joint assessment against those, who, as tenants in common, own a parcel of land which is subject to assessment. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

— **Personal liability.**—See *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703; note under art. 1012.

A personal liability cannot be imposed against a married woman for an assessment of benefits for a street improvement on the homestead owned in her separate property right. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 533.

Under Dallas charter personal liability may not be imposed upon owners of property upon which assessments for public improvements are levied. *Id.*

This act, providing for the assessment of the cost of improvements against abutting owners, and that the cost shall be a personal liability of the owner, includes, within the term "owner," married women. *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

In view of Rev. St. art. 5502, subd. 3, providing that the masculine includes the feminine, no inference can be drawn from the use of the masculine gender in this act, that married women are not included among those personally liable for a special assessment. *Id.*

— **Lien.**—Art. 5695 (Acts 33d Leg. [1st Called Sess.] c. 27, § 1), relating to renewal and extension of liens, does not apply to a paving certificate, in view of Const. art. 3, § 35. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

Where a city charter provided that on the day fixed for hearing any person owning or having any interest in the property proposed to be assessed for paving should have the right to be heard, held, that the provision of the charter making the lien of paving superior to that of a mortgage was not invalid. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

— **Certificates—Validity.**—Where all improvements for which paving certificates were issued had been paid by city with proceeds from bonds voted and issued therefor, certificates were not legally issued, and never became valid obligations against property owners. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

— **Sufficiency of description.**—A certificate of assessment for improvements in street describing the land as abutting 959 feet on the north side of West Josephine in the city of San Antonio, being in acres in new city block No. A2, sufficiently described the property, since it furnished means by which the property could be identified by the use of extrinsic evidence. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Where a parcel of land abutting on a street being improved was owned by M. and three of her children, a certificate of assessment was not invalid which described the owners as "M. and children." *Id.*

— **Actions.**—In proceeding against a property owner to recover the cost of a paving improvement, the certificate of special assessment was admissible as part of the plaintiff's cause of action pleaded. *City of Ft. Worth v. Capps Land Co.* (Civ. App.) 205 S. W. 491.

Petition, in action on paving and curbing certificates issued by city, alleging it adopted a special charter pursuant to Acts 33d Leg. c. 147 (arts. 1096a to 1096i), that the street in front of defendant's property was paved and curbed, and the certificates issued therefor, all in compliance with the powers given in the act and charter, held not subject to demurrer or exceptions. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

There was prima facie proof of plaintiff's ownership, claimed in his petition, of the certificate for curbing, issued by the city to another, sued on; it having at the trial been in his possession and introduced in evidence without objection. *Id.*

A petition in an action on a certificate of assessment which was attached and made a part thereof held to state a cause of action although the ordinances, resolutions, and

other matters were not copied in the petition, and each act or step taken was not pleaded in detail, in view of this article. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Joint owners of land need not all be made parties to an action on a certificate of assessment for street improvements, the interest of each being liable for the entire tax. *Id.*

Actions on improvement certificates are not governed by the four-year statute of limitations, relating to vendor's and deed of trust liens. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

— **Prima facie evidence.**—Certificates issued by a city for street improvements are prima facie evidence of the amount of indebtedness due by a property owner. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

A certificate of assessment for improvements in street when introduced in evidence establishes a prima facie case, hence it is not necessary for plaintiff in an action on such a certificate to also introduce the ordinance levying the assessment and authorizing the issuance of the certificate. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

The provision of this article, that a certificate of assessment containing certain recitals shall be prima facie evidence of the facts thus recited, does not violate Const. art. 3, § 56, subsecs. 16, 30. *Id.*

— **Rate of interest.**—In judgment upon a street paving certificate a provision that the aggregate sum should bear interest at the rate of 8 per cent. per annum was erroneous so far as providing that interest should bear interest at 8 per cent. certificate not so providing. *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

A judgment upon a certificate of assessment providing for 8 per cent. interest only bears 6 per cent. interest, in view of Rev. St. 1911, arts. 1011, 4981. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Setting aside sale.—In suit to set aside constable's sale of realty to foreclose street improvement lien, any incumbrance at time of sale should have been considered in determining whether or not defendant purchased at grossly inadequate price. *Dubois v. Lowery* (Civ. App.) 205 S. W. 858.

If purchaser at constable's sale to foreclose street improvement lien was not in adverse possession of the land in good faith when he made improvements, he was not entitled to recover value of improvements in suit against him to recover land. *Id.*

Attorney's fees.—This chapter is not unconstitutional as violating the due process clause of the state and federal Constitutions, merely because it authorizes the collection of attorney's fees for foreclosure of a paving lien. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

A statute and ordinance authorizing recovery of attorney's fee in an action on a special assessment paving certificate does not violate the due process of law clause of the Constitution. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444.

The provision of this article, granting authority to provide for the recovery of attorney's fees in actions on certificates of assessments for improvements, is valid. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Such provision is not limited or affected in any way by art. 2178. *Id.*

Art. 1012. No lien on exempt property; owner personally liable, etc.

See *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166.

Exemption of homestead.—Under Rev. St. 1879, arts. 375, 376, which regulated the construction of sidewalks in cities, and fixed the liability of the owners of the abutting property, assessments for sidewalks, when imposed by a city ordinance, were special taxes, for which the homestead might be sold, as other lands. *Bordages v. Higgins*, 1 Civ. App. 43, 19 S. W. 446.

The constitution exempts homesteads from forced sale for the payment of assessments for local city improvements, and such an assessment against the homestead is void. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Special assessment for paving under this article, created no lien upon the homestead premises of a property owner and her husband. *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Since the homestead is protected under the Constitution, failure of homestead owners to appear and contest special assessments for public improvements does not estop them from interposing a plea of homestead. *Id.*

The Constitution forbids the creation of any lien on homestead property for the cost of street improvements benefiting the property. *City of Dallas v. Atkins*, 110 Tex. 627, 223 S. W. 170, affirming judgment (Civ. App.) 197 S. W. 593.

Personal liability.—Arts. 1011, 1013, authorize a personal judgment against a married woman, who owned as her separate estate property abutting on the improved street, which was the homestead of herself and her husband; her estate, under art. 5502, subd. 1, not excluding her from the general term "owner." *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703.

Under Dallas City Charter, art. 11, § 5, providing that the cost of improvements shall be paid for by the owners of property in the immediate vicinity and benefited thereby, the city can assess the benefits to homestead property against the owner personally. *City of Dallas v. Atkins*, 110 Tex. 627, 223 S. W. 170, affirming judgment (Civ. App.) 197 S. W. 593.

A married woman is subject to personal assessment for benefits to her separate property, even though such property is the homestead. *Id.*

Art. 1013. Notice and hearing before assessment, etc.; no assessment in excess of benefit.

See *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703; notes under art. 1011.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Benefit to property.—A special assessment for a local improvement must not exceed the amount of benefits conferred. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Dallas city charter held not to impose the cost of property condemned for street improvements on property owners without requiring that assessment shall not exceed benefits. *Id.*

An agreement between a city and a paving contractor before a hearing before the council was had, wherein it was agreed that the city would only pay one-third of the costs, did not invalidate the assessment on the ground that it bound the paving company to assess absolutely against the owners two-thirds of the cost of the paving regardless of benefits, as the paving company, if it desired, could assume the risk of the benefits being equal to two-thirds. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Notice—Sufficiency.—Though no notice of the proposed paving of a street was given a mortgagee, held, that publication in a newspaper of notice of the proposed pavement was sufficient to bind the mortgagee; the city charter, which provided for notice, declaring that service of notice by advertisement should be conclusive. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

This article, does not require notice of a hearing for assessment of improvements to correctly state in every instance the name of each person who owns an interest in abutting property. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

A notice of hearing before levy of special assessments for local improvements was not void for unreasonableness in failing to state the names of three persons who had an interest in a parcel of land instead of describing them as the children of a joint owner named. *Id.*

The failure to give personal notice of a hearing before levy of assessments would not effect the validity of the proceeding. *Id.*

Deprivation of rights.—That a delay of 7 months occurred between the making of a contract for street paving by the board of commissioners and the submission to the board of the engineer's report was not a jurisdictional defect, and did not deprive a property owner of his rights as to notice of the character and extent of the burden to be placed on his property. *City of Ft. Worth v. Capps Land Co.* (Civ. App.) 205 S. W. 491.

Hearing.—Rev. St. 1911, art. 1013, relating to hearings before assessment for improvements, does not violate the due process of law provision of the Constitution because it provides for a hearing before the governing body of the city. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

That the city engineer without notice to owners made a plat and statement showing the total estimate of the cost and improvements and the division thereof according to his measurements of the abutting lots, and that such plat and statement were examined and approved by the council under a procedure ordinance of the city, prior to hearing was not a denial of a full and fair hearing guaranteed by this article, being merely preliminary steps. *Id.*

Effect of notice and hearing.—See *Elmendorf v. City of San Antonio*, 223 S. W. 631; note under art. 1008.

Waiver of objections.—A married woman whose property was assessed for a special improvement could not complain that her husband, who had no interest in the property, was joined with her in the assessment, the error being a mere irregularity which, not having been urged at the proper time, will not be permitted to invalidate the certificate. *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Provisions of city charter, which vests a board with judicial functions to determine assessments for street improvements, that objection thereto, unless filed with the board before hearing is closed, shall be deemed waived, do not in case of one given notice deprive him of property without due process in contravention of Const. U. S. Amends. 5, 14. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

Art. 1014. Governing body may correct mistake, etc., in assessment proceedings, etc.; may reassess, etc.

Conflict with charter.—Arts. 1014 and 1017, held not in conflict with the city charter (Sp. Acts 32d Leg., c. 51), providing for the "improvement district plan" for paving streets, but cumulative thereof. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

Reassessment—Power to make.—Under Ft. Worth Charter, c. 14, § 13, providing that errors in levying assessments may be corrected by reassessment, the city has right to reassess property to correct errors of description or in name of owner. *Texas Bitulithic Co. v. Henry* (Civ. App.) 197 S. W. 221.

Fact that real owner was made party defendant in original suit on improvement certificate against party in whose name property was originally assessed is not sufficient to show that city or contractor knew at that time who was true owner of property, where reason for making her and others parties is not shown. *Id.*

Where a street assessment was made after due notice to objecting abutting owner,

and after he had an opportunity to be heard in opposition thereto, and it did not appear from the record that the sum assessed was in excess of what the city had a right to assess, held that the city was authorized to make reassessment or final assessment to correct a previous erroneous one. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

— **Time for making.**—Where no period of limitations has been fixed either by charter or law, city may make reassessment if it discovers the error in its first assessment and improvement certificate within a reasonable time. *Texas Bitulithic Co. v. Henry* (Civ. App.) 197 S. W. 221.

In absence of proof as to reasons for delay of almost five years in discovering defective description in first assessment and having reassessment made, such delay held not unreasonable. *Id.*

— **Procedure.**—Held, that reassessment proceeding substantially complied with Ft. Worth Charter, c. 14, § 13, and rules and regulations adopted by board of commissioners thereunder. *Texas Bitulithic Co. v. Henry* (Civ. App.) 197 S. W. 221.

Irregularities in reassessment proceedings held waived by failure to present them in written protest before board of commissioners, etc. *Id.*

Art. 1015. Suit to set aside or correct assessment.

Cited, *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Validity of statutes.—A charter provision for an appeal within 10 days from the order of city commissioners overruling the protest of a property owner to a paving improvement did not constitute a taking of property without due process of law, in violation of Const. art. 1, § 19. *City of Ft. Worth v. Capps Land Co.* (Civ. App.) 205 S. W. 491.

Provisions of city charter, which vests a board with judicial functions to determine assessments for street improvements, that one failing within 10 days after closing of the hearing to institute suit to contest validity of the assessment shall be barred from contesting in any other proceeding, do not in case of one given notice deprive him of property without due process, in contravention of Const. U. S. Amends. 5, 14. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

A street paving assessment is not invalid because the proportion to be assessed against the abutting owners was determined by city officials, who were interested in preserving the city funds in view of this article, and the statutes and ordinances authorizing such apportionment do not violate due process of law contrary to Const. art. 1, § 19. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 441.

This article does not violate any constitutional provision. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Appeals.—Though a city charter provided that any person interested in property assessed for street improvements should not institute suit to contest the validity of the assessment after a time fixed, the assessment can be collaterally attacked where the board of commissioners of the city did not acquire jurisdiction under the charter to levy the assessment. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

Objection that an assessment for improvements was invalid because the city council had not by resolution ordered the improvement must be made on the hearing, or in a suit brought within 20 days thereafter, as provided in this article. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Art. 1016. Referendum on adoption of provisions of this chapter; ordinances to carry out same.

Constitutionality.—This act is not invalid as a delegation of legislative power. *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703; *Carwile v. Childress* (Civ. App.) 213 S. W. 308; *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189; *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

It does not violate Const. art. 3, § 1, vesting the legislative power in the Legislature and article 1, § 28. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444; *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

This act is not unconstitutional in that art. 1016 provides for a delegation of legislative power to the people of the various cities of the state; the act being an amendment of existing charters which the inhabitants may accept or reject. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

Effect of other legislation.—That the result of an election whereby a city adopted the provisions of this act, was not canvassed until after the effective date of Acts 33d Leg. 1913, c. 147 (arts. 1096a to 1996i) did not invalidate the election, and the powers given by the 1909 act were vested in the city by virtue of the election. *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

Irregularities in election.—That no notice was posted of a city election to adopt this act, other than a copy of the resolution, or that the resolution "did not limit the qualification of the voters as provided in the act," were not such irregularities as would invalidate the election, where it was not shown that any one entitled to vote failed to do so because of such irregularity, or that any one not entitled to vote did so. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

Art. 1017. Provisions of this chapter cumulative; subordinate to special charter.

Conflict with charter. Arts. 1014, and 1017, held not in conflict with the city charter Sp. Acts 32d Leg. c. 51), providing for the "improvement district plan" for paving streets but cumulative thereof. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

Art. 1017a. Special assessment or reassessment where other assessment was erroneous or void; procedure.—In any case in which the public funds of any city or town may have at any time heretofore been, or may hereafter be expended, or its vouchers or certificates issued to any contractor, or any contract made therewith, for the special improvement, raising or lowering the grade of, opening, straightening, widening, paving, constructing, or grading of any street, avenue, alley, sidewalk, gutter or public way, or any part thereof, and if for any reason, no part of the cost of such improvement has been borne by the abutting property or paid by the owner or owners thereof, either because an attempted assessment and enforcement thereof for the same was erroneous or void, or was so declared in any judicial proceeding, the City Council of [or] Commission, or other governing body of any city or town shall have the power to proceed at any time to specially assess, or reassess, such abutting property with such amount of the cost of such improvement as it deems proper but in no event shall the amount exceed the special benefits such property receives therefrom by enhanced value thereto, the amount of such special benefits to be determined on a basis of the condition of such improvement as it exists at the time of such assessment, or re-assessment; provided, that no such assessment, or re-assessment, shall be made without at least ten days written notice and an opportunity to be heard on such question of special benefits given to the owner or owners of such abutting property, provided that such notice may be served either personally or by publication in some newspaper of general circulation, published in said city or town; and provided, further, that the governing body of any such city or town shall have full power and authority to provide for all procedure, rules and regulations necessary or proper for such notice and hearing and to levy, assess and collect such assessment, or re-assessment; and provided, further, that such assessment, or re-assessment shall be and constitute a lien upon such abutting property and a personal charge against the owner or owners thereof, which amount shall not be construed as becoming due, or having become due, before such assessment or re-assessment is properly made in accordance with the provisions with this Act: Provided that such assessment or re-assessment as herein before provided shall be begun within three years after the completion of improvements contiguous to the property against which assessment or re-assessment is made and not thereafter, provided that in cases of re-assessments where the question of validity of the original assessment may be, or may have been, in litigation, the period of time during which it may be, or may have been, in litigation shall not be considered in computing said period of three years within which assessment or re-assessment shall be made; and provided, further, that any such assessment or re-assessment made by the governing body of any city or town with less than 5,000 inhabitants may equal the entire cost of side-walk, curb and gutter, and the cost of any street improvement, exclusive of street intersections, and such governing body of such town, in making such assessment or re-assessment, shall follow the procedure prescribed in Articles 999 and 1,000 of the Revised Civil Statutes of the State of Texas of 1911, in so far as applicable, but no such assessment or re-assessment shall be

made in excess of the special benefits in enhanced value conferred thereby on the property abutting such improvement, or until the owner or owners of such property shall have had notice, as provided above, and opportunity to contest such issue before such governing body under such rules and regulations as may, by ordinance, be prescribed by it, and such assessment, or re-assessment shall be and become due and payable in equal annual installments not less than five in number; provided that the owner of such property shall have the right to appeal from the decision of the governing board of any such town or city to the court of competent jurisdiction within twenty days after such re-assessment shall have been made, and upon failure to do so in said period, such assessment shall be final and conclusive upon such owner and property; and provided further, that the provisions of this Act be cumulative of all powers heretofore granted to any city or town either by general or special Act; and provided, further, that all Charter provisions of all cities and towns in this State heretofore adopted, relative to the subject covered by this bill and they are hereby validated. [Acts 1919, 36th Leg. 2d C. S., ch. 47, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

CHAPTER ELEVEN A

PARKS

Art.
1017½. Levy of tax for parks.

Art.
1017½c. Improvement of parks.

Article 1017½. Levy of tax for parks.

City acting as trustee.—Houston city charter, empowering city to maintain parks, authorizes it to accept management of park in trust for benefit of colored people of Harris county. *Woods v. Bell* (Civ. App.) 195 S. W. 902.

Where park intended for benefit of colored people of Harris county had been managed through trustees elected by such beneficiaries, but was in imminent danger of being seized by creditors, a court of equity has jurisdiction to transfer its control to city of Houston, which would discharge indebtedness and manage it for original purposes. *Id.*

Evidence of various trustees of a park devoted to benefit of colored people held to sustain finding that revenue derived from park would be insufficient to pay indebtedness already accrued and current expenses. *Id.*

Art. 1017½c. Improvement of parks.

Construction of sidewalk as diversion.—In view of Special El Paso City Charter, §§ 54, 93, providing that property acquired by the city for park purposes shall be inalienable, and for the construction and repair of sidewalks and crossways thereon, the construction of a sidewalk on a 14-foot strip on the edge of a park, for the use of a party with whom the city was adjusting a lawsuit, is a diversion of park property which may be enjoined. *Look v. El Paso Union Passenger Depot Co.* (Com. App.) 228 S. W. 917.

CHAPTER TWELVE

PUBLIC UTILITY CORPORATIONS, RATES AND CHARGES— REGULATION BY COUNCIL, ETC.

Art.
1018. City council may regulate rates.

Art.
1024b.-1024e.

Article 1018. City council may regulate rates.

Retrospective operation of ordinance.—Where a city ordinance made the price of gas a certain amount, with the privilege of a 10 per cent. discount if paid before a certain date, a later ordinance, omitting the privilege of a discount and providing an additional 10 per cent. for delay in payment, could not be applied retrospectively, under Const. art.

1, § 16, even though the discount feature be considered a mere inchoate right or privilege. *Amarillo Gas Co. v. City of Amarillo* (Civ. App.) 208 S. W. 239.

A city ordinance which granted a gas company the right to a minimum charge on meters, could not take effect for the month in the middle of which the ordinance went into effect, under Const. art. 1, § 16. *Id.*

Right to injunction.—In order to enjoin enforcement of an ordinance reducing fares to be charged by a street railway, it was not incumbent upon the railway company to show that the reduced rate was confiscatory within the meaning of the federal Constitution, being entitled to restrain its enforcement, where the reduced rate is unreasonable, unjust, and insufficient to maintain a fair return upon the value of the property. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

Arts. 1024b-1024e.

See arts. 4595½-4595½c post.

CHAPTER FOURTEEN

TOWNS AND VILLAGES

Art.

1033. May be incorporated, when.

1034. Towns and villages incorporated, when.

1037. Officers appointed to hold election.

1041. Duty of county judge to make an entry.

Art.

1042. Powers of corporation.

1043. Election of mayor, etc.

1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by street; penalty.

Article 1033. [579] [506] May be incorporated, when.

Cited, *Ex parte Tummins*, 32 Cr. R. 117, 22 S. W. 409.

Right to reorganize.—A town organized under this chapter, when it provided for the organization of a "town or village" containing 200 and less than 1,000 inhabitants, cannot reorganize under chapter 1, even though it has increased to more than 1,000 inhabitants, *Harness v. State*, 76 Tex. 566, 13 S. W. 535.

Art. 1034. [580] [507] Towns and villages incorporated, when.

Cited, *State v. Goodwin*, 69 Tex. 55, 5 S. W. 678.

Territory included.—Under this article, a town at the time of its attempted incorporation could not include within its corporate limits any "territory" that was not intended for strictly town purposes. *State v. Masterson* (Civ. App.) 228 S. W. 623.

Inclusion within a town of several hundred acres of vacant and unoccupied lands by the incorporators of such town would not alone render the incorporation invalid. *Id.*

Incorporation of a town comprising some 1,050 acres held illegal and an attempted fraud on account of the inclusion of 76 acres of land comprising an oil field and used for the purpose of extracting oil from the earth by means of wells with their accompanying derricks and other machinery. *Id.*

Validation of incorporation.—Where plaintiff claimed title under a conveyance by the officers of the town of San Elizario, held that, even if an attempt to incorporate the town in 1879 under general statute was of no effect, the special charter not having been repealed, the title was validated by Acts 21st Leg. Special Laws (9 Gammel's Laws, p. 1371), and Acts 34th Leg. (1st Called Sess.) c. 12, § 1 (Supp. 1918, art. 5393a). *Perez v. Cook* (Civ. App.) 208 S. W. 668.

Incorporation for school purposes.—See *Furrh v. State*, 6 Civ. App. 221, 24 S. W. 1126; notes under art. 2850.

Order for election.—Under this article, the county judge cannot withhold the order of election because the boundaries marked by the petitioners include territory which is outside the actual limits of the town or village, and such order is not conclusive that the territory was properly embraced. *Ewing v. State*, 81 Tex. 172, 16 S. W. 872.

Order, purporting to be only notice of election to determine whether town should be incorporated, signed by county judge, held a valid and sufficient order for the election. *State v. Troell* (Civ. App.) 207 S. W. 610.

Where county judge, in response to petition, ordered election on specified date to determine whether town should be incorporated, and that election was temporarily restrained, he could order another election on dissolution of the injunction, without new petition. *Id.*

Judicial inquiry.—The boundaries of a municipality incorporated under this article, may be inquired into by the courts, as such municipalities are not established by special legislative enactments. *Ewing v. State*, 81 Tex. 172, 16 S. W. 872.

Art. 1037. [582] [509] Officers appointed to hold election.

See 1918 Supp., arts. 6016½-6016½c, as to publication in newspaper instead of posting.

Notice of election.—Requirement of this article, that election shall be held after ten days' notice, is directory. *State v. Troell* (Civ. App.) 207 S. W. 610.

That 102 of 115 town electors voted at election to determine whether town should be incorporated is proof of actual notice, and, in the absence of fraud, the election was not invalid for failure to advertise it for ten days. *Id.*

Fact that promoters of town election to determine whether town should be incorporated procured order for election without ten days' statutory notice in order to beat neighboring town election did not invalidate the election when the judge acted fairly and without corrupt motive. *Id.*

Art. 1041. [586] [513] Duty of county judge to make entry, etc.

Cited, *State v. Goodwin*, 69 Tex. 55, 5 S. W. 678; *Harness v. State*, 76 Tex. 566, 13 S. W. 535.

Art. 1042. [587] [514] Powers of corporation.

Cited, *Ex parte Tummins*, 32 Cr. R. 117, 22 S. W. 409.

Art. 1043. [588] [515] Election of mayor, etc.

Cited, *Ex parte Tummins*, 32 Cr. R. 117, 22 S. W. 409.

Art. 1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by streets; penalty.

Duty to make repairs and liability arising therefrom.—City seeking penalty for railroad's failure to construct street crossing under this article, could not recover in the absence of demand for work on the roadbed, as well as on right of way. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 203 S. W. 795.

Fact that in condemnation suit by city against railroad the land involved was condemned did not estop railroad from showing its true boundary, which failed to include all the land, so that its repairing the street would not have connected with the city's improvements and it was not liable for the penalty. *Id.*

This article does not authorize action for the penalty against a receiver. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 203 S. W. 458.

Mere fact that receiver was appointed under federal statutes, requiring him to operate the road according to state laws, did not render him liable for penalty. *Id.*

CHAPTER FIFTEEN

COMMISSION FORM OF GOVERNMENT

Art.
1070. Election to determine.
1074. Clerk, etc., appointment, etc.

Art.
1075. Commissioners, powers and duties.

Article 1070. Election to determine.—Whenever ten per cent. of the qualified voters of any incorporated city or town in this State, having a population of over five hundred inhabitants and less than five thousand inhabitants, incorporated under the provisions of Chapter 1, Title 22, of the Revised Civil Statutes of Texas of 1911, or any previous general law, or hereafter incorporated under any general law, or of any incorporated town or village in this State having a population of more than five hundred inhabitants and less than one thousand inhabitants incorporated under the provisions of Chapter 14, Title 22, of the Revised Civil Statutes of Texas of 1911, or any previous general law, or hereafter incorporated under any general law, shall petition in writing the mayor of said city or town, or the mayor of such town or village as the case may be requesting that an election be ordered to determine whether such city or town, or such town or village, shall adopt the commission form of government, the mayor shall order an election within such city or town, or town or village, to determine whether or not the commission form of government shall be adopted. Thirty days' notice of such election:

shall be given by posting three written or printed notices of same at three public places in such city or town, or in such town or village, and by publishing such notice in some newspaper published therein if there be one. If any unincorporated city or town in the State of Texas having a population of over five hundred and less than five thousand inhabitants, or any unincorporated town or village in the State of Texas having a population of more than two hundred and less than one thousand inhabitants, shall desire to be incorporated under the commission form of government as herein provided, an election to determine whether such incorporation may be had shall be called by the County Judge under the provisions herein governing incorporated cities and towns, and incorporated towns and villages, and notice of such election shall be given as herein provided, and if satisfactory proof is made that the city or town, or town or village, contains the requisite number of inhabitants, it shall be the duty of the County Judge to make an order for holding an election on a day therein stated, and at a place designated within the city or town or town or village for the purpose of submitting the question to a vote of the people. [Acts 1913, p. 36, § 1; Acts 1921, 37th Leg., ch. 60, § 1, amending art. 1070, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting. Cited, *Bartlett v. State* (Civ. App.) 222 S. W. 656.

Art. 1074. Clerk; appointment, bond, duties and powers; city attorney, police and other officers, etc.

Removal of officers and employés.—Where city commissioners of Dallas removed firemen under a provision of the charter providing that firemen could hold their positions during good behavior, and should not be removed except for such cause as, in the opinion of the board of commissioners, rendered them unfit, after an opportunity to be heard, the extent of the power of the courts, is to inquire whether or not the commissioners exceeded their lawful authority so that their action may be treated as a nullity; and, if there might be fairly said to be any ground for difference of opinion as to whether the acts charged would be a sufficient cause, the courts cannot interfere. *McNatt v. Lawther* (Civ. App.) 223 S. W. 503.

It cannot be said that the action of the city commissioners of the city of Dallas in removing city firemen joining a labor union in violation of a rule of the department was arbitrary or capricious. *Id.*

Under the charter of the city of San Antonio the city commissioners have the absolute power of the removal of employés if it is done publicly and on written charges; and, if their action is not based on fraud or corrupt motives, it cannot be restrained, but, of course, such charges must not be frivolous or trivial, for such charges would be fraudulent. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

Under the charter of the city of San Antonio, providing that "any appointive officer or employé may be removed or discharged only by a majority vote of the commissioners on charges preferred in writing and after a public hearing of such charges by said commissioners," the offenses for which employés may be removed are lodged in the discretion of the commissioners, and no one can attack the exercise of that discretion without showing a gross abuse of it, or fraud, after the removal or discharge has taken place. *Id.*

The exercise of the power of the removal of an officer or employé by commissioners of a city is essentially administrative or executive, and the mere fact that the charter of a city requires a trial does not alter the executive character of the municipal body. *Id.*

Even if an appeal were permitted from a decision of the city commissioners of San Antonio, removing city employés after a public trial required by the city charter, the court could not review the exercise of executive discretion; but only in the absence of some essential formality or apparent arbitrary oppressive and fraudulent action, and not upon the questions of fact, could the removal be inquired into by the court. *Id.*

Art. 1075. Powers and duties of board of commissioners.—The board of commissioners of all incorporated cities or towns, or towns or villages, of over five hundred and less than five thousand inhabitants, and all unincorporated cities or towns or villages having a population of over five hundred and less than five thousand inhabitants incorporating under and adopting the commission form of government under the provisions of this chapter shall have all the authority and powers, and be subject to all the duties, granted and conferred under Chapters 1 to 13, both inclusive, of Title 22 of the Revised Civil Statutes of Texas of

1911, except where same may conflict with some provisions of this chapter herein contained. In incorporated towns and villages of more than two hundred and not more than five hundred inhabitants, adopting the commission form of government under the provisions of this chapter, and in unincorporated towns and villages of more than two hundred and not more than five hundred inhabitants, incorporating and adopting the commission form of government under the provisions of this chapter; the board of commissioners shall have the authority and powers, and be subject to all the duties, granted and conferred under Chapter 14 of Title 22 of the Revised Civil Statutes of 1911, except where same may conflict with some provision of this chapter herein contained. [Acts 1913, p. 36, § 1; Acts 1921, 37th Leg., ch. 60, § 1, amending art. 975, Rev. Civ. St. 1911.]

Took effect 96 days after March 12, 1921, date of adjournment.

Arbitrary action.—That board of commissioners may act arbitrarily under authority granted by city charter or an ordinance does not render ordinance void. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 123.

CHAPTER SIXTEEN

ABOLITION OF CORPORATE EXISTENCE

Art.	Art.
1077. Abolition of corporation provided.	1080. Receiver of abolished corporation; appointment; bond, etc.
1078. Petition and election to abolish, provided, etc.	1095. Public buildings of abolished corporation.
1079. Qualified voters at such election; duty of county judge.	1096. Corporation may be abolished, how.

Article 1077. [617a] Abolition of corporation provided.

Abolition of school district.—Where school district was declared duly incorporated, etc., and was operated for some time, held, it could only be abolished by election, as provided by arts. 1077, 1078, 2856b, and not by nonuser. *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176.

Art. 1078. [617b] Petition and election to abolish, provided, etc.

See *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176; note under art. 1078.

Art. 1079. [617c] Qualified voters at such election; duty of county judge.

Constitutionality.—Const. art. 6, § 2, giving the right of suffrage, with certain restrictions and exceptions, to all persons not disqualified under section 1, does not apply to municipal elections, in view of section 3; and hence the provision of this article, that at an election on the question of abolishing the corporate existence of a municipality only resident property taxpayers may vote, is not invalid. *Bonham v. Fuchs* (Civ. App.) 228 S. W. 1112.

The provision requiring the names of voters at an election on the question of abolishing the corporate existence of a municipality to appear on the last assessment roll, is not invalid. *Id.*

If such provision is invalid, its invalidity does not destroy the entire statute. *Id.*

Contest of election.—In a proceeding to contest an election on the question of abolishing the corporate existence of a municipality, a petition alleging that challenged voters were not taxpayers was not subject to demurrer, even though the provision of this article, requiring the name of the voters to appear on the last assessment roll, was invalid. *Bonham v. Fuchs* (Civ. App.) 228 S. W. 1112.

Art. 1080. Receiver of abolished corporation; appointment; bond, etc.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting; Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1095. [617g] Public buildings of abolished corporations.

Mandamus under former law.—Act April 13, 1891, provides that, if any de facto corporation shall be declared void by any court of competent jurisdiction, the commissioners' court shall provide for the sale of its property and the settlement of its debts, and for this purpose may levy and collect taxes from the inhabitants of said corporation. The act further provides that upon the reincorporation of the de facto corporation all property owned by it shall belong to the new corporation, which shall be liable for the debts of the old corporation. Held that, whether the act was valid or not, a petition for mandamus to compel the commissioners to levy a tax to pay the salaries of officers of a city, the incorporation of which had been declared void, was fatally defective where it failed to allege that the city had not been reincorporated. *Ewing v. Commissioners' Court of Dallas County*, 83 Tex. 663, 19 S. W. 230.

Art. 1096. [615] [540] Corporation may be abolished, how.

Cited, *State v. Goodwin*, 69 Tex. 55, 5 S. W. 678.

CHAPTER SEVENTEEN**CITIES HAVING MORE THAN 5,000 INHABITANTS—ADOPTION AND AMENDMENT OF CHARTER**

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| <p>Art.
1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.
1096b. Commission to frame new charter; submission to voters, etc.
1096c. Mayor or chief executive to certify copy of adopted charter or amendments to secretary of state; record; judicial notice, etc.
1096d. Full power of local self government; enumerated powers.
1096dd. City in fixing charges under franchise may consider fair value of property.
1096f. Former powers preserved, etc.</p> | <p>Art.
1096i. Penalties for obstruction or incumbrance of streets, etc.; street franchises, etc.
1096j. Validation of charters and amendments to charters adopted under this chapter.
1096k. Validation of charter amendments.
1096kk. Validating incorporations.
1096l. Validation of charters and amendments to charters adopted under this chapter.
1096m. Validation of elections and municipal proceedings and contracts.
1096n. Validation of charters and amendments to charters.</p> |
|---|---|

Article 1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.

Cited, *Le Gois v. State*, 83 Cr. R. 460, 204 S. W. 320; *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Constitutionality.—Const. art. 11, § 5, declaring cities of more than 5,000 inhabitants may have their charters granted or amended by special act of the Legislature, did not deprive the Legislature of the power to enact a general law applicable to the class of cities specified. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

Act March 29, 1917, incorporating the city of Plainview, violates Const. art. 11, § 5, in that it would deprive the inhabitants of that city of the right to adopt or amend their charter by a majority vote of the qualified electors thereof. *State v. Vincent* (Civ. App.) 217 S. W. 402.

Construction of language.—The language of the home rule amendment to the Constitution was not written for lawyers and judges alone, and is to be interpreted according to its usual and popular meaning. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084.

Amendments authorized.—Where city charter required consent of property owners on certain street to the granting of franchise entitling street railroad to make extension thereon, the amendment of the city charter so as to authorize the board of commissioners to order such extension without abutting owners' consent held not unconstitutional, under Const. art. 11, § 5, and arts 1096a, 1096b, the making of such amendment not constituting the granting of a franchise, but merely the taking away from such abutting owners by amendment authorized by Legislature the right previously given to prevent granting of franchise by withholding consent. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

Amendments prohibited within two years.—The change of the boundaries of a city from those specified in its home rule charter so as to include additional territory is an amendment and alteration of the charter which cannot be made within two years after the adoption of charter under Const. art. 11, § 5, construing that provision either according to the meaning of its language, the construction placed thereon by the Enabling Act, arts. 1096a-1096i, or in the light of the history of legislation showing that the boundaries of a city were usually fixed by its charter. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084.

This act is merely a legislative construction of the home rule amendment to the Constitution as empowering the cities to fix their boundaries in their charters, and was not

intended to, nor could it, empower the cities to change their boundaries more frequently than they were permitted to amend their charters by the constitutional amendment. *Id.*

A city cannot amend its charter by changing its boundaries within two years after the adoption of the charter, though at the election at which the charter was adopted the voters also ratified a resolution directing a city to make the boundary change. *Id.*

Restrictions on taxation.—See *City of Ft. Worth v. Cureton*, 110 Tex. 590, 222 S. W. 521; note under art. 1096d.

Const. art. 8, § 9, relating to levy of city taxes in any one year, is not applicable to cities of 5,000 inhabitants, operating under special charter. *Williamson v. Cayo* (Civ. App.) 198 S. W. 643.

Art. 1096b. Commission to frame new charter; submission to voters, etc.

See *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

Amendments authorized.—See *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807; notes under art. 1096a.

What constitutes majority vote.—Under Const. art. 11, § 5, providing that cities having more than 5,000 inhabitants may, by a majority vote of the qualified voters, adopt or amend their charters, a majority of the votes polled at the election is sufficient. *Shaw v. Lindsley* (Civ. App.) 195 S. W. 338.

Under this article, first and fifth of the proposed amendments to city charter, each of which received majority of votes cast on such amendments, but not majority of votes at whole election, held carried. *Id.*

Effect of mailing copy of ballot.—Where copy of ballot was mailed to each voter 30 days before election in a city wherein proposed charter changes under Home-Rule Amendment were determined, it could not be said, after election, in suit to contest it, that voters did not act with clear understanding of the scope and character of each amendment. *Shaw v. Lindsley* (Civ. App.) 195 S. W. 338.

Collateral attack on election.—In action involving the right of a street railroad to remove tracks from certain streets and extend system in other street in which it was claimed that the city had a right to authorize such extension under the charter as amended, the validity of the election at which the charter was amended will not be inquired into under art. 3050, since the result of the election cannot be attacked in a collateral proceeding. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

Art. 1096c. Mayor or chief executive to certify copy of adopted charter or amendments to secretary of state; record; judicial notice, etc.

Judicial notice of charter.—Under this article, when a city has adopted a charter as authorized therein and it has been recorded as therein provided, no proofs are required thereof, but judicial notice must be taken of it. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

Due recording of charter is prerequisite to taking of such notice. *Pate v. Whitley* (Civ. App.) 196 S. W. 581.

Despite this article, it is at least highly advisable that copy of charter be offered in evidence in any case involving consideration thereof. *Id.*

Art. 1096d. Full power of local self government; enumerated powers.—That for the purpose of promoting the public health, safety, order, convenience, prosperity and general welfare the governing authorities of cities or towns having more than five thousand inhabitants may provide that such cities and towns shall be divided into zones or districts, may regulate the location, size, height, bulk and use of buildings within such zones or districts, may establish building lines within such zones or districts or otherwise, and may make different regulations for different districts for any such city or town and may thereafter alter the same.

That the governing authorities of any such city or town may be authorized by their charter to create a Commission or Board for the purpose of carrying out the powers of this Act or may provide for the creation of a Board of Appeals or Review for the purpose of hearing and deciding on appeals from and reviewing any order, requirement, decision or determination of the governing authorities in carrying out the powers and authority conferred hereunder.

That the powers conferred by this Act may be adopted by any city having a population of five thousand or over, provided the authority and power herein conferred shall never be construed to be a limitation of the power and authority of any such city making or amending any

charter under the provisions of the Home Rule Act. [Acts 1921, 37th Leg., ch. 87, § 1.]

Explanatory.—Took effect April 2, 1921. The act amends "article 1096d, chapter xvii (Acts of 1913) Civil Statutes of the State of Texas, relating to the Home Rule of Cities or towns having more than five thousand inhabitants * * * by adding thereto the following powers."

See *State v. Vincent* (Civ. App.) 217 S. W. 402.

Constitutionality.—The Legislature had the power to confer authority on the city of Dallas to regulate and license jitney busses. *City of Dallas v. Gill* (Civ. App.) 199 S. W. 1144.

Power to extend city limits, previously vested in the Legislature, could, by amendment of the Constitution, be vested in the voters of the city. *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

Annexation of territory.—See *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757; notes to art. 1096k.

Sale of liquor.—Under *Brownsville City Charter*, § 22, providing for establishment of saloon districts, facts that district established had more residences than business houses, and that limits without district contained more business houses than residences, held not to warrant conclusion ordinance establishing district was void as unreasonable. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

Ordinance of city establishing saloon district was not void because it failed to provide penalty for violation. *Id.*

Assessment for improvements.—See *Dillon v. Whitley* (Civ. App.) 210 S. W. 329; note under art. 1011.

Taxing power.—The amendment to the Ft. Worth charter, adopted June 17, 1919, pursuant to Const. art. 11, § 5, as amended, which allowed additional taxes for general school purposes, etc., did not diminish the city's general taxing power fixed by the charter at \$1.75 per \$100, which, however, included the school tax limited to 50 cents per \$100, and, hence, a bond issue cannot be rejected on the ground that the taxing power was so reduced. *City of Ft. Worth v. Cureton*, 110 Tex. 590, 222 S. W. 531.

Regulation of automobiles for hire.—Under this act, municipal ordinance, imposing license fee for operating automobiles for hire, held a valid exercise of the police power, and not an imposition of an unauthorized occupation tax. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

City having authority to regulate operation of automobiles for hire, the court cannot declare its regulations unreasonable, unless such unreasonableness is clearly apparent. *Id.*

An ordinance requiring a license to operate automobiles for hire was not rendered invalid by a provision therein giving authority to revoke the license. *Id.*

It was not improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes, and in another ordinance for the licensing of service cars confined to no particular route. *Id.*

Requirement that applicants for licenses to operate automobiles for hire should furnish bond or indemnity insurance in the sum of \$10,000 held not unreasonable on its face. *Id.*

Building regulations.—*Dallas City Charter*, art. 1, § 3, requiring new plats in cities to conform to abutting streets and lots, and Building Code, § 2, requiring new plats to maintain the established frontage, are within the police power, and not subject to attack on constitutional grounds. *Halsell v. Ferguson*, 109 Tex. 144, 202 S. W. 317.

Property owners in Dallas must, without compensation, submit to City Charter, art. 1, § 3, and Building Code, § 2, as to maintaining frontage of lots. *Id.*

Control of parks.—While the city of El Paso has exclusive control over its parks and may lay out sidewalks therein where necessary for park purposes, such right does not extend to diverting park grounds to general street and sidewalk purposes. *El Paso Union Passenger Depot Co. v. Look* (Civ. App.) 201 S. W. 714.

While the city of El Paso may not delegate its authority and control of public parks to create in a union depot company a vested right to keep and maintain the same and prohibit the city's control and improvement thereof, yet the city may contract for maintenance of park. *Id.*

Regulation of cemeteries.—The city of Sherman, under its general powers conferred in its charter adopted under this act may enact reasonable regulations for the government of public cemeteries. *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222.

Delegation of powers.—In an ordinance regulating barbers, and providing for a license and physical inspection, etc., the commissioners of the city of San Antonio were vested with the authority, under City Charter, § 99, to place the power of deciding what may be an "infectious, contagious, or communicable disease" to its health officer. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Art. 1096dd. City, in fixing charges under franchise, may consider fair value of property.—That any city having a special charter, or a charter adopted or amended under the provisions of Chapter 147 of the General Laws passed at the Regular Session of the Thirty-third Legislature, or under any amendments thereto, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying

a franchise in said city shall, in determining, fixing and regulating the charges, fares or rates of compensation to be charged by any such person, firm or corporation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued, or authorized to be issued, by, or any other indebtedness of such person, firm or corporation. And hereafter no city shall be responsible for, concerned with, authorize, approve or have jurisdiction over, the issuance or sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and general laws of this State applicable thereto. [Acts 1921, 37th Leg., 1st C. S., ch. 48, § 1.]

Explanatory.—Sec. 2 repeals all laws in conflict. The act took effect Nov. 15, 1921.

Art. 1096f. Former powers preserved, etc.

Failure to embrace powers in charter.—Under this article, the powers so preserved are not lost if an election be held under the act to amend an old charter, and such powers are not expressly written into the amendment. *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

The powers granted under arts. 1006-1017, relating to public improvements, were not lost to a city adopting amendments under this act, notwithstanding that the powers granted by arts. 1006-1017, were not copied into the amendments adopted. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

A paving ordinance is not void under this act, because the city charter, which had been amended since the passage of that law, failed to embrace within it and to make a part thereof the powers sought to be exercised by the ordinance as required by this article. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444.

Art. 1096i. Penalties for obstruction or incumbrance of streets, etc.; street franchises, etc.

Grant of franchise.—A right that properly may be denominated a franchise must be granted by the sovereignty (under our system of government, the legislative department thereof), and be of such a nature that, without the express legislative authority contained in the grant, it could not be lawfully exercised by the grantee. *McCutcheon v. Wozencraft* (Civ. App.) 230 S. W. 733.

Art. 1096j. Validation of charters and amendments to charters adopted under this chapter.

Validation of annexation.—If the voters of a city had not been given power to extend city limits by amending its charter, without vote of the inhabitants of the outlying territory required by Rev. St. 1911, art. 781, then such an attempt, subsequent to enactment of Acts 33d Leg. c. 147 (arts. 1096a-1096i), was rendered effectual by this act, and Acts 35th Leg. c. 30, § 1 (art. 1096k). *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

Art. 1096k. Validation of charter amendments.

See *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757; note under art. 1096j.

Art. 1096kk. Validating incorporations.—That each charter and each act of incorporation adopted by the qualified voters of cities of over five thousand inhabitants that have incorporated under Chapter 147, page 307, Acts of the Regular Session of the 33rd Legislature, 1913, prior to December 15, 1915, and filed in the office of the Secretary of State, the population of which was less than five thousand inhabitants, as shown by the United States Census of 1910, but which, at the time of the adoption of the charter or act of incorporation, was in excess of five thousand inhabitants according to an official census taken under the direction and supervision of the city council, be and the same are hereby validated and are hereby declared to be in full force and effect the same as if adopted in strict compliance with the requirements of said Chapter 147, page 307, Acts of the Regular Session of the 33rd Legislature, 1913, and this Act shall take effect and be in force from and after its passage. [Acts 1918, 35th Leg. 4th C. S., ch. 68, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Proceedings not validated.—This act cannot validate an amendment to a home rule charter extending the boundaries of the city which was unconstitutional. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084.

Art. 1096l. Validation of charters and amendments to charters adopted under this chapter.—That each charter, and amendment to a charter, adopted by any city of more than Five Thousand inhabitants in this State, or where such city has amended or attempted to amend or adopt such charter, since the enactment of Chapter 147, Acts of the Regular Session of the Thirty-third Legislature, 1913, and all proceedings had with reference thereto, are hereby validated, and are hereby declared to be in full force and effect, the same as if adopted in strict compliance with the requirements of said Chapter 147, Acts of the 33rd Legislature, and this Act shall take effect and be in force from and after its passage. [Acts 1919, 36th Leg., ch. 52, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 1096m. Validation of elections and of municipal proceedings and contracts.—That in all cases where an election has been held in any city of more than five thousand inhabitants in this State for the purpose of voting on the question of the adoption of a charter or amendment of charter of said city, and a majority of the qualified voters of such city voting on the question have voted in favor of such charter or amendment, such election and all proceedings of the governing authorities in relation thereto are hereby validated and confirmed, notwithstanding such proceedings may not have been in strict conformity with the provisions of Chapter 147 of the Acts of the Thirty-third Legislature of 1913, and notwithstanding any irregularity in the form of ballot, or that several amendments may have been submitted on the same ballot; and all such charters and amendments which have been approved by the majority of the legal voters as aforesaid, and copies of which have been filed in the office of the Secretary of State, are hereby validated, approved and confirmed, the same as if adopted in strict compliance with the requirements of said Chapter 147 of the Acts of the Thirty-third Legislature and other laws applicable thereto; and all proceedings taken or contracts entered into by the governing authorities of such cities pursuant to any such charter or amendment are hereby validated. [Acts 1920, 36th Leg., 3d C. S., ch. 18, § 1.]

Took effect June 16, 1920.

Art. 1096n. Validation of charters and amendments to charters.—That each charter, and amendment to a charter, adopted by any city of more than five thousand inhabitants in this State, or where such city has amended or attempted to amend or adopt such charter, since the enactment of Chapter 147, Acts of the Regular Session of the Thirty-third Legislature, 1913, and all proceedings had with reference thereto, are hereby validated, and are hereby declared to be in full force and effect, the same as if adopted in strict compliance with the requirements of said Chapter 147, Acts of the Thirty-third Legislature [Vernon's Sayles' Civ. St. 1914, arts. 1096a-1096i], and this Act shall take effect and be in force from and after its passage. [Acts 1921, 37th Leg., ch. 39, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

CHAPTER EIGHTEEN

CONSOLIDATION OF CITIES

Article 1096½. Certain cities may consolidate.

Cited, *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

TITLE 24

CONVEYANCES

Art.	Art.
1103. Conveyances must be in writing, signed and delivered.	1110. Conveyance by sheriff or other officer will pass title, when.
1104. Purchaser or creditor, without notice, not to be affected.	1111. Estates in futuro.
1105. Conveyance of the greater estate passes the less.	1112. Implied covenants.
1106. An estate deemed a fee simple, when.	1113. "Incumbrances" embraces, what.
1107. Form of conveyance.	1114. Conveyance of the separate lands of the wife, how made.
1108. Other forms and clauses valid.	1115. Conveyance of homestead, how made.
1109. Must be witnessed or acknowledged.	1116. Failing as a conveyance, shall be valid as a contract.

Article 1103. [624] [548] Conveyances must be in writing, signed and delivered.

See *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

1. **Necessity of writing in general.**—Under this article, an oral contract by one who owns land certificates, and who has located the land, intending to apply for patents, whereby he agrees to convey a part of such land to another in consideration of services as an attorney, and a decree of partition obtained by the latter setting off the land to him, cannot be pleaded as a defense in a suit by one who received a deed from the owner before the suit for partition was begun. *Masterson v. Little*, 75 Tex. 682, 13 S. W. 154.

A conveyance in settlement of the grantee's interest in other land was not in conflict with this article. *Kandolph v. Junker*, 1 Civ. App. 517, 21 S. W. 551.

One cannot divest himself of title to land by mere declarations that he does not own or claim any of it. *Hardin v. Wanslee* (Civ. App.) 197 S. W. 1031.

Under allegation of adverse possession, defendant could not show as against prima facie case that the property had been conveyed to him by parol by one who had been in adverse possession, where it appeared that if the statute of limitations had operated at all in the grantor's favor it had operated long enough to perfect title in him, which title could not be divested by parol, in view of this article. *Campbell v. Castle* (Civ. App.) 204 S. W. 484.

The ratification of an unauthorized mortgage must be evidenced by a written instrument, under arts. 1103, 3965. *Texas Moline Plow Co. v. Klapproth* (Com. App.) 209 S. W. 392.

2. — **Easement or license.**—See *Handal v. Cobo & Dosal* (Civ. App.) 225 S. W. 67.

Without the intention of abandonment, the mere nonuser of an easement created by grant will not extinguish it. *Henderson v. Le Duke* (Civ. App.) 218 S. W. 655.

Where landowner engaged in an enterprise with owners of other lands to build a pumping plant on his land, and the plant was erected on the faith of his promise that it should be a permanency, and the plaintiff sold his interest to his associates, expressing a willingness to make the license or easement perpetual in writing, equity will not allow the permission to use his premises to be revoked, even though it amounted to a mere license. *Markley v. Christen* (Civ. App.) 226 S. W. 150.

An "easement" implies an interest in land and a "license" does not. *Id.*

3. — **Lease.**—Oil lease for five years and longer, giving the lessee, his heirs, and assigns right to sink wells, lay pipes, erect tanks, etc., conveys an estate of inheritance within this article, "estate," in the statute, meaning any quality of interest from that of absolute owner to naked possession, and "inheritance" meaning the method by which children or relatives take property from another at his death; and this is so, whether the lease is termed a conveyance, grant, or lease, or a "demise," which signifies a conveyance either in fee for life or for years. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

A lease giving right to enter and remove oil and gas, whether considered a contract to lease for a term more than one year, or a contract conveying an interest in the land must be in writing. *Id.*

Under arts. 1103, 3965, an assignment of a lease for more than one year must be in writing. *Lewis Bros. v. Pendleton* (Civ. App.) 227 S. W. 502.

A 10-year lease giving lessee the right to enter on the land, to drill wells and erect buildings, etc., necessary to save and take from the land oil, gas, or other minerals, is such an estate in the land that under this article, a conveyance of it must be in writing subscribed and delivered by the party disposing of the same. *Texas Co. v. Tankersley* (Civ. App.) 229 S. W. 672.

A lease of lands for more than one year is a conveyance under this article. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

4. — **Gifts.**—To constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor, taking effect immediately, and fully executed by delivery and acceptance. *Martin v. Martin* (Civ. App.) 207 S. W. 188.

Alleged parol gifts asserted for the first time after the death of the donor, to be upheld must be supported by evidence that is full, clear, and free from uncertainty. *Id.*

One seeking to recover upon an alleged parol gift, must establish, by full, clear, and satisfactory evidence, a gift of the land, the terms and conditions of which must be shown free from ambiguity, and not merely an expression of an intent to make the gift at a future time. *Id.*

Evidence held insufficient, the terms of the gift not being clearly shown, and no making of improvements of substantial value being disclosed. *Id.*

It is necessary to the validity of a parol gift of land that possession be delivered and valuable improvements made with the knowledge or consent of the donor, and the mere taking of possession and making of improvements of insignificant value is not sufficient where the value of the rents exceeds that of the improvements. *Id.*

A parol gift of land will be sustained and enforced when clearly proven, and when possession has been taken and valuable improvements made on the faith of it, notwithstanding temporary absence; it appearing there was no abandonment. *Dean v. Dean* (Civ. App.) 226 S. W. 492.

In order for a break in the continuity of possession to destroy the gift, it must appear, either that there was noncompliance with the conditions of the gift or an abandonment of the property, and hence instruction that there could be no recovery unless possession was continuous was properly refused, where it appeared that the donee left the land temporarily with the consent of the donor, and that thereafter he returned and resumed possession without objection. *Id.*

Title to land will pass by verbal gift accompanied by possession and improvements by the donee. *Reid v. King* (Civ. App.) 227 S. W. 960.

Defendants held to have wholly failed to discharge the burden of showing that they made valuable improvements on the property of a character that materially enhanced its value. *Leonard v. Cleburne Roller Mills Co.* (Civ. App.) 229 S. W. 605.

A parol gift of land may be established by a fair preponderance of the evidence just as in any other civil action. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

Payment of taxes on land by alleged donor after date of alleged parol gift is a circumstance tending to refute an allegation of gift, but it is not conclusive. *Id.*

Where it was claimed that father made parol gift of land to daughter, conduct of a partnership business on the premises by the father and the daughter's husband was not necessarily a denial of the right of possession in the daughter through her husband. *Id.*

Possession of property taken and held by husband of donee for and in behalf of his wife in reliance on a parol gift to her is sufficient, especially where that possession is shared in part by the wife in person, and donor during entire period of possession recognizes ownership of land in the wife. *Id.*

In an action to have land given by parol to daughter applied to pay grantor's debts, contention of plaintiff that improvements were not sufficient because less than the rental value of the land was untenable, where the rentals of the land up to the time the first improvements were made did not equal one-half the cost of such improvements. *Id.*

5/2. — **Interest under contract.**—Letter to vendors, advising them to foreclose their vendor's lien, held not inoperative as abandonment of rights under contract on ground that it was insufficient as a relinquishment of an interest in real estate acquired under such agreement because not in the form of or sufficient as a deed as required by this article, writer having no title or present interest in the property to convey, but only a parol agreement to acquire an interest. *Daugherty v. Roasberry* (Civ. App.) 229 S. W. 924.

6. **Appointment of agent.**—Authority to make an executory contract for the sale of real estate need not be in writing. *Armstrong v. Palmer* (Civ. App.) 218 S. W. 627.

A written proposition in the form of a letter was sufficient to create a perpetual easement in the land, where it was in fact a power of attorney to a third person to sell such an interest in the land, and there was in fact a conveyance made by such third person under the authority given by such letter. *Markley v. Christen* (Civ. App.) 226 S. W. 150.

7. — **Power as conveyance.**—Power of attorney to bring suit for certain land, agreeing that attorney should have "one-half of the amount of land so recovered and one-half of the proceeds of any and all sales," etc., did not convey one-half the land, but merely interest in proceeds. *Browne v. King* (Civ. App.) 196 S. W. 884.

One claiming interest in land under power of attorney from plaintiff, who deeded to defendant in settlement of action, cannot, on intervening, recover by merely showing record title in plaintiff, but must further show that defendant had not perfected title under recorded deed or by adverse possession as alleged. *Id.*

Instrument, whereby landowners authorized agent to sign their names to contract with third person in disposal of their land, owners agreeing in consideration of agent's services and moneys expended in negotiating the transaction to accept a number of acres out of certain public school lands for their equity in the land disposed of, did not pass any legal or equitable title to the agent or agents in the public school lands conveyed by the third person to the owners. *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

8. — **Authority of agent.**—A power of attorney, authorizing one to bargain and sell property, does not give power to execute a deed of trust. *Texas Moline Plow Co. v. Klapproth* (Com. App.) 209 S. W. 392.

A power of attorney authorizing lawyer to assign and handle property for client's best interests, etc., does not authorize attorney to make another his associated agent

and attorney in fact and assign property to pay already accrued debts of such attorney in fact. *Miers & Rose v. Trevino* (Civ. App.) 213 S. W. 715.

The assignee must take notice of the powers of attorney and their recitals and whether assignment was within usual scope of assignors' powers. *Id.*

A general authority to sell given an agent does not give the authority to barter. *Federal Supply Co. v. Wichita Sales & Supply Co.* (Civ. App.) 232 S. W. 879.

9. — **Termination of agency.**—Where agent is authorized to sue for land or to sell it, to have share out of proceeds or property recovered for his services, his powers are not coupled with an interest, and authority may be revoked at principal's will, even though, by the agreement, declared to be exclusive and irrevocable. *Browne v. King* (Civ. App.) 196 S. W. 884.

A power of attorney to lease land and collect rents, being for personal services not coupled with an interest, was revoked by the principal's death, and the agent cannot recover thereunder for services rendered thereafter. *Beckham v. Scott* (Civ. App.) 204 S. W. 137.

A bare power of attorney, in which the agent's only interest is in the performance of his services therein contracted to be rendered in order that he loan the stipulated compensation, is revocable at the will of the grantor unless the power is given as security or is coupled with an interest. *Bryan v. Ross* (Civ. App.) 214 S. W. 524.

Where a client gave his attorney a written power to sue for and recover lands, and assigned a two-thirds undivided interest as compensation, the attorney after part performance had acquired such an interest in the land sued for as to constitute an interest in the subject-matter of the power and to prevent revocation by the grantor. *Id.*

Such contract was intended as security, and the power was not revocable after a partial performance by the attorney. *Id.*

12. **Dedication, requisites of.**—Where road had long been used as public roadway, a judgment sanctioning agreement that road be opened up and dedicated as a public road, in connection with another judgment ordering road to be opened and an obstruction removed and the acts of the parties to the judgment, owners of land upon which right of way was located and public officials treating road as public highway, constituted a dedication to public use. *Santa Fé Town Site Co. v. Norvell* (Civ. App.) 207 S. W. 960.

The judgment was not invalid as an infringement upon exclusive rights of commissioners' court to lay out public road. *Id.*

Dedication must be unequivocal before even use can create a dedication. *City of Pearsall v. Crawford* (Civ. App.) 213 S. W. 327.

To constitute a dedication of land for the purpose of a highway it must appear from the acts and declarations of the owner that such dedication was clearly and unmistakably intended by him, and that the public has acted in reference to and upon the faith of such acts and declarations. *Id.*

Where owners of land deeded it to church trustees for a cemetery, and thereafter members of the church and public were interred in the land, there was a dedication to cemetery purposes, and so long as it continued fit for such purposes it was the duty of the church through its trustees to execute the trust and maintain the cemetery for the benefit of the public, and persons having their dead buried therein had the right to invoke the aid of equity to restrain destruction, spoliation, or disturbance of the graves, as by an oil company's drilling a well under conveyance from the trustees. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 874.

15. — **Evidence, sufficiency of.**—Evidence held insufficient to show that alleged road was ever dedicated or accepted by the county. *Espejo Land & Irrigation Co. v. Urbahn* (Civ. App.) 203 S. W. 920.

17. — **Designation in maps or plats.**—Deed stating that all streets and alleys are dedicated to the public generally, and especially to the city, that red lines on map indicate public sidewalks, and that green shadings indicate private parking between the sidewalk and curbing, would constitute a dedication to the public of an easement in sidewalk space, but not in strip designated private parking. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

If intention of maker of map was to include sidewalk space and private parking space as portions of corner lots, such intention was adopted by the owner when it recorded the map. *Id.*

Where title to land dedicated as alley was obtained by defendant by limitation under art. 5683, defendant did not rededicate land to city by sale of property with reference to map filed in deed records, where no mention was made of the alley, and where owner had not made or recorded plat. *City of Pearsall v. Crawford* (Civ. App.) 213 S. W. 327.

18. — **Acceptance.**—Where triangular piece of land, dedicated to street purposes, was thereafter incorporated within limits of city, which improved portion of street, but not triangular parcel, there was sufficient acceptance of dedication by city. *Newton v. City of Dallas* (Civ. App.) 201 S. W. 703.

The dedication of streets and alleys to the use of the public in a town site is not rendered invalid by want of acceptance by the municipality, there not being sufficient number of inhabitants to organize a municipal government. *Roaring Springs Townsite Co. v. Paducah Telephone Co.*, 109 Tex. 452, 212 S. W. 147.

Where land has been platted, and the plat recorded, showing certain streets thereon, purchasers of portions described with reference to the plat acquire easements in the streets as designated, even though there has been no acceptance by the city. *Sherman Slaughtering & Rendering Co. v. Texas Nursery Co.* (Civ. App.) 224 S. W. 478.

20. — **Estoppel.**—An agent for sale of town-site lots is not estopped to claim ownership by purchase of a certain lot, by statements that such lot was public prop-

erty, where no one was induced to purchase lots thereby. *School Dist. No. 7 v. Frazier* (Civ. App.) 199 S. W. 846.

Where the owner of a town site sold lots with reference to the plat which designated lands as reserved for railway purposes, the owner on reconveyance from the railway company is estopped, as against persons who bought lots on faith of the dedication, from putting the property to any other use. *Nave v. City of Clarendon* (Civ. App.) 216 S. W. 1110.

21. — **Operation and effect.**—Where public square had been donated to city for use of public without reservation, construction thereon of building for county fuel and water-closets for use in connection with county courthouse held nuisance, which would be abated by adjoining owner; acquiescence of public in use for courthouse not authorizing extension of unauthorized use. *McBride v. Rockwall County* (Civ. App.) 195 S. W. 926.

Where land was sold and conveyed with reference to alley, purchaser acquired by dedication easement in such alley, which became charged with incidental servitude, and purchaser could have alley kept open. *Barclay v. Dismuke* (Civ. App.) 202 S. W. 364.

Where alley was dedicated as inducement to purchaser, purchaser is not required to plead and prove special injury to his property. *Id.*

Previous dedication of sidewalk, by map duly recorded, and by reference made a part of deed, precludes grantee from using sidewalk space for building purposes. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

The general rule that a dedicator may impose such restrictions as he may see fit on making a dedication of his property to a public use is subject to the limitation that the restriction be not repugnant to the dedication or against public policy. *Roaring Springs Town-site Co. v. Paducah Telephone Co.*, 109 Tex. 452, 212 S. W. 147.

Trustees of a church, grantees in a deed of land for cemetery purposes, vested with fee-simple title, and authorized by their governing authority to sell part of the land, had no authority to convey the land to an oil company in consideration of one-eighth of its capital stock instead of money. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 874.

Where owners of land deeded it to trustees of a church for cemetery purposes, and the dedication was completed by use of the land as a cemetery, persons having their dead buried therein could protect the graves, not only as against the grantor and trustees of the church, but also as against an oil company holding the deed of the trustees, for which it had paid cash consideration before proceeding to drill an oil well on the land. *Id.*

Where an owner of land subdivides it, and reserves or dedicates a strip of land to be used as a right of way for pipe lines, and there is nothing in the deed restricting its use to private pipe lines, such right of way may be used as such by any person or corporation operating a public pipe line, such corporations being common carriers and having the right of eminent domain. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

Abutting property owners may enjoin the use of land dedicated to a public purpose for any other than the purpose for which it was dedicated. *Id.*

23. **Tenancy in common—Mutual rights and liabilities.**—One tenant in common may maintain action to establish title and to recover possession against his cotenant, when the latter has ousted him of possession of the property owned in common. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

There can be no recovery for rent against co-owner in possession in absence of evidence of a demand on co-owner for the use of the land. *Guarantee Mercantile Co. v. Nelson* (Civ. App.) 223 S. W. 543.

24. — **Rights as to third persons.**—One of two joint tenants cannot make a valid contract of sale of the entire title without the consent of the other. *Dodge v. Lacey* (Civ. App.) 216 S. W. 400.

Title of a tenant in common to an undivided interest in the land involved in an action to establish title and to recover possession was sufficient to warrant recovery of the entire tract as against a trespasser, though such right does not exist as against a cotenant. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

The right of one cotenant to appropriate or convey specific part of common property does not depend upon agreement or assent of his co-owners, but is conditioned solely upon the right being exercised without prejudice or injury to co-owners, and, having been so exercised, the grantee is entitled upon partition to have such specific part. *Gosch v. Vrona* (Civ. App.) 227 S. W. 219.

A tenant in common may dispose of a specific described portion of the common property if such disposition is made with due regard to the rights of his cotenant, and a purchaser of such specific portion of the property acquires full title if it is of no more value than the interest of the seller, and cotenant is not injured by the partition. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

A deed from one tenant in common to a specific part of the common property will be recognized and the purchaser thereof protected by setting apart to him the specific part so conveyed, if this can be done without prejudice to the other owners. *Lasater v. Ramirez* (Com. App.) 212 S. W. 935.

Where there remains a sufficient estate out of which the interests of the nonjoining tenants can be satisfied, the remaining acreage being exactly the same in kind and value as the tract sold, the nonjoining tenants cannot be prejudiced, and the right of the purchaser should be enforced. *Id.*

The right of the purchaser to a specific tract conveyed to him does not depend upon the nonjoining tenants' assent to or recognition of the sale, nor is it created through estoppel, but is conditioned solely upon whether its enforcement would prejudice the other owners. *Id.*

Since the right of the purchaser does not depend upon their assent or upon estoppel, it is immaterial that a nonjoining tenant against whom it is sought to enforce the right is mentally incompetent, or that an estoppel cannot arise from his conduct, where his rights will not be prejudiced by the sale. *Id.*

The conveyance may be ratified by the other cotenant and made to operate as a partition or conveyance in severalty, and the nonconveying tenant may recognize such deed by conveying in like manner the remainder of the common property by metes and bounds. *Starr v. Brooks* (Civ. App.) 222 S. W. 660.

Where a widow who took an undivided one-half interest in land, title to which was in her husband at the time of his death, conveyed a portion less than her half, and it appeared that the lands conveyed acre for acre were of no greater value than the other property, the widow's conveyance passed good title, notwithstanding there had been no partition and children were entitled to the other undivided one-half interest. *Zabawa v. Allen* (Civ. App.) 228 S. W. 664.

29. Trusts—express.—That an attorney was mistaken as to the rights of his clients, in filing a suit to establish a lien on land instead of showing an express trust, will not defeat those rights if afterwards properly alleged and proved, but only goes to the weight to be given to the evidence. *McBride v. Briggs* (Civ. App.) 199 S. W. 341.

Trusts may be created by conveyance or assignment to the donee, or by transfer to third persons upon declared terms, or upon declarations which fasten a beneficial interest, but retain the legal title in the donor; language showing unequivocally an intention on his part to create a trust being essential under the first method, but not under the second and third. *Samuell v. Brooks* (Civ. App.) 207 S. W. 626.

To create express trust in favor of one not a party to the deed, there must be an agreement existing at the time the title is acquired that it shall be held for his benefit. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

A parol agreement to acquire interest in land for the joint benefit of the parties, where the deed was taken in the name of one, is enforceable as a trust upon the legal title, although promise of party seeking to enforce such agreement was not a consideration paid for the joint interest in land. *Schultz v. Scott* (Civ. App.) 210 S. W. 830.

Where a nephew deposited money with his uncle on the latter's proposal that he would place the money at interest or in the bank for him, the relation of debtor and creditor was not created, but the uncle's holding of the money was as an acknowledged trustee. *Allen v. Pollard*, 109 Tex. 536, 212 S. W. 468.

An express trust may be ingrafted on a deed conveying the absolute title by parol testimony. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

The right to use money deposited with defendants in trust and to receive commissions for its investment and reinvestment is sufficient consideration to sustain the trust contract. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

Where land was conveyed to defraud, hinder, and delay creditors, the sale being a mere pretense, and grantor died and grantee conveyed the property to a third person in trust for the estate of the original grantor, the trust thus created was valid and enforceable. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

Committee appointed by shareholders in a colony, though denominated trustees, held in fact mere agents, not vested with the title of any of the shareholders. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

Where employer claimed to have paid employee, on termination of employment, an amount in excess of that due, and made an agreement with employee pursuant to which employee deposited such amount in a bank in his own name as trustee, upon employer's agreement to make a prompt statement as to employee's account with employer, there was no trust created between employer and employee either expressly, constructively, or by implication of law. *Mexican Coal & Coke Co. v. Ruckman* (Civ. App.) 229 S. W. 347.

The rule that the facts which show a trust in land must exist at the time of the execution of the deed, and that no prior or subsequent verbal agreement will create a trust, is true only of resulting trusts and not of an express trust. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

30. — Resulting trust.—To create a resulting trust, the consideration must be paid, and the trust arise at the very time title is acquired. *Guest v. Guest* (Civ. App.) 208 S. W. 547; *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1062.

In suit to establish resulting trust in land, plaintiffs must disclose all facts and circumstances connected with transaction in question, so as to make it manifest that remedy they ask is just and equitable. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

A verbal agreement to pay part of the purchase price of lots, title to be taken jointly, made prior to delivery of deed to defendant's husband alone as grantee, will subject the property to the confidence or trust confided in defendant's husband. *McBride v. Briggs* (Civ. App.) 199 S. W. 341.

Where it was verbally agreed that title should be taken jointly to lots, it is immaterial, in an action by one to have a trust declared, that the other had taken a deed in his name alone. *Id.*

Where plaintiff and defendant agreed to jointly acquire land, defendant to furnish all the money and to be thereafter repaid by plaintiff, defendant, in taking the title in his own name, held an undivided one-half interest in trust for benefit of plaintiff. *Johnston v. Johnston* (Civ. App.) 204 S. W. 469.

Where plaintiff loaned money to defendant to buy land for defendant, who agreed to repay the money, there was no resulting trust, to create which the payment must be made at the time of purchase. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

Where wife out of her own separate property furnished all money invested in land, a resulting trust existed as between husband and wife which in legal effect vested equitable title in wife. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

A resulting trust arises where one party furnishes money to buy property which is transferred or conveyed to another. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

Where a father purchased land during his second marriage for a consideration paid from proceeds of sale of three tracts, one belonging to the community of the second marriage, one to the issue of his first marriage, and one which was his separate property, a resulting trust was created in the purchased land in favor of the children of the first marriage. *Higsaw v. Head* (Com. App.) 228 S. W. 561.

A resulting trust in land must result, if at all, at the time deed is taken and the legal title vests in the grantee, and no oral agreement and no payment made before or after the title is taken will create it. *Burns v. Veritas Oil Co.* (Civ. App.) 230 S. W. 440.

Where the conveyance is made to one person, the mere fact that he has agreed to purchase or hold it for another, who has not paid anything or only a small part of the purchase price, does not create a resultant trust in the latter's favor, or where it does not appear that any valid consideration was given for such agreement. *Id.*

Where ten men and plaintiff contributed property to organize a company, and one of the trustees purchased an option on oil lands, and later along with others, organized a corporation which took over the oil lands, no trust held to result in favor of plaintiff none of his property or interest in any way inducing the new corporation, to advance the money to purchase the land, even though the company was incorporated upon a conspiracy to squeeze out plaintiff's interest. *Id.*

A resulting trust will not exist unless the transaction is such at the moment the title passes that the trust will result from the transaction itself, and one who has paid no money or had none paid on his account, either actual or constructive, cannot claim a resulting trust. *Id.*

A resulting trust will be implied only where it is consistent with the intention of the parties at the time of the acquisition of the property. *Id.*

Where an agreement is made at the time of the transaction to hold property on a different trust from that which would arise by implication of law, a resultant trust will not arise. *Id.*

31. — **Constructive trust.**—See *Mexican Coal & Coke Co. v. Ruckman* (Civ. App.) 229 S. W. 347; note 29; *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

Attorney acquiring title to lots while he has contract to secure title for his client will be regarded in equity as holding legal title for client. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849.

Defendant, who obtained assignment of vendor's lien notes from plaintiff by duress, held them as trustee for plaintiff, charged with sum paid to third person in discharge of plaintiff's debt, and, having used notes to acquire land, held undivided interest in it as constructive trustee for plaintiff. *Mallard v. Day* (Civ. App.) 204 S. W. 245.

Even if a trustee could question the validity of the alleged oral trust on which the land was conveyed to him, equity would enforce a constructive trust against him for the protection of the wronged beneficiaries. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

The only heir of deceased, on discovering a will making bequests to others and naming him as executor, concealing its existence, and taking and using as his own all the property, became a trustee for the others. *Van Orden v. Pitts* (Com. App.) 206 S. W. 830.

Where a person acquires legal title to land by means of an intentionally false and fraudulent verbal promise to hold same for a certain specified purpose, or to reconvey, and thereafter retains, uses, and claims property as his own, so that the transaction is in fact a scheme of actual deceit, a constructive trust results. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

A mere verbal promise to purchase and convey land does not create an *ex maleficio* trust; positive fraud accompanying the promise, and by means of which the acquisition of the legal title was obtained, being necessary. *Id.*

Generally, where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances rendering it unconscientious for holder of legal title to retain beneficial interest, equity impresses a constructive trust. *Id.*

When land is purchased at execution sale under prior fraudulent verbal promise to hold property for benefit of owner and reconvey upon payment of the amount advanced, and purchaser, having obtained property for much less than actual value, retains the land as his own, a constructive trust results in favor of former owner. *Id.*

Where a mother induced her daughter to execute deed by promise to make will devising estate to daughter, equity will ingraft a trust on the deed upon mother's refusal to fulfill promise, without an allegation of fraud. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

It is no defense that such promise can be enforced against mother's estate upon her death, since mother may dispose of property before her death. *Id.*

Where conspirators fraudulently procured conveyance from plaintiffs for a small valuation, court in rendering judgment establishing a constructive trust in favor of plaintiffs could not decree that such judgment be satisfied by payment by defendant to plaintiffs of certain sum per acre; such conveyance being void, and plaintiffs having the

superior equitable substantial title with which they cannot be compelled to part. *Scarborough v. Ward* (Civ. App.) 220 S. W. 274.

Where, through misrepresentations, plaintiffs were induced to convey land, and mineral rights obtained in exchange for the lands were conveyed to the wife of one of the parties, the wife's rights are not affected by the misrepresentations, unless she had notice, and her liability as a constructive trustee cannot be fixed in an action against her husband and collaborator in his fraud, but must be fixed in an action to which she is a party. *Reeves v. Shook* (Civ. App.) 225 S. W. 429.

32. — Sufficiency of evidence.—Proof of an express trust must be clear and satisfactory. *Faville v. Robinson* (Civ. App.) 201 S. W. 1061; *Watts v. McCloud* (Civ. App.) 205 S. W. 381; *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983; *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Proof, to establish resulting trust in land, must be clear and satisfactory, and with reasonable degree of certainty must trace trust funds into payment for land. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

Evidence that corporation managing park for benefit of colored people had been dissolved, and that park was managed by trustees elected at negro mass meeting, sustains finding that colored citizens had beneficial interest in park authorizing suit in equity for readjustment of property's management. *Woods v. Bell* (Civ. App.) 195 S. W. 902.

Evidence held sufficiently clear and certain to support finding that there was a verbal trust in land. *McBride v. Briggs* (Civ. App.) 199 S. W. 341.

In proving a parol trust in land, the question is not as to the amount of the evidence, but does the evidence adduced make it reasonably clear and certain that the verbal trust was made. *Id.*

Evidence held not to show that grantee held the land in trust for the grantor. *Faville v. Robinson* (Civ. App.) 201 S. W. 1061.

Evidence held insufficient to establish trust in land for money loaned to pay purchase money. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

Evidence held to sustain finding that a deed to testator's son on settlement of a will was made on condition that he would divide the land between himself and plaintiffs. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

In an action to ingraft a parol trust upon a deed absolute in form, an instruction that proof must be certain or indisputable, or beyond a reasonable doubt, or of the most convincing and positive character, would be erroneous. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Evidence held insufficient to make out a case of resulting trust. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

In a suit by judgment debtor, who asserted that on the creditor's promise to allow an additional period for redemption the debtor waived his right to have the land sold in small parcels and that as a result of the agreement there was no competitive bidding, evidence held sufficient to sustain the jury's finding of such promise and the creation of a parol trust. *Riley v. Chandler* (Civ. App.) 220 S. W. 361.

Recitals in deed from son to mother held sufficient to support finding in trespass to try title by mother against son's widow that son held property in trust for mother and that she paid greater part, if not all, of purchase money for lots and house thereon, with agreement title should stand in son's name but be her property. *Witt v. Witt* (Civ. App.) 223 S. W. 277.

As an abstract proposition it is no longer the rule that a parol trust cannot be established by the testimony of one witness. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

In an action by a son against father to have a trust declared in land, plaintiff claiming an undivided interest, evidence held sufficient to support a verdict for plaintiff. *Id.*

33. — Reimbursement of trustee.—Attorney acquiring title to land by breach of trust, with intention of depriving his client thereof, held entitled to reimbursement for actual purchase money paid, but not for fees or expenses incurred outside of actual purchase money paid. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849.

One claiming that another acquired land and held it in trust for him is not entitled to compel a conveyance, except upon repayment of the purchase price advanced by such other. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

36. — Title and rights of parties.—Where two heirs agreed to acquire joint title to property, in which they had an interest and pay each of the other heirs \$40 and did acquire the property by foreclosure, right of one of the purchasers to compel the other to make division of the property, title to which had been taken in the other's name, was not affected by failure to pay the other heirs \$40 each. *Johnston v. Johnston* (Civ. App.) 204 S. W. 469.

Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the cestuis que trust, or deny the title of the cestuis que trust, as a trustee must assume the validity of a trust under which he acts. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

One could not, by reason of the wrong of trustees, in which he participated, making him a trustee, acquire the property free from the equitable title, as he would be estopped from setting up the invalidity of a contract to which the beneficiaries were not parties. *Id.*

Where a vendor of land agreed to deposit \$50,000 with trustees to be paid as bonus to the first railroad coming through the land, the vendor or his heirs held entitled to the interest on the fund during the time it was held by the trustees, before a railroad was constructed. *West Texas Bank & Trust Co. v. Matlock* (Com. App.) 212 S. W. 937.

Where the executors of vendor sought to recover the amount on the theory that a reasonable time had expired without the construction of a railroad, purchasers who because of their interest intervened are not entitled to attorney's fees out of the corpus of fund because the trustees represented them and persons similarly situated. *Id.*

Beneficiary though *sul juris* may rely on the honesty and fair dealing of trustees, or recover relief when the trust relationship is abused. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

Ordinarily, the measure of damages for breach of faith by trustee in purchasing land for the beneficiary is the difference between the value of the land at the time of the purchase and the contract price. *Id.*

37. — **Power of sale and management.**—Trustees cannot sell the trust estate without the express or implied authority conferred upon them by the instrument creating the trust. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

No particular form of words is necessary to create a power of sale but it is essential only that the intent to create the power appear. *Id.*

Deed to trustee, the habendum clause of which was to the trustee, his successors, or assigns, and granting other rights to the trustee and those for whom he holds title, "and his or their assigns," created a power to sell. *Id.*

If a trustee is empowered by the instrument creating the trust to sell, he may be compelled to specifically perform. *Id.*

Where father, in whose name legal title was taken to land purchased with funds of sons, sold land, sale would include equity of sons, and it is presumed that purchaser took land free from equity. *Highsaw v. Head* (Civ. App.) 202 S. W. 155.

Trustees should be allowed out of trust fund expenses of litigation concerning such fund when forced on them; hence trustees of fund, deposited by vendor of land as a bonus to first railroad coming through are entitled to attorney's fees out of fund, where it was sought by the executor of the vendor to recover the fund. *West Texas Bank & Trust Co. v. Matlock* (Com. App.) 212 S. W. 937.

All trustees must join in an act, or one must act for all, thus becoming the agent of the others. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

One of several trustees in whom confidence has been reposed jointly, with no power given him, either expressly or by implication, to act singly, cannot sell the entire title to the trust property without the consent of the others. *Dodge v. Lacey* (Civ. App.) 216 S. W. 400.

A trustee is not permitted to manage the trust property so as to gain any advantage, directly or indirectly, beyond his lawful commission, and for breach of such duty the beneficiary is entitled to claim all gains and to charge the trustee with all losses. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

Where trustees to invest money for plaintiff acted as agents for vendor who sold property to plaintiff and collected a commission from the vendor, they were guilty of a breach of trust for which they are liable. *Id.*

The acceptance by the beneficiary of property purchased with trust funds in breach of trustees' duty is not a ratification of trustees' act, unless made after full knowledge of facts. *Id.*

Where trustees induced the beneficiary to accept a purchase with trust funds of property for whose owner they were agents and represented that they could sell the property before the deferred payments became due, which they knew she could not meet, but they failed to make the resale and plaintiff lost the property, the trustees were liable for the amount of trust funds invested, not merely for the difference between value and contract price and the commission they received from the vendor. *Id.*

38. — **Misappropriation.**—Where land purchased with money of sons was sold by father, in whose name legal title was standing, sons could rightfully claim proceeds or follow them into any other property in which they were shown to have been invested. *Highsaw v. Head* (Civ. App.) 202 S. W. 155.

Where father later purchased other land, with proceeds of land sold, land purchased became impressed with same trust as attached to land sold. *Id.*

Where plaintiff advanced funds to enable the borrower to purchase 133 cattle, and, in a letter inclosing a check to defendant, the seller, gave notice that plaintiff contemplated the purchase of such number of cattle, defendant who applied a portion of money to a debt due from the borrower selling 93 cattle held liable therefor; the same being a trust fund, and defendant appropriating it with knowledge of its character. *Witherspoon-McMullen Live Stock Commission Co. v. North Texas Trust Co.* (Civ. App.) 212 S. W. 278.

The measure of damages for the misappropriation or misapplication of trust funds by the trustee, where the fund is beyond reach, is the sum misapplied with legal interest from the date of misappropriation. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

Purchasers of land from a trustee with knowledge of the trust take the property subject thereto, and both the cestui que trust and the trustee may recover the property. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

A court of equity may reach trust property in the hands of any person not innocent. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

40. — **Revocation and termination.**—Where a vendor agreed to deposit \$50,000 with trustees to be paid by them as a bonus to the first railroad constructing line through the property, held that the vendor was entitled to have the fund revert to him if the trust should terminate within a reasonable time without attainment of object. *West Texas Bank & Trust Co. v. Matlock* (Com. App.) 212 S. W. 937.

It was proper for the vendor to insist that the trustees' bond should provide for return of the money within a reasonable time if no railroad was constructed, for if such provision were not incorporated in the agreement, the trust would be invalid under Const. art. 1, § 26, as creating a perpetuity. *Id.*

Trustees, to whom husband and wife devised property for a charity, subject to the payment of half the income to the survivor, did not abandon their fiduciary relation to the survivor by bringing suit to remove cloud placed on the title by her deed of an in-

terest in the property, executed after death of the husband and probate of the will. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.

46. **Execution of conveyance.**—Where a deed was not executed by the owner of the land, delivery could give it no legal effect. *Hensley v. Pena* (Civ. App.) 200 S. W. 427.

A deed otherwise complete passes title, although revenue stamps are not affixed thereto. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

47. — **Burden of proof and evidence.**—In a suit between heirs involving title to lands, evidence held insufficient to show that a conveyance was made by either of two of deceased's sons to a third son. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

47½. **Parties to conveyance.**—Under arts. 1103, 1114, 1115, a contract to execute an oil lease on homestead property, in which contract the wife of the owner has not joined, is void. *Haynie v. Stovall* (Civ. App.) 212 S. W. 792.

A grantor cannot ordinarily convey to himself. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

49. **Avoidance of deed.**—Facts held to show that vendor, who had commenced proceeding to foreclose lien, subsequently rescinded the sale by agreement with vendee, thus dispensing with notice and demand, so that subsequent conveyance to defendant was valid. *Walls v. Cruse* (Civ. App.) 217 S. W. 240.

A general warranty deed for a stated consideration, evidenced in part by a note and retaining a vendor's lien in an executory contract under which superior legal title remained in the vendor, and vendee's refusal to pay the unpaid purchase price authorized vendor to claim an immediate rescission. *Id.*

In suit to cancel deeds given by a sister to her brother soon after the death of their mother, findings of the court canceling the deeds on ground of mental weakness of grantor at time of conveyance, inadequacy of consideration, and general overreaching by the brother, and that deeds were not ratified, held not sustained by the evidence. *Duckels v. Dougherty* (Civ. App.) 226 S. W. 720.

50. — **Conditions precedent.**—Where plaintiff, insane person, deeded away land, receiving no money, while none of purchase notes were delivered to her, defendant by fraud obtaining possession of instruments, plaintiff was not called upon to make tender back to defendants in suit to cancel her deed. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

In suit to rescind sale for fraud and cancel deeds, notice and demand prior to suit is not necessary, but bringing of suit with offer to restore what plaintiff has received is sufficient. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

When a party dealing with an insane person acts in good faith and without knowledge of such insanity, he must, to avoid the transaction, return the consideration received in specie if possible. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

In action by grantor's heirs to cancel deed made in consideration of grantee's promise to support and maintain grantor during his lifetime, it was unnecessary, as a basis for the action, to offer or tender the return of any consideration; none having been paid in money or property at execution of deed. *Id.*

One who had conveyed his interest in land to his attorney cannot rescind the contract because of the attorney's breach of faith, without offering to restore the consideration. *Head v. Moore* (Civ. App.) 232 S. W. 362.

52. — **Failure of consideration.**—See *Long v. Calloway* (Civ. App.) 220 S. W. 414; note 55.

Where a mother conveyed leased property to a son to defraud lessee, who could be removed on a sale of the property, the scheme being that the son reconvey after danger of suit was past, equity will not set aside the sale for the benefit of other children claiming under a will executed by the mother, and it is immaterial that the deed was without consideration. *Rogers v. Rogers* (Civ. App.) 230 S. W. 489.

52½. — **Inadequacy of consideration.**—Where, in payment of indebtedness of about \$1,000, land was conveyed which was worth about \$1,500, the difference between its value and the indebtedness was not so great as to require court to set aside deed for inadequacy of consideration alone. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

53. — **Mistake.**—Evidence held insufficient to show mutual mistake in the settlement of a suit and execution of a deed. *Davenport v. Shepherd* (Civ. App.) 197 S. W. 729.

Evidence held insufficient to show mutual mistake. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

Evidence held to show that plaintiff intentionally and without mistake of facts executed and delivered quitclaim deed. *Smith v. Thompson* (Civ. App.) 201 S. W. 220.

In action for breach of covenant against incumbrances, defendant is precluded from relief from the contract on the ground of mutual mistake, where he noticed the oversight or mistake at time he signed deed. *Neeley v. Lane* (Civ. App.) 205 S. W. 154.

Without culpable negligence on part of a grantor, and where the rights of innocent third parties do not intervene, one executing a deed in ignorance of its character and contents and delivering it under the impression that it was for another purpose, under certain conditions, may be relieved from its terms. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

Though husband did not know full legal effect of a deed conveying a lot to his wife as her separate property, where it was partly intended by him to defraud creditors, its effect, was not a mistake of fact of either party or the attorney preparing the conveyance. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

54. — **Duress.**—Duress sufficient to warrant the cancellation of a deed may be practiced upon a person by threats of criminal prosecution against a near relation if the anxiety and fear of disgrace excited by such threats are so potent as to overcome the free will and choice of the person affected. *First Guaranty State Bank of Clyde v. Tipton* (Civ. App.) 227 S. W. 963.

A bank cashier who represented to a mother that the bank would refuse to honor checks drawn by her sons unless she conveyed her property to the bank, and that as a result of refusal to honor the checks the sons would be arrested and thrown into jail, practiced such duress as to warrant cancellation of the conveyance; it being unnecessary that the threatened prosecution is to be by the person practicing the duress. *Id.*

A threat by employer to resort to fidelity bond for loss by embezzlement did not constitute duress such as would require the cancellation of a deed made by employee's wife to her homestead, although the inevitable result of carrying out the threat would be to put in motion the processes of the criminal law; employer not intending to exact an unconscionable bargain. *Houston Ice & Brewing Co. v. Harlan* (Com. App.) 228 S. W. 1090.

In an action by a married woman, evidence held insufficient to warrant submission of issue of duress, to the jury. *Id.*

55. — **Fraud.**—Plaintiff's evidence held insufficient to sustain a finding of fraud. *Campbell v. Turley* (Civ. App.) 224 S. W. 528; *Faville v. Robinson* (Civ. App.) 201 S. W. 1061.

In suit by daughter against father, question of fraud held for jury. *Dean v. Dean* (Civ. App.) 196 S. W. 567.

Proof that as result of fraud purchaser obtained possession of property and deprived vendor of its revenue for an entire season was sufficient showing of actual damage. *Posey v. Hanson* (Civ. App.) 196 S. W. 731.

Proof that notes given by purchaser are worth only small percentage of their face value was sufficient showing that plaintiff was actually damaged. *Id.*

One who constituted another her agent to purchase land for her was bound by such agent's knowledge as to character and value of land. *Patterson v. Bushong* (Civ. App.) 196 S. W. 962.

Evidence held insufficient to show fraud upon the part of the widow of a partner of plaintiff, in settlement of a suit with plaintiff, when she was deeded a half interest of the land to which plaintiff claimed defendant's husband had given him a deed, which was lost. *Davenport v. Shepherd* (Civ. App.) 197 S. W. 729.

Before deed can be canceled for fraud, facts and circumstances ought to be brought forth which would clearly lead a fair and reasonable mind to conclusion that fraud was actually perpetrated. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

In suit to cancel deed, evidence held insufficient to show fraud. *Id.*

To cancel deed or other contract on ground of fraud, there must have been false representation of material fact, which must have been believed to be true by party deceived, who must have relied on representation. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

Where the owner of land received the proceeds of sale thereof with knowledge that her agents were the real purchasers, she is not entitled to cancellation of her deed executed to one of them on the ground that they abused their relation of trust and confidence. *Samuel v. Branche* (Civ. App.) 211 S. W. 841.

Daughter's deed to mother made upon mother's promise to make will devising her estate to daughter will not be canceled upon mother's refusal to make such will, unless mother made the promise with the design and intention of disregarding it. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

A grantor may rescind an executed conveyance in consideration of a representation and promise by grantee to perform some act in the future and which the grantee refuses to perform, where the representation and promise were made for the purpose of defrauding and deceiving the grantor without any intention of performance, and the failure is without excuse. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

Alleged misrepresentations, made after the delivery of the deed, need not be considered. *Campbell v. Turley* (Civ. App.) 224 S. W. 528.

Where divorced wife, in anticipation of remarriage to former husband, agreed to convey land in consideration of husband's promise to discharge a lien, but was induced to sign deed reciting a different consideration relying on the promise that husband would do the right thing by her, her remedy, on husband's refusal to discharge lien, was not limited to a legal action, but, could bring action in equity to cancel deed. *Moore v. Moore* (Civ. App.) 225 S. W. 78.

Plaintiff who conveyed to defendants under misrepresentations his interest in certain mineral lands held not to have waived his right to rescind by permitting defendant grantees to make an annual rental payment to keep alive plaintiff's and their rights; plaintiff having brought suit immediately after learning of the fraud. *Holland v. De Wait* (Civ. App.) 225 S. W. 216.

Where the deed from plaintiff's predecessors conveyed title in the absence of evidence requiring finding by the trial court that plaintiff had ever parted with his interest so acquired other than by his deed to defendants sought to be canceled, plaintiff's suit could not be defeated on the claim there was no evidence showing he had any interest in the property. *Id.*

Defendants who procured by fraud and misrepresentations conveyance from plaintiff of his interest in mineral lands held entitled to judgment against them in his suit for cancellation for the \$1 paid to him by them on execution of deed to them, and for the \$25 paid by them to plaintiff's predecessor to continue in effect the conveyance from such predecessor to plaintiff and his associates. *Id.*

If a deed was procured by grantee's fraud in misrepresenting its contents to grantors, one of whom could not read or speak English, cancellation of the deed was authorized. *Stephenson v. Arceneaux* (Civ. App.) 227 S. W. 729.

Where there was a parol agreement that ground rents under a prior oil and gas lease were not to pass under mineral deed, and grantee and his attorney misrepresented the effect of the deed, on which representations the grantors relied, the grantee cannot avail

himself of a right thus acquired by fraud, which avoided the legal effect of the deed so far as concerned future rentals. *Walker v. Ames* (Civ. App.) 229 S. W. 365.

A representation that an instrument conveying minerals, oil and gas constituted a lease and not a conveyance was in the nature of a mere legal opinion, and was not ground for cancellation of the conveyance, in the absence of evidence to indicate that defendants knew any such expression to be false, or that it was made with any purpose to deceive or mislead. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

It was not ground for cancellation of a conveyance of oil and gas, coal and other minerals, that grantees, or lessees, falsely and fraudulently represented that the instrument amounted to no more than a license to enter on and explore for oil and gas, with the incidental privileges of entering thereon, laying pipes, lines, etc., since plaintiffs were not prejudicially affected. *Id.*

See arts. 3973a-3973c, and notes.

57. — Mental incapacity.—Evidence held sufficient to show that grantor at time of execution of deed was in a condition of senile dementia and unable to comprehend sufficiently the consequences of his act. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

In a suit to cancel deeds on the ground that the grantor was of unsound mind, defendants are not chargeable with rent except from the date of their occupancy. *Sherwood v. Sherwood* (Civ. App.) 225 S. W. 555.

In action to foreclose deed of trust defended on the ground that grantor was insane at the time of its execution, evidence held to require submission to jury of whether the deed of trust had been ratified during subsequent lucid intervals. *White v. Holland* (Civ. App.) 229 S. W. 611.

60. Necessity and requisites of delivery and acceptance.—When the grantor offers a deed for record he constructively delivers it to the grantee. *Russell v. Beckert* (Civ. App.) 195 S. W. 607.

There is valid delivery of deed, supporting innocent purchase from grantee, where it was placed in escrow, and delivered by depositary in accordance with escrow agreement, though execution of deed and such agreement was induced by fraud of grantee. *Lynn v. McCoy* (Civ. App.) 200 S. W. 885.

A deed takes effect only from its delivery. *Grimm v. Williams* (Civ. App.) 200 S. W. 1119.

For a deed to operate as a conveyance, there must have been delivery with intent and purpose on the part of the grantor to relinquish control of the deed. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

It must be delivered into the control of the grantee with the intent of the grantor that it shall become operative as a conveyance. *McEntire v. Thomason* (Civ. App.) 219 S. W. 563; *Hapgood v. City Nat. Bank* (Civ. App.) 230 S. W. 775.

An actual manual delivery of deed is not necessary if the intention to deliver appears, and such intention may be evidenced by the facts and circumstances shown. *Earl v. Mundy* (Civ. App.) 227 S. W. 970.

The mere handing of a deed to a grantee for inspection does not amount to a delivery. for intention is the essence of delivery. *Aggers v. Blackburn* (Civ. App.) 230 S. W. 424.

To operate as a transfer of title to land, there must be a delivery of the deed thereto, and the delivery must be made with the intention that it shall take effect as a conveyance. *Benavides v. Benavides* (Civ. App.) 218 S. W. 566.

Delivery of a conveyance is just as necessary as its execution to give it legal effect. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

Where a deed was handed to grantee to be transmitted to a depositary, who was to hold the same in escrow, there was no delivery. *Aggers v. Blackburn* (Civ. App.) 230 S. W. 424.

An acceptance is necessary to make a delivery effective. *Id.*

If deed was never accepted by grantee, it did not convey grantor's interest to her. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

Delivery of a deed expressing consideration of love and affection to an agent, who delivered it to the grantee, who had it recorded, was a sufficient acceptance. *Smith v. Thompson* (Civ. App.) 201 S. W. 220.

The delivery of a deed is essential to its validity, and an undelivered deed passes no title. *Hapgood v. City Nat. Bank* (Civ. App.) 230 S. W. 775.

63. — Persons to whom delivery may be made.—Delivery of a deed expressing consideration of love and affection to an agent who delivered it to the grantee who had it recorded was a sufficient delivery. *Smith v. Thompson* (Civ. App.) 201 S. W. 220.

Act of both parties to exchange of lands in leaving deeds with third party to have revenue stamps attached, held to constitute actual delivery of the deeds to the respective parties entitled to them. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

That one of parties to exchange of lands took possession by force of deeds placed in hands of third party to have revenue stamps affixed thereto did not invalidate deeds, where delivery to third party constituted sufficient delivery thereof. *Id.*

A grantor who delivered a deed to a third person, with directions it should not be delivered to the grantee until his death, held to have retained control of the same, so the deed never became effective, the grantor having otherwise disposed of the land by will. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

65. — Evidence of delivery and acceptance.—Registration of a deed is prima facie evidence of delivery to and acceptance by grantee. *Moser v. Tucker* (Civ. App.) 195 S. W. 259.

That a deed properly executed is found in possession of the purchaser is prima facie evidence of delivery, but such evidence may be affirmatively rebutted by the testimony of the grantor that she did not execute the deed. *Hensley v. Pena* (Civ. App.) 200 S. W. 427.

In action on fire policy wherein insurer claimed policy was avoided by change in title, evidence held to show deed back to plaintiff, executed by husband and wife to whom he had sold, became effective as conveyance when delivered to plaintiff. *Springfield Fire & Marine Ins. Co. v. Morgan* (Civ. App.) 202 S. W. 784.

Recording of a deed is presumptive evidence of its delivery. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

In trespass to try title based on a deed to plaintiff's decedent from his mother, evidence held insufficient to show delivery and acceptance. *Benavides v. Benavides* (Civ. App.) 218 S. W. 566.

Evidence held not to support a finding that defendant claimed and had possession of the property subject to the legal effect of the deed. *Id.*

Evidence held to sustain a finding of the jury that one claiming land under a lost deed and claiming that he refused to accept a deed to the timber alone did not file the timber deed with the county clerk or authorize any one else to file it. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

Evidence held to entitle the lessor to a directed verdict on the issue of delivery. *Aggers v. Blackburn* (Civ. App.) 230 S. W. 424.

67. — Redelivery, effect of.—The destruction or loss of a deed or its redelivery to the grantor does not divest legal title in the grantee or revest it in the grantor, unless equity so demands. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

Under this article, where the purchaser of land and his wife had received title by reason of the seller's deed to them, mere delivery of the deed back to the seller did not divest them of title, and revest the seller, to effect which a conveyance in writing back to the seller was necessary. *Cooper v. Hinman* (Civ. App.) 212 S. W. 972.

The redelivery of an unrecorded deed to grantor by a third party without grantee's knowledge or consent held insufficient to reinvest grantor with title; such delivery being insufficient unless both parties intended at the time of delivery that title should pass. *Mason v. Hood* (Civ. App.) 230 S. W. 468.

68. Escrows, requisites of, in general.—Delivery of a deed to third party for purpose of having revenue stamps affixed does not constitute placing it in escrow. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

A delivery, made to a third person of a deed or instrument conditional on the performance of an act or the happening of an event whereupon it is to be delivered to the grantee, is an escrow. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

A valid contract of sale is necessary to render the deposit of a deed in pursuance of the same a genuine "escrow" (citing *Words and Phrases, Escrow*). *Simpson v. Green* (Com. App.) 231 S. W. 375.

An escrow is a written instrument importing a legal obligation which is deposited by grantor, promisor, obligor, or his agent with a stranger or third party to be kept by the depository until the performance of a condition or happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee, and has no application to money placed in the hands of another to be applied as directed by the owner. *Stonewall v. McGown* (Civ. App.) 231 S. W. 850.

68½. — Operation and effect.—When deed is placed in escrow, grantee is entitled to delivery only upon strict compliance with terms of agreement, and substantial compliance is not sufficient. *Grimm v. Williams* (Civ. App.) 200 S. W. 1119.

Where purchaser of land who was in default executed deeds which were held in escrow, and were not delivered unless he failed to obtain an irrigation contract, in which case the vendor was given an option to declare deeds to be absolute conveyances, or sell the land under judicial sale, title did not pass by virtue of the deeds, which were unrecorded, on the purchaser's failure to perform. *J. C. Engelman Land Co. v. La Blanco Agr. Co.* (Civ. App.) 220 S. W. 653.

Where escrow agreement covering oil lease provided, that lessee should accept good record title as shown by abstract, and, that if he had objections to title and pointed them out, and they could not be cured within reasonable time, contract should be at an end, regardless of character of title to be furnished, the life of the agreement depended solely upon one or the other of the two actions to be taken by the lessee. *Mackenzie v. Pugh* (Civ. App.) 221 S. W. 1010.

Where a portion of the purchase price is deposited in escrow either of the parties, to recover amount thereof, must show performance of conditions entitling him thereto. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

But vendor was entitled thereto upon the performance of the conditions to be performed by him, notwithstanding purchaser's failure to perform his part of the contract by payment of the balance of the cash consideration. *Id.*

Where a contract provided that the depository was authorized to repay his deposit to the buyer on proof that the title had been shown to be bad "as per the opinion of" the buyer's attorney, the parties did not intend that the banking company should sit as a court to determine whether the title was bad, but that the opinion of the buyer's attorney was the means whereby the fact was to be proven. *Lea v. Helgerson* (Civ. App.) 228 S. W. 992.

69. — Depositories.—Generally an escrow delivery must be made to a third person. *Aggers v. Blackburn* (Civ. App.) 230 S. W. 424.

A deed which is complete on its face and is sufficient to pass title, without any conditions therein stated, cannot be delivered to the grantee to be held in escrow. *Parker v. Sorell* (Civ. App.) 230 S. W. 819; *Springfield Fire & Marine Ins. Co. v. Morgan* (Civ. App.) 202 S. W. 784; *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 351.

If delivered to him it becomes an operative deed, freed from any condition not expressed in the deed itself. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

It takes effect on delivery despite his agreement that it shall not be effective as conveyance until he has done certain things. *Springfield Fire & Marine Ins. Co. v. Morgan* (Civ. App.) 202 S. W. 784.

70. — **Revocation.**—An escrow held waived by acquiescing in delivery of deed, surrendering possession, and obtaining the other papers placed in escrow. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

An escrow agreement cannot be revoked by one of the parties. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

It is an attribute of an escrow that its deposit should be irrevocable by the depositor, pending performance of conditions of its deposit. *Blue v. Conner* (Civ. App.) 219 S. W. 533.

To render the deposit irrevocable, and thus constitute deposit of the instrument an escrow, there must be a binding contract touching the subject-matter of the deposit. *Id.*

The depository becomes in a sense a trustee for both parties of the transaction, and neither may withdraw the deed until the happening of the condition upon which it was deposited, or until after a reasonable time given for the performance of the condition. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

Where there is a prior verbal contract of sale, and the recitals in the deed placed in escrow, in themselves or in connection with other writings submitted therewith, meet the requirements of the statute of frauds, the deed so deposited is a genuine escrow, and therefore irrevocable, and the prior verbal contract is thereby rendered enforceable. *Simpson v. Green* (Com. App.) 231 S. W. 375.

71. — **Time of taking effect of deed.**—Deed deposited in escrow does not become operative, and passes no title, until condition has been performed or event has happened upon which it is to be delivered to grantee. *Pennsylvania Fire Ins. Co. v. Stockstill* (Civ. App.) 197 S. W. 1036.

Where a grantor parts with all control over his deed when he delivers it to a third person for delivery to the grantee on the grantor's death, the conveyance takes immediate effect, and vests in the grantee, title to commence after the grantor's death. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

Where a deed was delivered in escrow, on condition that it should not be effective until certain acts were performed by the grantee, such condition was a condition precedent to the taking effect of the grant. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

Where a landowner who conveyed property to a city for a street, and received a valuable consideration, insisted that the deed should be held in escrow until the city widened a certain street according to its agreement, held that, as the failure of the city to widen the street within the time limit fixed did not injure the grantor or his property, such failure did not prevent the passage of title, for the condition should be treated as a condition subsequent. *Id.*

A deed placed in escrow to be delivered on compliance with specified conditions becomes effective on the fulfillment of the conditions, though there is no actual delivery. *Sykes v. Fischl* (Civ. App.) 212 S. W. 217.

Where delivery is to a third person in escrow for delivery to grantee upon compliance with specified conditions, a delivery as directed relates back so as to divest the title of the grantor from the first delivery. *Id.*

A deed delivered in escrow in deposit does not convey title until the conditions are performed, and until that time the contract is executory. *Blue v. Conner* (Civ. App.) 219 S. W. 533.

A written contract, whereby, a husband and wife obligated themselves to execute and deliver a deed conveying one-half of the minerals under a certain tract of land, the deed to be placed in escrow until examination and approval of title and payment, is an executory contract; no title passing to the grantee until performance of the conditions of the escrow agreement. *Crabb v. Bell* (Civ. App.) 220 S. W. 623.

Execution of deed by a husband to his wife and its delivery by the husband to a third person, with instructions to place the deed in the wife's private safety box and to have it recorded in case anything happened to him, had the legal effect to then vest title to the property conveyed in the wife. *Earl v. Mundy* (Civ. App.) 227 S. W. 970.

74. **Operation of conveyance in general.**—If deed was forgery, it conveyed no interest. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

A deed, when executed, relates back to the date of the contract of sale of the realty and fixes the right of the parties as of that date. *Alexander v. Anderson* (Civ. App.) 207 S. W. 205.

Where a grantor who delivered a deed to a third person, with directions that it should not take effect until his death, retained control of the same, the property, on death of the grantor, passed to the grantee if not otherwise disposed of. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

Parties making and accepting a deed to realty are bound by its terms. *Buie v. Miller* (Civ. App.) 216 S. W. 630.

Where land was conveyed and a note taken for the price and the deed contained a recital that if the grantor died before the note was due then he willed the note to the grantee, the transaction was not a gift of the land or of the note to the grantee, but a sale of the land and an agreement to pay therefor conditioned on the grantor living until maturity of the note. *Newcom v. Ford* (Civ. App.) 222 S. W. 591.

By an option contract the optionee did not acquire any title to the land involved, but at most secured only the right to acquire an interest in the land by complying, at his election, with the stipulations on his part. *Roberts v. Armstrong* (Com. App.) 231 S. W. 371.

77. Reformation, grounds of.—Where an improper description is put in a mortgage, and foreclosure is had, and the mistake is carried into the sheriff's deed, the sheriff's deed cannot be reformed, but to get title the mortgage itself should be reformed and another foreclosure had. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

Where title to a house on land conveyed by warranty deed is reserved by parol, a court having jurisdiction will reform deed to include reservation. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

Where a deed of gift from father to sons described certain lands not owned by the father, one purchasing from the sons cannot have the deed reformed to describe adjoining land then owned by the vendor as being the land intended; since the sons, having paid no consideration, have no standing in equity to reform the deed. *Browne v. Gorman* (Civ. App.) 208 S. W. 385.

A deed will not be reformed on the ground of mistake, where the mistake was not mutual. *Henson v. Peterson* (Civ. App.) 218 S. W. 126.

Where a party executing preliminary contract accepted a deed providing for his keeping open a permanent roadway on land conveyed, in the absence of showing of fraud or excuse for failure to read the instruments, reformation thereof could not be had on the ground of accident, fraud, or mistake. *Arden v. Boone* (Com. App.) 221 S. W. 265, affirming judgment (Civ. App.) 187 S. W. 995.

Where deeds correctly described a tract of land in accordance with the field notes, but by mistake the grantor put the grantees in possession of a different tract, and such possession was retained long enough to give title to the tract, there was no basis for a correction of the field notes. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

Where a father and children were entitled to undivided interests in land, and, sale having been negotiated, the father without authority from his children undertook to point out the premises sold, his representations are not binding on the children, and the deed which clearly described the premises, but did not include a portion of the lands pointed out, will not be reformed as to them. *Compton v. Franks* (Civ. App.) 222 S. W. 988.

81. — Evidence.—To show mutual mistake, claimed by lessor, for reformation of lease describing leased building as No. 10, evidence that the building occupied by lessee under the lease was No. 11 is admissible. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

Parol evidence is not admissible to reform a deed describing by field notes land that did not belong to grantor, to make it describe adjoining land then owned by grantor but which the deed in no way describes. *Browne v. Gorman* (Civ. App.) 208 S. W. 385.

82. — Relief.—In suit to reform a deed, court in denying reformation will not construe deed solely for the purpose of relieving an uncertainty regarding its legal effect. *Henson v. Peterson* (Civ. App.) 218 S. W. 126.

Art. 1104. [625] [549] Purchaser or creditor, without notice, not to be affected.

See *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552; notes to art. 6824.

Art. 1105. [626] [550] Conveyance of the greater estate passes the less.

See *Rutherford v. Stamper*, 60 Tex. 447.

Interest of grantor conveyed.—A deed, if not voidable on account of fraud, conveyed whatever interest, legal or equitable, the grantor had in the premises. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

Merger.—Mergers are not favored in equity. *Amicable Life Ins. Co. v. Slovak* (Civ. App.) 217 S. W. 200.

In law when an inferior title is vested in the holder of a superior title, the inferior is merged in the superior, and ceases to exist, but equity will preserve the inferior title and prevent a merger, when such was the intention of the parties to the transaction at the time, and no injustice will be done thereby. *West v. McCelvey Loan & Investment Co.* (Civ. App.) 229 S. W. 913.

Art. 1106. [627] [551] An estate deemed a fee simple, when.

Cited, *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450.

Estates or interests created in general.—The largest estate that the terms of a deed with all its parts harmonized will permit of will be conferred upon grantee. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639.

A deed conveying "all that certain accretion, alluvial and riparian right" east of a described lot, together with a War Department permit to fill in the riparian right, and erect whatever the grantee desired, held not to convey title to the fee of the submerged land, but merely a right in vendee to fill in and acquire title from the state in himself. *Westervelt v. Meuly* (Civ. App.) 216 S. W. 680.

Actual entry upon land is not necessary to give seisin or investiture or to give a more perfect title; the right of possession being an incident to and growing out of the title. *Hall v. Edwards* (Com. App.) 222 S. W. 167.

The owner of the fee may separate his estate in the surface from the minerals underneath, and sell the one and reserve the other. *States Oil Corporation v. Ward* (Civ. App.) 223 S. W. 250.

The rule that an absolute disposition may be limited by a subsequent clause in a will, where the intention is clearly expressed, is not affected by this article. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

While mere words of conveyance alone, though apt and usual, will not fix the character of the estate if from the context as a whole the plain intention was otherwise, in the absence of any such contextual indications the chosen words will neither be disregarded nor given other than their usual meaning in the trade, business, or transaction to which they relate. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

Fee simple.—Evidence that property was conveyed to certain parties as trustees for colored people of a county, and that trustees controlled it in such capacity, sustains finding that colored people owned beneficial interest, instead of fee-simple title, in property. *Woods v. Bell* (Civ. App.) 195 S. W. 902.

Deed to son, on cash consideration and further consideration that stepchild of son should receive equal share of property as if she were daughter of son, passed fee-simple title and did not create any estate in stepdaughter or his own children. *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

The use of the word "forever" in the granting or habendum clause of a deed does not generally have the effect of enlarging the estate granted, if the instrument as a whole shows that the fee-simple title was not intended to be granted. *Houston Oil Co. of Texas v. Bunn* (Civ. App.) 209 S. W. 830.

A conveyance of timber though the habendum clause used the word "forever," held not to grant the fee-simple title to the timber, together with the necessary interest in the land for its sustenance, but to contemplate a removal within a reasonable time. *Id.*

Deed to trustees of a church "for a public cemetery," to have and to hold to themselves, successors, heirs, and assigns forever, held to vest in the church fee-simple title to the land, so that it could not be said that under no circumstance did the trustees or church have power to sell. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 374.

A deed to a county judge "for school purposes," wherein the habendum clause was, "To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said C., county judge, his successors in office, heirs and assigns, forever," held a conveyance of the fee-simple title in trust for the schools of the district, especially in view of arts. 1106, 1107. *Wilson v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 669.

Limitation to heirs, issue, etc.—A deed conveying land to R. for her natural life, and at her death conveying the remainder to her children or their descendants in the proportions prescribed by the laws of descent and distribution, gave R. a life estate with remainder to her children surviving her or the descendants of children whom she might survive; the word "descendants" being construed as a word of purchase and not of limitation. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Conditional limitations.—Despite the rule in *Shelley's Case*, a deed with the provision that, if the grantee dies first, title shall pass to another, is valid. *Runge v. Freshman* (Civ. App.) 216 S. W. 254.

Exceptions and reservations.—Landlord who conveyed land by general warranty deed, containing no recital reserving rents, could not retain any interest therein by merely keeping in his possession a rent note executed by his tenant, which was simply an evidence of his lease contract with the tenant. *Evans v. First Guaranty State Bank of Southmayd* (Civ. App.) 195 S. W. 1171.

Where landowner conveyed timber, with provision for extension of time for removal and heirs conveyed land except timber reversion rights in timber did not pass to grantee, and heirs of original owner alone are entitled to receive consideration for extension of period of removal. *Adams v. Fidelity Lumber Co.* (Civ. App.) 201 S. W. 1034.

When a particular thing has been granted by apt terms of conveyance a reservation or restriction which might result in destroying the subject-matter of the conveyance will be declared void and ineffectual. *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532.

Though a conveyance reserved all coal and minerals, a subsequent deed from the same grantors to the same grantee passed title to oil, petroleum, and gas, in the absence of an express reservation. *Luse v. Penn* (Civ. App.) 220 S. W. 303.

Where an owner of land has subdivided it and sold according to a plat showing a strip reserved for a pipe line, and such reservations are made in the deed, such owner cannot thereafter drill for oil within such strip, regardless of whether the fee is in him or not. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

Deeds "excepting and reserving all coal and mineral and the right to prospect, mine and remove the same," and retaining "the coal and mineral in said described land and the right to work and remove the same" held to reserve title to the oil, petroleum, and gas. *Luse v. Parmer* (Civ. App.) 221 S. W. 1031.

The clause in a deed that grantor was "to continue using said lot as she has always done, so long as she may live," did not, as a matter of law, constitute a reservation of a life estate. *Ahrens v. Lowther* (Civ. App.) 223 S. W. 235.

Deed whereby grantor reserved the right to enter and prospect for coal and minerals, etc., and to open up mines, borings, etc., providing that coal and minerals taken from such mines and borings should be the property of the grantor, held not to have retained title to the minerals in place under the surface. *States Oil Corporation v. Ward* (Civ. App.) 223 S. W. 250.

A grantor may by reserving to himself the mineral rights in land and conveying to the grantee only the surface rights effectually separate the two estates. *Lyles v. Dodge* (Civ. App.) 228 S. W. 316.

A "reservation" is a clause in a deed creating or reserving something out of the thing granted that was not in existence before, while an "exception" is something exist-

ing before as a part of the thing granted, and which is excepted from the operation of the conveyance (citing Words and Phrases, Exception.) *Donnell v. Otts* (Civ. App.) 230 S. W. 864.

Where sons of the grantor in a deed excepting mineral rights conveyed the land by warranty deeds, which, being without limitation, conveyed full fee-simple title, under this article, they and those in privity with them were estopped from claiming as against their grantees their share inherited from the grantor in the mineral rights so excepted. *Id.*

In a general warranty deed by grantor and wife of 160 acres, a clause reciting that the grantor did "reserve and hold all minerals of all and any kind (except stone coal) that may be on the aforesaid land for my own use and benefit" held not a mere personal reservation or license in favor of the grantor and ending at his death, but an exception of the oil and minerals in the land, wholly withdrawing the mineral rights from the operation of the conveyance, so that the mineral interest passed to his heirs. *Id.*

Conditions and restrictions.—A deed with conditions held to invest the grantee with an estate upon condition subsequent, the right of forfeiture of which was personal to the immediate grantor, so that, when the condition was not fulfilled and the grantor deeded the land to another person, such person had no cause of action. *Perry v. Smith* (Civ. App.) 198 S. W. 1013.

Where deed granted use of an alley over plaintiffs' land and provided that the title should revert if building were not constructed, and defendant refused to construct the building, plaintiffs were not precluded from recovering the premises because they had not opened the alley, since this would have been useless under the circumstances. *Brown v. McKinney* (Civ. App.) 208 S. W. 565.

Recovery may be had upon noncompliance with conditions subsequent, where right to such recovery is clearly reserved in the deed or appears from necessary intentment. *Waco Development Co. v. McNeese* (Civ. App.) 209 S. W. 464.

But a substantial compliance with the terms of the condition will satisfy the law and prevent a forfeiture of title. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

The estate is defeated only at the election of the parties who can take advantage of the breach, and not on the mere happening of the condition. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

No one can take advantage of a breach of the condition except the grantor or his heirs. *Tickner v. Luse* (Civ. App.) 220 S. W. 578.

The fee passes by the deed and the law requires some act on the part of the grantor for its termination. *Id.*

Conditions subsequent are not favored in law. *Waco Development Co. v. McNeese* (Civ. App.) 209 S. W. 464.

When it is doubtful whether a conveyance is made on a condition subsequent or on the covenant of the grantee, the latter interpretation will be adopted. *Weiss v. Claborn* (Civ. App.) 219 S. W. 884; *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when the use is for the benefit of a special class of persons or the public at large. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639.

The mere use of technical terms which ordinarily denote a limitation or a condition subsequent is an unsafe test of the true nature of the estate granted; the word "proviso" or "provided" itself being sometimes taken as a condition, sometimes as a limitation, and sometimes as a covenant. *Id.*

Language ordinarily importing a limitation or condition subsequent will be construed most strictly against grantor on the ground that law does not favor forfeitures. *Id.*

Where there is a doubt from the language of the entire instrument whether its fair construction imports a limitation which would absolutely determine the estate or a condition subsequent determining the estate only upon some act of the grantor tantamount to re-entry, the deed must be construed to import the latter as being in a sense less onerous upon the grantee. *Id.*

The general rule is that where a deed is to take effect on the performance of a condition by the grantee, and the grant is without other consideration, no title will pass until the condition is performed; but where other conditions have been performed, and especially where full value has been paid, the condition will be considered a condition subsequent. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

Where warranty deed in exchange of properties conveyed fee-simple title, but collateral written agreement provided grantees should reconvey if within fifteen years title to property received by grantor from them should fail, such collateral agreement merely ingrafted on deed a condition subsequent, on happening of which grantor would be entitled to reconveyance, and did not prevent vesting of title and right to possession in grantees subject only to defeat on happening of condition. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

Mother's promise to make will giving estate to daughter inducing daughter to execute deed to mother was a covenant, and not a condition. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

A conveyance of a one-half interest in minerals, providing that the agreement should be null and void if minerals in paying quantities were not shown to exist within a year, held a deed absolute to an undivided fee to the mineral in the land upon a condition subsequent, and not a covenant. *Tickner v. Luse* (Civ. App.) 220 S. W. 578.

A will, which gave land to testatrix's nephew "H. (with express understanding that his sisters are to have a home there whenever they need one), to have and to hold his

heirs and assigns forever provided he comply with the conditions herein mentioned, but if he refuses to give them a home it shall be divided equally between them," held not to create a condition precedent, but to vest the fee in the nephew, on a condition subsequent, a defeasance in case of a refusal of a home when needed and requested in view of this article. *Adams v. Henry* (Civ. App.) 231 S. W. 152.

Only the grantor and his heirs have a right to enter on condition broken, and they lose their rights if they convey away their reversion, so that a purchaser of the land on execution sale under judgment against the grantor gained no right of entry. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

A party entitled to right of entry because of breach of a condition subsequent may waive performance by an actual release of the condition or by an express license. *Id.*

Mere indulgence does not operate as a waiver of grantor's right to claim and enforce a forfeiture for grantee's failure to construct a building upon premises conveyed within time agreed, where no intervening equity has arisen. *Brown v. McKinney* (Civ. App.) 208 S. W. 565.

Where a conveyance was made on condition subsequent, that grantees should reconvey if title to property they conveyed to grantor should be defeated and such condition having happened, grantor sued for reconveyance, and subsequently contracted to release property from her claim if grantee, should successfully defend a criminal case, which he did, grantor not only waived her right of re-entry for breach of condition, but expressly relieved grantees from obligation to reconvey. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

The dedication as a place of sepulcher of land deeded to church trustees did not entirely destroy the power of the church or its trustees to sell, which power was merely restricted or held in abeyance until the happening of circumstances rendering it necessary or proper to sell, as abandonment of the cemetery or its condemnation. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 874.

As to oil lease, see *Priddy v. Green* (Civ. App.) 220 S. W. 243; notes to title 93, chapter 1.

Grantee of a one-half undivided interest in minerals, if minerals be shown to exist in paying quantities within a year, did not abandon his interest by failing to develop the land, where he ascertained and satisfied the grantor that minerals existed in paying quantities. *Tickner v. Luse* (Civ. App.) 220 S. W. 578.

The law applies the rule of strict construction, when a forfeiture is claimed for the breach of a condition subsequent in a conveyance of an interest in minerals in land. *Id.*

A conveyance of a one-half undivided interest in minerals in land held to require nothing of purchaser to prevent forfeiture at the end of a year, except to show that paying mineral existed or laid in place in the land, and development was unnecessary. *Id.*

Consent by a grantor that grantee place a mechanic's lien upon the land was not a waiver of a condition in the deed that a gin and mill be constructed and operated, the company placing the mechanic's lien upon the land being charged with knowledge of the conditions in the deed, and that its lien was subject to be defeated by a breach of such condition. *Perry v. Smith* (Com. App.) 231 S. W. 340.

Enlargement of lesser grant into fee.—Where deed conveyed life estate, with remainder to grantee's children, grantor and grantee could not, by subsequent agreement, enlarge the grantee's estate, or divest the remaindermen of their interest. *Henson v. Peterson* (Civ. App.) 218 S. W. 126.

Easements.—Contract construed, and held to create easements in favor of each of two adjoining lots on the adjoining lot for support of party wall. *McCormick v. Stoneheart* (Civ. App.) 195 S. W. 883.

Where a grantor agreed to "give a road 20 feet wide," and provided "said road sold to remain open permanently," but did not place any restrictions as to the use in a special way, or for a forfeiture, such easement could be devoted to pedestrians, and failure to use such road for passage of wagons, was not an abandonment or extinguishment of the easement. *Henderson v. Le Duke* (Civ. App.) 218 S. W. 655.

Under a deed wherein grantee was to "keep open" a way so that grantor and assigns "may have access to public road," the grantor was not entitled to a road way unobstructed by gates. *Arden v. Boone* (Com. App.) 221 S. W. 265, affirming judgment (Civ. App.) 187 S. W. 995.

Grantee agreeing to "keep open" a way was not required to keep it unobstructed by gates, where for a long period prior to execution of deed gates had been used and the parties made the contract with knowledge of conditions as they existed at the time; the word "keep" meaning in such case "to maintain, to cause to continue without essential change of condition." *Id.*

Art. 1107. [628] [552] Form of conveyance.

Cited, *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450; *Peterson v. McCauley* (Civ. App.) 25 S. W. 826.

4. Deed or executory contract.—Contract for sale or lease, whereby seller promised he would make deed only on buyer's making specified payments, which in fact were never made, was not "deed of conveyance." *Bailey v. Burkitt* (Civ. App.) 201 S. W. 725.

Contract executed by husband and wife, to convey minerals in homestead if defendant were successful in attacking prior oil and gas lease held not sufficiently definite and specific to operate as a conveyance of the minerals. *Maynard v. Gilliam* (Civ. App.) 225 S. W. 818.

Conveyance of 2 acres of 100 acres obtained of a third person, held a deed conveying a present, undivided interest in the 100 acres, with right of selection, and not an executory contract of sale of 2 acres to be selected within 30-day period, rights under which

would lapse and be lost by failure to exercise such right of selection within the 30-day period. *Gray v. Producers' Oil Co.* (Civ. App.) 227 S. W. 240.

5. Deed, mortgage, or conditional sale.—Whether a conveyance absolute on its face with an agreement for repurchase is a mortgage or a conditional sale will depend upon continuance of relation of debtor and creditor. *Wedgworth v. Pope* (Civ. App.) 196 S. W. 621.

A deed in trust to secure a debt is in legal effect a mere mortgage with power of sale. *Thornton v. Goodman* (Com. App.) 216 S. W. 147.

Where purchaser gave quitclaim deed to the vendor as security the time of payment being extended for one year, the vendor agreeing to withhold the deed from record, the deed, although absolute on its face, was a mortgage or security for the debt. *Morrow v. Gorter* (Civ. App.) 217 S. W. 164.

The existence of a debt is indispensable to existence of a mortgage. *Masterson v. Ginners' Mut. Underwriters' Ass'n of Texas* (Civ. App.) 222 S. W. 263.

That an instrument in form a deed may be considered a mortgage, a debt from grantor to grantee, created before or at the time of the execution of the instrument, must have continued. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699.

Whether a conveyance of land to mortgagee was a conditional sale or mortgage held a question of fact. *Holmes v. Tennant* (Com. App.) 231 S. W. 313.

For a deed absolute on its face to be a mortgage, it must have been so understood and intended by both of the parties at the time of its execution. *Young v. Blain* (Civ. App.) 231 S. W. 851.

6. — Evidence.—Evidence held to show it was the intention that a deed absolute should constitute a mortgage. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

Evidence held to show a warranty deed was a mortgage, and not a conditional sale. *Zamora v. Vela* (Civ. App.) 202 S. W. 215.

Evidence held to support a finding that the debt sued for was secured by mortgage. *Ewing v. Schultz* (Civ. App.) 220 S. W. 625.

In suit by daughter to partition her parents' land, evidence held to justify the trial court's finding that the daughter's deed, delivered to defendants' predecessor with the grantee blank, was not intended, as she claimed, as a mortgage. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

When a conveyance of land grows out of a pre-existing debt or loan of money, it must clearly appear that such debt is extinguished or it will be held that the conveyance is a mere change in the security. *Holmes v. Tennant* (Com. App.) 231 S. W. 313.

7. — Estates and interests of parties.—A mortgagor of land remains the owner thereof and holds it subject to the rights of the mortgagee. *Holmes v. Tennant* (Com. App.) 231 S. W. 313.

Hence the mortgagee or one holding his interest under a will, is not entitled, in a suit by mortgagor to have a trust declared in the land, to invoke the defense of stale demand. *Id.*

9. Quitclaim.—Where the grantee in a quitclaim deed intended for security only himself quitclaimed the land to his daughter, who acquired it with notice, the effect was to assign to her the security. *Morrow v. Gorter* (Civ. App.) 217 S. W. 164.

Quitclaim deed to aid title to a company under which both parties claimed, held to relate back to deed from the company's remote grantor to its predecessor in title. *Thorn-dale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

An instrument in the form of quitclaim deed, held simply a release of any claim that a sale under a trust deed was invalid. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

The intention of the parties, as appears from the language used, must prevail in determining whether a conveyance was a warranty or a quitclaim deed. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

Where ambiguity as to whether a conveyance was a warranty or a quitclaim deed arises from the language used, the court must look to the circumstances surrounding the parties at the time of the conveyance, to aid it in ascertaining the intention which controls. *Id.*

The use of the word "quitclaim" is not conclusive evidence as to the character of the conveyance. *Id.*

The words "all of our interest," in a deed by owners of a homestead, of minerals, nothing else appearing, would have rendered the conveyance a quitclaim deed. *Id.*

Mineral deed executed by owners of a homestead interest, containing in the granting clause the words "bargain, sell, and convey," and in the habendum clause "to have and to hold the above-described mineral interest," and in the warranty clause the words "warrant and forever defend all and singular the said mineral interest," held a warranty deed, and not a mere quitclaim. *Id.*

A quit claim deed conveys no more than the present interest of the grantor in the land described, and does not extend to an interest subsequently accruing. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

A conveyance by grantors of all their right, title, and interest in certain described lands, followed by the habendum clause of a general warranty deed, is a deed to the land, and not a mere quitclaim of the grantor's interest. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

11. Alteration.—In action on purchase-money notes wherein defendant introduced deed which by alterations and interlineations recited that he had not assumed payment thereof, evidence held to justify conclusion that the alteration and interlineations had been made by defendant after execution and delivery of the deed, without the knowledge of plaintiff grantor. *Green v. Roos Bros.* (Civ. App.) 219 S. W. 519.

12. **Recital of consideration.**—Where a deed recited receipt of consideration, the burden is upon the person suing to cancel it for lack of consideration to show that the consideration was not paid. *Russell v. Beckert* (Civ. App.) 195 S. W. 607.

13. **Recital as to parties.**—Where a deed executed and delivered after death of the person named in the granting clause as one of the grantors was signed and acknowledged by persons shown by extrinsic evidence to be heirs, but the deed did not identify the parties as such, it did not pass the interest of such heirs. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

One who signs a deed, but does not appear on the face thereof to be a party thereto, or whose name is not recited in the premises thereof, is not bound thereby. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Instruments creating liens on real estate of whatever character are conveyances thereof, and hence the same rule applies. *Id.*

Where land was conveyed to "Sheldon E. Bell," and thereafter by "E. S. Bell," the initials "E. S.," even though both conveyances were of great antiquity, cannot be deemed *idem sonans* with the name "Sheldon E." *Dittman v. Cornelius* (Civ. App.) 218 S. W. 109.

Deed executed by married woman and her husband, reading that they, "for and in consideration of \$60 to us in hand paid by J. L. M., the receipt of which is hereby acknowledged, have granted, sold, and conveyed and by these presents do grant, sell, and convey unto the said ———," conveyed to J. L. M. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

County judge is a sufficiently definite grantee in a conveyance of a fee-simple title in trust for the schools of the district in which the land was situated. *Wilson v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 663; and see note to art. 1106.

A conveyance to a fictitious person was inoperative, and the title remained in the grantor. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

14. **Construction.**—In case of ambiguity in a deed or other conveyance, or where it admits of two constructions, it will be construed most strongly against the grantor. *Texas & N. O. R. Co. v. Orange County* (Civ. App.) 206 S. W. 539; *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145; *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639; *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532.

Every part of the deed must be given effect if it can be done. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639; *Scheller v. Groesbeck* (Com. App.) 231 S. W. 1092.

A deed should be construed according to its apparent intent as gathered from the entire instrument, in the absence of ambiguity on the face of the instrument. *Texas & N. O. R. Co. v. Orange County* (Civ. App.) 206 S. W. 539.

Where parties to instrument in writing have by their acts and conduct placed a construction upon the same showing the intention, such acts and conduct should be given strong weight in arriving at such intention, and, in the absence of clear language indicating intention inconsistent with acts and conduct, the courts should adopt the construction placed upon instrument by parties themselves. *Id.*

If deed contains conflicting clauses, which cannot be reconciled, the clause will be retained which gives the greatest estate, and the clause in conflict therewith rejected. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

Where a deed or other written instrument contains clauses that are inconsistent with each other, such clauses, if possible, should be reconciled so that the intention of the maker as disclosed by the whole instrument shall be given effect, and this intention must not be defeated by a literal interpretation of any of the words of the instrument. *Houston Oil Co. of Texas v. Bunn* (Civ. App.) 209 S. W. 830.

The intention of the maker must be ascertained from the instrument as a whole, and to ascertain the intent, it is proper to look to the subject-matter embraced in the instrument and the conditions surrounding the parties. *Id.*

The court in construing language of deed susceptible of different constructions will consider the circumstances attending the transaction, the particular situation of the parties, the state of the thing granted, for purpose of ascertaining the true intent. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639.

In determining the character of the estate granted, the court will consider, not merely the uses for which the property was designated in the conveyance, but the relation of the grantor to those uses. *Id.*

A deed should be so interpreted as to give effect to the intention of the parties. *Id.*

If any of the terms used in a deed seem to contradict the manifest intention clearly indicated by the deed as a whole, the intention must govern. *Id.*

To warrant a departure from the general rules of construction and to give deeds a meaning not fairly deducible from the language employed, the circumstances should be such as to impel the conclusion that the parties intended other than their expressed language would ordinarily imply. *Id.*

Whenever possible, all parts of a deed must be given effect, and all the language of the deed must be retained and construed so as to harmonize and make effective every word and sentence, but where uncertainty or conflict arise if every word is literally accepted, the main intent of the parties, which is to be gathered from the language of the deed, allowing consideration of connected extrinsic facts to make certain what was intended by the parties, shall completely control. *Scheller v. Groesbeck* (Civ. App.) 215 S. W. 353.

When a deed or contract is reasonably susceptible of a construction which will make it valid and binding, such construction should be given rather than one rendering it void. *Blackwell v. Scott* (Civ. App.) 223 S. W. 334.

It cannot be said there is a patent ambiguity in a deed if the court, placing itself in the situation of the parties, can ascertain what they meant. *Id.*

In construing deeds, resort must be had to the general rule that that is certain which may be made certain. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

If the language of a clause of a deed, as the habendum, cannot be harmonized with the rest of the instrument, such interpretation will be adopted as is most favorable to the grantee. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

The entire habendum clause of a deed may be rejected, if repugnant to other clauses, and defeating the conveyance, as through its recital that the grantee is to hold the premises "unto the said [grantors], their heirs," etc., since a repugnant clause will not be given effect to destroy the deed. *Id.*

Where ambiguity as to whether a conveyance was a warranty or a quitclaim deed arises from the language used, the court must look to the circumstances surrounding the parties at the time of the conveyance, to aid it in ascertaining the intention which controls. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

The intention of the parties, as appears from the language used, must prevail in determining whether a conveyance was a warranty or a quitclaim deed. *Id.*

The cardinal rule for construction of a written instrument as a deed is to arrive at the intention of the parties. *Scheller v. Groesbeck* (Com. App.) 231 S. W. 1092.

All instruments in a chain of title when referred to in a deed will be read into it. *Id.*

15. **Property conveyed.**—Nothing passes by deed except what is described in it, whatever the intention of the parties may have been. *Browne v. Gorman* (Civ. App.) 208 S. W. 385; *Buie v. Miller* (Civ. App.) 216 S. W. 630.

In determining the sufficiency of a description in a deed, whatever can be made certain is certain. *Zoeller v. Offer* (Civ. App.) 216 S. W. 1113; *Pope v. Witherspoon* (Civ. App.) 231 S. W. 837.

Where deed refers to land as that granted by certain instrument on file in General Land Office, such other instrument becomes part of deed. *McDougal v. Conn* (Civ. App.) 195 S. W. 627.

A deed reciting that grantor conveyed a certain tract or parcel of land, "the title and possession was by George Antonio Nixon, commissioner for said colony, on the 16th day of March, A. D. 1835, and for more particular description of said reference is hereby made to the original title now on file in the Gen. Land Office of this," where the deed on file in the Land Office definitely described the land, was sufficient. *Id.*

Where deed was made in republic of Texas, and referred to deed on file in General Land Office, without stating of what state or country General Office was department, mere omission of words "of the republic of Texas" did not raise ambiguity. *Id.*

An instrument signed by P. transferring all his right "to the within deed," being recorded immediately after a deed to P. may be found to have been indorsed on such deed, and to be a conveyance of the land described in that deed. *Conrad v. Hughes* (Civ. App.) 195 S. W. 1181.

A deed held on its face to sufficiently describe land to be admissible in evidence. *Ludtke v. Murray* (Civ. App.) 199 S. W. 321.

Deed showing obvious omission of two calls of description which might be supplied with reasonable certainty held not void for patent ambiguity. *Fortenberry v. Cruse* (Civ. App.) 199 S. W. 523.

Description of land in deed as 1,000 acres lying on "west of a half" of named league held not to disclose patent ambiguity rendering deed void in view of record supplying omission. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 200 S. W. 216.

Where a deed described land by metes and bounds, chain of title, and reference to prior deeds, and by a name which was erroneous, the nominal description could not control, so as to make those purchasing at execution sale of the land described by name innocent purchasers. *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

Where a deed specifically described land by giving the chain of title and reference to records, a general description by name could not control. *Id.*

Where deed accurately described land by metes and bounds, and erroneously described it by a name, and the land named was sold under execution against the grantee, it was immaterial what were the intentions of the grantor and grantee, since the land sold under execution was not in fact included in the deed. *Id.*

Deed conveying part of a survey, and containing 640 acres more or less, being a one-half undivided interest out of the survey, held to convey an undivided one-half interest in the survey and not any specific number of acres undivided out of the survey. *Read v. Blaine* (Civ. App.) 201 S. W. 415.

There being a repugnance between the general and particular descriptions in a deed, the latter will prevail. *Tucker v. Angelina County Lumber Co.* (Com. App.) 216 S. W. 149.

Where a particular description is followed by a general description, the latter yields, but, where it is possible, the real intention must be gathered from whole description. *Scheller v. Groesbeck* (Com. App.) 231 S. W. 1092.

In trespass to try title, where plaintiff claimed under a deed conveying 87½ acres, evidence held to sustain findings that the deed did not convey a 100-acre tract previously sold to another. *Delta Land & Timber Co. v. Spiller* (Civ. App.) 216 S. W. 414.

A grant of 640 acres, located by course and distance, with no marks called for or identified, will not embrace lands not included in the 640 acres, or take the grant to lines and corners not called for, merely because the parties believed that the survey would embrace such lines and corners. *Buie v. Miller* (Civ. App.) 216 S. W. 630.

A deed of trust on "about three-fourths of an acre of land on the H. G. survey, in Milam county, Texas, three miles north of S. G., Texas," etc., held sufficiently to describe the property, and therefore not void. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

In suit for lot 4 of a subdivision, the southeast quarter, evidence held to sustain the finding that a deed between plaintiff's remote grantors conveyed the southwest quarter, or lot 3, though it stated that it conveyed lot 4, a mistake recognized in a subsequent power of attorney. *Masterson Irr. Co. v. Owen* (Civ. App.) 218 S. W. 62.

The undivided interest referred to in a mortgage of "the following land in T, and being the undivided interest owned by C, in * * * the estate of S.; said land consisting of three residences * * * and one 12-acre tract and one 8-acre tract," is limited to the particular lands mentioned; and there is not embraced a lot, on which was neither of the houses, and which was part of neither of the two tracts, though part of S.'s estate. *Shegog v. Craig* (Civ. App.) 218 S. W. 530.

Where the description of a deed to plaintiff's predecessor was a result of mistake, and it did not follow a survey then made, plaintiff, if a purchaser without notice, would take to the limits of the description in the deed, regardless of the rights of the vendor to have the deed reformed as against his predecessor. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

Deeds conveying, "certain piece, parcel and quantity of land on Dickinson bayou in the county of Galveston, containing one hundred and fifty acres, being a part of the original headright of the said John Sellers, * * * and lying at or near the mouth of the said bayou," held void, being insufficient to describe a particular tract with the certainty required to pass title. *Penney v. Booth* (Civ. App.) 220 S. W. 430.

A deed for a given number of acres out of a larger tract of land with the right of the purchaser to select its location on the larger tract is valid provided such selection is made by the purchaser. *Id.*

A deed for a proportionate part of a larger tract without the stipulation therein that the purchaser may select and locate the land conveyed is valid. *Id.*

Deed describing land as the "Sam J. Whitney survey" held insufficient to vest grantee with title to land in the "Samuel J. Withey survey," as against subsequent innocent purchaser for value from grantor; such names not being idem sonans. *Conn v. Southwestern Settlement & Development Co.* (Civ. App.) 222 S. W. 612.

Description in a deed "the entire point W. or S. W. of Nixon's Bayou that Scott's gin and shipyard was on, adjoining the above-specified tract or parcel of land of 100 acres," held to describe the entire body of land lying west and southwest of the bayou and west of a bay down to its mouth, adjoining the 100 acres specified in the deed for a distance of 325 feet just north of the bay. *Blackwell v. Scott* (Civ. App.) 223 S. W. 334.

Deed held to have pointed out with sufficient definiteness 160 acres in a survey of which grantors conveyed a one-tenth interest; a description being sufficient if it furnishes means of identification. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

A deed conveying all mineral to be found on certain lands held to have conveyed all the minerals in the land, "and all other minerals that may be found by the said [grantee]," being intended to enlarge the description of minerals specifically mentioned. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

In action of trespass to try title, a deed which fails to describe what section is conveyed is insufficient to show boundaries. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

A description in a deed of trust as all the interest that the grantor at that time had or might thereafter have by inheritance, will, or otherwise in the lands, belonging to a named estate is sufficient to authorize the admission of the trust deed in evidence in a suit to foreclose it upon land of the estate subsequently partitioned to grantor. *Shaw v. Jackson* (Civ. App.) 227 S. W. 520.

Field notes of grant referred to in deed would be read into deed. *Temple Lumber Co. v. Mackechney* (Com. App.) 228 S. W. 177.

Description of land in deed as "4,000 acres of land lying and being in Sabine county on the banks of the Sabine river and known as the grant originally made to A," would have been sufficient to pass title to the entire grant, even though the grant contained about 5,500 acres. *Id.*

Where a specified tract of land is named, the entire tract passes, although it exceeds the quantity mentioned in deed, the deed in such case being sufficient to charge a subsequent purchaser with notice as to the entire tract. *Id.*

A deed which conveyed the fee also included the oil, gas, and minerals. *Taylor v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 670.

Where the grantor owned a league of land in Jasper county and labor of land in Liberty county, a deed to a league of land in county of Liberty which referred to previous conveyances wherein the league and labor were referred to as the C. league and C. survey did not, though the grantee later attempted to convey both parcels of land, include the labor. *Scheller v. Groesbeck* (Com. App.) 231 S. W. 1092, reversing judgment *Scheller v. Groesbeck* (Civ. App.) 215 S. W. 353.

A description of land in a judgment or conveyance is sufficient, if by it the true location of the land may be ascertained, and if it contains an erroneous or false call or designation or description, or other detail, and by omitting or disregarding such there remains sufficient description by which the land may yet be identified and located, the judgment or conveyance is effective. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

16. — **Appurtenances and easements.**—Clause of deed permitting use of water on land retained held not to grant exclusive right to water. *Altgelt v. Aue* (Civ. App.) 198 S. W. 606.

Where plaintiff exchanged property with defendant for lot represented by defendant to be 114 feet wide, but which plaintiff alleged was only 98 feet wide, held that deed, when construed as a whole, vested in plaintiff the fee to sidewalk space and title to private parking, so that lot was 114 feet wide as represented. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

Whether the grantee of a right of way is entitled to a way unobstructed by gates or bars depends upon the terms of the grant, the provision for which it was made, the nature and situation of the property, and the manner in which it has been used. *Arden v. Boone* (Com. App.) 221 S. W. 265, affirming judgment (Civ. App.) 187 S. W. 995.

An owner of land abutting on a private easement, who has purchased on the faith that the reservation was permanent, is entitled to have the easement kept open. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

Where an owner of land subdivided it, and reserved in the deed a right of way for a pipe line, the right to have the use of such strip of land restricted to the purposes for which it was dedicated is a valuable one to the abutting owners, and passes to purchasers regardless of whether the fee to the strip be conveyed by their deeds. *Id.*

Where land has been platted, and the plat recorded, showing certain streets thereon, purchasers of portions described with reference to the plat acquire easements in the streets as designated, even though there has been no acceptance of the dedication by the city. *Sherman Slaughtering & Rendering Co. v. Texas Nursery Co.* (Civ. App.) 224 S. W. 478.

The fact that the city had not taken over the property, or had not worked or graded streets shown on a recorded plat, does not evidence abandonment of an easement over the streets by purchasers of lots and blocks with reference to the plat. *Id.*

Where a portion of a parcel of land was conveyed with the verbal understanding that vendee could use an alleyway to reach the rear of a building, and the right to use such alleyway affected the purchase price, and the vendee constructing a building in reliance thereon, and the vendor permitting the use of such alleyway by defendant for some time, the vendee could enforce his right to use such alleyway under the verbal agreement, being actually executed. *Handal v. Cobo & Dosal* (Civ. App.) 225 S. W. 67.

Where the owner of a tract subdivided it between his children, and prior to the subdivision there were public roads bounding it giving convenient access to the church, school, gin mill, and store used by the occupants, and private ways over the land intersecting the public roads, the parties living on any subdivision who would otherwise be cut off by other subdivisions had the right to demand access to and the use of the prior existing private roads over other subdivisions, under the rule that partition of real estate among heirs carries with it by implication the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

But they could not sit by and permit themselves to be cut off by their kindred and then demand of the owner of an adjoining tract that he give them an outlet over his land, under art. 6876, a new road not being a road of necessity. *Id.*

17. — **Crops and timber.**—When not agreed to the contrary, rents and crops from purchased land pass with the deed to the land. *Armstrong v. Gifford* (Civ. App.) 196 S. W. 723; *Williams v. King* (Civ. App.) 206 S. W. 106.

Crops pass by sale of land, if they belong to owner at sale, and where neither buyer of land from landlord nor buyer's grantee had notice of execution by tenant and transfer by landlord to bank of rent note at date of purchase, crops belonged to them as against bank's assignee. *Evans v. First Guaranty State Bank of Southmayd* (Civ. App.) 195 S. W. 1171.

If it was not intended by parties, in giving and accepting trust deeds, that nursery stock on land conveyed should become permanent acquisition to soil, such stock would be personalty, and would not be affected by trust deed liens. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 196 S. W. 626.

Evidence held to show that it was intention of parties that such nursery stock should remain personal property. *Id.*

Nursery stock on land conveyed by trust deed, which had no value unless transplanted and sold annually, held personal property, and not subject to lien of trust deed. *Id.*

Where the vendor instructed his agents to sell, but said nothing of reserving the crops, and the agents sold, telling the purchasers that nothing had been said and the crops would go to them, the crops, unsevered at the time the sale was consummated, passed to the purchasers. *Holloman v. Bishop* (Civ. App.) 197 S. W. 1000.

As a rule, growing crops are part of the soil, and pass with the land. *Id.*

Though standing timber is generally regarded as part of the realty, the owner by contract can constructively cause a severance, and for purposes of mortgage or sale convert it into personalty. *Downey v. Dowell* (Civ. App.) 207 S. W. 585.

Though annual crops, the fruits of industry, so long as they are attached to the land, pass with the deed thereto unless actually or constructively severed, yet they are for general purposes classed as personal property. *Roberts v. Armstrong* (Com. App.) 231 S. W. 371.

18. — **Fixtures.**—A conveyance of land by deed containing no reservation of fixtures passes title thereto to the purchaser, regardless of a verbal sale or disposition of such fixtures. *Alexander v. Anderson* (Civ. App.) 207 S. W. 205.

The purchaser of land by virtue of his deed acquired title to a pump, rods, and trough which had been affixed to the realty so as to become a part thereof. *Boyd v. Hurd* (Civ. App.) 207 S. W. 339.

Title to personalty which had become part of realty was in vendor of land, subject to vendee's right to pay the price, failing in which the title, free from any equity in the vendee, passed to his successor, with title to the fixtures constituting a part of the land. *Id.*

Where a renewal of a deed of trust, given after the mortgagor had installed machinery under a contract with the seller that it should remain personalty until paid for, did not specify the machinery, but provided that the renewal should cover the same property, in-

cluded in the original deed of trust, the deed of trust did not include the machinery, unless it became part of the realty as a fixture. *Murray Co. v. Simmons* (Com. App.) 229 S. W. 461.

Art. 1108. [629] [553] Other forms and clauses valid.

Cited, *City of Ft. Worth, Tex. v. National Park Bank of New York* (C. C. A.) 261 Fed. 817.

Covenants in general.—Deed conveying a designated quarter, section, "containing 160 acres," and reciting a consideration of \$1 and four notes, held to convey land in bulk and not by the acre with quantity warranted. *Nicholson v. C. C. Slaughter Co.* (Civ. App.) 217 S. W. 716.

Where the covenant of a deed is qualified as being subject to a mortgage, the deed is treated as applying only to the equity of redemption, which is all that the deed purports to convey. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

Covenants of title.—Where land is sold in bulk and not by the acre with the quantity warranted, the warranty of title does not include a warranty of quantity, and purchaser is not entitled to a reduction in the price for a deficit in quantity in the absence of fraud or mistake. *Nicholson v. C. C. Slaughter Co.* (Civ. App.) 217 S. W. 716.

While, if one sells land which he does not own, the purchaser may obtain relief in equity for damages which he has suffered, yet, if the seller makes a deed which by its terms does not include some of the land pointed out, the purchaser cannot recover upon the warranty for it is only where there is failure of title to part of the land which the deed purports to convey that the covenant of warranty is broken. *Compton v. Franks* (Civ. App.) 222 S. W. 988.

A general warranty is of title, not of quantity. *Gillespie v. Gray* (Civ. App.) 230 S. W. 1027.

Assumption of incumbrances.—Where grantee under a warranty deed assumed payment of "721.60 due the N. Co., payable \$12.24 monthly," deed was not inconsistent with a finding that grantee did not assume payment of interest on the \$721.60. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

Taking a deed subject to a mortgage does not import a promise on the part of the purchaser to pay the mortgage. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

Covenants running with the land.—A covenant of warranty runs with the land, to the grantee, his heirs and assigns, and is available by a subsequent grantee, claiming title through a quitclaim deed or a sheriff's deed, or both. *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. 212.

Covenant of warranty runs with the estate till broken by eviction. *Shannon v. Childers* (Civ. App.) 202 S. W. 1030.

The law of the place where the land is situated governs in determining the effect of a covenant running with land. *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (Civ. App.) *Newsom v. Langford*, 174 S. W. 1036.

A collateral agreement between vendor and purchaser, whereby the vendor agreed to furnish electricity, gas, water, sewers, and street car service, is not a covenant running with the land and does not inure to the benefit of the assigns of the first purchaser. *Lakewood Heights Co. v. McCuiston* (Civ. App.) 226 S. W. 1109.

Persons entitled to enforce covenants.—In cases of breach of covenant in a warranty deed, notice of adverse claim or incumbrance covenanted against does not affect right of covenantee. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

That grantee in a warranty deed had knowledge of existence of incumbrances, not excepted in the deed, did not preclude him from relying on the covenant against incumbrances. *Neeley v. Lane* (Civ. App.) 205 S. W. 154.

An intermediate owner of land has no right of action for the breach of the covenants of a warranty deed, until he has been made to respond to the claims of his covenants. *McPike v. Smith* (Civ. App.) 209 S. W. 815.

Where a vendor of a riparian right does not warrant title to the submerged land, but merely the title and right necessary to acquisition of title from the state, no recovery by the purchaser can be had for breach of warranty in the absence of any evidence of eviction or threatened suit by the state. *Westervelt v. Meuly* (Civ. App.) 216 S. W. 680.

Purchaser could not recover for shortage in acreage against remote grantor on warranty of title, where purchaser had only an equitable title, subject to vendor's liens, and remote grantor had settled for deficit with intermediate purchaser. *Nicholson v. C. C. Slaughter Co.* (Civ. App.) 217 S. W. 716.

Performance or breach.—Judgment in favor of holder of vendor's lien notes foreclosing lien he asserted against land did not constitute breach of covenant of general warranty by grantee of purchaser, who conveyed to others. *Davis v. Teal* (Civ. App.) 200 S. W. 1166.

Complete failure of title does not amount to mere shortage in acreage, for which action for breach of covenant will not lie. *Shannon v. Childers* (Civ. App.) 202 S. W. 1030.

Action of state in forfeiting a survey which entirely conflicted with prior surveys amounts to a constructive eviction, breaching a covenant of warranty in a deed thereof. *Id.*

Evidence held insufficient to show breach of vendors' covenant to deliver peaceable possession of land, and to defend against paramount claims, incumbrances, and adverse possession. *Adams v. Carter* (Civ. App.) 204 S. W. 781.

Any incumbrances which would compel payment of any amount in excess of exception stipulated in a warranty deed would be a breach to that extent of covenant against incumbrances. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

An unexpired lease is a breach of the covenant for quiet enjoyment. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

Covenantee has no right to presume that a superior title will be asserted until he actually feels its pressure upon him, and cannot recover money spent voluntarily in perfecting title. *Hilburn v. Matheny* (Civ. App.) 227 S. W. 746.

Waiver of breach.—The fact that the purchasers of lots in a restricted residential subdivision made no objection to a temporary building on one lot used as a real estate office by the owners of the subdivision, and later occasionally used for elections, schools, and social gatherings, does not establish acquiescence in the use of that lot for business purposes. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

Duty to defend suits.—It is the duty of a warrantor, when made a party to a suit, or when notified of a suit in which his warrantee is sued for the title to the land, the title to which he has contracted to defend, to come in and defend such title, and if he fails to do so he cannot complain that his warrantee has failed to make such defense. *Brader v. Zbranek* (Civ. App.) 213 S. W. 331.

Damages for breach.—Where title to only part of land sold under general warranty of title falls, vendor is liable upon his warranty for damages bearing same proportion to whole purchase money as value of the part as to which title fails bears to the whole premises, estimated at prices paid. *Fidelity Lumber Co. v. Ewing* (Civ. App.) 201 S. W. 1163; *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 195 S. W. 949; *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 220 S. W. 354.

Between the immediate parties, the proper measure of damages for breach of a covenant of general warranty of title, in an executed contract for the sale of real estate, is the purchase money paid, with interest, where there has been a total failure of title. *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 195 S. W. 949; *Fidelity Lumber Co. v. Ewing* (Civ. App.) 201 S. W. 1163.

Where warrantors, by payment of \$5,000, obtained for their warrantees good title to only 132 out of 320 acres of land warranted, they were entitled to release from only $\frac{132}{320}$ of their warranty liability, and not to the extent of \$5,000 absolutely. *Fidelity Lumber Co. v. Ewing* (Civ. App.) 201 S. W. 1163.

A grantee, receiving from tenant lease money or part of the crops, is chargeable with what he so receives as an offset to his claim, under covenants in his deed, for the value of the use of the land during the time he is deprived thereof by reason of the tenant's possession. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

In an action for breach of covenant against incumbrances consisting of an outstanding lease, interest was properly allowed on the amount by which the value of the use and enjoyment of the land was diminished by occupation of the premises by the lessee. *Id.*

For breach of warranty of title the warrantee is entitled to recover the price paid for the conveyances, and where the price is paid in property, the value of the property is admissible. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

In an action for breach of warranty of title of land conveyed in an exchange of properties, evidence held sufficient to show that the price paid by plaintiff warrantee to the warrantor for all the land conveyed to him was \$8,000. *Id.*

In an action for breach of warranty of title of lands conveyed in an exchange of properties, evidence held sufficient to show the proportional part of the price paid by plaintiff warrantee represented by the part of the land to which title failed, though there was no direct evidence that the land was all of similar quality or equal value. *Id.*

Art. 1109. [630] [554] Must be witnessed or acknowledged.

Non-compliance with statute.—Plaintiff, in an action against the heirs of his deceased grantor, under Rev. St. art. 4354, sought to prove for record an instrument purporting to have been executed by deceased, conveying certain lands to plaintiff. The instrument contained all the essential elements of a conveyance of real estate, except that it was not acknowledged by the grantor nor attested by subscribing witnesses, as required by this article. Held, that a demurrer to the petition was properly overruled, since the instrument, though it might not take effect as a conveyance, was effectual as a contract to convey, on which a conveyance could be enforced under Rev. St. art. 561, and as such was entitled to record. *Howard v. Zimpelman* (Sup.) 14 S. W. 59.

In suit to cancel deed given by deceased widow, original deed, 30 years old, executed by widow and husband, held admissible as receipt of widow, although acknowledgment was defective. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

A joint lease or other conveyance by husband and wife is valid without acknowledgment, unless the property conveyed was the homestead. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

In case of a deed by a party competent to execute it, neither the acknowledgment nor record is necessary to make it a valid and binding obligation. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

Whether a lost deed was duly acknowledged by the grantor was immaterial where the execution was proved as at common law. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

Art. 1110. [631] [555] Conveyance by sheriff or other officer will pass title, when.

Conveyance by officer in general.—The fact that the best evidence of a sheriff's authority to sell is not available, and that proper predicate has been laid for secondary evi-

dence, does not alter the rule that recital in a sheriff's deed is not competent evidence of his power to sell. *Richards v. Rule* (Com. App.) 207 S. W. 912.

Whether a sheriff's deed was executed by virtue of the requisite authority may be established by competent secondary evidence, and the question is not foreclosed by the fact that the execution docket contains no entry of the issuance of an order of sale. *Id.*

Description of land.—Where an improper description is put in a mortgage and foreclosure is had and the mistake is carried into the sheriff's deed, the sheriff's deed cannot be reformed, but to get title the mortgage itself should be reformed and another foreclosure had. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

Art. 1111. [632] [556] Estates in futuro.

Cited, *Concho Camp No. 65, W. O. W. v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

Purpose of statute.—This article was enacted to abrogate the common-law rule that a freehold to commence in futuro could not be conveyed, and has reference to estate in expectancy other than estates in reversion and remainder. *Glenn v. Holt* (Civ. App.) 229 S. W. 684.

Remainders and reversions.—"Remainders" are created by deed or devise, whereas "reversions" are created by operation of law, and, regardless of how many estates are carved out of the owner's entire estate, a reversion will be left, provided they do not amount in quantity to his original estate, and as to all the estate except the particular part granted or devised the original owner remains the owner as he originally was. *Glenn v. Holt* (Civ. App.) 229 S. W. 684.

Where a deed from husband to wife granting a life estate to the wife provided the parties should live together as husband and wife, and further provided that if no issue be born to grantor or his wife the conveyance was intended to vest title, after termination of the life estate, in "my legal heirs in the same manner as they would inherit under the law," a reversion in fee remained in the grantor upon his dying without issue. *Id.*

Where grantor died without issue, the heirs could not take as contingent remaindermen, since a contingent remainder cannot be limited to the grantor's heirs, and such estate continued in the grantor as a reversion in fee, which could be conveyed by him. *Id.*

Art. 1112. [633] [557] Implied covenants.

See *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734.

Cited, *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727; *Peterson v. McCauley* (Civ. App.) 25 S. W. 826.

Implied covenants in general.—Decree of partition created statutory warranty in writing similar to general warranty expressed in deed, and such statutory warranty cannot be enlarged or restricted by parol evidence. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

Parties to partition wherein decree was founded on mutual mistake of matter could sue either upon statutory warranty or in equity, and allege two causes alternatively in same pleading. *Id.*

When the words "grant" or "convey" are used in a deed, the deed warrants against all incumbrances, in view of this article. *Robinson v. Street* (Civ. App.) 220 S. W. 648.

The assignors, of a gas and oil lease do not warrant their title where the assignment contains no express covenants of any kind, since covenants for title are not implied in a mere assignment of a lease, so that the assignors are not liable to the assignee for failure of the title. *White v. Murphy* (Civ. App.) 229 S. W. 641.

If by the use of the words "grant and convey" in the assignment of an oil and gas lease a covenant against incumbrances and prior conveyance by the assignors is implied under this article, such a covenant would not protect the assignee against a cancellation of the lease for fraud of the assignors in obtaining it. *Id.*

Art. 1113. [634] [558] Incumbrances include what.

Implied covenants.—An unexpired lease constitutes an incumbrance, in that it entitles the tenant to a right or interest, to the diminution of the value of the land conveyed. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

Art. 1114. [635] [559] Conveyance of separate lands of the wife, how made.

See *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734.

Cited, *Ikard v. Thompson*, 81 Tex. 285, 16 S. W. 1019.

Conveyance and contract to convey in general.—See *Haynie v. Stovall* (Civ. App.) 212 S. W. 792; note to art. 1115.

Although husband procured money under express agreement that wife would join him in trust deed, where she alone signed, deed was invalid, and neither husband nor wife, in foreclosure, were estopped from denying its validity; there being nothing to show fraud on wife's part. *First State Bank of Tomball v. Tinkham* (Civ. App.) 195 S. W. 880.

This article necessarily includes by implication the power of the wife to incur her estate, when joined by her husband, and accordingly she may mortgage it to secure the husband's debts. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

Wife's acknowledgment.—A joint lease or other conveyance by husband and wife is valid without acknowledgment, or if the wife's acknowledgment is defective, unless the property conveyed was the homestead. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

Where an oil lease executed by husband and wife was acknowledged by wife while containing blank for description, lease was not operative, despite wife's parol authorization of a third person to fill blank, and was void where blank was subsequently filled in and no subsequent acknowledgment made by wife. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

A deed by a married woman must be acknowledged in a prescribed manner, and without such acknowledgment is absolutely void, and no court can give validity to it by judgment proving it. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

In an action by a wife to cancel a deed executed by her and her husband, evidence held sufficient to support a finding that notary public took plaintiff's acknowledgment as required by law and as stated in the certificate. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

In order for a married woman to convey her separate property or her homestead, it is necessary that her acknowledgment be taken to the instrument by an officer authorized to do so in the manner required by statute. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

An instrument, executed by the heirs, confirming a distribution of the property by the executor, cannot operate as a conveyance of an interest of a married woman in the property, where she was not examined separate from her husband in taking her acknowledgment, as required by arts. 6805, 1114. *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

Art. 1115. [636] [560] Conveyance of homestead, how made.

See notes under art. 3786 in edition of 1914 and 1918 Supplement.

Cited, *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

Conveyance and contract to convey in general.—Under this article, a married woman may convey her homestead through an attorney in fact, by a power of attorney, executed jointly with her husband in the manner prescribed in this article. *Warren v. Jones*, 69 Tex. 462, 6 S. W. 775.

No title to homestead passed by quitclaim deed executed by husband alone, in violation of arts. 1115, 4621, 6802, 6803, and Const. art. 16, § 50. *Clark v. Tulley* (Civ. App.) 200 S. W. 605.

Unless there is reasonable necessity for such action by husband alone, he cannot convey or mortgage homestead to cancel or adjust equities. *Church v. Hayner* (Civ. App.) 201 S. W. 711.

Sale of standing timber on homestead lands of husband and wife, made by husband alone, wife not joining in conveyance, passed title as against subsequent buyer of timber, from husband's grantee of lands; use of lands as homestead not having been interfered with or value impaired by sale of timber. *Downey v. Dowell* (Civ. App.) 207 S. W. 585.

Where oil lease executed by husband and wife, covering their homestead, was signed and acknowledged by the wife merely for the purpose of enabling lessee to secure other leases, and without intent on her part to convey her rights in the homestead, and lessee had notice thereof, the lease was inoperative as a conveyance of an interest in the homestead, in view of arts. 1115, 6802, and 6805. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

Where the husband alone contracted to convey land used as a homestead, the grantee was clearly entitled to enforce his contract under the rules governing ordinary actions for specific performance of parol contracts to convey land after the land had ceased to be a homestead. *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

A contract to convey a homestead is not one for which specific performance may be decreed. *Richardson v. Terry* (Civ. App.) 212 S. W. 523.

Under arts. 1103, 1114, 1115, a contract to execute an oil lease on homestead property, in which the wife of the owner has not joined, is void. *Haynie v. Stovall* (Civ. App.) 212 S. W. 792.

Though husband and wife signed and acknowledged an oil and gas lease of their homestead and placed it in escrow, contract still being executory up to actual delivery with intent to vest title, specific performance cannot be decreed. *Jackson v. Scoggins* (Civ. App.) 220 S. W. 302.

An executory contract to convey the homestead cannot be specifically enforced against the wife. *Crabb v. Bell* (Civ. App.) 220 S. W. 623.

Deed executed by husband and wife, owners of a homestead in the land, conveying all minerals therein, held a joint conveyance. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

A husband's deed to his wife of their homestead property, without her joinder, the conveyance being intended to take effect on the contingency that something happened to the husband, on happening of which the conveyance was to be recorded, was not such a sale and conveyance of the homestead as is inhibited by Const. art. 16, § 50, and by this article, the deed not being void because the property was a homestead. *Earl v. Mundy* (Civ. App.) 227 S. W. 970.

Where plaintiff and his father-in-law jointly bought a parcel of land, the title being taken in the name of plaintiff, and the two families moved on the land, plaintiff's conveyance to his father-in-law on partition cannot be attacked because his wife did not join; the homestead right attaching only to plaintiff's undivided interest in the land. *Zabawa v. Allen* (Civ. App.) 228 S. W. 664.

Under Acts 33d Leg. (1913) c. 32 (arts. 4621, 4622, 4624), even if a married woman had made a contract in writing, properly acknowledged, to convey a lot which was her separate property and the homestead of herself and husband, she could not be bound there-

by, for she could repudiate and refuse to comply with it up to the time she declared to the officer taking her acknowledgment that she did not wish to retract, as she could not legally contract beforehand in regard to her right to retract so as to deprive herself of that right. *Collett v. Harris* (Civ. App.) 229 S. W. 885.

Where a wife, when requested by broker to join her husband in signing contract to sell a lot which was her separate property and also the homestead of herself and husband, refused to do so but authorized her husband to sign it, the broker was charged with notice of the fact that her parol contract to sell was an absolute nullity. *Id.*

When landowner lists homestead with broker, and a purchaser is found, ready, willing, and able to accept it, he cannot avoid liability to the broker for commissions on the ground that his wife refuses to execute a deed. *Cotten v. Willingham* (Civ. App.) 232 S. W. 572.

Wife's homestead interest is neither an "incumbrance" nor a "defect in the title," such as would prevent recovery of commissions from the husband. *Id.*

What constitutes homestead.—One who has been in the peaceable, and adverse possession of land for more than 10 years, occupying it as his homestead, thereby acquires a title such that a valid transfer can only be made in the manner prescribed by statute for the conveyance of a homestead. *Bridges v. Johnson*, 69 Tex. 714, 7 S. W. 506.

Abandonment of homestead.—There was no difference between the power of a husband to abandon a part and his power to abandon all of the homestead, either of which he alone may do if acting in good faith. *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

Under Const. art. 16, § 50, it is only the homestead which the husband is forbidden to sell, and land having once been used for the purposes of a home retains its homestead character until lost by abandonment. *Id.*

Where an insolvent decedent gave a mortgage upon his land, subsequently married, made the land his homestead, and after abandoning it, gave, without his wife's joinder, a new trust deed, and some time later re-established such homestead, the mortgage lien is superior to the homestead exemption rights of the widow and children. *Investors' Mortgage Security Co. v. Newton*, 109 Tex. 478, 211 S. W. 971.

A husband, acting in good faith, may select the homestead, and when he has acquired a new home, and his wife has removed with him to the newly acquired homestead, a prior deed made by him without her concurrence to the former homestead becomes as to the husband operative as an estoppel, and the wife's right, being that of homestead only, ceases when a new homestead has been acquired and she removes thereto. *Fisher v. Gulf Production Co.* (Civ. App.) 231 S. W. 450.

Insanity of husband or wife.—Art. 4621 applies to a conveyance of the homestead, which was the wife's separate property, though the husband was insane, where the conveyance was not made or necessary for the support and maintenance of either the husband or wife. *Lawson v. Armstrong* (Civ. App.) 227 S. W. 687.

Separation.—Const. art. 16, § 50, exempting homestead, does not protect a married man who executed a deed of trust, though he was married and was occupying the property as a residence when he executed it, his wife having abandoned him with the intention never to return. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

Abandoned wife, without minor children or single daughters living with her, or other constituent members of family, may mortgage her homestead. *Williams v. Farmers' Nat. Bank of Stephenville* (Civ. App.) 201 S. W. 1083.

Sentence of husband to penitentiary is equivalent to abandonment of wife. *Id.*

Acknowledgment by wife.—Where mortgagee canceled mortgage in consideration of conveyance to him, and thereafter reconveyed to mortgagors, and accepted vendors' lien notes, the fact that wife of one of the mortgagors did not acknowledge deed until after reconveyance did not, in the absence of fraud, affect its validity, even though it conveyed the homestead. *Jones v. Fink* (Civ. App.) 209 S. W. 777.

In an action to cancel an oil lease of a homestead between the original lessors and lessees, a petition alleging that the separate acknowledgment of the wife of lessor was not taken as required is sufficient, without alleging fraud or imposition in the taking of the acknowledgment. *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

In order for a married woman to convey her homestead, it is necessary that her acknowledgment be taken to the instrument by an officer authorized to do so in the manner required by statute. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

See *Pierce v. Fort*, 60 Tex. 464.

Ratification.—A mutual will of a husband and wife, giving the survivor a life estate and upon his or her death devising the homestead in fee to an adopted child and a son of a deceased adopted child, when adopted and ratified by the widow, who survived, vested an undivided half interest in the homestead in each of the named remaindermen. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Where a husband and wife contracted to sell their homestead and the wife subsequently refused to join, notwithstanding that with the proceeds of the sale they had acquired a new homestead, their act in accepting the purchase money with full knowledge of the material facts held a ratification, precluding them from recovering for false representations inducing the execution of the earnest money receipt by the wife. *Fisher v. Gulf Production Co.* (Civ. App.) 231 S. W. 450.

Repudiation.—Where a conveyance by a husband and wife of a homestead was not duly acknowledged by the wife, the execution and delivery of a subsequent deed while they were still on the land and had acquired no other homestead was a repudiation of the attempted sale to the first grantee. *Fidelity Lumber Co. v. Adams* (Civ. App.) 220 S. W. 177.

Estoppel.—Married woman's title to homestead cannot be divested by estoppel, worked by conduct of husband, to which she is not a party. *Barclay v. Dismuke* (Civ. App.) 202 S. W. 364.

Where plaintiff, in reliance upon written and verbal statements of defendants, that lot No. 11 alone was their homestead, made a loan secured by a mortgage on lot No. 12, defendants cannot defeat loan by setting up that lot No. 12 was in fact their homestead. *Turrentine v. Doering* (Civ. App.) 203 S. W. 802.

Where defendants were not occupying lots 11 and 12, or in such physical possession thereof as would give notice of homestead character, plaintiff could safely, in making a loan, rely on their statements as to intention to make lot No. 11 their sole homestead. *Id.*

Fraud and coercion.—In a suit by grantor to recover damages based upon certain fraudulent representations by which he and his wife had been induced to convey their homestead, evidence held to sustain finding that he did not rely upon the alleged fraudulent representation, but upon a written guaranty. *Hinds v. Allen* (Civ. App.) 213 S. W. 671.

Easements and incumbrances.—Where claimants were occupying premises as homestead at time of attempted execution of lien thereon by executing deed of trust, attempted lien was void. *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

Existence of purchase-money lien against homestead did not authorize husband alone to deal with property by giving deed of trust, as if it were not a homestead. *Church v. Hayner* (Civ. App.) 201 S. W. 711.

Deed of trust covering homestead, given by husband alone, unless given to acquire it, or pursuant to agreement as to its acquisition, or unless he had power to give it in adjusting equities against homestead, cannot be sustained. *Id.*

Under Const. art. 16, § 50, and Rev. St. art. 5631, held, that sale of homestead under trust deed given to secure notes, executed in payment of improvement of homestead, under contract signed by husband and wife, was valid. *Bowers v. Eennett* (Civ. App.) 203 S. W. 82.

Deed of trust on homestead to secure payment of note given by husband and wife to contractor to erect building is invalid where there is no contract in writing for work and material, though money secured on note is afterwards used to improve homestead. *Herring v. Barber* (Civ. App.) 203 S. W. 142.

If land was homestead of husband at time of conveyances from him, and conveyances were intended as mortgages, and grantees had notice of facts when they acquired their several interests, conveyances were void. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

An instrument, creating a lien in favor of street paving contractor, purporting in its premises to be from "M. and his wife," was binding on wife, where she signed and acknowledged that she was the wife of M., the person described, named, and referred to in the premises. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Rights of purchasers and mortgagees.—Under Const. art. 16, § 50, in absence of showing of diligence by making inquiry by purchaser at trustee's sale, possession of tenants of prior grantor who held homestead held notice that his deed and a subsequent deed were intended as mortgages, and hence trustee's deed was void, and not voidable. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

Duty of purchaser in respect to privy examination of wife by notary, see *Pierce v. Fort*, 60 Tex. 464.

Where a grantor by deed absolute, but in fact a mortgage, conveys a homestead, but is in possession at the time of a subsequent conveyance by his grantee, or a subsequent grantee in chain of title, the purchaser has notice of his title. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

That a deed absolute was of record at the time plaintiff purchased from a subsequent grantee was not determinative of the sufficiency of notice of the claim of mortgage given by reason of the defendant's occupancy as a homestead of the premises. *Id.*

At time of trial of suit to recover homestead and cancel quitclaim deed executed by husband alone, husband and wife had right to pay defendant amount of husband's note given for part of purchase money to husband's vendor; husband never having made default, and defendant, after receiving quitclaim deed, and as part consideration, having paid husband's vendor amount of note. *Clark v. Tulley* (Civ. App.) 200 S. W. 605.

Where wife of joint owner of land having homestead right failed to sign lease or option to develop for oil, failure could only be involved to limit rights of lessees or optionees, not as ground for cancellation. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

While an executory contract for the sale or lease of a homestead signed and acknowledged by both husband and wife in the manner required for the conveyance of such property will not be specifically enforced, damages may be recovered for breach of such contract by way of alternative relief. *Blue v. Conner* (Civ. App.) 219 S. W. 533.

Art. 1116. [637] [561] Failing as a conveyance, shall be valid as a contract.

Insufficient conveyance as contract.—An instrument which contained all the essential elements of a conveyance of real estate, except that it was not acknowledged by the grantor nor attested by subscribing witnesses, as required by art. 1109, though it might not take effect as a conveyance, was effectual as a contract to convey, on which a conveyance could be enforced under this article, and as such was entitled to record under art. 6853. *Howard v. Zimpelman* (Sup.) 14 S. W. 59.

Whether there was such intention to convey that a deed conveyed title as a contract for conveyance of land under this article, held for the jury under the evidence, though defendants admitted they signed the instruments. *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

Merger of contract in deed.—Where plaintiff contracted to sell defendant "the Angelus Hotel," the delivery of a deed which failed to embrace all of the land occupied by the hotel, and acceptance of such deed in ignorance of such fact, was a fraud preventing the application of the doctrine of merger of contract in deed. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

Assignment of contract.—Instrument assigning a purchaser's interest under a contract of sale for a valuable consideration duly signed and acknowledged was a valid contract conveying purchaser's interest, and admissible in action for deposit. *J. M. Frost & Sons v. Cramer* (Civ. App.) 199 S. W. 838.

TITLE 25

CORPORATIONS—PRIVATE

Chap.

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4. Land, acquisition, etc., of, restricted.
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Chap.

12. Educational corporations.
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16. Channel and dock corporations.
20. Bridge and ferry corporations.
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- 21a. Gas, electric current and power corporations.
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CHAPTER ONE

PRELIMINARY PROVISIONS

Art.

1118. Public corporations.

Art.

1119. Private corporations.

Article 1118. [639] [563] Public corporations.

In general.—In view of Rev. St. 1911, art. 1118, and arts. 4991-5011, an irrigation district is a "public corporation," which cannot be dissolved or have its powers destroyed at the suit of any one except the state. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

Art. 1119. [640] [564] Private corporations.

Regulation.—The public has no regulatory interest in an ice company. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Quasi public corporations.—An ice company, lacking the power of eminent domain, and not being subject to regulation by public, is a private, and not a quasi public, corporation. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

CHAPTER TWO

CREATION OF CORPORATIONS

Art.

1120. Private corporations may be created.
1121. For what purposes corporations may be created.
1122. Charter and what it must set forth.
1123. Charter must be subscribed and acknowledged.
1125. Private corporations for profit must subscribe full amount of stock, etc.
1127. Satisfactory evidence defined.
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Art.

1130. Subscriptions and payment of stock required of excepted corporations.
1131. Must be filed with secretary of state, etc.
1132. Corporation shall exist from time of filing charter, etc.
1133. Charter may be amended, how.
1137. Renewal and consolidation of two or more such corporations, etc., how.
1138. Existence of corporation shall not be disputed collaterally.
1139. Legislature may alter, reform or amend.

Article 1120. [641] [565] Private corporations may be created.

Acceptance of charter.—Legislative grant of a corporate charter by special act without its acceptance does not constitute a contract between the company and the state investing the company with legal existence. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

Art. 1121. [642] [566] For what purposes corporations may be created.—The purposes for which private corporations may be formed are:

17a. To contract for the erection, construction, or repair of any building, structure, or improvement, public or private and erect, construct or repair same or any part thereof, and to acquire, own, prepare for use, any materials for said purposes. [Acts 1919, 36th Leg., ch. 39, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

28. The construction or purchase and maintenance of mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale and storage of products and commodities by grain elevator and public warehouse companies, and the loan of money by such elevator and public warehouse companies, and to act as general commercial brokers and as customs brokers in the United States and foreign countries. [Acts 1920, 36th Leg. 3d C. S., ch. 17, § 1, amending art. 1121, sec. 28, Rev. Civ. St.]

That all corporations heretofore organized under said section 28, Article 1121, of the Revised Civil Statutes of the State of Texas be, and they are hereby, vested with the additional power provided by this Act. [Acts 1920, 36th Leg. 3d C. S., ch. 17, § 2.]

Took effect June 16, 1920.

77. A private corporation may be formed and chartered for the establishment and maintenance of garages with authority to purchase, sell store, house, rent, operate, repair, and otherwise deal in automobiles and other motor vehicles and their accessories, provided that the right to operate shall not conflict with the ordinances of any incorporated city or town in which they shall operate; gasoline and oils necessary to the operation of motor vehicles. [Acts 1919, 36th Leg., ch. 7, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

78. A private corporation may be formed and chartered for the establishment and maintenance of drilling companies, with authority to own and operate drilling rigs, machinery, tools and apparatus necessary in the boring, or otherwise sinking of wells in the production of oil, gas or water, or either, and the purchase and sale of such goods, wares and merchandise used for such business, and declaring an emergency. [Acts 1919, 36th Leg., ch. 8, § 1.]

Took effect 90 days after March 19, 1919, adjournment.

79. A private corporation may be formed and chartered for the construction, building and manufacture of aeroplanes, including all classes of flying machines, to buy, sell and otherwise deal therein, and to operate, or have operated any such machines for the purpose of carrying passengers and freight, both or either, including United States mail, from and to any point in this State and subject to the laws thereof, to and from any point in any State of the United States, or any foreign country, with the right to acquire by purchase, or otherwise, and to maintain all necessary starting and lighting grounds and fields. [Acts 1919, 36th Leg., ch. 9, § 1.]

Took effect 90 days after March 19, 1919, adjournment.

80. Private corporations may be formed for the purpose of accepting, guaranteeing, enforcing, becoming surety upon, buying, selling, contracting with reference to or otherwise dealing in acceptances, bills of exchange, bills of lading and warehouse and other receipts growing out, or to be used in aid, of the transportation, warehousing, distribution, or financing, in either domestic or foreign trade, of readily marketable, staple, non-perishable, agricultural products and so executed or supported as to be secured upon or to represent such products in amounts at least equal in clear market value to the amount of the financial undertaking of such corporations upon or on account of such instruments. Any such corporation may also buy, sell, endorse, contract with reference to, or otherwise deal in, acceptances of approved banking corporations, not secured upon nor representing any such products, but eligible for rediscount to, or for purchase in the open market by, Federal Reserve Banks; provided however the total liabilities to any corporation chartered under this Act of any such banking corporation, on account of any such unsecured acceptances, shall at no time be permitted to exceed ten per cent. of the unimpaired capital of such corporation chartered under this Act. No corporation shall be chartered under this Act with authorized capital stock of less than \$500,000.00, nor shall the authorized capital stock of any such corporation be reduced by amendment, to less than \$500,000.00. By readily, marketable, staple, non-perishable, agricultural products are meant those classes of agricultural products which are subject to such constant dealing in ready markets as to make their values easily and definitely ascertainable and realizable on short notice and which are not ordinarily subject to substantial depreciation in quality within the period of immaturity of the obligations which they secure or by which they are represented. Each corporation chartered under this Act shall invest and keep invested in obligations of the United States of America, the State of Texas, or political sub-divisions or incorporated cities of the State of Texas, not less than one-half of its paid in capital.

No corporation formed under this Act shall enter into any contract or contracts of acceptance, guaranty, endorsement or suretyship when its obligation thereon in connection with its entire existing obligations and indebtedness primary or secondary, fixed or contingent, shall exceed five times its then unimpaired capital and surplus; provided however, if previously authorized in writing so to do by the Commissioner of Insurance and Banking, it shall be lawful for such corporation to enter into such contract or contracts when its obligations thereon in connection with its said entire then existing obligations and indebtedness shall not exceed ten times its said capital and surplus and shall not exceed the limits fixed by the written authorization issued by such Commissioner, and all such contracts and obligations entered into in violation hereof shall be unenforceable against such corporation; provided further that those obligations, to pay which at maturity, any such corporation has been furnished funds by other parties liable thereon, need not be considered in determining the amount of its existing obligations and indebtedness under this paragraph, provided, however that nothing contained in this Act shall prevent the enforcement of any such prohibited obligations by any holder who has acquired the same in due course, for value, before maturity, and without notice of its infirmity.

It shall be lawful for any private corporation formed under Title 25 of the Revised Statutes of Texas and for any banking corporation or trust company (excepting Savings Banks) formed under Title 14 of the Revised Statutes of Texas to hold stock in corporations chartered under this

Act and in corporations chartered under the laws of the United States or any state thereof and principally engaged in financing domestic or foreign trade in any such agricultural products, in amounts not to exceed in the aggregate, ten per cent. of the capital and surplus of such private corporation, banking corporation or trust company, nor to exceed ten per cent. of the capital stock of such corporation in which such stock is to be held; provided, however, no banking corporation or trust company shall acquire stock in such corporation without express written authorization therefor from the Commissioner of Insurance and Banking of the State of Texas, under such rules and regulations as he may provide, except in payment of debt, and if it shall acquire same in payment of debt, it shall promptly dispose of same unless expressly permitted to retain same by such Commissioner of Insurance and Banking.

Corporations formed under this Act shall be subject at all times to the supervision and control of the Commissioner of Insurance and Banking of the State of Texas and shall conform to all lawful regulations of such Commissioner. No such corporation shall begin business until authorized so to do by such Commissioner after satisfactory showing made that such corporation has complied with the law, and thereafter it shall make such reports to such Commissioner and be subject to such periodical visitations and examinations under his direction, and shall pay fees therefor, all as in the case of State Banking corporations under existing law. Said Commissioner shall have such powers with reference to taking charge of such corporations, liquidating same, and for like causes, as are possessed by him with reference to State banking corporations. No partial invalidity of this Act in any other respect shall be effective to impair any of its provisions authorizing the formation of corporations hereunder, defining their powers, and authorizing private corporations, banking corporations and trust companies to hold stock in them, subject to the limitations of this Act. [Acts 1919, 36th Leg., 2d C. S., ch. 4, § 1.]

For section 2 of this act see post, Penal Code, art. 1907b. The act took effect July 9, 1919.

81. For the organization of companies with authority to subscribe for, purchase, invest in, hold, own, assign, pledge and otherwise deal in and dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities, obligations, contracts and evidences of indebtedness of corporations organized under the laws of the State of Texas or of any other State.

Provided, however, no company organized under the provisions of this Act shall be authorized to subscribe for, purchase, invest in, hold, own, assign, pledge or otherwise deal in or dispose of the shares of capital stock, bonds, mortgages, debentures, notes or other securities, obligations, contracts or evidences of indebtedness of any two or more corporations engaged in the same line of business that are in competition with each other. Provided, further, that the powers and authority conferred under the provisions of this Act shall in no way affect the provisions of the Anti-trust laws of this State. [Acts 1921, 37th Leg., ch. 136, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

82. For the purpose of manufacturing ice and nonintoxicating beverages and in connection therewith the operation of a general storage business; provided, that no beverage of any kind prohibited by any law of this State from being manufactured, sold or stored, shall be so manufactured, stored or in any manner kept in the possession of any company so incorporated. [Acts 1921, 37th Leg. 1st C. S., ch. 47, § 1.]

Establishments incorporated under this subdivision shall be subject to and pay two franchise taxes. [Id., § 2.]

Took effect Nov. 15, 1921.

Art. 1121 cited, Ft. Worth St. Ry. Co. v. Rosedale St. Ry. Co., 68 Tex. 169, 4 S. W. 534; Farmer v. State, 69 Tex. 561, 7 S. W. 220; San Antonio Fire Fighters' Local Union No. 84 v. Bell (Civ. App.) 223 S. W. 506.

Construction of prior acts.—See Guadalupe & S. A. R. Stock Ass'n v. West, 70 Tex. 391, 7 S. W. 817; National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101.

Purposes for which may be created—Several and distinct purposes.—A corporation held not organized and conducted for two purposes, contrary to law, its charter stating it is for educational purposes, though providing it shall be controlled by a religious denomination. Lightfoot v. Poindexter (Civ. App.) 199 S. W. 1152.

Subdivision 21.—See Taylor v. Dunn, 80 Tex. 652, 16 S. W. 732.

Subdivision 23.—See Westbrook v. Missouri-Texas Land & Irrigation Co. (Civ. App.) 195 S. W. 1154.

Cited, Knight v. Oldham (Civ. App.) 210 S. W. 567.

Subdivision 25.—A corporation, organized for the purpose of buying and selling goods by wholesale and retail, has power to sell goods by taking orders from the customer, sending them to the wholesaler, and having him ship goods directly to customer. Sheehan v. Sheehan-Hackley & Co. (Civ. App.) 196 S. W. 665.

— **Construction of prior acts.**—See Empire Mills v. Alston Grocery Co. (App.) 15 S. W. 505, 12 L. R. A. 366.

Subdivision 36.—Where defendant club might lawfully dispense liquor to its members and guests so far as Penal Laws are concerned, the state was not entitled to restrain it from so dispensing the same on the ground that such was not within its corporate powers, since a corporation may transact all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of its main undertaking. Country Club v. State, 110 Tex. 40, 214 S. W. 296, 5 A. L. R. 1185.

Subdivision 37.—Under its charter the city of Austin had power to make, for a period of more than two years back, assessments of securities of a fidelity and bonding company, also doing a casualty insurance business, deposited with the state treasurer as required by this subdivision, and Acts 32d Leg. c. 117 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4942a-4942z), which had been omitted from taxation. Texas Fidelity & Bonding Co. v. City of Austin (Civ. App.) 211 S. W. 818.

A corporation may be appointed and act as executor; the creation of such corporations being authorized by this subdivision. Simmons v. Campbell (Civ. App.) 213 S. W. 338.

Subdivision 39.—Construction of prior acts.—See McGee Irrigating Ditch Co. v. Hudson (Sup.) 22 S. W. 967.

Subdivision 60.—The Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) and this act having been passed at the same session of the Legislature, and within a few days of each other, it is to be presumed that they are imbued with the same spirit and actuated by the same policy, and they should be construed each in the light of the other. Eastern Texas Electric Co. v. Woods (Civ. App.) 230 S. W. 498.

The Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) in its application to an electric company operating a lighting and power department, as well as a street railway and an interurban railway, held not repealed by this subdivision. Id.

Subdivision 72.—An ice company has no power of eminent domain. Van Valkenburgh v. Ford (Civ. App.) 207 S. W. 405.

Evidence that a corporation was incorporated under the laws of Texas and operated two cotton gins and an ice plant under the same charter and authorized its secretary and manager to operate mills without specifying the kind of mills was sufficient to show that it was incorporated under this subdivision. Bishop Mfg. Co. v. Sealy Oil Mill & Mfg. Co. (Civ. App.) 220 S. W. 203.

A corporation organized under this subdivision, though conducting a cotton seed oil business, would not be authorized to conduct a general trading business in cotton seed nor to contract for the sale of cotton seed, where it did not then own the seed, and the sale was not based upon any estimate of the amount of seed which could reasonably be expected to be acquired from customers of the gin. Id.

A corporation incorporated under this subdivision, and operating cotton gins had power to contract for the sale of cotton seed acquired from its customers and to contract for the sale of seed acquired by means of ultra vires contracts for the purpose of preventing a loss. Id.

Art. 1122. [643] [567] Charter and what it must set forth.

See National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101.

Cited, Ft. Worth St. Ry. Co. v. Rosedale St. Ry. Co., 68 Tex. 169, 4 S. W. 534.

Residence.—A corporation's "residence" in legal contemplation is the place where it maintains its office and transacts its business—its principal place of business. Sanders v. Farmers' State Bank of Mexia (Civ. App.) 228 S. W. 635.

Capital.—The term "capital" designates that portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purposes of deriving therefrom the gains and profits. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Art. 1123. [644] [568] Charter must be subscribed and acknowledged.—The charter of an intended corporation must be subscribed by three or more persons, two of whom at least must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgments of deeds; provided, that all charters may be subscribed by married women who may also be stockholders, officers and directors thereof; and their acts contracts and deeds as such stockholders, officers and directors shall be as binding and effective for all the purposes of said corporation as if they were males; and the joinder and consent of their husbands and privy examinations separate and apart from them shall not be required. [Acts 1887, p. 103; Acts 1919, 36th Leg., ch. 132, § 1 amending art. 1123, Rev. Civ. St.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 1125. Private corporations for profit must subscribe full amount of stock, etc.

Payment.—A corporate charter may be procured when entire stock has been subscribed and 50 per cent. of capital paid in, although certain subscribers had not paid half of their subscriptions. *Stringfellow v. Panhandle Packing Co.* (Com. App.) 213 S. W. 250.

Estoppel to deny recital.—Creditor dealing with corporation has right to assume its capital will be or has been paid in accordance with law, the capital constituting a warranty for the extension of credit, and, on the corporation's insolvency, becoming a trust fund for creditors. *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S. W. 977.

Where original incorporators and subscribers, in their affidavit in application for charter, set forth, as fully paying for stock subscribed by them, payments partly in merchandise and partly in cash, they could not claim, as a defense to their liability for the amounts recited as cash, which were, in fact, not paid, that their valuation in such affidavit of the merchandise turned over by them was too low. *Park v. Rich* (Com. App.) 212 S. W. 947.

Persons signing corporate charter and affidavits that stock had been fully subscribed and that they had paid 50 per cent. of their stock subscriptions may be held to a performance of their subscription agreements by state or corporation. *Stringfellow v. Panhandle Packing Co.* (Com. App.) 213 S. W. 250.

Art. 1127. Satisfactory evidence defined.

Effect of false statement.—Where incorporators and subscribers made affidavit that the stock was fully subscribed and paid, caused the corporation's books to so show, had stock issued to themselves as fully paid and nonassessable, and represented, in sale of the stock, that it was fully paid, purchaser paying full face value therefor, but, although they had paid for the stock the amount of merchandise recited in their affidavits, the cash amounts recited as paid were in fact not paid by them, the question of their good faith in their sale of the stock was immaterial on the question of their liability for amounts unpaid on their stock. *Park v. Rich* (Com. App.) 212 S. W. 947.

Art. 1128. Secretary of state may require other evidence.

Effect of acceptance by Secretary of State.—Acceptance by the secretary of state of the valuation of an oil lease, placed upon it by incorporators who received stock on such valuation, renders such valuation prima facie correct, and it can only be called in question in case of fraud. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Art. 1129. Certain corporations exempt from provisions.—Corporations created under subdivisions 21, 29, 37, 53, 54, and 60 of Article 1121, as well as corporations formed for the construction, purchase and maintenance of mills and gins, having a capital stock of not exceeding fifteen thousand dollars, mutual building and loan associations, corporations formed for the construction, purchase, maintenance and operation of cotton mills, and also waterworks, ice plants, electric light plants and cotton warehouses in cities of less than ten thousand inhabitants are exempt from the provisions of Articles 1125 to 1128, inclusive. [Acts 1901, p.

18; Acts 1897, p. 192; Acts 1907, p. 309, § 1; Acts 1920, 36th Leg., 3d C. S., ch. 45, § 1.]

Took effect 90 days after June 18, 1920, date of adjournment.
See Knowles v. State, 31 Cr. R. 383, 20 S. W. 829.

Art. 1130. Subscriptions and payment of stock required of excepted corporations.

Cited, Spearman v. State, 23 Tex. App. 224, 4 S. W. 586.

Art. 1131. [645] [569] Must be filed with secretary of state, etc.

Cited, Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043.

Art. 1132. [646] [570] Corporation shall exist from time of filing charter, etc.

Cited, Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043.

Art. 1133. [647] [571] Charter may be amended, how.

Cited, Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043.

Effect of amendment.—An authorized change in the name of a corporation has no effect on its identity, nor on its rights and obligations. C. R. Miller & Bro. v. Mummert (Civ. App.) 196 S. W. 270.

Art. 1137. Renewal and consolidation of two or more such corporations, etc., how.

What constitutes consolidation.—Where borrowing companies conveyed all their property to the lender to satisfy indebtedness, which was usurious, and the lender conveyed to a new company formed to unify business of borrowing companies, the new company could not avail itself of fact of usury in contract between lender and borrower companies, transaction not constituting an "amalgamation," "merger," or "consolidation" of borrower companies. Sugg v. Smith (Civ. App.) 205 S. W. 363.

Art. 1138. [675] [599] Existence of corporation shall not be disputed collaterally.

Who may question corporate existence.—Under this article, a person who has entered into a rental contract with a corporation as such is estopped to deny its corporate existence in an action against him to recover rents and for the possession of the leased premises. Lamb v. Beaumont Temperance Hall Co., 2 Civ. App. 289, 21 S. W. 713.

Forfeiture of charter.—In suit by corporate stockholders to recover assets of company wrongfully disposed of by director, court improperly declared charter forfeited, where state was not party, and record showed company was still existing, not showing that plaintiffs, as individuals, or that the corporation itself, ratified illegal acts. Millsaps v. Johnson (Civ. App.) 196 S. W. 202.

Illegal corporation.—If a company, which assumed to be a corporation by amendment of the charter of an old and defunct corporation, exercising powers prohibited by the law after its beginning business, was neither a de jure nor de facto corporation, persons purchasing stock could attack its existence collaterally. Crow v. Cattlemen's Trust Co. (Civ. App.) 198 S. W. 1047.

Where banking corporation authorized by special act was not organized before adoption of Const. 1876, art. 16, section 16 of which prohibited organization of such corporations, it had no legal existence when organized after 1904, despite the constitutional amendment of that date authorizing the incorporation of banks by general laws, and subscribers to its stock, in suit by a receiver to enforce their subscriptions, were not estopped to defend on the ground that there was no legal corporation, despite this article. Davis v. Allison, 109 Tex. 440, 211 S. W. 980.

Where charter was obtained from territory of Arizona for bonding and insurance company, which was never organized in Arizona in compliance with its laws, but was attempted to be organized in Texas, where most of its stockholders and directors resided, and virtually all of its business was subsequently done, the pretended corporation was a fraud on the states of Arizona and Texas, and the company's pretended directors were liable as individuals or partners to a county of Texas on a bridge contractor's bond. Scharbauer v. Lampasas County (Civ. App.) 214 S. W. 468.

Art. 1139. [650] [574] Legislature may alter, reform or amend.

Cited, Thompson v. State, 24 Tex. App. 383, 6 S. W. 296.

DECISIONS RELATING TO SUBJECT IN GENERAL

Corporate entity.—Two corporations separately organized held not in law identical because they had common president, or in certain transactions acted one for the other. Planters' Oil Co. v. Gresham (Civ. App.) 202 S. W. 145.

CHAPTER THREE

POWERS AND DUTIES OF PRIVATE CORPORATIONS, AND
DUTIES OF STOCKHOLDERS IN REFERENCE
THERE TO, ETC.

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1140.	General powers of corporations.	1158.	Trustees to be elected to control religious corporation.
1141.	Unpaid stock payable when; proof of payment.	1159.	Directors shall have general management, etc.
1142.	On default of payment, secretary of state to forfeit charter, how.	1160.	Directors shall cause record to be kept, etc.
1143.	Notification of forfeiture; record, etc.	1162.	May borrow money.
1146.	Watering stock prohibited, forfeiture for violation.	1164.	Corporation restricted to objects of its creation; may contribute to certain enterprises not political; pending suits.
1147.	Watered stock and bonds not for money, etc., quo warranto suit to cancel.	1165.	Restrictions upon creation of debts.
1152a.	Voting power of fractional shares of stock on decrease.	1168.	Stock of corporation is personal estate.
1153.	Quorum of directors, and annual elections.	1169.	Directors may require payment of stock.
1155.	By-laws may be adopted, altered, etc.	1170.	Stock forfeited, when and how.
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Article 1140. [651] [575] General powers of corporations.

1. **Construction of charter, etc.**—Provisions in a charter purporting to authorize a corporation to engage in a business in which corporations are not authorized to engage can be treated as surplusage. *Aultz v. Zucht* (Civ. App.) 209 S. W. 475.

2. **Corporate powers and liabilities—In general.**—See also, art. 1164 and notes. Corporations can transact only such business and perform only such acts as are authorized by the express terms of their charters, or by necessary implication. *National Equitable Soc. v. Alexander*, 220 S. W. 184; *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746; *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485; *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

University, under charter, held to have power to rent building in which auxiliary school of medicine might establish hospital. *Ingram v. Texas Christian University* (Civ. App.) 196 S. W. 608.

It is no defense, to an action to enjoin the grantor of the good will of a business from soliciting his former customers in Mexico and neighboring states not to do further business with his grantee, that latter, a corporation organized in Texas, has no power to do business in that territory, since such a corporation may lawfully transact the business for which it is organized in another state or foreign country. *Sheehan v. Sheehan-Hackley & Co.* (Civ. App.) 196 S. W. 665.

A gift to a college for erection of a chapel is not void on the ground that the college, being incorporated for educational purposes, cannot own and control a building used for purpose of conducting religious services. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

An act of a corporation is properly said to be "ultra vires," when it is beyond the powers conferred upon the corporation. *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746.

In the case of grants by the Legislature to corporations, public or private, only such powers and rights can be exercised by the companies under them as are clearly embraced within the words of the act or derived therefrom by necessary implication, regard being had to the object; any ambiguity in terms being resolved in favor of the public. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

3. — **Incidental.**—A corporation has implied authority to do whatever is reasonably necessary to carry out the purposes of its existence. *Taylor Cotton Oil Co. v. Early-Foster Co.* (Civ. App.) 204 S. W. 1179; *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

The doctrine of ultra vires ought to be reasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which a corporation has been authorized to do ought not, unless expressly prohibited, be held by judicial construction to be ultra vires. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 144.

5. — **Purchase own stock.**—Corporation when authorized by directors may repurchase its own stock by consent of stockholders. *West Texas Supply Co. v. Dunivan* (Civ. App.) 198 S. W. 163.

9. — **To enter into partnership.**—No valid partnership agreement can be made between a corporation and an individual and it is immaterial that individual is owner of most of stock of corporation. *Vineyard v. Miller Land Co.* (Civ. App.) 209 S. W. 693.

10. — Indemnity, guaranty, and suretyship.—It is ultra vires of corporation, not given express authority, to enter into contracts of guaranty or suretyship not in furtherance of its business. *Ingram v. Texas Christian University* (Civ. App.) 196 S. W. 608.

A corporation organized for sole purpose of conducting mercantile business has no authority to pledge its assets to pay debts other than its own. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

For a lumber company to sign contractor's bond as an indirect means of securing sale to the contractor is ultra vires. *W. C. Bowman Lumber Co. v. Pierson*, 110 Tex. 543, 221 S. W. 930, 11 A. L. R. 547, answering certified questions (Civ. App.) 139 S. W. 618.

A contract by a corporation engaged in the brick business by which it agreed to indemnify a railroad from liability on account of claims for damages growing out of negligence in the construction, maintenance, or operation of a spur track running to the brick plant was not ultra vires. *Houston & T. C. R. Co. v. Diamond Press Brick Co.* (Com. App.) 222 S. W. 204, reversing judgment (Civ. App.) 188 S. W. 32, and judgment modified (Sup.) 226 S. W. 140.

12. — Taking notes, etc.—In the absence of pleading and proof to the contrary, the court must assume that a corporation, if it was authorized to make notes sued on and to create a lien on property to secure them, had the authority to provide for their payment and to agree on an extension of due dates of the notes and the lien, and one suing on the note and to foreclose the lien need not allege that the corporation had the power to agree to such extension. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

13. — Sales.—A company chartered to do cotton oil business had power to estimate year's output of "linters," estimate being reasonable and in good faith, and to contract to sell output on such estimate, being bound to deliver number of bales estimated. *Taylor Cotton Oil Co. v. Early-Foster Co.* (Civ. App.) 204 S. W. 1179.

A corporation, granted power to operate and maintain cotton seed oil mills, etc., and to sell "cotton seed and any and all products and by-products," had the power to purchase cattle to be fed on hulls at a time when there was practically no market for the hulls. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

15. Capacity to contract in general.—It is not beyond the power of the ordinary private corporation to agree to repay money delivered to it by another and claimed by third parties in case it is determined that such third parties are in law entitled thereto. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

A corporation is empowered to enter into contract to enable it to carry on the business and accomplish the purpose of its existence, unless prohibited by law or the provisions of its charter. *Houston & T. C. R. Co. v. Diamond Press Brick Co.* (Com. App.) 222 S. W. 204, reversing judgment (Civ. App.) 188 S. W. 32, and judgment modified (Sup.) 226 S. W. 140.

16. Contracts before incorporation or organization.—The promoter of a corporation to be formed stands in a fiduciary relation toward it, and to the subscribers to its stock. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

Where property was sold to a corporation acting through its manager, was purchased for the use and benefit of the corporation, and the latter ratified the contract and the security mortgages by accepting and using the property, it is estopped to deny the validity of the security instruments, though they were executed prior to its legal organization as a corporation, and its successors are also bound by such ratification and estoppel. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

17. — Liability for contracts of promoters.—A contract by a promoter in which he attempts to bind the future corporation, without a present existence, and to create a liability against it, cannot be enforced against the corporation unless and until adopted by it. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

A corporation is not bound by agreement made by its promoters and organizers, though the services rendered thereunder resulted in benefit to the corporation. *Hart-Toole Furniture Co. v. Shahan* (Civ. App.) 220 S. W. 181.

A corporation would not be liable to plaintiff in damages occasioned by its organizers wrongfully inducing or persuading the breach of a contract by persons who had agreed to purchase lands in a venture in which plaintiff was to have an interest, even though such organizers are liable in damages for such wrong. *Burns v. Veritas Oil Co.* (Civ. App.) 230 S. W. 440.

18. — Rights on contracts of incorporators.—A corporation may, after its organization is complete, adopt a contract made by its organizers where the services rendered thereunder resulted to its benefit. *Hart-Toole Furniture Co. v. Shahan* (Civ. App.) 220 S. W. 181.

An inventory, made under agreement with the organizers of the corporation, of a stock of furniture on which the organizers desired to bid, was for the corporation's benefit though it did not acquire the furniture and furnishes sufficient consideration for the corporation to adopt the contract of its organizers. *Id.*

21. Ultra vires contracts.—Except in cases where the rights of the public are involved, the plea of ultra vires, whether interposed for or against a corporation, will not be allowed to prevail when it will not advance justice, but will accomplish a legal wrong. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367; *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

The question of whether a corporation acted ultra vires in the face of an expressed or implied statutory prohibition cannot be raised in litigation between it and a private party, but only by the state in a direct proceeding to forfeit the franchise or to punish it

for the unlawful act. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

Undertaking of furniture company, which sold porch swings, to hang swing sold customer, was not ultra vires, so that no liability could attach to company for damages from negligent hanging. *Rick Furniture Co. v. Smith* (Civ. App.) 202 S. W. 99.

Mere general prohibitions against exceeding corporate powers do not make such acts illegal as well as ultra vires. *Hollis Cotton, Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

If a corporate act is in express violation of statute, as distinguished from being merely beyond the corporate powers conferred by express statutory terms, and if the corporation nevertheless violates the plain letter of the law, one so dealing with the corporation must take notice of the law and the statutory limitations placed upon the charter power. *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746.

Persons dealing with a corporation, while chargeable with knowledge of its powers, are not bound to take notice of the manner in which it has attempted to exercise them. *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S. W. 977.

Whether a contract is ultra vires must be tested by the charter powers of the corporation. *Bishop Mfg. Co. v. Sealy Oil Mill & Mfg. Co.* (Civ. App.) 229 S. W. 203.

Evidence held to show that the purchase and sale of cotton seed in the open market by the secretary and manager of a corporation operating cotton gins was a speculative venture, indulged in for the purpose of making the profit thereon, and was not designed or intended to foster the ginning business but insufficient to show that the purchase of cotton seed in the open market from persons other than customers of the gin was essential to the successful operation of the gin. *Id.*

An ultra vires and unauthorized contract made by an agent of a corporation is not rendered valid by reason of the fact that it is a substitute for a similar contract and merely extends the time of performance. *Id.*

22. Property and conveyances—Power to convey.—In absence of collusion between a grantor corporation and its grantee to defraud grantor's creditors, deed from solvent corporation conveys good title, stripped of equitable lien claimed by grantor's creditor, whose debt is not reduced to judgment at time of conveyance, whether or not grantee had notice of claim. *C. R. Miller & Bro. v. Mummert* (Civ. App.) 196 S. W. 279.

27. Shareholder's purchase from or sale to corporation.—Where a large stockholder undertook to sell all the property of a corporation though another had been duly appointed agent for sale, and fraudulently succeeded in getting corporation to give option to one who was his paid dummy, and then had option assigned to him and sold the property at a large profit over the option, and with the president, also a large stockholder, who had become acquainted with the fraud, fraudulently secured ratification of the sale, they were liable to the suing stockholders as for secret profits of a trustee, regardless of fact whether stockholder was a duly appointed agent or not. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

The doctrine that a stockholder may deal with the corporation the same as any stranger has the qualification that the transaction is free from fraud and not unfair to the corporation itself. *Id.*

31. Estoppel to deny corporate powers of corporation.—Where a corporation is the vendor, the vendee cannot set up its want of capacity to take and hold land as a defense to an action to recover the purchase price of land sold to him. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

Where a contract with a corporation void because ultra vires and forbidden by statute was wholly executory, no ground of recovery against sureties on theory of estoppel existed. *Zurn v. Mitchell* (Civ. App.) 196 S. W. 544.

Where a corporation ordered cattle, and the cattle were actually shipped, corporation was estopped to set up as a defense that it had no power to purchase cattle, in an action for damages and commissions, although shipper again took possession and found another purchaser at the best possible market price. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

Defense of ultra vires is not available, where the ultra vires act has been a benefit to the corporation seeking to avail itself thereof, or has worked legal wrong, injustice, or loss to other contracting party. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

Where a national bank, to which a cotton oil company owed more money than was permissible under the banking laws, connived with the president of the oil company in his formation of a feed company which ultra vires executed its note to the bank for the amount of the oil company's extra indebtedness, such bank cannot set up, in the feed company's suit to cancel note and deed of trust securing it, that the company is estopped to urge the ultra vires character of the transaction; the bank not having been misled. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Com. App.) 215 S. W. 859.

Where plaintiff's lease, according to its expressed stipulations, was subject to terms of defendant corporation's prior lease, plaintiff was in no position to say that the right acquired by defendant under its lease to dispose of water to the public for domestic use was beyond its charter powers, and therefore valid. *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

32. — By receiving and retaining benefits.—Where a corporation has borrowed money and used it to advantage for three years, it is estopped to set up that the loan was for an unlawful purpose and ultra vires, especially where there is a presumed finding that the lender did not know of the unlawful use. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

A corporation which guaranteed a note and received a benefit therefrom could not set up the ultra vires character of its guaranty as a defense to an action for delinquent interest and attorney's fees on the note. *Parlin & Orendorff Implement Co. v. Frey* (Civ. App.) 200 S. W. 1143.

An insurance company securing money under and by means of an ultra vires act or contract is not justified in appropriating it and refusing to pay it back. *Trammell v. San Antonio Life Ins. Co.* (Civ. App.) 209 S. W. 786.

When a litigant seeks to set up the defense of equitable estoppel, by reason of benefits received, against the illegal and ultra vires acts of the corporation, it must appear that the corporation, in the operation of its franchise rights and powers, received the benefits in the line of its necessary business and operation. *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746.

A private corporation was not estopped to set up the defense of ultra vires to its note, executed to a railroad in consideration of the future extension of the railroad through the county where the corporation, owned lands, by its having received the benefit of such extension, which was in fact built, since it received no such benefits until after the execution of the note. *Id.*

If a railroad corporation, to assist the federal government, advanced on behalf of its employes subscription money for bonds issued by the government in time of war, under an agreement that certain sums should be withheld from monthly salaries until the amount due on the employes' subscriptions had been paid, the railroad corporation, under a plea of ultra vires, could not escape delivery of the bonds to the employes after they had been paid for. *Chambers, Watson & Wilson v. Hines* (Civ. App.) 225 S. W. 200.

Art. 1141. Unpaid stock payable when; proof of payment.

Cited, *Smoot v. Perkins* (Civ. App.) 195 S. W. 938.

Trust fund.—The liability of shareholders of a corporation to contribute the amount of their shares as capital, is ordinarily treated in equity as assets like other legal claims belonging to the corporation. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

Art. 1142. On default of payment, Secretary of State to forfeit charter, how.

Cited, *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Art. 1143. Notification of forfeiture; record, etc.

Cited, *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Art. 1146. Watering stock prohibited; forfeiture for violation.

See notes under art. 6469.

In general.—Where trust company gave shares of its stock, as part consideration for note, note was void in view of Const. art. 12, § 6. *Commonwealth Trust Co. v. Hardee* (Civ. App.) 200 S. W. 201.

An agent selling stock for corporation having entered into void contract to accept notes for stock in violation of Const. art. 12, § 6, it will be presumed that parties acted thereafter in accordance with its terms. *Cattlemen's Trust Co. of Ft. Worth v. Swearingen* (Civ. App.) 200 S. W. 596.

While an agreement between a corporation and stock subscriber that it will accept his promissory note in payment for stock is of no force as between the parties, in view of Const. art. 12, § 6, neither a note nor stock issued under it is utterly void since the word "void" being found only in that clause which says that all fictitious increases of stock shall be void, it must be assumed that the Legislature deliberately omitted the word from the clause as to corporation not issuing stock except for "property actually received," etc. *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

An amount which the subscriber to corporate stock was to pay into surplus funds of the company in consideration for permitting him to subscribe was not such a payment on the "capital stock" as is contemplated in Const., art. 12, § 6, and this article. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

A subscription to stock in its legal effect is measured by the provisions of the Constitution, and must be effectuated in consonance with its terms. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Giving note or other obligation for subscription price in general.—Evidence held to support finding that maker was not induced to execute note by promise that corporate stock would be issued to indemnify him against its payment and that the stock had not been issued in payment of note on which money was loaned which borrower gave railway company as a bonus or donation. *Handly v. Adams* (Civ. App.) 195 S. W. 888.

Where company had never been incorporated, and stock was not to be delivered until notes were paid, notes, reciting that they were given for stock in company, were not given for stock issued in corporation, within meaning of Constitution and statutes making notes so given invalid. *Commercial Guaranty State Bank v. Crews* (Civ. App.) 196 S. W. 901.

In suit by maker to cancel note and trust deed on ground that, as note was given in part for stock of defendant trust company, it was void, evidence held sufficient to support jury findings that shares of stock belonged to company, were issued by it out of its capital stock, and that note was made payable to it. *Commonwealth Trust Co. v. Hardee* (Civ. App.) 200 S. W. 201.

Evidence held to show that stock of corporation was issued to defendant in consideration of notes sued on, and not for money paid or property actually received within Const. art. 12, § 6, so that notes were void as between original parties. *Patterson v. Onion* (Civ. App.) 202 S. W. 327.

The execution of notes in consideration of national bank stock is not compliance with constitutional and statutory provisions requiring "cash" to be paid therefor. *Citizens' Nat. Bank of Stamford v. Stevenson* (Civ. App.) 211 S. W. 644.

Under Const. art. 12, § 6, prohibiting the issuance of corporate stock except for property actually received, the giving of a note for stock is not a valid payment, but neither the stock issued nor the note given is void. *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S. W. 977.

Promissory note of a subscriber which only evidenced his liability on his subscription in another form constituted, not payment, but merely a promise to pay, and was not "property actually received" within Const. art. 12, § 6, prohibiting the issuance of corporate stock except for such property. *Id.*

The integrity of a corporation and the interests of the public demand that the assets of the corporation consist of something more than its stockholders' debts, and therefore it cannot accept a stock subscriber's note in payment for his stock in view of Const. art. 12, § 6. *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

Where stock subscription contract, whereby subscriber gave note to corporation and made no cash payment, contained proxy authorizing named person to vote at stockholders' meetings, and referred to "amount paid" and to "sale price of the stock herein purchased" and where collateral agreement was entered into whereby the "stock" was taken as collateral security for subscriber's note, and where corporation issued certificate to subscriber, entered subscriber's name on stock book, and thereafter recognized subscriber as a stockholder, the note was unenforceable, the transaction being in violation of constitutional provision prohibiting issuance of stock except for money, labor or property. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

In an action by plaintiff on notes given to a trust company, where the petition alleged the corporate existence of the company, and the case was submitted on such theory, plaintiff cannot complain of the refusal of a directed charge on the theory that the trust company was not organized at the time the notes were executed, and hence, though the notes were given for its stock, they were not invalid under Const. art. 12, § 6. *Masterston v. Turnley* (Civ. App.) 220 S. W. 428.

Evidence held not to show that a note was given in payment for unpaid corporate capital stock. *Lone Star Life Ins. Co. v. Shield* (Com. App.) 228 S. W. 196.

Issuance of stock in payment for property.—While in a broad sense a note is "property," it is not such within Const. art. 12, § 6, providing that no corporation shall issue stock except for "property actually received"; said section meaning property readily capable of being applied to debts of corporation. *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

Where corporation had authorized capital stock of \$20,000, all of which had been paid in money with exception of \$5,000, which had been paid for by transfer of land of the reasonable value of that amount, its stock was legally issued. *Braley v. Samuels* (Civ. App.) 213 S. W. 684.

Conveyance of land to corporation for stock of value largely in excess of actual value of land does not constitute payment for such stock. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Securities may be used in payment for corporate stock, and are not inhibited by Const. art. 12, § 6, or this article, "securities" being property (citing *Words and Phrases*, "Property"). *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

Contract rights transferred to a corporation in payment for stock to the extent of their value are "property actually received" by the corporation within Const. art. 12, § 6. *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031.

Delivery of stock to purchaser.—Provisions of Constitution and laws, forbidding acceptance of anything for capital stock of corporations except money, property, or labor, are not violated, so as to be a defense to notes given on subscription to capital stock, where there has been no "issuance of stock" which requires actual or constructive delivery of certificates. *Smith v. McAdams* (Civ. App.) 206 S. W. 955; *Smoot v. Perkins* (Civ. App.) 195 S. W. 983.

Where company had never been incorporated, and stock was not to be delivered until notes were paid, notes, reciting that they were given for stock in company, were not given for stock issued in corporation, within meaning of Constitution and statutes making notes so given invalid. *Commercial Guaranty State Bank v. Crews* (Civ. App.) 196 S. W. 901.

Evidence held to sustain finding that there was sale and delivery of stock in exchange for notes in violation of Const. art. 12, § 6, although there was no manual delivery, and certificate of stock was not made out for year. *Cattlemen's Trust Co. of Ft. Worth v. Swearingen* (Civ. App.) 200 S. W. 596.

Action on nine-month note given in purchase of stock, in absence of showing that stock was issued in view of defendant's allegations that stock had not been delivered, was not obnoxious to Const. art. 12, § 6, prohibiting issuance of corporate stock except for money paid and labor done or property received. *McCoy v. Bankers' Trust Co.* (Civ. App.) 200 S. W. 1138.

Contract for purchase of increase of capital stock was not, where stock was not to be delivered until notes given therefor had been paid, an executed sale so as to be void under Const. art. 12, § 6, this article, and art. 4725, subd. "e." and arts. 4726, 4728, pro-

hibiting issuance of stock except for money paid, etc.; "issue" meaning delivered. *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

Contract for sale of trust company stock on credit, purchaser giving his note covering price of stock and amount borrowed from trust company, held ultra vires and void, there being actual delivery of stock with intention to have title vest in buyer, who delivered it back to trust company as collateral security for note. *Rousseau v. Everett* (Civ. App.) 209 S. W. 460.

Constitutional provisions prohibiting corporation from issuing stock except for money paid, labor done, or property received, applies not only where certificate has been issued, but also where corporation recognizes subscriber as stockholder by permitting him to exercise rights of a stockholder. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

In action on a promissory note given for the purchase price of corporate stock evidence that the corporation made out a stock certificate which was not delivered to the maker of the note, that dividends on the stock were credited against interest due on the note, etc., held to make a jury question whether the stock had been "issued" in violation of the constitutional provision that no corporation shall issue stock except for money paid, labor done, or property actually received. *Wilson v. Bankers' Trust Co.* (Civ. App.) 218 S. W. 803.

Where a certificate for corporate stock, subscribed but not paid for, was delivered to a trustee for the corporation who attached it to the note of the subscriber in accordance with a contract whereby the stock was to be pledged as collateral security for the note and to be sold if the note was not paid, with no provision that the certificate was not to be delivered until fully paid for, the stock was issued in violation of the constitutional declaration that no stock should be issued, except for money paid, labor done, or property actually received. *Kanaman v. Gahagan* (Sup.) 230 S. W. 141.

Note secured by mortgage.—Notes for stock amply secured by deed of trust on real estate are "property" actually received, for which by Const. art. 12, § 6, stock may be issued. *Penland v. Schramm* (Civ. App.) 232 S. W. 359; *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031; *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513.

Under Const. art. 12, § 6, there could be no recovery by a corporation on a note given for stock issued though collateral security was deposited, since the transaction was illegal. *Shield v. Lone Star Life Ins. Co.* (Civ. App.) 202 S. W. 211.

Note of a subscriber to corporate stock in an insurance company, secured by valid first mortgage on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received." *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031.

Note of subscriber to corporate stock in an insurance company, secured by valid deed of trust on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received" within the meaning of Const. art. 12, § 6. *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513.

Under Const. art. 12, § 6, providing that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, a corporation might recover on a subscriber's note secured by first lien on land double in value the amount of the note. *Lone Star Life Ins. Co. v. Shield* (Com. App.) 228 S. W. 196.

Pledge of stock as security for note.—Where national bank stock purchaser executed note payable to bank other than that issuing stock, and stock was deposited with such bank as security for payment of note, and thereafter purchaser executed note payable to bank issuing stock to satisfy note executed to former bank, and upon execution of latter note received the stock, the transaction was void under statutes and act of Congress prohibiting issuance of stock in consideration of note, notwithstanding execution and delivery of prior note. *Citizens' Nat. Bank of Stamford v. Stevenson* (Civ. App.) 211 S. W. 644.

Stock in banking corporation.—Where a bank took a note for a subscription to its stock, which it issued in the subscriber's name, retaining possession until note should be paid, apportioning dividends to subscriber from date of making certificate recognizing subscriber's proxy as valid, and sending him notices as a stockholder, the transaction was violative of Const. art. 12, § 6, and this article. *Pruett v. Cattlemen's Trust Co.* (Com. App.) 222 S. W. 533, reversing judgment (Civ. App.) *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, 184 S. W. 716.

Where the president of plaintiff national bank, to assist defendant in the purchase of the bank's stock, arranged with another bank to make defendant a loan, to be evidenced by his note indorsed by the president of plaintiff bank personally, and further secured by the bank stock to be issued to defendant, and the note was prepared and signed by defendant and indorsed by the president of plaintiff bank and accepted by the other bank, which passed the amount of the note to the credit of plaintiff bank subject to its check, and sent in a slip showing the same, and the stock was issued to defendant, who indorsed it in blank and forwarded it to the other bank to be deposited as collateral security for his note, the facts constituted a payment for the stock in money to plaintiff bank as completely and conclusively as would have an actual transfer of cash, and plaintiff bank can recover on the last of notes given it by defendant when it took up his note from the other bank. *Citizens' Nat. Bank v. Stevenson* (Com. App.) 231 S. W. 364.

Stock in insurance company.—In suit by subscriber to stock in insurance company to recover money paid and to cancel notes claimed to have been given for stock in violation of Constitution, art. 12, § 6, and this article, evidence held to show subscriber became

possessor of stock on cash payment, and that notes and deed of trust sought to be canceled represented his obligation as to surplus. Commonwealth Bonding & Casualty Ins. Co. v. Hollifield (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

Contract to subscribe for stock in insurance company, paying \$10 a share "in cash or securities to be approved by the insurance department," held a valid obligation not inhibited by Const. art. 12, § 6, or this article, securities not meaning notes of subscriber, which he executed to organization company secured by deed of trust on realty to secure his liability under contract. *Id.*

Rights of purchasers of note or obligation.—A note given for issuance of corporation stock in violation of statute is not void and unenforceable by a purchaser in due course before maturity for a valuable consideration and without notice of the infirmity. *Zielinski v. Hernig* (Civ. App.) 195 S. W. 952; *Washer v. Smyer*, 109 Tex. 398, 211 S. W. 985, 4 A. L. R. 1320.

A note given in Texas for the purchase price of stock of a corporation to be organized in Colorado is not utterly void under the provisions of Const. Tex. art. 12, § 6, and the similar provision of Const. Colo. art. 15, § 9, that no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, but is enforceable in the hands of a bona fide holder. *Wilson v. Spencer* (C. C. A.) 261 Fed. 357.

In action on notes given for corporate stock, held, under evidence, that cashier of purchaser bank had such knowledge with reference to consideration as to prevent bank being bona fide holder. *Commonwealth Bank & Trust Co. of San Antonio v. Limburger* (Civ. App.) 199 S. W. 816.

In suit by commissioner of insurance and banking on two notes, pledged as collateral to a bank in process of liquidation, held, under evidence that notes were unenforceable, bank not being an innocent purchaser without notice that notes were executed in consideration of shares of stock, contrary to Const. art. 12, § 6. *Patterson v. Onion* (Civ. App.) 202 S. W. 327.

Note issued in payment of bank stock, made payable to bank other than that issuing stock under agreement to have stock deposited with such bank as security for payment of note, is void in the hands of such bank; it having notice that note was issued in payment for bank stock, and hence void. *Citizens' Nat. Bank v. Stevenson* (Civ. App.) 211 S. W. 644.

Where notes were given a corporation in payment of stock, and the corporation issued the stock, they are void under Const. art. 12, § 6, and are unenforceable even in the hands of an innocent holder. *Masterson v. Turnley* (Civ. App.) 220 S. W. 428.

Rights and remedies of parties to contract or obligation.—If subscriber to corporation stock gave his note and deed of trust in violation of statute and Constitution, they were void, and here could be no ratification, and he could have defended a suit at any time brought to collect on such instruments. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

Where stock of trust company was sold on credit, buyer giving his note, both for price and for amount borrowed from trust company, purchase of stock and borrowing of money being separable transactions, buyer's promise to repay borrowed money was not vitiated by ultra vires contract for sale of stock. *Rousseau v. Everett* (Civ. App.) 209 S. W. 460.

Subscriber to stock in insurance company, party to transaction whereby his note was accepted in payment for stock, and whereby he received stock, being estopped to deny legality of note in suit of creditors of company, held bound to its receiver for portion of note representing subscription to surplus, not within constitutional inhibition of issuance of stock for notes, particularly in view of fact burden was on him to show invalidity of note. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Estoppel to assert invalidity of purchase.—A corporation's fraud in inducing a subscription to stock, not being complained of till after its insolvency, will not avail as a defense in action by its trustee in bankruptcy on note given for subscription. *Smoot v. Perkins* (Civ. App.) 195 S. W. 988.

A subscriber to bank stock, who gave his note therefor in violation of Const. art. 12, § 6, prohibiting issuance of corporate stock except for property actually received, is estopped to assert invalidity of transaction in suit to enforce the note for the benefit of creditors. *Thompson v. First State Bank of Amarillo*, 109 Tex. 419, 211 S. W. 977.

Subscriber to stock in a bonding and casualty insurance company whose subscription contract stipulated it was payable in moneys or securities satisfactory to the insurance department, and who gave his note therefor, cannot escape liability thereon on the ground that it violated Const. art. 12, § 6, and this article; such subscriber having participated in stockholder's meetings, etc. *Davis v. Mitchell* (Civ. App.) 225 S. W. 1117.

Rights of creditors of corporation.—Even if stock were issued for part cash and a note for balance, in violation of the Constitution, this would not prevent the corporation's trustee in bankruptcy recovering on the note.—*Smoot v. Perkins* (Civ. App.) 195 S. W. 988.

In action by creditor, evidence held sufficient to sustain a finding that incorporators did not overvalue an oil lease given for stock in their statement to the secretary of state, so as to render them individually liable. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Art. 1147. Watered stock and bonds not for money, etc., quo warranto suit to cancel.

In general.—See *Zielinski v. Hernig* (Civ. App.) 195 S. W. 952.

Decisions under prior acts.—See *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. 199.

Art. 1152a. Voting power of fractional shares of stock on decrease.—Whenever any corporation organized under the laws of the State of Texas, shall reduce its capital stock under the provisions of law applying thereto, and by reason thereof fractional shares of its stock shall be issued to or held by any of its stockholders, the holder of any such fractional share or shares shall be entitled to vote the same at any meeting of the stockholders in accordance with the proportionate or ratable value of such share or shares. [Acts 1919, 36th Leg., ch. 112, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 1153. [665] [579] Quorum of directors and annual elections.
Cited, *Orynski v. Loustaunan* (Sup.) 15 S. W. 674.

Art. 1155. [657] [581] By laws may be adopted, altered, etc.
Cited, *Orynski v. Loustaunan* (Sup.) 15 S. W. 674.

Art. 1158. [660] [584] Trustees to be elected to control religious corporation.

In general.—See *Wallace v. Wells* (Civ. App.) 228 S. W. 1111.

Art. 1159. [661] [585] Directors shall have general management, etc.

4. Management of corporate affairs.—While the directors of a corporation, subject to limitations of charter and by-laws, have as much control of its business affairs as an individual has over his own business, their power is no greater. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

In suit in trespass to try title by oil and gas lessors against the lessee, a corporation, it was not necessary for defendant lessee to show that its president or board of directors formally accepted the lease; the fact that it paid into the depository bank the agreed rentals at the agreed time being sufficient evidence of acceptance of the lease by it. *Patton v. Texas Pac. Coal & Oil Co.* (Civ. App.) 225 S. W. 857.

Under this article, and art. 1212, relating to religious societies, where there were never two separate and distinct "Churches of Christ" established in a town, but were at all times merely two factions of the same church, the majority faction of which, in the manner authorized by such church as the proper method, elected new trustees on a specified date, such election took away all authority previously existing in other and former trustees. *Wallace v. Wells* (Civ. App.) 228 S. W. 1111.

4½. Liability of stockholder.—This article does not, in the absence of any by-laws on the subject, authorize the directors to enforce an unpaid subscription before the capital stock is all taken. *Orynski v. Loustaunan* (Sup.) 15 S. W. 674.

This article does not authorize issuance of stock at less than par value, nor relieve the subscribers from responsibility to creditors for the difference between the amount paid and the par value. *Mathis v. Pridham*, 1 Civ. App. 53, 20 S. W. 1915.

6. Corporate property, funds, etc.—Conversion.—In action for conversion of tools claimed to have been acquired from defendant corporation for shares of its stock, held there was no authority, express or implied, to vice president to make trade. *West Texas Supply Co. v. Dunivan* (Civ. App.) 198 S. W. 163.

7. — Purchase and sale of.—Though an instrument executed by the president of a private corporation years after it had forfeited its right to do business declaring a so-called oil lease owned by the corporation null and void and releasing the land covered thereby bore the corporation's seal and recited that the corporation was acting through the president, it amounted to such an assumption by him of unusual, exceptional, and extraordinary power outside the ordinary course of affairs and beyond his apparent or ex officio authority as to devolve on those claiming under the release the duty of inquiring as to the existence of the power and the facts bringing it into being, and they could not claim to be innocent purchasers. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

8. Individual profits, etc., from corporate business.—It is a general rule that an officer whose interests are adverse cannot bind the corporation except as to innocent parties, nor are acts of manifest bad faith on the part of the officer binding on the corporation, and strangers who participate in such wrong against the corporation may not profit thereby. *Harwood v. Ft. Worth Nat. Bank* (Civ. App.) 205 S. W. 484.

Where president and stockholder of corporation discovered that another stockholder had fraudulently secured an option for sale of all the property of the corporation to a dummy, and had sold the property after taking an assignment of the option at a large profit, and president entered into fraudulent scheme and secured ratification of the sale, judgment in action by stockholders to recover secret profits was properly awarded against president as well as other stockholder, though president received no part of the secret profits. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

The fact that H. was director and general manager of a company which held a lease from M. conditioned to become void if a paying quarry was not established on the land in two years did not require him, though knowing M. intended to forfeit the lease for non-

performance of the lease, to inform the others interested in the company of such fact, or prevent him, on the forfeiture being declared, from individually taking a new lease free of any interest therein of such others, so long as the failure to develop the quarry was due to no fault of his, but only to the company's inability to finance it. *Green v. Hall* (Com. App.) 228 S. W. 183.

9. **Dealings with corporation or shareholders.**—Where the owner of nearly all the shares of a corporation agreed with the president and one of the directors that they would not create any liabilities against the corporation, the fact that they advanced money to the corporation would not make the corporation liable therefor. *Newton v. Houston Hot Well Improvement Co.* (Civ. App.) 211 S. W. 960.

10. **Officers, etc., of different corporations.**—Where Ohio company organized corporation in Texas, for transacting its business in that state, and appointed a general manager, who leased a building for a term, corporation was liable for rent the same as if it had done business in its own name. *John Church Co. v. Martinez* (Civ. App.) 204 S. W. 486.

That some of the stockholders of one corporation owned stock in another independent corporation did not make the corporations liable each for the acts of the other. *Harper v. Lott Town & Improvement Co.* (Com. App.) 228 S. W. 138.

10½. **Actions—By stockholders.**—In stockholders' suit, if facts alleged show defendants constitute majority of directors, or that directors or majority are under control of wrongdoing defendant, so that refusal of directors to sue in name of corporation on request may be inferred, stockholders' action may be maintained without demand. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In stockholder's suit against directors on behalf of company, petition must allege and evidence show plaintiff has made a good-faith effort to obtain action by the corporation, or he must allege and prove such a state of facts as makes it clear that an appeal to the directors or stockholders would have been useless. *Barthold v. Thomas* (Com. App.) 210 S. W. 506.

12. — **Between shareholders and officers.**—In suit by corporate stockholders, evidence held sufficient to sustain jury's finding that defendant, director, improperly dominated and controlled majority of directors. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In all suits by stockholders brought to redress wrongs done to corporation by directors, the corporation is a necessary party defendant. *Barthold v. Thomas* (Com. App.) 210 S. W. 506.

For wrongs committed by corporation directors in management of company, a stockholder must seek his remedy, in the first instance, before suing, through the corporation itself by application to the directors and stockholders, and, if unsuccessful, may then bring suit for the company for its benefit, not his personal benefit. *Id.*

13. **Representation by officers and agents.**—A corporation is charged with the acts of its principal officers in transactions after its organization. *Burns v. Veritas Oil Co.* (Civ. App.) 230 S. W. 440.

14. **Who may represent.**—A private corporation with limited power of operating, drilling for, and producing oil was not liable for medical services rendered its employé upon request of another employé having no authority to bind the corporation. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

The term "general manager" imports general authority to perform all reasonable things in conducting the usual and customary business of his principal. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

15. — **Actual or apparent authority.**—It is within general scope of authority of claim agent of railroad company to refuse or allow a claim against his principal. *Galveston, H. & S. A. Ry. Co. v. Booth* (Civ. App.) 209 S. W. 198.

18. — **Contracts.**—General manager of oil-drilling corporation had authority to modify contract under which the corporation was obligated to drill well for owner of oil lease so as to permit owner to drill well with equipment and casing furnished by the corporation. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

20. — **Purchases, sales, and warranties.**—A bill of sale, which does not mention a motor sales company nor any member of that firm as grantor, but specifically states that the automobile sold was the property of H., and on its face purports to be made and executed by H., who warrants the title, although bearing the names of the company and H. in the place for signatures, construed as from H., and not from the company. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

In trespass by city to try title to land claimed to have been conveyed to city by defendant corporation through its president owning three-fifths of the stock of the corporation, the deed from the corporation to the city by such president was admissible in evidence, even though deed was not authorized, since the deed conveyed at least three-fifths interest in the property; the president being owner of three-fifths of the corporate stock. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

Conveyance of corporation's property by president owning three-fifths of the stock without authority from board of directors conveys a three-fifths interest in the property. *Id.*

General manager of corporation selling lighting plant had power to modify terms of contract so that buyer would retain from price a stated amount until guaranty of a machine was made good. *Ware v. Fairbanks-Morse Co. of Texas* (Civ. App.) 217 S. W. 211.

A president of a private corporation, years after it had forfeited its right to do business, was without authority to execute a release of land covered by an oil grant owned by the corporation without any consideration to the corporation and without the knowl-

edge or participation of any other stockholder or director or any action by the corporation's governing body. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

21. — **Collections and payments.**—The fact that money was received by the director of a creditor company, as a dividend on the bankruptcy of the debtor company, such director never in fact paying all the money to his company, nor applying it to a corporate purpose for the benefit of the company, gave no ground for the recovery of such dividend from the creditor company to a bank holding the note of such company. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Com. App.) 215 S. W. 850.

22. — **Bonds and mortgages.**—The signing of a chattel mortgage by secretary-treasurer of a corporation is not with apparent authority, since such officer is not ordinarily the one to perform such acts. *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205.

A corporation may mortgage its property to secure payment of its debts when solvent, authority to do so does not inherently exist in any officer. *Id.*

Where cotton oil company's indebtedness to bank exceeded amount permitted by banking laws, and president of such company formed a feed company with dummy directors, the execution by such feed company of note, secured by deed of trust on all its property to bank to cover other company's excess indebtedness, the bank having full knowledge of the scheme, was ultra vires. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Com. App.) 215 S. W. 850.

27. — **Estoppel to deny authority or acts.**—Where the railroad which gave its notes had ratified prior notes made by the vice president and general manager, who had absolute control, contracted for labor, and sometimes paid for it, it was liable and could not deny his authority. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

Where, from inception of corporation existence, secretary-treasurer was in active and exclusive management of corporation's affairs until its assets were disposed of, corporation would be estopped to deny authority of such officer to execute a chattel mortgage to secure a note representing a pre-existing corporate debt. *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205.

Corporation being estopped to deny authority of secretary-treasurer to execute a chattel mortgage to secure a note, representing a pre-existing corporate debt, defendant, purchaser of mortgaged property, would be estopped in suit to foreclose mortgage, since defense urged by him is that of corporation. *Id.*

Ordinarily a corporation may not deny that its agent possesses the authority he appears to have, or that which is necessarily implied from his office. *F. L. Shaw Co. v. Dalton Adding Mach. Co.* (Civ. App.) 211 S. W. 833.

28. — **Ratification and repudiation.**—The assent or approval of a corporation to acts done on its account may be inferred in the same manner that the assent of a natural person may be, and where a corporation, with full knowledge of the unauthorized act of its officers or agents, acquiesces therein, it thereby ratifies them, especially where the acquiescence results in prejudice to a third person. *Harwood v. Ft. Worth Nat. Bank* (Civ. App.) 205 S. W. 484.

Directors of corporation, by acquiescence in conveyance of property of the corporation through the president without authority from the board as a body, ratified the conveyance. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

Where a contract in the name and behalf of a corporation is made by one lacking authority, or by one of its general officers whose personal interests in the transaction are adverse to those of his corporation, the corporation, after having received, through another source full knowledge of all the terms and provisions of the agreement, may ratify, adopt, and confirm it, in which event it will be bound thereby in all respects. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

29. — **Notice to officers and agents as affecting corporation.**—A corporation is charged with the acts or knowledge of its principal officers in transactions after its organization. *Burns v. Veritas Oil Co.* (Civ. App.) 230 S. W. 440.

Principal officer's knowledge held imputable to corporation. *Parks v. Schoellkopf Co.* (Civ. App.) 230 S. W. 704.

30. — **Notice of authority of agents, etc.**—Where the act by which a corporation is sought to be bound is out of the usual course of its business, those dealing with its agent are bound to inquire as to agent's authority and deal with him otherwise at their peril. *J. I. Case Threshing Mach. Co. v. Dallas Chamber of Commerce* (Civ. App.) 206 S. W. 206.

Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with notice of, but in case of controversy have the burden of showing authority assumed to have been in fact possessed. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

31. **Evidence as to authority—Sufficiency.**—Evidence held insufficient to show that defendant threshing machine company's branch house manager had authority to sign an agreement that it would save plaintiff harmless from loss in promoting, financing, and conducting a national corn show. *J. I. Case Threshing Mach. Co. v. Dallas Chamber of Commerce* (Civ. App.) 206 S. W. 206.

That agent of threshing machine company signed his name as branch house manager was insufficient to show his authority to make agreement to save plaintiff harmless from loss in conducting national corn show, where there was nothing to show the character of the company's business or the extent of the agent's authority. *Id.*

In physician's action against corporation for professional services rendered employé of the corporation, evidence held insufficient to sustain finding that employé who had made arrangements for the rendition of such services had authority to bind the corporation. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

33. **Torts—Scope of authority.**—Where local manager of company started on trip to post office in company's automobile with another employé to mail report to company, a duty of his employment, and, after making a stop on the other employé's personal business, started to go on, and negligently injured a pedestrian, the company was liable, though, after mailing the report, he intended to journey on to his home, and though the use of the automobile was after business hours. *Pierce-Fordice Oil Ass'n v. Brading* (Civ. App.) 212 S. W. 707.

If a servant's deviation from his instructions amounts to an entire abandonment of the service, the master is not liable for injuries by the servant during such deviation; but if the deviation is a mere incident to a duty of the service, and after termination of it authorized service is resumed, the master is liable. *Id.*

Art. 1160. [662] [586] Directors shall cause record to be kept, etc.

See *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

Records as evidence.—That person's name appears upon stock book as owner of stock is evidence of ownership. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Art. 1162. [653] [577] May borrow money.

Notes—Officers authorized to execute.—While a corporation may mortgage its property to secure payment of its debts when solvent, authority to do so does not inherently exist in any officer. *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205.

Where a manager of branch office of corporation, who had no authority to sign notes or borrow money for the branch business, by means of notes signed in the business name of the branch obtained money sufficient to cover in part shortages and paid said money to the corporation, the corporation which in good faith received the money without notice of the manager's wrongful act is not liable to the payee. *Guaranty Bank & Trust Co. v. Beaumont Cadillac Co.* (Civ. App.) 218 S. W. 638.

Facts held insufficient to show apparent authority of branch office manager to borrow money on notes signed in business name of branch. *Id.*

Art. 1164. [665] [589] Corporation restricted to objects of its creation; may contribute to certain enterprises not political; pending suits.

In general.—This article, being the law of the land, was in contemplation of law known to one who entered into a forbidden contract with a corporation. *Zurn v. Mitchell* (Civ. App.) 196 S. W. 544.

This article is but declarative of the general rule. *Ingram v. Texas Christian University* (Civ. App.) 196 S. W. 608.

Where railroad company owned fee in strip on which its road was constructed, it could not be restrained from extracting oil therefrom, notwithstanding this article. *Crowell & Conner v. Howard* (Civ. App.) 200 S. W. 911.

This article is merely declaratory of common law, by which corporations are strictly confined in their powers to the limits and purposes for which created. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

Corporate purposes.—Where purpose of corporation was dealing in building material and to purchase and sell such material as is necessary in transaction of its business, a contract made by it to construct improvements on a lot, not being within purposes of corporation, was void for all purposes. *Zurn v. Mitchell* (Civ. App.) 196 S. W. 544.

The execution of paper by a corporation for the debt of another is beyond the corporate powers, in view of this article. *Newton v. Houston Hot Well Improvement Co.* (Civ. App.) 211 S. W. 960.

See, also, art. 1140, and notes.

Diversion of funds.—An agreement by a Texas corporation to exchange property owned by it for lands in Texas, which were not needed in any business it was authorized to transact, and were not taken in due course of business to secure the payment of a debt, would have been not merely ultra vires, but wholly void, though the exchange was for the purpose of winding up its affairs, paying debts, and distributing its assets. *Jackson v. Western Union Tel. Co.* (C. C. A.) 269 Fed. 598.

Where a building and loan association made a loan to one not a member by taking his note therefor and 2 per cent. per month interest thereon, the transaction was a discounting, and in violation of a provision of its charter that it should not lend money at a greater rate of interest than 12 per cent., or to any person other than its own members; and under this article such a note is void, and no action can be maintained on it. *Anderson v. Cleburne Building & Loan Ass'n* (App.) 16 S. W. 298.

Solvent mercantile corporation was not bound by its agreement to pool its earnings with earnings of other insolvent corporations for purpose of paying the debts of the several concerns, the only purpose being to lend financial aid to other concerns, in violation of this article, and the ultra vires act thereby contemplated being of no benefit to the corporation, and working no loss to the other concerns. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

The execution of a note by a land and live stock company to pay a railroad contractor a certain sum upon the completion of a railroad line adjacent to the company's land was within the power of the corporation. *Richardson v. Bermuda Land & Live Stock Co.* (Com. App.) 231 S. W. 337.

Forfeiture.—Act of mercantile corporation in entering pool to lend financial aid to other concerns, in violation of this article, may form the basis of a suit to forfeit its permit or license. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

Art. 1165. [665] [580] Restrictions upon creation of debts.

Debts permitted.—This article renders ultra vires note of private corporation organized for farming and stock raising, executed to a railroad in consideration of the future construction of a railroad into the county where such private corporation had large land holdings; such an indebtedness not being one for "money paid or labor done" for the corporation. *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746.

A note by a land and live stock company to pay a certain sum on the completion of a railroad line adjacent to its land, being so conditioned as to prevent the use of its means or assets, until the facilities contracted for were delivered, was not within the prohibition of this article. *Richardson v. Bermuda Land & Live Stock Co.* (Com. App.) 231 S. W. 337.

Accommodation paper.—The execution of paper by a corporation for the debt of another is beyond the corporate powers. *Newton v. Houston Hot Well Improvement Co.* (Civ. App.) 211 S. W. 960.

Art. 1168. [666] [590] Stock of corporation is personal estate.

Cited, *National Bank of Jefferson v. Texas Investment Co.*, 74 Tex. 421, 12 S. W. 101.

Nature of property.—The tangible property belongs to the corporation, the stockholders owning merely intangible interests in the corporate business. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

The stock of a corporation prior to issuance is the common property of the incorporators. *Id.*

Certificate of stock.—Title to certificate of stock may not carry with it title to the stock itself, and the stock remaining in possession of corporation may be subjected to the satisfaction of process by third parties seeking to appropriate it to the payments of the debts due by the shareholder. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Transfers of stock.—Where bank had direct information from a third person that he claims an interest in shares of corporate stock taken by the bank as collateral, the bank is bound by such notice, and takes the risk of third person's successful assertion of his claim. *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544.

Where agents acting within the apparent scope of their authority in selling corporate stock made a sale by means of false and fraudulent representations, the principal was liable therefor, whether authorizing such acts or not. *Bankers' Trust Co. v. Calhoun* (Civ. App.) 209 S. W. 826; *Same v. James* (Civ. App.) 209 S. W. 830.

The stock, being in the possession of the corporation, is transferable only on its books upon presentation of proper evidence of a transfer of ownership. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

When one dealing as pledgee with an apparent owner of corporate stock has notice of rights of true owner, he can acquire no better title to the stock than the apparent owner can transfer. *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106.

— **Fraud.**—Where one exchanging corporate stock for lands misrepresented its value at 75 cents on the dollar, he cannot defend the other party's action for damages from the fraud on the ground that had inquiry and investigation been made the falsity of the representation would have been discovered. *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

Whether the party who exchanged corporate stock for lands, misrepresenting the value of the stock, knew that he was making a false representation, is immaterial to his liability to the other party if such other party in fact believed the representations to be true, relied on them, and closed the transaction on the faith thereof. *Id.*

Where one trading corporate stock for lands positively insisted after discussion that the stock was not only worth 75 cents on the dollar, but had such market value, and the other party had no knowledge on the subject, and believed and relied on the statement, such statement as to value by the party exchanging the stock was a representation of fact rather than of opinion, and therefore actionable. *Id.*

False statements made by the seller to the purchaser of a share of an oil company concerning the capacity of a well, though made on information, are actionable. *Phillpott v. Edge* (Civ. App.) 224 S. W. 263.

A false statement to the purchaser of a share of an oil company by the seller concerning the capacity of an oil well, as to which the seller stated he had received a confirmatory telegram from one in whom the purchaser had confidence, is a misstatement of a material fact, giving a cause of action. *Id.*

Actions on stock contracts.—Generally the remedy for a breach of a contract to sell stock in a corporation is an action for damages but where justice requires it, an action can be maintained for specific performance of a contract to sell stock in a corporation. *Amsler v. Cavitt* (Civ. App.) 210 S. W. 766.

In an action against a bank for conversion of corporate stock pledged, evidence held sufficient to sustain a finding that the bank had notice that plaintiff was the true owner of the stock, which was pledged as collateral by another. *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106.

Art. 1169. [667] [591] Directors may require payment of stock.

See National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101. Cited. Orynski v. Loustaan (Sup.) 15 S. W. 674; Smoot v. Perkins (Civ. App.) 195 S. W. 988.

3. **Contract of subscription—Construction.**—Corporation may, by contract with stockholder, acquire a lien on the stock for debts due the corporation by the stockholder. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

In order to bring into existence by subscription to stock the relationship of stockholder to corporation, there must be some sort of contract in which the subscriber obtains the right to demand and exercise the privileges of a shareholder. *Id.*

In ascertaining whether subscriber became stockholder, the intention of the parties at the time subscription was taken and accepted must be determined from the facts as they may be affected by the subsequent conduct of the parties. *Id.*

In suit to cancel notes given on subscription to corporate stock, in absence of pleading raising issue as to construction of "securities" as used in subscription contract providing for payment in cash or securities, general signification of word should be followed. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

4. — **Liability of subscriber.**—In corporation's action on note given for stock issued, where defendant set up abandonment of business by sale of the assets, he could testify that one holding general proxy was instructed to vote against the sale. *Shield v. Lone Star Life Ins. Co.* (Civ. App.) 202 S. W. 211.

In suit to recover money paid for oil stock on the ground of fraud, the claim that in taking out the charter of defendant company the total capital stock had been paid for by the individual defendants, so that it was thus deprived of power to fulfill plaintiff's subscription contracts, if any, and that therefore plaintiff would not be bound, was no defense, where the individual defendants bore such relation to the corporation that they could be considered the corporation itself, so that the tender by an individual defendant to plaintiff of the stock for which he subscribed would be a valid tender in behalf of the corporation. *Burchill v. Hermsmeyer* (Civ. App.) 230 S. W. 809.

7. **Subscriptions obtained by fraud.**—A delinquent subscriber to corporate stock after failure of corporation cannot ordinarily complain that his subscription was obtained through fraud of the promoters, officers, or agents of the corporation. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

A nominal director of a corporation may rely on statements of the president, who was salesman and financial agent, as to solvency of the corporation, so as to set up fraud in action for the purchase price of stock. *Robinson v. Aldredge* (Civ. App.) 198 S. W. 413.

Where unauthorized agent, by fraud and false representations, secured subscription to stock and directors, knowing he had assumed to act, and, without disclosing true facts to subscriber, sent notice requiring payment for stock, and accepted a note therefor, subscriber could have his contract and note canceled for fraud and misrepresentation of agent. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

Representations having reference to future merely, however much relied on, do not constitute cause of action or ground of defense against action by principal of agent who made such representations on note given for corporation stock purchased in reliance on such representations. *McCoy v. Bankers' Trust Co.* (Civ. App.) 200 S. W. 1138.

To hold that oral agreement whereby defendants agreed to return to plaintiff money paid for stock in an oil company in case oil was not developed operated as a fraud, plaintiff must prove that defendants at the time they made the agreement did not intend to fulfill it, but to deceive plaintiff and induce him to advance the moneys which he seeks to recover. *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767.

Where a subscriber seeks to recover money paid for stock on the ground of fraudulent representation as to existence of oil under company's land, that defendants represented that other oil companies were seeking to purchase their property was immaterial if made long after plaintiff had advanced the sums of money he seeks to recover. *Id.*

In an action to recover money paid for stock in oil company on the ground of fraudulent representation as to existence of oil under the land, held, that the representations of the defendants to the effect that spirits had revealed through a medium the existence of oil in valuable quantities beneath the land in question must, under the circumstances of the case, be regarded as insufficient to form a basis for relief asked by plaintiff. *Id.*

A corporation is chargeable with the fraudulent representations of its agents made for the purpose of procuring subscriptions, the rule applying to subscription contracts entered into between the subscriber and promoter prior to incorporation, when such contracts have been adopted by the corporation. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

Where one company acted as promoter of another, and procured by misrepresentations a subscription to the latter's stock, as between the promoting company and the subscriber the fraud of the company was ground for rescission, and the organized company for whose benefit the subscription contract to its stock was made through its acceptance or adoption acquired no higher right than that of the promoting company. *Id.*

A company accepting a subscription to its capital stock, procured by one technically not its agent through fraudulent misrepresentations made without its authority, not only adopts the act of such a one in receiving the subscription, but also impliedly adopts and becomes responsible for any fraudulent representations made to induce the subscription, whether or not it is without knowledge or notice of the fraud, and cannot defend the stockholder's suit for rescission. *Id.*

Where an agent selling corporate stock made misrepresentations to prospective purchaser as to the returns from the stock, such representations, though partaking of the

nature of opinion and of promissory character, are actionable, and hence admissible in an action by purchaser to recover not only payments on the ground that subscription was induced by false representations but also exemplary damages. *Texas Co-operative Inv. Co. v. Clark* (Civ. App.) 216 S. W. 220.

Representations by agent selling corporate stock that the company was one of the best in Texas, that the dividends which it would declare would pay off the note by the time it matured, that the company would put expert salesmen in the territory adjacent to defendant's bank to sell insurance and allow him 50 per cent. of the first year premiums, and that the company could keep on deposit as much as \$2,000 in the bank, held to be expressions of opinion or promises to do something in the future which would not be a good defense to the note; the company being solvent. *Lone Star Life Ins. Co. v. Shield* (Com. App.) 228 S. W. 196.

In suit to recover money paid for oil stock on the ground of fraud, mere acquiescence on the part of a defendant in plaintiff's belief in spiritualism would not constitute a badge of fraud, but to support the charge of fraud there must be evidence that such defendant induced such belief, or played thereon by some false and deceitful practice, and thus induced plaintiff's action when he would otherwise not have so acted. *Burchill v. Hermsmeyer* (Civ. App.) 230 S. W. 809.

10. — Estoppel.—Plaintiff held not estopped to secure cancellation of subscription contract and notes and deed of trust given for stock, on the ground that they had been secured by fraudulent representations, where he brought suit before the corporation was declared insolvent, and was not guilty of laches, and no creditor of the corporation became such after he subscribed for the stock. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

A stockholder who has enjoyed the fruits of that relation and received dividends held not entitled, after failure of the corporation to rescind his subscription contract because obtained by false representations. *Id.*

Where a stockholder, induced to subscribe by fraudulent misrepresentations of the promoter, had no knowledge of the fraud when he transferred his stock, he did not thereby waive his right to rescind his subscription. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

A subscriber who gave a note for corporate stock waived any defense as to false representations and promises, where, after the corporation failed to comply with its promises, he continued to pay interest on the note and acted as director. *Lone Star Life Ins. Co. v. Shield* (Com. App.) 228 S. W. 196.

11. — Effect of fraud and remedies of subscriber.—Where a contract to subscribe to corporate stock stipulated that an amount was paid the promoters in consideration of their agreement to organize and incorporate the company free from expense to stockholders, and none of the amount was paid or received by the company, on rescinding his subscription for misrepresentations a stockholder was not entitled to recover the amount from the organized company. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

In suit to rescind a stock subscription, where the company to which plaintiff had assigned his certificate was made a party defendant, judgment ordering surrender of the certificate for cancellation held effectually to protect the main defendant, the company whose stock was sought to be canceled, being tantamount to a tender and return by plaintiff of the certificate. *Id.*

13. Withdrawal or cancellation.—Evidence that stock subscribers selected certain of their number to effect incorporation, etc., held to establish that original subscriptions were not abandoned and that committee was merely acting in representative capacity. *Stringfellow v. Panhandle Packing Co.* (Com. App.) 213 S. W. 250.

14. Release or discharge.—Where committee appointed by stock subscribers to complete company's incorporation falsely made affidavit that each had paid half of his subscription and secured charter, the original subscribers could elect to complete payment for stock or recover money already paid. *Stringfellow v. Panhandle Packing Co.* (Com. App.) 213 S. W. 250.

Where plaintiff, after having subscribed for corporate stock on installments, gave a further subscription to defendant's agent, paying the price of the stock, but defendant refused to issue the stock, such failure of defendant warranted plaintiff in refusing to pay installments on her earlier subscriptions, and excused her from provisions of the contract that payments made should be forfeited in case of default. *Texas Co-operative Inv. Co. v. Clark* (Civ. App.) 216 S. W. 220.

Subscriber for stock, who does not consent to a change in the subscription, is released if the corporation, which is afterwards formed for a greater or less amount of capital stock than agreed upon, seeks to enforce the subscription. *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

16½. Certificate.—Upon issuance of a certificate to subscriber, evidencing the definite interest in the common fund existing in the individual, the possession of the stock evidenced by the certificate does not pass from, but is retained by the corporation, the certificate being simply the evidence in the hands of subscriber on which he may be able to base an assertion of interest in the common fund. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Issuance of certificate is not essential in order to create relation of shareholders, which may arise by reason of the contract duly made, and to vest in the subscriber the privileges attendant upon relationship of stockholder, which he may exercise and enjoy with the consent of the company. *Id.*

The certificate of stock is not the stock, but is only evidence in the hands of the shareholders that the corporation recognizes him as owning an interest therein, and is not necessary to the existence of the stock nor to the transfer of it by shareholder. *Id.*

19. Estoppel to allege invalidity.—A stock subscriber waived defense that subscription agreement and statute required each subscriber to pay half of his subscription be-

fore incorporation, where he actively assisted in incorporating company with knowledge of facts. *Stringfellow v. Panhandle Packing Co.* (Com. App.) 213 S. W. 250.

Subscriber for stock, by exercising privilege of attending and voting at stockholders' meetings, of holding positions of trust in corporation, and receiving dividends, manifests recognition of ownership of stock. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Corporation, by accepting stock subscription, by recording subscriber as stockholder, by permitting him to attend and vote at stockholder's meetings, and by paying over to him dividends, manifests an intention to recognize him as a stockholder. *Id.*

Though the organization of a corporation under the laws of Arizona, instead of under the laws of Texas, as provided in a stockholder's contract, was a departure from the terms of the contract sufficient to warrant its cancellation at the suit of the stockholder, the transfer of his stock after he had acquired knowledge of such departure was a waiver by him of his right of cancellation on such ground. *Cator v. Commonwealth Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 140.

Corporation which had issued stock to trustee to be delivered to employé on said date with right of cancellation on termination of employment prior to such date held to have had knowledge of employé's cessation of employment for a sufficient period of time prior to cancellation to have waived the right of cancellation, since the records of the corporation showed that employé was no longer in its employment, and since the corporation was charged with knowledge of such records. *Donoghue v. Lee* (Civ. App.) 228 S. W. 957.

Art. 1170. [668] [592] Stock forfeited, when and how.

Cited, *Cattlemen's Trust Co. of Ft. Worth v. Swearingen* (Civ. App.) 200 S. W. 596.

Art. 1173. [676] [600] Corporation may convey lands, how.

See *Shropshire v. Behrens*, 77 Tex. 275, 13 S. W. 1043.

Execution of deed.—A conveyance, signed and acknowledged by the president of a Texas corporation as such, which complied with this article, and art. 1108, though voluntary and to the stockholders of the corporation, one of whom was the president, will pass title in the absence of objection by a then existing creditor; the corporation not appearing insolvent. *City of Ft. Worth, Tex., v. National Park Bank of New York* (C. C. A.) 261 Fed. 817.

Effect of noncompliance with requirements.—This article does not make such deed invalid and inadmissible in evidence, though not acknowledged or proved as therein required. *Kimmarlé v. Houston & T. C. Ry. Co.*, 76 Tex. 685, 12 S. W. 698.

Where corporation's attempted assignment of property to private trustee for sale for creditors was void as conveyance under statute, being common-law mortgage, it was not void as such because of company's failure to authenticate it by corporate seal. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

CHAPTER THREE A

SALE OF CORPORATE STOCK

Art. 1174a. Corporations affected by act; etc.	Art. 1174d. Granting or refusing permit; etc.
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Article 1174a. Corporations affected by act; etc.

Construction of act in general.—Agreement by corporation to pay plaintiff 10 per cent. of the subscriptions obtained to the capital stock held not invalid, as in violation of this act; there being no showing that the amounts were to be paid out of sums received from the subscribers, this conclusion being strengthened by the fact that plaintiff, when receiving payments in cash, did not deduct the amounts claimed. *Thannish v. Brewton Transfer & Auto Co.* (Civ. App.) 220 S. W. 300.

Art. 1174d. Granting or refusing permit; etc.

Commission contract.—Agreement by corporation to pay plaintiff 10 per cent. of the subscriptions obtained to the capital stock held not invalid, as in violation of this act; there being no showing that the amounts were to be paid out of sums received from the subscribers, this conclusion being strengthened by the fact that plaintiff, when receiving payments in cash, did not deduct the amounts claimed. *Thannish v. Brewton Transfer & Auto Co.* (Civ. App.) 220 S. W. 300.

CHAPTER FOUR

LAND—ACQUISITION, ETC., OF, RESTRICTED

Art. 1175.	Purchase of land, unless necessary to business or to secure debts, prohibited.	Art. 1176.	Excess of land over necessary amount to be alienated, when.
		1177.	Certain corporations forbidden to acquire lands.

Article 1175. Purchase of land, unless necessary to business or to secure debts, prohibited.

In general.—An agreement by a Texas corporation to exchange property owned by it for lands in Texas, which were not needed in any business it was authorized to transact, and were not taken in due course of business to secure the payment of a debt, would have been not merely ultra vires, but wholly void, though the exchange was for the purpose of winding up its affairs, paying debts, and distributing its assets. *Jackson v. Western Union Tel. Co.* (C. C. A.) 269 Fed. 598.

A gift to a college for erection of a chapel is not void, on the ground that the college, being incorporated for educational purposes, cannot own and control a building used for purpose of conducting religious services. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

The purchase of real estate by a corporation for the purpose of compromising a demand against it for breach of contract was ultra vires, and its agreement to pay a debt secured by a lien on the land was not binding. *National Equitable Soc. v. Alexander* (Civ. App.) 220 S. W. 184.

That the purchase of land by a corporation and the assumption of an indebtedness secured by a lien thereon may have been regarded by it, and may in fact have been, a profitable investment is immaterial in determining the corporation's power and authority to so obligate itself. *Id.*

Art. 1176. [749c] Excess of land over necessary amount to be alienated, when.

See *Jackson v. Western Union Tel. Co.* (C. C. A.) 269 Fed. 598.

Art. 1177. [749a] Certain corporations forbidden to acquire lands.

See *Jackson v. Western Union Tel. Co.* (C. C. A.) 269 Fed. 598.

In general.—This article, and art. 5011e, permitting irrigation companies to acquire land, are not irreconcilable, and the former does not impliedly repeal the latter. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

CHAPTER EIGHT

LIABILITY OF STOCKHOLDERS AND DIRECTORS

Art. 1198.	When and how stockholders may be made liable on execution.	Art. 1200.	Directors liable for debts of corporation, when and to what extent.
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Article 1198. [671] [595] When and how stockholders may be made liable on execution.

Liability as stockholders.—**In general.**—In a suit by a judgment creditor of a corporation against a stockholder to establish liability on the part of the stockholder, the judgment against the corporation is not only evidence, but, in the absence of fraud or lack of jurisdiction, conclusive evidence, of fact that the corporation was indebted to the plaintiff. *Butcher v. J. I. Case Threshing Mach. Co.* (Civ. App.) 207 S. W. 980.

Where incorporators and subscribers made affidavit that the stock was fully subscribed and paid, caused the corporation's books to so show, had stock issued to themselves as fully paid and nonassessable, and represented, in sale of the stock, that it was fully paid, purchaser paying full face value therefor, but, although they had paid for the stock the amount of merchandise recited in their affidavits, the cash amounts recited as paid were in fact not paid by them, the question of their good faith in their sale of the stock was immaterial on the question of their liability for amounts unpaid on their stock. *Park v. Rich* (Com. App.) 212 S. W. 947.

The right of set-off, conferred on bankrupt's debtor by federal Bankruptcy Act July 1, 1898, § 68 (U. S. Comp. St. § 9652), does not apply to the creditor of a bankrupt corporation, who is also a stockholder and indebted to the corporation on an unpaid stock subscription. *Cochran v. Monteith* (Civ. App.) 221 S. W. 1055.

— **Unpaid subscriptions.**—Subscribers for stock with option of rescinding were not liable on subscription contract for debts of corporations, where they rescinded subscription before the enfranchisement of the corporation and its organization, and before any liability to any creditor or stockholder was incurred. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

— **Effect of transfer of stock.**—Where promoter of land development corporation turned land over to corporation in return for stock in value largely in excess of actual value of land, and thereafter made compromise agreement with other stockholders whereby he surrendered his stock and resigned as president in consideration of corporation conveying land to him, such agreement terminated his liability as stockholder. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Art. 1200. [670] [594] Directors liable for debts of corporation, when and to what extent.

Negligence.—The directors of a corporation are liable to its creditors for losses resulting from their negligent acts, but the rule as to such liability is largely relative. *McCollum v. Dollar* (Com. App.) 213 S. W. 259.

CHAPTER NINE

INSOLVENT CORPORATIONS

<p>Art. 1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, etc.</p>	<p>Art. 1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc.</p>
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Article 1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, payment of indebtedness as affecting suit, etc.

See *East Line & Red River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690.
Cited, *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

Liability of directors.—Corporate directors are personally liable for damages sustained by reason of insolvency of corporation, when a person is induced to extend credit by false representations, either knowingly made, or which in exercise of ordinary care the directors should have known were false, and in an action against them recovery cannot be defeated because credit was not wholly extended in reliance upon representations. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

In action against corporate directors by plaintiff which extended credit to corporation when insolvent, relying on false statements issued to mercantile agencies, defendants cannot escape liability because identical statements rendered to commercial agencies were not transmitted; it appearing that material contents were made known to plaintiff. *Id.*

Plaintiff, who claimed a corporation refused to deliver automobiles stored in its garage, cannot, upon insolvency and dissolution of the corporation, recover against directors personally, where they owed nothing on stock subscriptions, and where, as trustees after dissolution, they had no property of the corporation in their hands, unless they negligently continued to hold automobiles after dissolution, and then only for such depreciation as occurred after dissolution. *White v. Texas Motor Car & Supply Co.* (Civ. App.) 203 S. W. 441.

Claims against insolvent corporation.—Where a corporate judgment debtor was insolvent, and had ceased to do business when execution was levied on its property, the judicial sale conveyed no title as against the rights of other creditors of the corporation. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

Where a corporation has become insolvent and ceased to do business, the title to its property is vested in its officers in trust for the benefit of creditors; but when its debts are paid the trust is discharged, and presents no impediment to title acquired under judicial sale. *Id.*

When a corporation becomes insolvent and ceases to be going concern or takes steps which substantially incapacitate it from continuing business, all its assets and property becomes a trust fund for benefit of creditors, subject only to rights of other creditors holding prior valid liens. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

Art. 1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc.

Receiver.—In suit by a stockholder in a company against it and directors for appointment of receiver and to restrain the directors from making sale of the assets of the company under an alleged fraudulent deed of trust, appointment of a receiver on ex parte hearing held improper, in view of Rev. St. art. 1203, and the insufficiency of the verification of the petition. *Alto Cotton Oil & Mfg. Co. v. Berryman* (Civ. App.) 213 S. W. 513.

CHAPTER TEN

DISSOLUTION OF PRIVATE CORPORATIONS

<p>Art. 1205. Corporation is dissolved, how. 1206. Unless receiver appointed, president, etc., to be trustees, and close business. 1207. Trustees responsible to creditors, etc., to what extent.</p>	<p>Art. 1210. Only liable for unpaid stock. 1211. Members or officers of defunct corporation not to do business under old corporate name, etc.</p>
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Article 1205. [680] [604] Corporation is dissolved, how.

See *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823. Cited, *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

Acts of incorporators.—Under this article, and arts. 1206, 1207, though the dissolution and transfer of corporate property to the directors was effected through the agency of the stockholders, yet it was a transfer by the corporation of all of its property, in the nature of an assignment for the benefit of creditors, and amounted to an act of bankruptcy within Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2 (U. S. Comp. St. § 9587). *Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co.*, 158 C. C. A. 609, 246 Fed. 653.

The filing by a Texas corporation, which had paid or was able to pay all its creditors, of a petition for dissolution, does not authorize the creditors to have the corporation adjudged an involuntary bankrupt. *W. H. Baker, Inc., v. Monarch Wholesale Mercantile Co.* (C. C. A.) 269 Fed. 794.

Abatement of action.—After a corporation has been dissolved, no judgment can be entered against it, although suit may have been pending at the time of dissolution. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

Forfeiture—Grounds.—Act of mercantile corporation in entering pool to lend financial aid to other concerns, in violation of art. 1164, ante, may form the basis of a suit to forfeit its permit or license. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

An adjudication of insolvency dissolved a corporation, so that it could not thereafter be sued, and the directors became trustees to wind up its affairs, under this and the following articles, and suit could not be maintained to establish a corporate liability against any of such trustees singly; the directors acting collectively as trustees. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

An adjudication of insolvency dissolved a corporation. *Id.*

— **Proceedings to enforce.**—Failure of corporation to pay franchise tax does not ipso facto work dissolution. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

Under art. 7399, corporation's failure to pay franchise tax does not bring about a forfeiture of its charter, but merely established a ground for forfeiture which could only be taken advantage of by the state and used as a basis for a judicial forfeiture. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

Art. 1206. [682] [606] Unless receiver appointed, president, etc., to be trustees, and close business.—Upon the dissolution of any corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and to this end, and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and to exercise the full power and authority of said company over such assets and properties; and the existence of every corporation may be continued for three years after its dissolution from whatever cause for the purpose of enabling those charged with the duty to settle up its affairs; and, in case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the

courts so long as in its discretion it is necessary to suitably settle up the affairs of such corporation; provided that the dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same was not dissolved, and in case no receiver has been appointed for said corporation, suit may be instituted on any claim against said corporation, as though the same had not been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the aff[ai]rs of the corporation at the time it was dissolved by whatever name they may be known in law, and judgment may be rendered as though the corporation had not been dissolved and the assets of said corporation shall be liable for the payment of such judgment just as if said corporation had not been dissolved. [Acts 1907, p. 311, § 4; P. D. 5970; Acts 1919, 36th Leg. 2d C. S., ch. 56, § 1, amending art. 1206, Rev. Civ. St.]

Took effect 90 days after July 22, 1919, date of adjournment.

See *East Line & Red River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690; *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823.

Application.—On the forfeiture of the charter of a railroad company because of its failure to construct, equip, and operate ten miles of road within two years from its incorporation, its property rights survive for the benefit of those who may have right to, or just claim on, its assets. *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

Appointment of receiver.—As the public are interested in the proper management of the property of a dissolved railroad company, the court may, in adjudging the forfeiture of the franchise of such a company at the suit of the state, appoint a receiver or make any other order that may be necessary to the enforcement of its judgment, although the state may not be a creditor of the company. *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. 199.

Effect of dissolution.—Though the dissolution and transfer of corporate property to the directors was effected through the agency of the stockholders, yet it was a transfer by the corporation of all of its property, in the nature of an assignment for the benefit of creditors, and amounted to an act of bankruptcy within Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2 (U. S. Comp. St. § 9587). *Moody-Hormann-Boelhaue v. Clinton Wire Cloth Co.*, 158 C. C. A. 609, 246 Fed. 653.

The filing by a Texas corporation, which had paid or was able to pay all its creditors, of a petition for dissolution, does not authorize the creditors to have the corporation adjudged an involuntary bankrupt. *W. H. Baker, Inc., v. Monarch Wholesale Mercantile Co.* (C. C. A.) 269 Fed. 794.

Where a solvent corporation is dissolved, leaving debts due to creditors, and assets are distributed among stockholders, remedy is, in the absence of actual fraud, against stockholders under this article. *C. R. Miller & Bro. v. Mummert* (Civ. App.) 196 S. W. 270.

Dissolution of a corporation did not abate a suit pending against the corporation, or deprive the court of power to render judgment; the dissolution under such statutes being a qualified one. *Butcher v. J. I. Case Threshing Mach. Co.* (Civ. App.) 207 S. W. 980.

An adjudication of insolvency dissolved a corporation, so that it could not thereafter be sued, and the directors became trustees to wind up its affairs, and suit could not be maintained to establish a corporate liability against any of such trustees singly; the directors acting collectively as trustees. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

Trustees to close business.—Ordinarily forfeiture of corporation's charter does not place the property of the corporation in the hands of one officer to act as trustee for creditors and stockholders with authority to sell lands, without authority of board of directors. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

Ordinary dissolution of corporation places all the property in the hands of the president and directors as trustees for the benefit of directors and stockholders; it being necessary for directors to join president in conveyance of the corporation's real estate. *Id.*

If stockholders and directors of dissolved corporation were in constructive possession of property as trustees, and were liable as the corporation would have been but for dissolution, judgment for damages for detention of such property in favor of the owner could not be rendered against them, where they owed nothing on stock subscriptions, and the corporation was wholly insolvent prior to dissolution and no property or assets thereof came into their hands after dissolution; such trustees being responsible only to creditors and stockholders, and their liability being limited to the extent of its property coming into their hands. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

Directors of a dissolved corporation are individually liable to the owner of automobiles for their unlawful detention by the corporation where they were nonresidents, knew nothing concerning the automobiles, and never had them in their possession as individuals. *Id.*

Art. 1207. [683] [607] Trustees responsible to creditors, etc., to what extent.

See *Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co.*, 158 C. C. A. 609, 246 Fed. 653; *W. H. Baker, Inc., v. Monarch Wholesale Mercantile Co.* (C. C. A.) 269 Fed. 794.

Art. 1210. [686] [610] Only liable for unpaid stock.

See *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Art. 1211. Members, etc., of defunct corporation not to do business under old name.

See arts. 5950½-5950½d, Civil Statutes, post, and art. 1007c, Penal Code.

CHAPTER ELEVEN

RELIGIOUS, CHARITABLE AND OTHER CORPORATIONS

Art.	Art.
1212. Powers and privileges of.	1217. May acquire and hold land and personality necessary for sites, etc.
	1221. Grand body may provide in charter what, etc.

Article 1212. [713] [637] Powers and privileges of.

Officers.—Under Rev. St. art. 1159, and this article, where there were never two separate and distinct "Churches of Christ" established in a town, but were at all times merely two factions of the same church, the majority faction of which, in the manner authorized by such church as the proper method, elected new trustees on a specified date, such election took away all authority previously existing in other and former trustees. *Wallace v. Wells* (Civ. App.) 228 S. W. 1111.

It cannot be assumed that the charter of a church, in granting to the board of trustees power to make by-laws, gave the trustees authority to enact by-laws in contravention of the statutes relating to corporations, as power to exclude a majority of the church members displacing the board of trustees. *Id.*

Liability for torts.—In suit against hospital association for refusal of physician to give plaintiff, injured railway employé, treatment, held, there could be no recovery, as funds contributed by plaintiff and others were held in trust for purpose of giving medical relief and could not be applied to payment of damages. *Davis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 196 S. W. 603.

In a personal injury action against a sanitarium, facts in evidence held to show as a matter of law that the defendant was purely a public charity such as is exempt from liability for the negligent acts of its employé which resulted in plaintiff's injury, so that instructed verdict for defendant was proper. *Barnes v. Providence Sanitarium* (Civ. App.) 229 S. W. 588.

— **Acts of employees.**—An institution of purely public charity is not liable in damages for the negligent acts of its employés, although it is liable for injuries resulting from failure to exercise ordinary care in selecting and retaining employés. *Barnes v. Providence Sanitarium* (Civ. App.) 229 S. W. 588.

Art. 1217. May acquire and hold land and personality necessary for sites, etc.

See *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

Art. 1221. Grand body may provide in charter what, etc.

Cited, *Roaring Springs Town-Site Co. v. Paducah Tel. Co.*, 109 Tex. 452, 212 S. W. 147.

CHAPTER TWELVE

EDUCATIONAL CORPORATIONS

Article 1226. [708] [632] Directors, etc., may make by-laws, etc.

Powers of officers and directors.—Lease for building to be used by auxiliary school of medicine, held valid, where authorized by executive committee of university and signed by business manager and secretary where never repudiated by board of trustees. *Ingram v. Texas Christian University* (Civ. App.) 196 S. W. 608.

Where a business college reserved the right to require its students to board in homes approved by the college, the word "board" means lodging, and the college might require a student to change her lodgings. *Castleberry v. Tyler Commercial College* (Civ. App.) 217 S. W. 1112.

Regulations.—Where a written contract between a pupil and a business college provided that the school reserved the right to require students to board in homes approved by college, a pupil who refused to change her place of residence when requested by the college might be refused further instruction until she changed her residence as required, and such pupil cannot demand that she be given 3½ months' instruction under the provision that if a student disregards regulations, the scholarship would be limited to that period. *Castleberry v. Tyler Commercial College* (Civ. App.) 217 S. W. 1112.

CHAPTER THIRTEEN

TELEGRAPH CORPORATIONS

Art. 1231. May set poles, etc., across public roads, etc.	Art. 1232. May enter upon lands, etc.
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Article 1231. [698] [622] May set poles, etc., across public roads.

Construction and application in general.—A corporation organized for the express purpose of operating a long distance telephone line has the power and may be treated as "created for the purpose of constructing and maintaining such line," within this article. *Roaring Springs Town-Site Co. v. Paducah Telephone Co.*, 109 Tex. 452, 212 S. W. 147.

Rights in and use of streets, roads, and other public places.—Streets in a town site which have been dedicated to public use by the town-site company, which has reserved a right to grant the use of such streets to telephone companies, are subject to the operation of this article, since the dedication of streets and alleys to the use of the public in a town site is not rendered invalid by want of acceptance by the municipality, there not being sufficient number of inhabitants to organize a municipal government. *Roaring Springs Town-site Co. v. Paducah Telephone Co.*, 109 Tex. 452, 212 S. W. 147.

Consent of municipality.—A long distance telephone company may use the streets of a city for its poles without the consent of the city, subject only to regulations as to where the same shall be placed, but a local telephone exchange has no right to use the streets without permission of the municipal authorities. *Texas Telephone Co. v. City of Mart* (Civ. App.) 226 S. W. 497.

— **Payment for use of streets or roads.**—A license to use streets granted to a telephone company by the authorities of a municipality must be complied with so long as the company accepts the benefits. *Texas Telephone Co. v. City of Mart* (Civ. App.) 226 S. W. 497.

Art. 1232. [699] [623] May enter upon lands, etc.

Construction in general.—*Vernon's Sayles' Ann. Civ. St. 1914, arts. 1283a-1283f*, as to the incorporation of gas, electric current and power companies, in providing, by art. 1283d for condemnation by such company in the same manner and method as is provided by law in the case of railroads, pipe lines, and telegraph and telephone lines, does not extend to gas, electric current and power companies the benefits of art. 6531, allowing a railroad, in a suit against it by the owner of land, to litigate the question of condemnation, in view of this article and art. 1306; art. 6531 being a special provision, and therefore not included by the adoption by art. 1283d of general provisions as to condemnation by railroads, etc. *Pecos & N. T. Ry. Co. v. Malone* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

CHAPTER FOURTEEN

TELEPHONE AND TELEGRAPH COMPANIES

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| <p>Art.
1237. Corporations owning lines, etc., shall arrange for transfers, etc.</p> <p>1238. Telephone companies, etc., shall connect lines at common points.</p> | <p>Art.
1240. City council, etc., to hear and determine whether transfers be necessary and just, etc.</p> <p>1241. Companies to comply with order, etc.</p> |
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Article 1237. Corporations owning lines, etc., shall arrange for transfers, etc.

Validity of requirement.—Order of Childress city council, pursuant to this article, requiring physical connection between two phone companies and interchange of service, held not to take property of either company without due process of law or just compensation. *Southwestern Telegraph & Telephone Co. v. State*, 109 Tex. 337, 207 S. W. 308.

Art. 1238. Telephone companies, etc., shall connect lines at common points, etc.

Liability for nondelivery of message.—Where a telephone company was a domestic corporation domiciled in B. county and had no property in J. county, its transfer over its switchboard to another telephone company, with which it had an agreement to pay for connections, and with which it was required to make physical connections, of a call for a party in J. county, held not to support a contention that defendant had contracted to deliver the message in J. county so as to make one company liable for the negligence of the other and authorize suing defendant in J. county. *Texarkana Telephone Co. v. Blisard* (Civ. App.) 216 S. W. 213.

Art. 1240. City council, etc., to hear and determine whether transfers be necessary and just, etc.

Validity of order.—Order of Childress city council, requiring physical connection between two phone companies and interchange of service, held to authorize fair toll rates in addition to connection charge fixed therein, and not to warrant requiring one company to accept, from other, calls originating on its own line. *Southwestern Telegraph & Telephone Co. v. State*, 109 Tex. 337, 207 S. W. 308.

Art. 1241. Companies to comply with order, etc.

Action for penalty.—Where two phone companies, ordered to make physical connection and interchange service pursuant to Acts 30th Leg. (1st Ex. Sess.) c. 12, refused to do so, complaint of state seeking penalty therefor held not demurrable for failure to allege, as was the fact, that one company had attempted to comply. *Southwestern Telegraph & Telephone Co. v. State*, 109 Tex. 337, 207 S. W. 308.

DECISIONS RELATING TO SUBJECT IN GENERAL.

1. Regulation of rates, charges and conditions.—Act Cong. June 18, 1910, c. 309, conferring power on Interstate Commerce Commission to pass on reasonableness of regulations of interstate telegraph companies, does not make such companies' regulations, establishing measure of their liability for negligent nondelivery of interstate messages, controlling until they are declared to be unreasonable by commission after complaint duly made. *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516.

7. What law governs.—In suits based upon interstate messages, laws of the state where the message originates must determine whether mental anguish alone can be regarded as an element of actual damages. *Western Union Telegraph Co. v. Epley* (Civ. App.) 218 S. W. 528; *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516; *Mackay Telegraph & Cable Co. v. Martin* (Civ. App.) 218 S. W. 133.

Interstate Commerce Commission has no power to promulgate rules of law as to measure of liability of telegraph companies for negligent nondelivery of interstate messages. *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516.

Where a telegram was sent from another state into Texas, and through the negligence of the office in Texas was not delivered, the measure of damages is governed by the state decisions and not the federal decisions, and mental anguish is an element of actual damage. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

Where there was continuous transmission of a telegraph message from a place in Mississippi to a place in Texas, the message was interstate commerce. *Mackay Telegraph & Cable Co. v. Martin* (Civ. App.) 218 S. W. 133.

The right of recovery for mental anguish due to failure of defendant's agent in Arkansas to send death message to plaintiff in Texas must be referred to the Arkansas statutes (Kirby's Dig. § 7947), as construed by the courts of that state, and, since the Arkansas courts following the federal Supreme Court would deny recovery in suit for

damages for mental anguish alone, there can be no recovery in the Texas courts. *Western Union Tel. Co. v. Epley* (Civ. App.) 218 S. W. 528.

Act Cong. June 18, 1910, fixed the status of interstate telegraph companies as that of common carriers, and they are not only subject to requirements of Interstate Commerce Acts, but are entitled to have their liabilities determined by the law as administered by the United States courts. *Western Union Telegraph Co. v. McDavid* (Civ. App.) 219 S. W. 853; but that statute does not supersede all state laws as to their liability for negligent nondelivery of interstate message and as to right of such company to stipulate for exemption from such liability. *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516.

9. **Contracts for service or facilities.**—If plaintiff did not own telephone wires, he had no right, title, or interest therein, and if he had no right of user on telephone poles sold to defendant telephone company, he cannot complain of the removal of the wire and has no cause of action for being excluded from use. *Miller v. Bandera Independent Telephone Co.* (Civ. App.) 216 S. W. 900.

10. **Charges.**—Telephone franchise held not to authorize charges for installation and removal of telephones though bankruptcy would result from disallowance. *Greenville Telephone Co. v. City of Greenville* (Civ. App.) 221 S. W. 995.

A contract is created when the company accepts the benefits of the franchise, and an injunction against rates in excess of those permitted by franchise contract will not be denied, on the theory that plaintiff had adequate legal remedy, nor because labor and materials had increased, so that contract was not longer profitable. *Texas Telephone Co. v. City of Mart* (Civ. App.) 226 S. W. 497.

Rate fixed by Postmaster General *Texas Telephone Co. v. City of Mart* (Civ. App.) 226 S. W. 497.

12. **Receipt and acceptance of messages.**—Evidence held to show message was delivered to the company's agent. *Western Union Telegraph Co. v. Carver* (Civ. App.) 222 S. W. 333.

14. **Delivery of messages, and failure to deliver or misdelivery.**—Where the government under federal statutes has taken control of a telegraph company's lines, and operates them, the company is not liable for delay or failure to deliver a message. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 224 S. W. 203; *Western Union Telegraph Co. v. Conditt* (Civ. App.) 223 S. W. 234; *Western Union Telegraph Co. v. Robinson* (Civ. App.) 225 S. W. 877.

A telephone company is not liable for failure to perform its agreement to locate a person to whom it was desired to telephone, unless its agreement was founded on a consideration. *Southwestern Telegraph & Telephone Co. v. Payne* (Civ. App.) 210 S. W. 988.

Modifications of charges permitting a verdict for defendant telegraph company if it exercised ordinary care in delivering message by adding "unless it was received and transmitted under special contract" were erroneous as imposing a greater duty than the law requires. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

It is the duty of telegraph company to exercise due diligence in attempting to deliver a message announcing the severe illness of the mother of sendee. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

15. — **Delivery to person other than addressee.**—Company, which failed to deliver message reading: "Mr. J. S. Mother dead. Come home at once"—held liable to J. V. S., the son, notwithstanding delayed delivery to J. W. S., his father, at same address, having been put on inquiry by word "mother" and by agent's conversation with sender. *Western Union Telegraph Co. v. Streeter* (Civ. App.) 205 S. W. 940.

Where telegraph company received a message announcing the fatal illness of the addressee's mother under a special contract for delivery to the addressee personally, delivery to the company in whose care the message was sent was insufficient; it appearing that the addition was merely for the convenience of the telegraph company. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

16. — **Delivery outside of city or free delivery limits.**—It was not necessary for a telegraph company to make a manual delivery of a telegram addressed to G., "phone care Moore's Bluff Pumping Plant," although the telephone lines were not in working order; plant being situated seven miles from the town where the telegram was sent. *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

19. — **Forwarding or retransmission.**—Where telegram was addressed, "H. S. P., N. C. R. Co., 414 O. St.," the full duty of the telegraph company was not discharged by tendering delivery at such address, at which its messenger learned that the addressee was no longer at that address, and was given his correct address. *Postal Telegraph-Cable Co. v. Prewitt* (Civ. App.) 199 S. W. 316.

Where a telegram was sent to a town and was to be delivered by telephoning it to the sendee at another point, it was the duty of the telegraph company to use reasonable care to deliver it to the sendee by telephoning it, and the fact that receiving agent attempted once to telephone the message, and was informed by the telephone company that the line was out of order, did not necessarily acquit the telegraph company of the duty of later making a further effort to transmit the message by telephone. *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

21. **Effect of mistake or vagueness in or wrong address of addressee.**—Notwithstanding a mistake in initials of addressee, it is the telegraph company's duty to use ordinary care to make seasonable delivery of the message, and negligence in the discharge thereof is actionable. *Postal Telegraph-Cable Co. v. Prewitt* (Civ. App.) 199 S. W. 316.

Where death message was directed to address where telegraph company's agent

was informed the addressee did not live, being resident, however, in the vicinity, it was duty of company, not only to seek to deliver telegram at address, but, when it ascertained addressee was not there, to make at least some effort to ascertain her whereabouts by making due inquiry, failing of which a finding of negligence would be justified. *Western Union Telegraph Co. v. Carver* (Civ. App.) 222 S. W. 333.

22. — Nature and contents of message and relationship between sender and addressee, and notice thereof to company.—Where telegraph company received notice from the face of the message that death message was for the son, and not the father, it was under the duty of exercising ordinary care to make delivery to the son. *Western Union Telegraph Co. v. Streeter* (Civ. App.) 205 S. W. 940.

It did not appear from telegram reading, "Ruth is not expected to live unless change in condition," or from telegram reading, "Ruth very bad. Can't live long," that either was sent for the benefit of the sender. *Western Union Telegraph Co. v. Barrett* (Civ. App.) 207 S. W. 976.

A telegraph message by R. to J. that "mother died at 6:30 p. m." was on its face sufficient to give the telegraph company notice that deceased and J. were mother and son. *Western Union Telegraph Co. v. Johnston* (Com. App.) 210 S. W. 516.

Where a telephone company was informed that a requested connection was to enable a mother's agent to get in touch with her children, to inform them that another child had been shot, so that they could attend the funeral, the telephone company was liable for any negligence in failing to make the connection. *Southwestern Telegraph & Telephone Co. v. Harris* (Civ. App.) 214 S. W. 845.

Where a telegram announcing a death was addressed to husband and did not mention his wife, defendant company was not chargeable from the message itself with knowledge of the relationship between the wife and deceased person mentioned in message. *Meadows v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 211.

A telegraph company is charged with notice of the relationship, if any, existing between the persons named in the message or between the persons named and those referred to in such a way as to prompt inquiry, and with notice of such purpose as, having regard for such relationship and the usual manner of expressing such messages, is disclosed by the communication or fairly inferable from it. *Western Union Telegraph Co. v. Johnson* (Sup.) 226 S. W. 671.

24. Delay.—Evidence that the initial company did not have the message on its file of transmitted messages held insufficient to show delay by it. *Western Union Telegraph Co. v. Allen* (Civ. App.) 221 S. W. 1107.

27. — Nature and contents of message, and relationship between sender and addressee and notice thereof to company.—In an action against a telegraph company for delay in failing to deliver a message to a son that his mother is dead, it is not necessary that the company have distinct notice of the relationship, where the language of the message itself puts the company on inquiry. And a message from R. to J. that "mother died at 6:30 p. m." charged the telegraph company with notice that J. would probably desire to attend the funeral, and should have anticipated that he would have sent a message requesting postponement. *Western Union Telegraph Co. v. Johnston* (Com. App.) 210 S. W. 516.

Telegram, "If still in notion of selling me interest in business, let me hear from you at once," and answer, "Will sell my interest, meet me in Longview tomorrow, second," gave defendant company notice that a business transaction was pending between the parties, and that a failure to promptly transmit would probably result in loss to one or the other. *Western Union Telegraph Co. v. Dorough* (Civ. App.) 213 S. W. 282.

A telegram: "Mother died five. Wire if coming, and when"—gave telegraph company notice that the relation between the sendee and deceased was that of son and mother, and that sendee would probably desire to attend funeral, and would suffer mental anguish by being denied the opportunity of being present, by delay in delivery, and it was immaterial that the deceased was not the natural mother of the sendee, being the only mother he had ever known. *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611.

The interest of the sender of a telegram in its prompt delivery must fairly appear from the message itself or be disclosed by other information, for the telegraph company to be affected with notice thereof. And in determining whether a telegraph company had notice of the sender's interest in prompt delivery of a message, the message must be interpreted in the light of the company's presumed knowledge of the sender's relationship to the persons named in it or so referred to as to prompt inquiry. *Western Union Telegraph Co. v. Johnson* (Sup.) 226 S. W. 671.

Where a message from a mother to her son concerning the impending death of her husband, the son's stepfather, read when presented to the company: "Come at once. Death message. Mother"—but was changed by the agent who was well acquainted with the parties, to read: "Mr. J. not expected to live. Come at once. Mother"—the company was charged with notice of plaintiff's interest in the prompt delivery of the message. *Id.*

29. Errors.—One who telegraphs quotation of price to another, with whom he had previously corresponded by mail, makes the telegraph company his agent, and so must settle with the sendee on the price erroneously transmitted, accepted by sendee, and can recover the loss of the company. *Western Union Telegraph Co. v. Chihuahua Exchange* (Civ. App.) 206 S. W. 364.

33. Liability for acts or omissions of employés.—Error of telegraph company's employé in writing addressee's name was not chargeable to the company, where he wrote telegram at sender's request, since in writing telegram he was acting as agent of

sender and not of the company. *Western Union Telegraph Co. v. Holcomb* (Com. App.) 210 S. W. 509.

In an action against a telegraph company for delay in transmission of a death message, evidence held to support conclusion that for the purpose of receiving telegrams during night hours the telegraph operator of a railway company in a yard office was an authorized agent of the telegraph company, for whose negligence it was responsible. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

35. Contributory negligence.—Misspelling by sender of telegram of name of addressee, though resulting in delay in delivery, does not prevent recovery, if by exercise of ordinary care the company, after learning the correct name, could have delivered in time to prevent the injury; it not being a proximate cause. *Parham v. Western Union Telegraph Co.* (Com. App.) 206 S. W. 839.

The failure of a brother, knowing sister to be critically ill, to go to her without receiving telegram that she could not live did not preclude him from recovering for negligent delay in delivery of telegram preventing his presence at the funeral; the telegraph company's negligence, and not his negligence, being the proximate cause of his failure to be present. *Western Union Telegraph Co. v. Morgan* (Civ. App.) 219 S. W. 244.

36. Prevention of damage from default or error.—If, through error in transmission of owner's telegram to real estate agents, too low a price for land was given them, and owner was not bound by the contract of sale made by the agents at such price, he could not, after discovery of the mistake, carry it out and hold telegraph company liable. *Western Union Telegraph Co. v. Southwick* (Civ. App.) 214 S. W. 987.

One who has entered into contract of sale of his land below its value, through mistake in transmission of telegram, being entitled to abandon his contract on forfeiture of a certain sum as damages, may not perform and recover of telegraph company greater damages. *Id.*

37. Proximate cause of loss or damage.—Testimony of sendee in a telegram announcing the death of a relative that he could have taken an earlier train, which would have placed him in the city in time to have attended the funeral of his relative, if the telegram had been promptly delivered, was insufficient on which to base a finding that he would have taken the earlier train. *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611.

Where a telegraph company negligently failed to deliver money transmitted to plaintiff to enable him to return home by train, and plaintiff, being destitute and unable to work, made his way home on foot with occasional rides, the negligence of the company, and not the attempt to return home on foot, was the proximate cause of plaintiff's mental suffering during the journey. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1024.

38. Limitation of liability.—Those who deal with telegraph corporations are entitled, if they insist upon it, to have their messages transmitted and delivered free from all conditions or limitations, except those imposed by the law of the land. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

Stipulation limiting telegraph company's liability for error in unrepeatable message does not exempt the company from liability, where error in transmission was due to company's negligence, but merely requires proof by sender that company was negligent. *Western Union Telegraph Co. v. Ferguson Bros.* (Civ. App.) 209 S. W. 446.

40. — Requirement of repetition.—An interstate telegraph company may limit its liability in damages for negligence of its servants in transmitting unrepeatable interstate messages involving different rates. *Western Union Telegraph Co. v. McDavid* (Civ. App.) 219 S. W. 853.

Under provisions on the back of a telegram to the effect that the company should not be liable beyond the cost of transmission for mistakes or delays in transmission, unless the message was repeated, and that the company should not be liable for damages for mistakes in transmission, whether caused by negligence of its servants or otherwise, beyond the sum of \$50, the company was liable to the extent of \$50, where a mistake in an unrepeatable message was caused by the negligence of the company. *Id.*

41. — Of amount of liability.—Stipulation of telegraph company limiting its liability for damages for nondelivery of message, whether caused by negligence of its servants or otherwise, to \$50, in absence of payment of additional charge based on greater value, is void under law of this state or of Tennessee. *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516.

Printed stipulation in telegram blank limiting liability for mistake in transmission to price of telegram, unless repeated, and in any event to \$50 unless greater value is declared in writing and additional rate paid, is invalid. *Western Union Telegraph Co. v. Southwick* (Civ. App.) 214 S. W. 987.

Where an interstate telegram is sent at a reduced rate in consideration of an agreement by the sender not to hold the telegraph company liable in excess of \$50 for negligent delay, the sendee cannot recover more than \$50 for damages caused by negligent delay in delivery. *Western Union Telegraph Co. v. Price* (Civ. App.) 219 S. W. 869.

42. Notice and acceptance of conditions and persons bound thereby.—Where sender of telegram telephoned it to the company's agent, who wrote it upon blanks containing provisions limiting liability, such provisions were not binding as a part of the contract. *Postal Telegraph-Cable Co. v. Prewitt* (Civ. App.) 199 S. W. 316.

Telegraph operator taking message over phone for transmission held not agent of sender so as to bind party with conditions on back of slip limiting liability. *Id.*

A rule of a telegraph company that telegrams should be written on certain forms, and

the stipulations on the back of such forms, were not binding on the sender of a telegram, having no knowledge thereof, who telephoned a message, although the agent recorded the message upon one of such blanks. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

Stipulation on back of telegraph blank as to damages for nondelivery held not binding in Texas, it not appearing plaintiffs had any notice, as required by Interstate Commerce Act, of any such regulation. *Western Union Telegraph Co. v. Morrow* (Civ. App.) 208 S. W. 689.

One dictating a message to a telegraph agent and then signing the message, and the sendee named in the message, are presumed to know the contents of a contract on the back of the blank. *Western Union Telegraph Co. v. Janko* (Civ. App.) 212 S. W. 243.

45. Persons entitled to damages—Sender.—Defendant telegraph company which erroneously duplicated plaintiff's message to his brokers for purchase of cotton, causing them to use his standing deposit in closing his account, etc., cannot avoid liability upon ground that it is responsible only to brokers with whom alone it contracted. *Pearlstone v. Western Union Telegraph Co.* (Civ. App.) 199 S. W. 860.

The rule that a telegraph company is not liable to the sender on account of a purchase by the sendee through errors in a message has no application to an action by the sender who has been assigned the claim of the sendee and the purchase by the sender of a telegram for a valuable consideration of the claim of the sendee due to error in message does not extinguish the claim against the telegraph company, in an action by the sender as assignee. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

46. — Addressee.—That sender and sendee of telegram arbitrated a loss caused by error in a message before a board, which decreed that they should share in loss equally, did not estop the sendee from suing the telegraph company. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

47. — Third persons.—Where a telegram was sent a divorced woman notifying her of the death of her former husband, a son of the addressee and the deceased in charge of the addressee was entitled to damages occasioned by failure of the telegraph company to deliver the message, where the telegraph company had oral notice that deceased had a minor son in charge of the addressee. *Western Union Telegraph Co. v. Fulton* (Civ. App.) 211 S. W. 285.

50. Actions for damages—Evidence.—In action by plaintiff for damages due to failure to promptly deliver to her son a telegram with reference to serious condition of plaintiff's daughter, testimony held sufficient to charge defendant with notice that plaintiff sender had an interest in prompt transmission and delivery. *Western Union Telegraph Co. v. Barrett* (Civ. App.) 207 S. W. 976.

Transmission of message so that the word "here" read "there" was not evidence in itself sufficient to justify finding that telegraph company was negligent in transmission of message. *Western Union Telegraph Co. v. Ferguson Bros.* (Civ. App.) 209 S. W. 446.

Evidence held to sustain verdict finding telegraph company negligent in failure to deliver message announcing death of addressee's brother in time to permit addressee to attend funeral, notwithstanding error in statement of addressee's name. *Western Union Telegraph Co. v. Holcomb* (Com. App.) 210 S. W. 509.

Evidence held insufficient to show that failure to promptly deliver telegram sent by a bank with which plaintiff had pledged stock to secure note to one who had agreed to advance money to pay off note and redeem stock notifying him that, if loan was not retired, collateral would be sold, was the proximate cause of the loss due to acquisition or sale of stock by the bank. *Western Union Telegraph Co. v. Haynes* (Civ. App.) 212 S. W. 260.

In an action against a telegraph company for delay in transmission of a death message, evidence held sufficient to sustain finding that the person who received the telegram by telephone from the person sending it to plaintiff was one for whose negligence the telegraph company was liable. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

In action for failure to deliver a telegram informing plaintiff that seller would sell his interest in a partnership, evidence held to show that plaintiff sustained damages as the proximate result of defendant's negligence. *Western Union Telegraph Co. v. Dorough* (Civ. App.) 213 S. W. 282.

In action for failure to promptly deliver a telegram informing plaintiff that sender would sell his interest in a partnership, failure to deliver resulting in sale not being consummated, held, there was competent evidence to sustain judgment for damages, based upon the difference between the agreed price and the market value of the business. *Id.*

In a mother's action against a telephone company for negligently failing to put her in touch with a son by long-distance, to summon him and other children to the funeral of another child, evidence held sufficient to show that the mother suffered mental anguish by reason of the absence of some of her children, though the others attended. *Southwestern Telegraph & Telephone Co. v. Harris* (Civ. App.) 214 S. W. 845.

Evidence held to support verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant company. *Southwestern Telegraph & Telephone Co. v. Riggs* (Civ. App.) 215 S. W. 403.

In an action for damages from delay in delivering a telegram sent to the addressee in care of a company, testimony of messenger boys that it was the habit of one of them to deliver such messages to the company's manager, and that the other boy believed he delivered the message to such manager, who was not called as a witness for plaintiff,

though present, constituted prima facie proof that the message was offered to the manager. *Western Union Telegraph Co. v. Price* (Civ. App.) 219 S. W. 869.

51. — **Instructions and province of court and jury.**—In an action against a telegraph company for failing to deliver a message, refusal to submit a charge asking a verdict for defendant on a finding that a stipulation in the contract whereby notice of damages was to be given within 95 days was reasonable held error. *Western Union Telegraph Co. v. Verhalen* (Civ. App.) 204 S. W. 210.

53. — **Rights of action and conditions precedent.**—Where telegraph company failed to deliver message notifying plaintiff to have his brother come to wait on their father, plaintiff had no cause of action on theory that he was personally deprived of privilege of going to see his sick father. *Western Union Telegraph Co. v. Goodson* (Civ. App.) 202 S. W. 766.

Where filing of response to telegram with telegraph company made a binding contract, there could be no recovery against it for failure to transmit the response. *Western Union Telegraph Co. v. Fletcher* (Civ. App.) 208 S. W. 748.

54. — **Defenses.**—Where plaintiff sent telegram to brother that he was coming through town on a certain train, and, if his father's physical condition was not better, brother should meet him at the train, and plaintiff would stop off, and the message was never delivered, the subsequent negligence of the brother in not notifying plaintiff of his father's dying condition would not bar recovery. *Western Union Telegraph Co. v. Huffman* (Civ. App.) 208 S. W. 183.

55. **Grounds and elements of compensatory damages in general.**—Where by reason of a telegraph company's neglect to deliver a purchaser's message relative to holding cattle for delivery the seller declined to deliver them, the measure of damage, in the absence of notice of special damages, is the difference between the market value and contract price at the place of delivery, and in case there is no difference there can be no recovery. *Western Union Telegraph Co. v. George P. Brittain & Sons* (Civ. App.) 219 S. W. 296.

56. — **Notice or knowledge of circumstances and effect thereof.**—Telegraph company which received for transmission a message addressed to plaintiff saying, "Send Oscar at once to help wait on his father. Lida sick," was chargeable with notice of relationship of parties, purpose of message, necessity of prompt transmission, and of probable injury from delay. *Western Union Telegraph Co. v. Goodson* (Civ. App.) 202 S. W. 766.

Messages by a purchaser to a seller, reading, "I am sick, can't come now. Will let you know later," and "Will be there," in connection with statements that he had a contract whereby the addressee was to deliver cattle, and that he wanted to send a message to have the addressee hold them, held not notice that the purchaser would suffer special damages for loss of profits on the purchase and shipment of the cattle, delivery of which was refused by reason of nondelivery of messages. *Western Union Telegraph Co. v. George P. Brittain & Sons* (Civ. App.) 219 S. W. 296.

Where owner of hogs sent message to prospective buyer stating: "Can see hogs today. Over thirteen thousand pounds. Come today"—informing telegraph company's agent to rush the message through, as he expected prospective buyer to come on the train the same morning to get the hogs, as he had them ready and waiting for buyer, the company did not have notice that special damage would result from nondelivery of message, and the failure to promptly deliver it, preventing the buyer from buying the hogs, did not entitle the buyer to recover the profits he would have made if he had purchased the hogs at the prevailing market price. *Western Union Telegraph Co. v. Sanders* (Civ. App.) 219 S. W. 536.

The purpose of a telegraphic message as known to the parties or as fairly disclosed in view of the relationship between the persons concerned must determine what damages may reasonably be regarded as within the contemplation of the parties from delay in delivery. *Western Union Telegraph Co. v. Johnson* (Sup.) 226 S. W. 671.

Whatever would have been a natural and probable result to the sender of a telegram advising her son of the impending death of his stepfather from delay in delivery preventing the son's reaching her until after her husband's burial may be justly deemed to have been within the company's contemplation, but it will not be held to the anticipation of an unnatural or improbable result. *Id.*

58. — **Direct or indirect consequences.**—Even if plaintiff's telegram was merely an approximate quotation of price, this is immaterial as regards plaintiff's right to recovery of telegraph company for transmitting a lower price, sendee ordering plaintiff to buy, and he doing so at market price, resulting in a complete and fully executed contract. *Western Union Telegraph Co. v. Chihuahua Exchange* (Civ. App.) 206 S. W. 364.

If telegraph company assumed duty to transmit telegram accepting, though not unconditionally, a contractual offer, and negligently failed to transmit delivery to party making the offer, the latter could recover any damages proximately resulting from his failure to receive qualified acceptance or counter proposition, providing he could show he would have consummated contract on terms of telegram of acceptance. *Western Union Telegraph Co. v. Fletcher* (Civ. App.) 208 S. W. 748.

59. **Damages for mental suffering.**—Allowance of damages for mental distress in action for negligent nondelivery of interstate telegraph message does not impose direct burden upon interstate commerce. *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516.

In action for negligent nondelivery of interstate telegraph message, damages for mental distress may be recovered, where negligence occurs in this state, and such damages are recoverable under law of state from which message is sent. *Id.*

Plaintiff could not recover from telegraph company for mental anguish suffered by

his wife, where, on learning that his wife, away from home, among strangers desired to bring on her mother's body, he wired her funds, which she received in time to take train she had intended, though there was delay causing her apprehension; anguish resulting from apprehension of a situation which did not occur. *Western Union Telegraph Co. v. Deaver* (Civ. App.) 207 S. W. 972.

Mental anguish is an element of actual damage, for which compensation may be recovered upon breach of a contract for the transmission of money by telegram, where such anguish is the natural and direct result of such breach. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1022.

To authorize recovery for mental suffering, the injury must naturally follow the negligent act, and be obviously contemplated by the parties, so that to render a telegraph company liable for mental distress, resulting from negligent failure to transfer money by telegram, it must be shown that the company was informed of the circumstances which would render mental suffering probable in the event of negligence in transmission. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1024.

Where plaintiff's mother informed the telegraph company, when she delivered money for transmission to plaintiff, that he had just escaped from an insane asylum, and the money was to enable him to return home, that he was poorly clothed and unable to work and could not secure employment, the telegraph company had sufficient information to render it liable for mental suffering of plaintiff caused by its negligent failure to deliver the money. *Id.*

Evidence in action for delay in delivering telegram held to show suffering of mental anguish from incarceration in jail as a result of the delay, though the fact of such suffering was not stated in exact words. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 227 S. W. 211.

Mental anguish from being incarcerated in jail can be recovered for negligent delay in delivering telegram, the incarceration being the direct and proximate result of the delay; and not only the message, "Detained here, wire me \$30 at once, send care of chief of police," being sufficient on its face to give notice of its importance and the probable injury to the sender from delay, but the company's agent having several times, in season to prevent delay, been told of the importance of the telegram and urged to try and have it delivered. *Id.*

60. — As distinct cause of action or element of damage.—No recovery for mental anguish can be had by reason of failure to attend the burial of a relative, in the absence of proof of physical injury, as a result of failure to promptly deliver an interstate telegram. *Western Union Telegraph Co. v. Price* (Civ. App.) 219 S. W. 869.

Interstate Commerce Act prevents recovery for mental anguish. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

Where a mother sent money to her destitute son to enable him to return home, and informed the telegraph company of his condition, her mental suffering, due to his failure to return by train when the money was not delivered, and continuing during three weeks while he was making his way home, is such suffering as entitles her to recovery of damages therefor for breach of the telegraph company's contract. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1022.

Injury to the feelings, sensibilities, or emotions, caused by the negligence or fault of another, constitute actual damages for which recovery may be had, and the rule applies to telegraph companies the same as to others. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1024.

61. — Messages relating to sickness, death or burial in general.—In an action for damages for delayed telegram preventing plaintiff's attendance at a funeral, an issue as to amount of credit for physical and mental damage plaintiff would have suffered if she had gone to the funeral, to be deducted from any recovery by plaintiff, held properly refused. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

Damages for mental anguish caused by failure to promptly deliver a death message may be recovered without showing that the telegraph company received a valuable consideration for transmitting it. *Western Union Tel. Co. v. Johnson* (Civ. App.) 218 S. W. 781.

In action against telegraph company for failure to deliver a death message, plaintiff addressee could recover damages arising both from physical pain and mental anguish, which were in contemplation of parties when message announcing dying condition of addressee's mother was sent. *Western Union Telegraph Co. v. Carver* (Civ. App.) 222 S. W. 333.

Where plaintiff was visiting his father, who was a subscriber of defendant telephone company, and while so visiting his child became ill, and by the direction of his father he attempted to use defendant's line to call a physician, and defendant negligently failed to connect him with the physician, he could not recover damages for mental anguish by reason of the child's death; it not appearing that there was any contract on the part of the telephone company to perform that particular service, and for the further reason that the circumstances could not have reasonably been foreseen. *Lawson v. Haskell Telephone Co.* (Civ. App.) 224 S. W. 390.

Where plaintiff sent a message to her son informing him of the impending death of his stepfather and asking him to come at once, her mental distress from his absence was a natural consequence of delay in delivery of the telegram which should have been reasonably anticipated by the telegraph company. *Western Union Telegraph Co. v. Johnson* (Sup.) 226 S. W. 671.

Where plaintiff's wife and stepdaughter went away for the summer, and the wife developed blood poisoning, necessitating an operation from which she died, and defendant

telegram company did not deliver to plaintiff messages from his stepdaughter announcing the condition of her mother and requesting money and that plaintiff come at once, the suspense and fear of plaintiff after receiving a wire announcing his wife's death was reflex suffering in anticipation of the suffering of the wife and daughter too remote and speculative to support actionable damage therefor, as was a delay of 12 hours in preparation of the body of plaintiff's wife for burial claimed to have been caused by the delay in communicating with him. *Western Union Telegraph Co. v. Waller* (Sup.) 232 S. W. 487.

62. — **Messages relating to sickness, death, or burial as affected by relationship of parties.**—Where sender of telegram had written his brother that he was going to pass through town and would wire him before starting, and that the brother should meet him at the train and tell him of his father's condition, and, if he was worse, he would stop off, and before starting telegraphed, "Meet me at train 6 p. m. I am going to M."—telling the agent all the circumstances, and the telegram was not delivered, damages for distress of mind suffered by the sender, because of failure to see his father before he died were not too remote. *Western Union Telegraph Co. v. Huffman* (Civ. App.) 208 S. W. 183.

Mental suffering resulting from failure to see the remains of one's father and be present at his funeral, due to delay or failure in transmitting a telegram, is ground for the recovery of damages. *Western Union Telegraph Co. v. Fulton* (Civ. App.) 211 S. W. 285.

A telegram company is not liable for the mental distress suffered by the sender of a telegram as a result of delay in delivery unless it had notice that a probable consequence of delay would be suffering of mental distress by her. *Western Union Telegraph Co. v. Johnson* (Sup.) 226 S. W. 671.

There is no presumption that mental anguish will be suffered by failure to receive a death message where deceased and the addressee are not related in degrees of father, mother, brother, or sister, and by such failure addressee is deprived of the privilege of attending the funeral. *Western Union Telegraph Co. v. Smith* (Civ. App.) 227 S. W. 1111.

63. — **Messages relating to sickness, death, or burial as affected by contents of message or notice to company.**—Where plaintiff wrote, "Come at once, death message, mother," and defendant's agent changed the wording to, "Mr. J. not expected to live, come at once, Mother," the messages, taken together, constituted notice that the message was sent for the benefit of the plaintiff, the mother, and that she would likely suffer mental anguish if it should not be delivered promptly, and therefore deprive her of the presence of her son, the addressee. *Western Union Tel. Co. v. Johnson* (Civ. App.) 218 S. W. 781.

Where a telegram is a death message, the telegram company must take notice of the relation between the deceased party and the addressee, and, if such relation is that of father, mother, brother, or sister, the company will be presumed to know that mental anguish will probably be suffered if the addressee does not promptly receive the message. *Western Union Telegraph Co. v. Smith* (Civ. App.) 227 S. W. 1111.

In an action for delay in delivering a telegram sent by father of deceased informing plaintiff, who was deceased's aunt, of the death and time of burial, where the relationship of the addressee to deceased did not appear from the telegram itself, and the telegram company was not notified thereof, a general demurrer to plaintiff's petition should have been sustained. *Id.*

64. **Measure or amount of damages in general.**—That sender of telegram paid to sendee half of loss caused by error in message did not render the telegram company liable to sendee for less than the whole loss. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

66. **Inadequate or excessive damages.**—Verdict of \$1,250.64 for mental suffering resulting from being deprived of opportunity to be with and nurse a sister during her last illness and to be present at the burial was excessive, and will be reduced to \$500. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

In an action against a telegram company for damages by reason of delay in a message whereby plaintiff was prevented from attending the funeral of her father, a verdict of \$1,627 held not excessive. *Western Union Telegraph Co. v. Parham* (Civ. App.) 210 S. W. 740.

Verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant company held not so excessive as to show passion or prejudice. *Southwestern Telegraph & Telephone Co. v. Riggs* (Civ. App.) 216 S. W. 403.

A verdict for \$1,950 against a telegram company for negligent failure to deliver a telegram to plaintiff so that plaintiff could send his brother to the bedside of his sick father was excessive and should be reduced to \$500. *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

One thousand dollars damages was not excessive for mental anguish, caused a mother by failure to promptly deliver a message to her son, so that he could come to her in her bereavement on the death of her husband. *Western Union Tel. Co. v. Johnson* (Civ. App.) 218 S. W. 781.

A verdict awarding \$500 damages for mental suffering caused by breach of contract to transmit money to plaintiff's son to enable him to come home when he was in destitute circumstances, as a result of which he had to work his way home, held not excessive. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1022.

Verdict for \$1,500 recovered by daughter against a telegram company for failure to deliver message announcing dying condition of her mother, whereby she was prevented from attending funeral, held not excessive. *Western Union Telegraph Co. v. Carver* (Civ. App.) 222 S. W. 333.

A verdict for \$1,500 for mental anguish suffered from failure to promptly deliver a telegram announcing illness of plaintiff's mother held excessive, and reduced to \$750, plaintiff having received the message in time to attend the funeral. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

CHAPTER SIXTEEN

CHANNEL AND DOCK CORPORATIONS

Art.
1250. Added powers.

Art.
1251. Dock corporations, added powers.

Article 1250. [722] Added powers.

Condemnation.—See *McGee Irrigating Ditch Co. v. Hudson* (Sup.) 22 S. W. 967.

Art. 1251. [723] [644c] Dock corporations; added powers.

Liability.—In an action by a purchaser of wheat against the seller, the carrier, and a wharf company to which it had been delivered, for its loss by fire occurring through flood waters reaching a car of unslacked lime at a point to which the wharf company had been forced to move the cars in an effort to protect them, held that the wharf company could not be charged with anticipation of the severity of the storm, and was not obligated to go to great expense to raise its track beyond the level of flood waters of previous storms. *Ft. Worth Elevators Co. v. Keel & Son* (Civ. App.) 231 S. W. 481.

CHAPTER TWENTY

BRIDGE AND FERRY CORPORATIONS

Article 1279. [718] [642] Distance between bridges and ferries regulated.

Right to operate.—A ferry company does not, by virtue of its incorporation acquire the right to operate a ferry between the points named in its articles, without first obtaining a license from the commissioners' court of the proper county. *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120.

CHAPTER TWENTY-ONE

GAS AND WATER CORPORATIONS

Article 1283. [706] [630] May contract with cities, etc.

Cited, *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.

CHAPTER TWENTY-ONE A

GAS, ELECTRIC CURRENT AND POWER CORPORATIONS

Art.
1283c. Powers of corporation.
1283d. Condemnation of property; poles;
pipes.

Art.
1283f. May not discriminate.

Article 1283c. Powers of corporation.

See *Stemmons v. Dallas Power & Light Co.* (Civ. App.) 212 S. W. 222.

Injuries from use of property.—Verdict for defendant, in action based on claim that plaintiff's team which ran away was frightened by articles which defendant had piled on the road, held supported by evidence. *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119.

Art. 1283d. Condemnation of property; poles; pipes.

Eminent domain.—Individuals operating light companies have no power of eminent domain. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

In a proceeding to condemn land for the use of electric power lines, the provision that lines shall be constructed upon suitable "poles" means either wood or metal poles, and in view of the land being subject to overflow, and the necessary carrying of numer-

ous wires and the distance between poles, the statute must be construed to include towers as well as "poles." *Stemmons v. Dallas Power & Light Co.* (Civ. App.) 212 S. W. 222.

This article does not extend to gas, electric current and power companies the benefits of art. 6531, allowing a railroad, in a suit against it by the owner of land, to litigate the question of condemnation, in view of Rev. St. arts. 1222, 1306; art. 6531 being a special provision, and therefore not included by the adoption by art. 1283d of general provisions as to condemnation by railroads, etc. *Pecos & N. T. Ry. Co. v. Maione* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

Injuries from defects in lines—Negligence of company.—After erection of a telephone pole in close proximity to electric light pole, it became electric company's duty to remove high-voltage wires to outer ends of crossbeams for protection of telephone linemen and to inspect insulation of wires. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

Evidence held sufficient to show that electric light company was negligent in maintenance of high-voltage wires causing injuries to a telephone lineman. *Id.*

Maintaining electric light and power plant transmitting 33,000 volts over wire constructed over public road, without ammeter, circuit breaker, or ground detector, is gross negligence, and the operators must be held to have anticipated severe shock or death from breaking of wire without shutting off the current. *Ablene Gas & Electric Co. v. Thomas* (Civ. App.) 198 S. W. 1027, 211 S. W. 600.

If an electric power company's guy wire was so situated with reference to a roadway and so near as to be adjoining it, and if its situation with reference to the known general uses of the roadway was such that the company might have foreseen by the exercise of reasonable care that some injury would probably result to persons traveling the roadway if the wire was not shielded, the company was guilty of negligence toward a horseman injured thereby. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

Where an electric power company had a right of way across plaintiff's land, and erected a tower to support its wires thereon, and thereby had a right to use the land immediately under the tower, it might to that extent be said to be the owner of the land occupied by the tower; so that where plaintiff's 14 year old son, for his amusement, started to ascend the tower without the permission of defendant or his agents, and was killed by the electric current, the boy was a trespasser. *McCoy v. Texas Power & Light Co.* (Civ. App.) 229 S. W. 623.

Where defendant power company had erected a tower to support its wires on plaintiff's land under a grant of right of way, and plaintiff's 14 year old son, for his amusement, climbed the tower and was killed by the current, defendant was not liable on the ground of maintaining a nuisance attractive to children, notwithstanding that no warning had been placed by defendant on the tower. *Id.*

— **Contributory negligence.**—A telephone lineman could assume that defendant's high-voltage wires were fixed to crossbars in usual manner indicating their dangerous or harmless nature. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

A horseman driving cattle along a public road which had no sidewalks, in the evening, was not confined to the traveled part of the road, where the wagons had made ruts, or even to the graded portion, with reference to subjecting an electric power company to liability for injuries to him from an unguarded guy wire in or near the roadway. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

— **Assumption of risk.**—A telephone lineman working on a pole adjacent to electric light pole was not required to discover that high-tension wires were uninsulated. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

— **Proximate cause.**—That owners of building knew of uninsulated condition of a wire and failed to remedy the defect cannot be held such an intervening cause of the death of one coming in contact therewith as to require a finding that the negligent act of electric company in sending high voltage current over wire after knowledge of its condition was too remote. *International Electric Co. v. Sanchez* (Civ. App.) 203 S. W. 1164.

Evidence held sufficient to sustain verdict that deceased came to his death by reason of receiving a shock from an excessive current of electricity, while attempting to attach an electric iron to a socket in his residence. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

"Proximate cause" is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the event, without which the event would not have occurred; it not being necessarily the cause which by measure of space or time stands next in proximity to the occurrence. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

Art. 1283f. May not discriminate.

Discontinuance of service.—The act of a lighting company in discontinuing service without notice upon user's default for past month's service, held proper, where contract provided for discontinuance on default, and it was immaterial that the amount due was not in excess of deposit by user to secure performance. *Texas Power & Light Co. v. Taylor* (Civ. App.) 201 S. W. 205.

CHAPTER TWENTY-THREE

CEMETERY CORPORATIONS

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| <p>Art.
1286. Incorporation and powers; charter to state what.</p> <p>1289. Power to acquire and hold land, etc.</p> <p>1293. Corporation may make by-laws and regulations.</p> | <p>Art.
1298. City council may control location of cemetery and limit price of lots.</p> |
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Article 1286. Incorporation and powers; charter to state what.

"Cemetery" defined.—A cemetery is a place set apart, either by municipal authority or private enterprise, for the interment of the dead, the term including not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes. *Ex parte Adolf*, 86 Cr. R. 13, 215 S. W. 222.

A cemetery does not lose its character as such because further interments in it have ceased or become impossible, but remains subject to the use so long as the bodies remain buried, or until they are moved by public authority, friends, or relatives. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 874.

Art. 1289. Power to acquire and hold land, etc.

Title to land.—The fact that a cemetery is subject to spray of oil from adjacent wells does not necessarily render it unfit for cemetery purposes, and if the spraying is to such an extent as to constitute a nuisance, it is a wrong of which persons having relatives and other dead buried there can doubtless complain, and does not justify an oil company, under conveyance from the trustees of the church holding title to the cemetery, in drilling for oil within its confines. *Barker v. Hazel-Fain Oil Co.* (Civ. App.) 219 S. W. 874.

Art. 1293. Corporation may make by-laws and regulations.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1298. City council may control location of cemetery and limit price of lots.

See *State v. Settegast* (Civ. App.) 227 S. W. 253.

CHAPTER TWENTY-FOUR

OIL, GAS, SALT, ETC., COMPANIES

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| <p>Art.
1305. Powers of corporations.</p> <p>1306. Right of condemnation; pipes, pipe lines.</p> <p>1306a. Same.</p> <p>1306b. Same.</p> | <p>Art.
1308. Discrimination unlawful.</p> <p>1308b. Corporations for storing salt water, etc.</p> <p>1308c. Same; powers.</p> <p>1308d. Same; service to producers of water.</p> |
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Article 1305. Powers of corporations.

Liability for injuries.—In action against an oil company for negligence in leaving oil barrels not completely emptied in the rear of a grocery store, where during a fire burning the store and other buildings the barrel exploded and injured plaintiff while assisting in extinguishing the fire, a directed verdict for defendant held proper; the evidence showing that defendant used the same method as other oil companies in delivering, emptying and removing their oil barrels. *Williams v. Gulf Refining Co.* (Civ. App.) 229 S. W. 959.

Art. 1306. Right of condemnation; pipes, pipe lines.—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to lay its pipes and pipe lines across and under any public road, provided that no pipes or pipe lines shall be laid parallel with and on any public highway, closer than fifteen feet from the improved section thereof except with the approval

and under the direction of the Commissioners Court of the County in which such public highway is located, or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this state, with the consent and under the direction of the board of Aldermen or city council of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads; provided, that such pipes or pipe line shall not pass through or under any cemetery, church or college, school house, residence, business or storehouse, or through or under any building in this state except by the consent of the owner or owners thereof; and provided, further, that all such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owners of such land; provided, further, that if such pipes or pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines, shall be buried by said corporation as hereinbefore provided, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof; and provided, further, that whenever such pipes or pipe lines shall cross any public road or highway, railroad, street railroad, or street or alley, the said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof. [Acts 1899, p. 202, § 4; Acts 1915, ch. 152, § 1; Acts 1919, 36th Leg., ch. 146, § 1.]

Construction of article.—Arts. 1283a–1283f, as to the incorporation of gas, electric current and power companies, in providing, by art. 1283d, for condemnation by such company in the same manner and method as is provided by law in the case of railroads, pipe lines, and telegraph and telephone lines, does not extend to gas, electric current and power companies the benefits of art. 6531, allowing a railroad, in a suit against it by the owner of land, to litigate the question of condemnation, in view of Rev. St. art. 1232, and this article 6531 being a special provision, and therefore not included by the adoption by art. 1283d of general provisions as to condemnation by railroads, etc. *Pecos & N. T. Ry. Co. v. Malone* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

Eminent domain.—In condemnation proceedings for an oil pipe line, special damages on ground that oil would contaminate water supply for cattle, and that persons inspecting the pipe line would frighten cattle from drinking at their usual places, cannot be recovered, because too speculative and remote. *Texas Pipe Line Co. v. Hildreth* (Civ. App.) 225 S. W. 583.

Art. 1306a. Same.—Every person, firm, corporation, limited partnership, joint stock association, or association of any kind whatsoever owning, operating or managing any pipe line, or any part of any pipe line within the State of Texas for the transportation of crude petroleum that is declared to be a common carrier by and is subject to the provisions of Chapter 30 of the General Laws passed by the Thirty-fifth Legislature approved February 20, 1917, shall have the right and power of eminent domain, in the exercise of which he, it, or they may enter upon and condemn the lands, rights of way, easements and property of any person or corporation necessary for the construction, maintenance or operation of his, its, or their common carrier pipe line, the manner and method of such condemnation and the assessment and payment of the damages therefor to be the same as is provided by law in the case of railroads; and shall have the right to lay his, its or their pipes or pipe lines across and under any public road, provided that no pipes or pipe lines shall be laid parallel with and on any public highway, closer than

fifteen feet from the improved section thereof except with the approval and under the direction of the Commissioners Court of the County in which such public highway is located, or under any railroad, railroad rights of way, street railroads, canal or stream in this State, and along and under any street or alley in any incorporated city or town in this State with the consent and under the direction of the board of aldermen or city council of such city or town, and such other rights in the matter of laying pipes and pipe lines as are conferred by Article 1306 of Chapter 24, Title 25 of the Revised Civil Statutes of Texas of 1911 as amended by this Act, upon corporations organized under said Chapter 24, subject, however, to the conditions, limitations and restrictions therein stated. [Acts 1919, 36th Leg., ch. 146, § 2.]

Art. 1306b. Same.—Every person, firm, corporation, limited co-partnership, joint stock association or associations of any kind whatsoever owning, operating, or managing any pipe line, or any part of any pipe line within the State of Texas for the transportation of fuller's earth for the public for hire, the same are hereby declared to be common carriers, and shall have the rights and power of eminent domain, and may condemn the necessary sights, rights of way and easements, under the same terms, and subject to the same conditions as are conferred by Sections 1 and 2 of this act, on like persons natural or otherwise, owning, operating or managing crude petroleum pipe line or lines. [Id., § 2a.]

Sec. 3 repeals all conflicting laws. The act took effect March 31, 1919.

Art. 1308. Discrimination unlawful.

Liability for discrimination.—In an action to recover from a gas company for discrimination as to rates, facts held to support a contention that industrial consumers were subjected to a contract restriction permitting the shutting off of gas in event of low pressure, not placed upon domestic consumers. *Cock v. Marshall Gas Co.* (Civ. App.) 226 S. W. 464.

In an action against a gas company, unlawful discrimination, even if proved, would not justify a judgment for damages for plaintiff in the absence of allegation and proof of an overcharge. *Id.*

Art. 1308b. Corporations for storing salt water, etc.—In the mode provided in Chapter 2 of Title 25 of the Revised Statutes of Texas of 1911 corporations may be created for the purpose of gathering, storing, and impounding water containing salt or other substances produced in the drilling and operation of oil and other wells, and to prevent the flow thereof into streams at times when the latter may be used for irrigation. [Acts 1918, 35th Leg. 4th C. S., ch. 49, § 1.]

Took effect April 2, 1918.

Art. 1308c. Same; powers.—Such corporations, in addition to the general powers conferred by such title upon private corporations, may acquire, own, and operate ditches, canals, pipe lines, levees, reservoirs, and their appliances appropriate for the gathering, impounding or storage of such water, and for the protection of such reservoirs from inflow or damage by surface waters; with further power to condemn lands and rights necessary therefor under like procedure as is provided in condemnation by railroads; and also to cross with their ditches, canals, and pipe lines under any highways, canals, pipe lines, railroads, and tram or logging roads; conditioned that the use thereof be not impaired longer than essential to the making of such crossings; provided that, no right is conferred to pass through any cemetery or under any residence, school house or other public building nor to cross any street or alley of any incorporated city or town without the consent of the authorities thereof. [Id., § 2.]

Art. 1308d. Same; service to producers of water.—In the localities in which they operate and to the extent of the facilities provided, such corporations shall serve all producers of such waters in the gathering, impounding, and storage of such waters in proportion to the needs of such producers, at fair and reasonable charges, and without discrimination between such producers under like conditions. Corporations interested in the proper disposition of such waters may subscribe for, own, and vote stock in the corporations which may be created hereunder. [Id., § 3.]

CHAPTER TWENTY-FIVE B

CO-OPERATIVE SAVINGS AND CONTRACT LOAN COMPANIES

Art.
1313½a. Supervision of companies.

Art.
1313½n. Investment of funds.

Article 1313½a. Supervision of companies.—All such corporations shall be under the supervision and control of the Commissioner of Insurance and Banking, and it shall be his duty, at least once every twelve months to cause the books of such corporation to be examined, the expense of such examination to be paid by such corporations in the same manner as now required by law for the examination of insurance companies. [Acts 1915, 34th Leg., 1st C. S., ch. 5, § 2; Acts 1918, 35th Leg. 4th C. S., ch. 45, § 3.]

Art. 1313½n. Investment of funds.—Corporations chartered hereunder shall invest their funds in the following and no other way:

(1) If building or loan association, in such manner and in such property as building and loan associations are permitted to invest their funds under the building and loan laws of this State.

(2) In the purchase of lands or building lots and erecting buildings and improvements thereon, or in the purchase of lands and improvements, shall be or be contracted to be sold to a certificate holder of the company, payable by the periodical contribution of the certificates of the association or in periodical installments of such period of time as shall be agreed upon and designated in the by-laws of the company; at the expiration of which term all payments having been made, the lands, dwelling and improvements so sold and conveyed to such certificate holder shall become the property of the grantee discharged from further payment.

(3) In loans to certificate holders on bonds secured by mortgage which shall be a first lien on real estate located in the State where the contract holder resides at the time such contract is issued and not to exceed sixty-five per cent. of the cash value thereof, payable in certificates of the company or by periodical installments; except where any company holds a mortgage on real estate which is a first lien, such company may increase its loan thereon and secure the same by a second or subsequent mortgage; provided, the total indebtedness to the company, less the amount paid on certificates pledged for such loan shall not exceed sixty-five per centum of the cash value of the real estate loaned on and all mortgages held by such company shall be prior to any other incumbrance on said real estate.

(4) In the redemption of certificates or contracts of the company.

(5) In loans upon the pledged or collateral security of the certificates

or contracts of the company not to exceed ninety per cent. of the withdrawal value of such contracts.

(6) In loans to persons not certificate or contract holders without pledge or their contracts as collateral security, on bonds secured by mortgage which shall be a first lien on improved real estate in this State not to exceed two-thirds the cash value thereof; provided, however, a purchase money mortgage or vendor's lien given to any company upon real estate sold by it shall not be considered a loan within the meaning of this subdivision.

(7) In the purchase, so long as the present war between the United States of America and the Imperial Government of Germany shall continue, of Liberty Bonds issued by the United States Congress and in such short time certificates of indebtedness as may have been heretofore or as may hereafter be authorized by the United States Congress. [Acts 1915, 34th Leg. 1st C. S., ch. 5, § 15; Acts 1918, 35th Leg. 4th C. S., ch. 45, §§ 1, 2.]

Explanatory.—Paragraph 7 was added by Acts 1918, 35th Leg. 4th. C. S., ch. 45, § 2. The act took effect 90 days after March 27, 1918, date of adjournment.

DECISIONS RELATING TO SUBJECT IN GENERAL

Misrepresentations.—Where plaintiff, when he signed written application for loan contract in defendant co-operative loan contract society, and paid installments knew that false representations of defendant's agents were unauthorized, he could not recover installments, defendant not having led him to believe that representations were authorized or later ratified them. *Reagen v. National Equitable Soc. of Belton* (Civ. App.) 202 S. W. 157.

CHAPTER TWENTY-SIX

FOREIGN CORPORATIONS

<p>Art. 1314. Permit to do business, etc., in state must be obtained and how; purposes; foreign corporations.</p>	<p>Art. 1318. No such corporation can maintain any suit, etc.</p>
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Article 1314. Permit to do business, etc., in state must be obtained, and how; limitation as to purposes; showing as to stock by foreign corporations.

Cited, *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

Power of state to regulate.—Proceedings to dissolve a corporation can be brought only in the country or state in which the corporation was created. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

A law of the state to which a foreign corporation had voluntarily subjected itself would necessarily be binding on its shareholders and other creditors, and any one standing in the stead of the corporation. *Phillips v. Perue* (Sup.) 229 S. W. 849.

Right to sue and defend without permit.—When construed in connection with this article, art. 7399, providing that a corporation failing to pay its annual franchise tax in advance as required by art. 7394 shall thereby forfeit its right to do business and be denied the right to sue or defend in any of the courts of the state, and that in any suit against it on a cause of action arising before forfeiture no affirmative relief shall be granted, the forfeiture of a foreign corporation's permit does not prevent its recovery in an action brought by it before the forfeiture for breach of a contract while it was authorized to do business, though such construction establishes a different rule for foreign corporations as plaintiffs from that applying to them as defendants. *Deveny v. Success Co.* (Civ. App.) 228 S. W. 295.

Interstate commerce.—A foreign corporation which ships goods into the state for sale on commission, held engaged in interstate commerce, and not in transacting business in the state, within Rev. St. 1911, art. 1314. *Eastman v. Tiger Vehicle Co.* (Civ. App.) 195 S. W. 336.

Laws of Texas authorizing foreign corporation to transact business or to maintain a suit therein by obtaining a permit to do so have no application to cases where corporation's business constitutes interstate commerce. *Merriam & Millard Co. v. Cole* (Civ. App.) 198 S. W. 1054.

Assuming a single sale of a machine by a foreign corporation was made wholly within the state, it was, nevertheless, in interstate commerce. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 202 S. W. 981.

Where defendant gave order for machinery to a third person, who without authorization transmitted it to foreign corporation, and after the machine arrived defendant agreed to and did give a new order "on the terms stipulated in the original order," there was a ratification of the interstate contract which permitted recovery by the foreign corporation, although it had received no permit to do business within the state. *Id.*

A foreign corporation manufacturing its products in another state, and selling them in Texas through the medium of soliciting or sales agents upon written orders forwarded to the factory in the other state was engaged in interstate commerce, and was not transacting business in Texas, and, in order to maintain suit to enforce rights growing out of such sales, need not obtain a permit. *F. L. Shaw Co. v. Dalton Adding Mach. Co.* (Civ. App.) 211 S. W. 833.

A foreign corporation manufacturing its products in another state and selling them in Texas through the medium of soliciting or sales agents upon written orders forwarded to the factory in the other state was engaged in interstate commerce. *Id.*

A foreign corporation has the right, without obtaining a permit to do business in the state, to collect a debt incurred in the transaction of interstate commerce, and, having accepted a promissory note of a third person in part payment of such debt, may sue thereon in the state, although the note of the third person, who had dealings with the purchaser of the corporation's goods, had made the note payable direct to the corporation. *Crisp v. Christian Moerlein Brewing Co.* (Civ. App.) 212 S. W. 531.

A contract for the delivery of peaches by Texas sellers to a common carrier in Texas for transportation to the buyer in Louisiana constituted interstate commerce, and the Texas statute, requiring the Louisiana buyer, a corporation, to have a permit to do business in Texas, does not apply. *C. S. Martin & Son v. John Bonura & Co.* (Civ. App.) 214 S. W. 841.

Where a contract between a manufacturer of medicines provided for sale of its products at its place of business in Illinois to one in Texas, the contract was interstate, and the manufacturer was not required to obtain a license as foreign corporation to do business in Texas. *W. T. Rawleigh Co. v. Marshall* (Civ. App.) 220 S. W. 1111.

Where product was manufactured in another state and shipped to the purchaser in the state, the transaction was interstate commerce, and the manufacturer and seller was not required to obtain a permit in order to lawfully carry on such commerce. *Caddell v. J. R. Watkins Medical Co.* (Civ. App.) 227 S. W. 226.

Transaction of business within state.—Corporation shipping vehicles for exhibition at state fair where its local agent sold them held not engaged in intrastate commerce. *Eastman v. Tiger Vehicle Co.* (Civ. App.) 195 S. W. 336.

Timber company which sold stock for note to its agent to sell stocks, and transacted no other business in state, did not "do business" in state. *Denman v. Kaplan* (Civ. App.) 205 S. W. 739.

Sale and installation of gasoline container and pump by a foreign corporation held a transaction of business within the state by it. *Bryan v. S. F. Bowser & Co.* (Civ. App.) 209 S. W. 189.

That a foreign corporation reimbursed a purchaser of its goods for rent paid for premises in which the property bought was stored and for money paid for signs advertising the goods, and furnished a truck for the delivery of goods, retaining the ownership, but requiring the purchaser of the goods to pay the expenses of the upkeep, does not conclusively prove that the corporation was transacting business in the state, being only evidence of such fact. *Crisp v. Christian Moerlein Brewing Co.* (Civ. App.) 212 S. W. 531.

A foreign corporation, manufacturing articles and shipping them to purchasers in Texas, was not doing business within the state by reason of its having an agent in the state who collected and adjusted accounts, and could maintain an action without procuring a permit. *Caddell v. J. R. Watkins Medical Co.* (Civ. App.) 227 S. W. 226.

A foreign corporation which had never gone beyond the promotion stage, and which had never done any business except to sell stock and to acquire through such sales some personal property, and which was in the process of liquidation, was not "doing business" in the state. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

Art. 1318. [746] No such corporation can maintain any suit, unless.

See *Eastman v. Tiger Vehicle Co.* (Civ. App.) 195 S. W. 336; *Denman v. Kaplan* (Civ. App.) 205 S. W. 739.

Necessity of compliance with statute.—Foreign corporation, doing business without permit, cannot sue agent. *Billingslea Grain Co. v. Howell* (Civ. App.) 205 S. W. 671.

A foreign corporation which had never gone beyond the promotion stage, and which had never done any business except to sell stock and to acquire through such sales some personal property, and which was in the process of liquidation, was not "doing business" in the state. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

A foreign corporation, which had not attempted to engage in business within the state after its permit was forfeited for failure to pay the annual license tax, must be assumed to have voluntarily withdrawn from business within the state and cannot be denied the right thereafter to collect by suit in the state courts an account accruing to it while lawfully engaged in business within the state. *Deveny v. Success Co.* (Civ. App.) 228 S. W. 295.

This article does not render void contracts made by a foreign corporation doing business without a permit, but merely prevents the corporation from enforcing any of its rights by action. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

As arbitration is the investigation and determination of matters of difference between contending parties by one or more unofficial persons chosen by the parties and called arbitrators or referees, and results in the substitution of a private tribunal for

the courts, an "arbitration" is not an action within this article; and hence, where the arbitrators made an award in favor of such a foreign corporation, it is entitled to have the award, the proceeding being statutory, entered up as a judgment of the court. *Id.*

Pleading and proof as to compliance with statute.—A petition by a foreign corporation, which contains no allegation that the transaction involved constituted business done in the state, was not subject to a general demurrer because it contained no allegation that plaintiff had a permit to do business in the state. *Crisp v. Christian Moerlein Brewing Co.* (Civ. App.) 212 S. W. 531; *Fennell v. Trinity Portland Cement Co.* (Civ. App.) 209 S. W. 796; *Houston Oil Co. of Texas v. W. R. Pickering Lumber Co.* (Civ. App.) 212 S. W. 802.

Where foreign corporation's pleadings did not show that business out of which cause of action arose was transacted in Texas, allegation as to permit to do business held surplusage, not needing to be proved. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

In shipper's action against railroad, pleas unexcepted to, held sufficient to present defense plaintiff had forfeited right to do business in state. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120.

A foreign corporation suing to recover possession of buggies, an interstate shipment, under a conditional sale, made a chattel mortgage by statute need not allege and prove a permit from the state; there being nothing to show that it was engaged in doing business in the state. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Under Rev. St. 1911, art. 1319, an insurance company is not subject to articles 1314 and 1319, prohibiting a foreign corporation without permit to do business in the state from maintaining a suit in any court in the state. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

Jurisdiction of action.—Statutes preventing suit in state courts by foreign corporations without permit to do business in state do not affect jurisdiction of federal courts. *Kruegel v. Standard Savings & Loan Ass'n* (Civ. App.) 196 S. W. 283.

TITLE 27

COUNTER CLAIM

Art.	Art.
1325. Counter claim may be pleaded, when.	1329. Certain and uncertain damages not to be set off against each other.
1326. Requisites of the plea.	1330. Matters incident to plaintiff's demand may be set off.
1327. Judgment in defendant's favor, when.	
1328. Judgment for costs determined, how.	

Article 1325. [750] [645] Counter claim may be pleaded, when.

1. **In general.**—Bank's right of set-off does not apply to special deposits. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

A party cannot by direct action, or by way of set-off or counterclaim, recover money voluntarily paid with a full knowledge of all the facts and without any fraud, duress, or extortion, although no obligation to make such payment existed. *Hunt County v. Greer* (Civ. App.) 214 S. W. 605.

In an action on note given for difference on exchange of land for corporate stock, in which defendant cross-claimed for misrepresentation, asking cancellation and damages, defendant's laches must be pleaded. *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

"Recoupment" is the right to set off unliquidated damages, while the right of "set-off," as distinguished from recoupment, comprehends only liquidated damages, or those capable of being ascertained by calculation. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

3. **Set-off of judgments.**—Plaintiff, suing on note, was not entitled to have defendants' judgment, for value of exempt property converted by attachment and levy, offset by its judgment on note. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

Courts of law have power to set off mutual judgments, such power depending, not upon statute, but upon the general jurisdiction of the court over its suitors. *Pierson v. Farmers' State Guaranty Bank* (Civ. App.) 206 S. W. 730.

8. **Subject-matter of counter claim in general.**—In action by contractor on improvement certificate, cross-action for damages to defendant's property in course of plaintiff's work was proper. *Fate v. Whitley* (Civ. App.) 196 S. W. 581.

Where plaintiff sold a tractor on condition that it should not be liable for damages in the use thereof, either original or consequential, defendants could, in an action for the purchase price, set off the loss to their crops owing to the defects in the tractor. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676.

In suit on a note, with attachment levied upon defendants' joint property, defendants, claiming exemption, were entitled by plea in reconvention to ask judgment against plaintiff for value of property levied upon treating it as conversion. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

In suit on notes evidencing balance due on price of land, vendee could not plead in offset unliquidated damages for misrepresentations of agent who sold land. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Where a plaintiff settles with one tort-feasor, but does not release his cause of action, another tort-feasor is entitled to have such payment credited as an off-set, pro tanto, against damages that may be recovered against him. *City of Austin v. Johnson* (Civ. App.) 204 S. W. 1181.

The civil-law doctrine of compensation is applied only in cases of running accounts between merchants and by analogy to running accounts between other parties, and does not apply to a claim by a debtor to his creditors, who had purchased property at a prior execution sale for much less than its value. *Nelson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 214 S. W. 366.

Immature obligation of plaintiff to defendant cannot be interposed as defense to present demand, but equity permits such defense when plaintiff is insolvent. *Wilkins & Lange v. Christian* (Civ. App.) 223 S. W. 253.

Where plaintiff contracted to deliver a piano, silverware, and advertising matter, to be given away as prizes in connection with defendant's business, and bound itself, in the event the annual sale of merchandise did not amount to a certain sum to refund 3 per cent. of the deficiency of such sale, defendant's attempt to cancel the order and failure to accept immediately the shipment upon its arrival and failure to pay notes promptly when they became due, resulting in their being placed in the hands of an attorney, held not to be such a material breach of contract as to preclude defendant from setting up as against notes remaining unpaid an amount due him under plaintiff's promise to refund, defendant otherwise having tried in good faith to live up to the terms of the contract and make sales. *Brenard Mfg. Co. v. Watkins* (Civ. App.) 224 S. W. 522.

9. — **Vendor and purchaser.**—The buyer has various remedies for relief from contracts induced by fraud, among which is the right to confirm the contract after knowledge of the fraud, and reconvene for damages when sued upon the contract. *Alba-Malakoff Lignite Co. v. Hercules Powder Co.* (Civ. App.) 219 S. W. 554.

10. Parties to and mutuality of cross-demands in general.—The defendant may set up an unliquidated demand, if it is connected with or grows out of, a contract on which the plaintiff declares, and not only defeat the claim sued on, but may obtain judgment for an excess over that claimed by plaintiff. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

11. Demands of one or more co-defendants.—In a suit by the assignee of a draft for two cars of cotton seed against both drawer and drawee and against a railroad for conversion of such seed, the claim of the railroad against the drawer for freight had no connection with fixing the liabilities of parties to the draft, and was neither a counterclaim nor an offset. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

Art. 1326. [751] [646] Requisites of the plea.

See *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

Art. 1327. [752] [647] Judgment over in defendant's favor, when.

Cited, *Higgins v. State* (App.) 19 S. W. 503.

Right to judgment.—Under Rev. St. arts. 1325-1330, the defendant may set up an unliquidated demand, if it is connected with or grows out of a contract on which the plaintiff declares, and not only defeat the claim sued on, but may obtain judgment for an excess over that claimed by plaintiff. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

Art. 1328. [753] [648] Judgment for costs, how determined.

See *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

Art. 1329. [754] [649] Certain and uncertain damages not to be set off against each other.

In general.—In suit on note, where defendant counterclaimed for plaintiff's breach of agreement to pay reasonable value of time in performance of services and expenses, value of the time and amount of expenses being alleged, items so claimed were not unliquidated. *McKinney v. Southwestern Liquor Co.* (Civ. App.) 201 S. W. 1162.

A petition alleging a final enforceable judgment in favor of plaintiff as against defendants and a final enforceable judgment in favor of defendants as against plaintiff, without showing whether the two suits grew out of the same transaction or if defendants' judgment was upon a liquidated claim, and that alleged insolvency of defendants, justified issuance of temporary injunction against levy of execution. *Pierson v. Farmers' State Guaranty Bank* (Civ. App.) 206 S. W. 730.

In suit against bank by clerk to recover deposit, bank could set off its claim against clerk for money which it was led to pay its customer through its teller on account of clerk's negligence in having overstated balance to customer's credit, bank's claim being "liquidated." *Commercial State Bank v. Van Hutton* (Civ. App.) 208 S. W. 363.

Liquidated demand as set off in action on unliquidated claim.—In action against railroad for damages to carload of apples in transit, railway can recover unpaid freight, and may set off amount due as freight charges. *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

In action for conversion of ore, converters are not entitled to offset expenses of shipment, etc. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

In an action against a defendant by former partners for conversion of certain timber, wherein defendant sought to set off payments made by him for plaintiffs' benefit, failure to object to the offset of a liquidated demand against damages arising from tort constituted a waiver. *Christian-Holmes Cedar Co. v. Dewees Cedar Co.* (Civ. App.) 221 S. W. 681.

It was error for the court in an action for conversion of property exempt from forced sale to a family, to set off against damages allowed to plaintiff a debt due by plaintiff to defendant. *Mason v. Green* (Civ. App.) 226 S. W. 829.

Unliquidated demand as set off in action for unliquidated damages.—A grantee, receiving from tenant in possession of the granted premises lease money or part of the crops in lieu of lease money, is chargeable with what he so receives as an offset to his claim, under covenants in his deed, for the value of the use of the land during the time he is deprived thereof by reason of the tenant's possession. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

Unliquidated claim as set off in action on certain demand.—Where plaintiff's claim was unliquidated, founded upon a breach of covenant, he was not entitled to have it set off against the judgment, although the estate of the decedent was insolvent. *Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495.

In suit on notes evidencing balance due on price of land, vendee could not plead in offset unliquidated damages for misrepresentations of agent who sold land. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

In seller's action against buyer on a verified account, the court had jurisdiction of buyer's plea in reconvention for unliquidated damages for breach of contract giving buyer exclusive selling rights in certain territory, the amount pleaded and set off

in such case being founded on a cause of action arising out of, incident to, or connected with seller's cause of action. *Ft. Smith Couch & Bedding Co. v. George* (Civ. App.) 222 S. W. 335.

Defendant's cross-action against plaintiff and brokers, who had represented plaintiff and defendant in execution of land exchange contract to recover damages for fraud and conspiracy inducing defendant to enter into such contract, held proper in plaintiff's action for liquidated damages for defendant's refusal to perform the contract, since the counterclaim, though based upon a tort, was connected with and arose out of the same transaction as plaintiff's cause of action, and since the only liability arising out of the transaction in the event of such fraud was that of plaintiff and the brokers. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

Art. 1330. [755] [650] Matters incident to plaintiff's cause of action may be set off.

Cited, *Streep v. Thompson* (Civ. App.) 23 S. W. 326.

In general.—As against a claim for standing timber converted by a mortgagee prior to foreclosure, the mortgagee may set off damages to his security for the act of plaintiff in cutting other timber from the land. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

In a suit by the assignee of a draft for two cars of cotton seed against both drawer and drawee and against a railroad for conversion of such seed, the claim of the railroad against the drawer for freight had no connection with fixing the liabilities of parties to the draft, and was neither a counterclaim nor an offset. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

In suit by assignee of part of series of notes secured by vendors' liens, cross-bill against the assignor and an irrigation company for fraud in the sale of the land and for failure to furnish water for irrigation held maintainable. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

Where after default in payment of note settled by mortgage parties agreed to an extension, and that mortgagee should have possession, held, that breach of latter agreement arose out of plaintiff's cause of action on notes, and could be set off as counterclaim. *Montgomery v. Gallas* (Civ. App.) 202 S. W. 993.

In suit on a note given for the difference between the values of corporate stock and farm lands exchanged, it was permissible for defendant, the former owner of the farm lands, and maker of the note, to bring a cross-action against plaintiff for misrepresenting the value of the corporate stock, such cross-action having arisen out of, and been incident to or connected with, the liquidated demand sued on. *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

In an action by landlord on notes for money advanced to purchase farming implements, on which plaintiff then had a landlord's lien and a chattel mortgage lien, tenant was entitled to set up his unliquidated damages for breach of an oral agreement of the plaintiff landlord to lease defendant a certain other tract of land by way of counterclaim in the form of a cross-action, all growing out of the same transaction. *Hulshizer v. Nelson* (Civ. App.) 228 S. W. 658.

Defendant's cross-action against plaintiff and brokers, who had represented plaintiff and defendant in execution of land exchange contract to recover damages for fraud and conspiracy inducing defendant to enter into such contract, held proper in plaintiff's action for liquidated damages for defendant's refusal to perform the contract, since the counterclaim, though based upon a tort, was connected with and arose out of the same transaction as plaintiff's cause of action, and since the only liability arising out of the transaction in the event of such fraud was that of plaintiff and the brokers. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

Liquidated or unliquidated demands.—A claim for damages for the malicious institution of criminal proceedings by the seller of goods against the purchaser, for alleged false and fraudulent representations as to solvency, in the faith of which they were obtained, is not a "cause of action arising out of or incident to, or connected with" the seller's cause of action for the purchase price. *Pittman v. Keith* (Civ. App.) 24 S. W. 88.

In action by contractor on improvement certificate, cross-action for damages to defendant's property in course of plaintiff's work was proper. *Pate v. Whitley* (Civ. App.) 196 S. W. 581.

The defendant may set up an unliquidated demand, if it is connected with or grows out of a contract on which the plaintiff declares, and not only defeat the claim sued on, but may obtain judgment for an excess over that claimed by plaintiff. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

TITLE 28

COUNTIES AND COUNTY SEATS

Chap.

1. Creation of counties.
2. Organization of counties.
3. Corporate rights and powers.

Chap.

4. County lines.
5. County seats.
6. County boundaries.

CHAPTER ONE

CREATION OF COUNTIES

Article 1331. [756] [651] Legislature may create counties.

See *Frank v. State*, 30 Tex. App. 381, 17 S. W. 936.

CHAPTER TWO

ORGANIZATION OF COUNTIES

Art.

1356. Old county shall organize new one.
 1357. Election to be ordered when and by whom.
 1359. New county subject to old until organized.

Art.

1361. County attached to another may be organized, how.
 1362. Certificates of election in such cases, etc.

Article 1356. [780] [667] Old county shall organize new one.

See *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663; *State v. Cook*, 78 Tex. 496, 14 S. W. 996.

Organization proceedings.—Under arts. 1356, 1357, 1361, 1362, 2911, 2930, 2933, the county judge may order an election for the election of officers for a newly organized county without waiting until the next general election. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

An order entered in the commissioners' court reciting the presentation of a petition for organization of a county, "and the court being of the opinion that the petitioners are entitled to the relief prayed for, and that B. county should be organized," and then proceeding to lay off the county into election precincts, etc., was sufficient. *Id.*

Art. 1357. [781] [668] Election to be ordered when and by whom.

See *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663; *State v. Cook*, 78 Tex. 496, 14 S. W. 996.

Order for election.—The county judge may order an election for the election of officers for a newly organized county without waiting until the next general election. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Effect of irregularity.—The fact that the county judge fails to canvass the returns and declare the result of an election to organize a county and choose the county-seat, as he is required to do, does not invalidate the election, when it appears by other evidence what the result actually was. *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1999.

Art. 1359. [783] [670] New county subject to old until organized.

Control pending organization.—Runnels county was created out of part of Bexar county by Act Tex. Feb. 1, 1858, which defined the boundaries of the new county, and provided for its organization, but the organization did not take place until February 12, 1880. Held, that the registration in Bexar county, February 17, 1858, of a deed of land lying in that part of Runnels county which at the passage of the act of February 1, 1858, constituted a portion of Bexar county, is notice to subsequent purchasers. *Lumpkin v. Muncey*, 66 Tex. 311, 17 S. W. 732.

Art. 1361. [785] [672] County attached to another may be organized, how.—When any unorganized or disorganized county has been attached to another county for judicial purposes or other purposes, and desires to be organized or reorganized, a petition expressing such desires, signed by not less than seventy-five qualified voters, residing in

such unorganized or disorganized county may be presented to the commissioner's court of the county to which such unorganized or disorganized county is attached, and thereupon it shall be the duty of said court to proceed without delay to the organization or reorganization of such county, as the case may be in the same manner as hereinbefore provided for the organization of new counties. [Act May 1, 1874, p. 188, § 2; Acts 1918, 35th Leg. 4th C. S., ch. 11, § 1.]

Took effect March 16, 1918.

See *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663.

Cited, *Llano Cattle Co. v. Faught*, 69 Tex. 402, 5 S. W. 494.

Time for election.—The county judge may order an election of officers for a newly organized county without waiting until the next general election. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Petition.—There was nothing to prevent one who became of age during the year 1917 to sign a petition for the organization of a county early in April, 1918, although he had not paid poll tax for 1917, and did not have an exemption certificate; Rev. St. 1911, art. 2954, not applying. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Signatures of voters to a petition for organization of a county, affixed by a third person in their presence and at their direction, were valid. *Id.*

A statement in a petition for organization of a county that the signers were "qualified voters of B. county" implies that they resided therein. *Id.*

A petition for organization of a county need not describe the signers as qualified, if they were qualified in fact. *Id.*

Order for organization.—An order entered in the commissioners' court reciting the presentation of a petition for organization of a county, "and the court being of the opinion that the petitioners are entitled to the relief prayed for, and that B. county should be organized," and then proceeding to lay off the county into election precincts, etc., was sufficient. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 1362. [786] [673] Certificates of election in such cases, etc.

See *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

CHAPTER THREE

CORPORATE RIGHTS AND POWERS

Art. 1365. County a body corporate.	Art. 1371. Contracts with county valid.
1366. Suits against.	1375. Agents to contract for county may be appointed.
1370. Commissioners to sell real estate of.	

Article 1365. [789] [676] County a body corporate.

Cited, *Reeves County v. Pecos County*, 69 Tex. 177, 7 S. W. 54; *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99.

County as corporation.—A county is a "municipal corporation" within Const. art. 3, § 51, providing that the Legislature shall have no power to make a grant of public money to a municipal corporation. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

Art. 1366. [790] [677] Suits against.

Cited, *Nolan County v. Simpson*, 74 Tex. 218, 11 S. W. 1098.

Presentation of claim.—Where one has presented a claim against the county to the commissioners' court, as authorized by law, and they have allowed the same, and ordered a warrant to be drawn, a petition for a writ of mandamus to compel issuance of the warrant cannot be defeated on the ground that there is an adequate remedy by suit against the county. *Callaghan v. Salliwax*, 5 Civ. App. 239, 23 S. W. 837.

The action of a commissioners' court in preventing the formation of a quorum to act upon a claim presented against a county held a neglect or refusal to audit the claim so as to authorize suit against the county. *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 438.

Art. 1370. [794] [681] Commissioners to sell real estate of.

Conveyance by commissioners.—In view of Pen. Code 1911, art. 812, as to obstructing highways, a commissioners' court has no authority under Civ. St. arts. 1370, 2241, 6859, 6860, 6861, to lease any portion of the public highways for oil and gas wells, which will necessarily be obstructions thereof, notwithstanding such portion of the highway has been acquired by purchase and not condemnation, or the lessee also holds a lease from the

owner of the fee of the land over which such portion of the highway runs as a right of way. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

Art. 1371. [795] [682] Contracts with a county valid.

Cited, *King v. Ireland*, 68 Tex. 682, 5 S. W. 499.

Art. 1373. [797] [684] Agents to contract for county may be appointed.

Appointment of agents.—A contract between county authorities and an attorney fixing the compensation of the attorney for services in procuring the consent of the government to aid in constructing a sea wall within the county and to procure rights of way and other necessary titles is not invalid as a grant of extra compensation contrary to Const. art. 3, § 53, though part of the services had been rendered before the contract was signed, where total compensation was less than the reasonable fee for the services. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

Ratification of acts of person acting as agent.—The acceptance by the commissioners' court of the services of an attorney rendered under a contract made in behalf of the county by the county judge and chairman of the finance committee is a ratification of the contract which makes it binding on the county, though it was not formally approved by the commissioners' court. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

CHAPTER FOUR

COUNTY LINES

Art.
1375. Survey made.

Art.
1385. Suit to establish boundary, etc.

Article 1375. [799] Survey made.

Cited, *Rockwell Co. v. Kaufman Co.*, 69 Tex. 172, 6 S. W. 431.

Art. 1385. Suit to establish boundary, etc.

Decisions under prior acts.—See *Rockwell Co. v. Kaufman Co.*, 69 Tex. 172, 6 S. W. 431.

CHAPTER FIVE

COUNTY SEATS

Art.
1387. Election for county seats.

Art.
1396. Courts shall be held at county seat.

1388. Two-thirds vote necessary, etc.

1397. Court house, jail, etc., to be provided.

1390. Proceedings for removal of county seat.

Article 1387. [809] Election for county seats.

See *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663.

Art. 1388. [810] Two-thirds vote necessary, etc.

See *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663.

Art. 1390. [812] Proceedings for removal of county seat.—When it becomes desirable to remove the county seat of any county, it shall be the duty of the county judge of said county, or, in case of his failure or inability to act, then two of the county commissioners of said county, upon the written application of not less than one hundred freeholders and qualified voters, who are resident citizens of said county thereof, to make an order in writing upon the minutes if [of] said commissioners' court for the holding of an election at various voting precincts in said county on a day therein named, which shall not be less than thirty days nor more than sixty days from date of order, for the purpose of submitting the question to the electors of said county; provided, that, when

a county seat has been established for a longer term than ten years, it shall require two hundred freeholders and qualified voters to make said application; provided, further, that in counties having less than three hundred and fifty legal voters, to be determined by the number of votes cast at the last proceeding [preceding] election for the State and county officers, such application may be made by one hundred resident freeholders and qualified voters of said county; and provided, further, that, when a county seat has been established for a longer term than forty years, it shall require a majority of the resident freeholders and qualified voters of said county to make the application, said majority of freeholders and qualified voters to be ascertained by the county judge, or, in case of his refusal or inability to act, then by any two of the county commissioners of said county, from the assessment rolls thereof; and provided, further, that in counties having not more than 150 qualified voters, such application shall be held sufficient when it shall have been signed by a majority of the resident freeholders and qualified voters of said county, said majority of freeholders and qualified voters to be ascertained by the county judge, or in case of his refusal or inability to act, then by any two of the county commissioners of said county, from the assessment rolls thereof. [Acts 1893, p. 164; Acts 1903, p. 118; Acts 1919, 36th Leg. 2d C. S., ch. 29, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

Art. 1396. [818] [704] Courts shall be held at county seat.

Cited, *Wheeler v. Wheeler*, 76 Tex. 489, 13 S. W. 305.

Art. 1397. [819] [705] Court house, jail, etc., to be provided.

Cited, *Wheeler v. Wheeler*, 76 Tex. 489, 13 S. W. 305.

CHAPTER SIX

COUNTY BOUNDARIES

Article 1400. [822] Boundaries as established, adopted, and acts creating continued in force.

New counties.—Acts 1921, 37th Leg., ch. 104, creates Kenedy County.

Application and operation.—In local option election contest where boundary line had never been established as required by this article, court properly determined boundary, for purpose of ascertaining whether certain parties who voted resided within commissioner's district in which election was held. *Garvey v. Cain* (Civ. App.) 197 S. W. 765.

Boundaries defined.—In local option election contest, evidence held insufficient to show that a boundary involved had been recognized and established within this article. *Garvey v. Cain* (Civ. App.) 197 S. W. 765.

TITLE 29

COUNTY FINANCES

Chap.
1. General provisions.

Chap.
2. County auditor.

CHAPTER ONE

GENERAL PROVISIONS

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| <p>Art.
1408. Receipt of collector for tax rolls.
1409. How collector may discharge his indebtedness.
1421. Clerks and justices of the peace shall report fines, judgments and jury fees, monthly.
1423. Fines imposed and judgments rendered by justices shall be charged against them, etc.
1427. Any officer collecting money for county shall report the same.
1432. County treasurer shall register claims against the county.
1433. Claims shall be classified.
1436. Claims shall be numbered, in what order.</p> | <p>Art.
1437. Order in which claims shall be paid.
1438. Classification of county funds.
1439. Commissioners' court may create other classes of funds, etc.
1440. Said court may transfer one class of funds to another, except, etc.
1446. County treasurer shall keep accounts, etc.
1453. District judge shall appoint committee to examine into finances of county.
1459. Warrants issued against county by judge or court shall be attested by clerk, etc.</p> |
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Article 1408. [827] [938] Receipt of collector for tax rolls.

See *Powell v. State*, 83 Cr. R. 584, 204 S. W. 439.
Cited, *Watson v. El Paso County (Civ. App.)* 202 S. W. 126.

Art. 1409. [828] [939] How the collector may discharge his indebtedness.

See *Powell v. State*, 83 Cr. R. 584, 204 S. W. 439.
Cited, *Watson v. El Paso County (Civ. App.)* 202 S. W. 126.

Art. 1421. [840] [951] Clerks, etc., shall report fines, judgments and jury fees monthly.

See *Crump v. State*, 23 Tex. App. 615, 5 S. W. 182.

Art. 1423. [842] [953] Fines imposed and judgments rendered by justices shall be charged against them, etc.

See *Crump v. State*, 23 Tex. App. 615, 5 S. W. 182.

Art. 1427. [846] [956] Any officer collecting money for county shall report the same.

See *Crump v. State*, 23 Tex. App. 615, 5 S. W. 182.

Report as notice.—In action against county judge and sureties on his bond to recover money due plaintiff county, a demurrer to petition because action was barred by limitations was properly sustained, where supplemental petition in avoidance failed to show defendant's fraudulent concealment of cause of action preventing bringing of an action, in view of this article, and art. 1453, relating to judge's statements, report to county clerk, and examinations. *Marion County v. Rowell (Civ. App.)* 207 S. W. 983.

Art. 1432. [851] [961] County treasurer shall register claims against the county.

In general.—Where the county commissioners' court has allowed a claim against a county for services under a contract for superintending construction of a courthouse, it is not necessary that the claim shall be registered by the treasurer, as this article, does not contemplate that claims against the county shall be registered by the treasurer, unless they are such, upon their face, as he is authorized to pay off. *Callaghan v. Salliway*, 5 Civ. App. 239, 23 S. W. 837.

If sum of claims, representing ordinary county expenses, amounted to as much as it reasonably could be expected current revenues would amount to, ordinary expenses there-

after incurred would be within prohibition of Const. art. 11, § 7, in view of arts. 1432, 1433, 1436-1438. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

Art. 1433. [852] [962] Claims shall be classified.

See *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.
Cited, *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

Art. 1436. [855] [965] Claims shall be numbered, in what order.

See *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

Art. 1437. [856] [966] Order in which claims shall be paid.

See *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

Art. 1438. [857] [967] Classification of county funds.

See *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

Application.—Art. 1440, empowering the commissioners' court to transfer money from one fund to another, held to apply only to statutory funds classed by this article, and not to those raised by taxation under Const. art. 8, § 9. *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

Art. 1439. [858] [968] Commissioners' court may create other classes of funds, etc.

In general.—A valid debt may be created by a county without complying with Const. art. 11, § 7, requiring that it provide for payment at the time it is created where it has a fund on hand under its control from which it contemplates the debt shall be paid, though it was not in fact paid therefrom. *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702.

Art. 1440. [859] [969] Said court may transfer one class of funds to another, except, etc.

Transfer of funds.—This article applies only to statutory funds classed by art. 1438, and not to those raised by taxation under Const. art. 8, § 9. *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

This article, even if applicable to money raised by taxation, would not permit transfer where levy was ostensibly for one purpose, but really for the transfer. *Id.*

A special tax, collected to repair a courthouse and jail, cannot be transferred to the general fund or road and bridge fund to pay current claims, but can be used only for the repair of the courthouse and jail. *Sanders v. Looney* (Civ. App.) 225 S. W. 280.

Art. 1446. [865] [975] County treasurer shall keep accounts, etc.

Cited, *Wharton County v. Ahldag*, 84 Tex. 12, 19 S. W. 291.

Transfer of vouchers.—Vouchers issued for salary, payable by the county treasurer, are not negotiable paper, and therefore, though the treasurer pay them without taking them up and punching them, one who afterwards buys them without notice cannot hold the treasurer liable for his loss, as being occasioned by the treasurer's negligence. *Stringer v. Morris*, 82 Tex. 39, 17 S. W. 926.

Art. 1453. [870] [980] District judge shall appoint committee to examine finances, etc.

See *Marion County v. Rowell* (Civ. App.) 207 S. W. 983.

Art. 1459. [876] [986] Warrants issued against county by judge or court shall be attested by clerk, etc.

Existence of debt.—That warrants for county improvements recited that the work had been done did not add anything to them, or estop the county from the defense that it had not been done, or turn the warrants into bonds within statutes regulating their issuance. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

A warrant drawn on the county treasurer in 1913 payable to the drawee in 1916, given for the purchase price of a traction engine, came within the definition of a debt under Const. art. 11, § 7, forbidding the incurring of debt unless provision is made at the time of executing the warrant for levying and collecting sufficient tax to pay the same. *J. I. Case Threshing Mach. Co. v. Camp County* (Civ. App.) 213 S. W. 1.

Warrants which county commissioners proposed to issue and deliver to contractors to pay for work and materials in the construction of a courthouse are void, where the contract for the contractor's services was illegal, and the materials and labor had not been purchased or performed so as to create a debt against the county. *Ashby v. James* (Civ. App.) 226 S. W. 732.

Creation of debt by warrant.—The issuance of county bonds by commissioners' courts is governed by the laws on that subject, and their evasion is not to be countenanced, and the use of warrants cannot be availed of for their circumvention; but where the instruments are in truth warrants lawfully issued as such, and no effort was made to cheat

any law, the law relating to bonds is inapplicable. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Counties cannot borrow money to erect a courthouse by issuing warrants and selling them in advance of contracting legal indebtedness for the courthouse, but can borrow the money only by issuing bonds with the approval of the taxpayers. *Ashby v. James* (Civ. App.) 226 S. W. 732.

Warrants or bonds.—Instruments reciting that they are warrants issued to contractor for labor and material, and constituting orders upon the county treasurer to pay such contractor, and intended to be warrants, are simply warrants and not "bonds" within statutes regulating issuance of bonds. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1639.

Evidence of indebtedness of a county to a contractor in form of negotiable bonds with interest coupons attached, for construction of courthouse, but designated "County Courthouse Warrants," in view of minutes of commissioners' court disclosing its intention, were warrants and not bonds. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Where instruments issued by the commissioners' court as evidence of the county's debt for construction of roads have controlling features, which are those of warrants, the fact that interest coupons were attached to them, as is ordinarily the case with bonds, is not determinative of their nature. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Negotiability of warrants.—The customary county warrants issued for public improvements, whether interest-bearing or not, have not the character of negotiable instruments, but are a convenient mode of conducting the county's authorized business, and do not protect an innocent holder from defenses of which he has no notice. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Warrants may be issued by a county to pay for a county courthouse, but they are not negotiable paper, and are only evidence of the debt owing by the county, so that their issuance can be enjoined at the suit of a taxpayer where the contract in payment for which they were to be issued was invalid. *Ashby v. James* (Civ. App.) 226 S. W. 732.

CHAPTER TWO

COUNTY AUDITOR

1. APPOINTMENT, QUALIFICATIONS, BOND.

Art.

1460. County auditor appointed in what counties; title; term; salary.

4. DUTIES AND POWERS OF AUDITOR.

Art.

1478. Deposits in treasury to be made, how.

1480. Bids for supplies, etc.

1485. Warrants, to countersign, except jury.

1. APPOINTMENT, QUALIFICATIONS, BOND

Article 1460. County auditor appointed in what counties; title; term; salary.

See *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

4. DUTIES AND POWERS OF AUDITOR

Art. 1478. Deposits in treasury to be made how.

Cited, *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 1480. Bids for supplies, etc.—Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments, or institutions must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the Commissioners' Court, has submitted the lowest and best bid. It shall be the duty of the County Auditor to advertise for a period of two weeks in at least one daily newspaper, published and circulated in the county, for such supplies and material according to specifications, giving in detail what is needed. Such advertisement shall state where the specifications are to be found, and shall give time and place for receiving such bids. All such competitive bids shall be kept on file by the County Auditor as a part of the records of his office, and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the County Auditor to the

County Judge and to the Commissioners' Court; and when the bids received are not satisfactory to the said judge, or County Commissioners' it shall be the duty of the County Auditor to reject said bids and re-advertise for new bids; provided, that in cases of emergency, purchases not in excess of One Hundred and Fifty Dollars may be made upon requisition, to be approved by the Commissioners' Court, without advertising for competitive bids. [Acts 1905, p. 381, § 17; Acts 1921, 37th Leg., ch. 95, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 1485. Warrants, to countersign, except jury.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

TITLE 29 A

COUNTY HOSPITAL

Article 1498c. Officers, etc.

See *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

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TITLE 29 C

COUNTY LIBRARIES

- | | |
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| <p>Art.
1498½. Commissioners' Court may establish free libraries; joint libraries.</p> <p>1498½a. Free libraries for parts of counties outside cities and towns maintaining free public libraries.</p> <p>1498½b. Location at county seat; service to all parts of county.</p> <p>1498½c. Appointment of librarian; qualifications.</p> <p>1498½d. Board of library examiners; terms of members; compensation; expenses; meetings; examination of librarians.</p> <p>1498½e. Salaries of librarians and assistants.</p> <p>1498½f. Reports by librarians.</p> <p>1498½g. Supervision; rules and regulations.</p> <p>1498½h. Supervision by State Librarian; visitation.</p> <p>1498½i. Oath and bond of librarians; duties; expenses.</p> <p>1498½j. Levy of tax.</p> <p>1498½k. Donations; title to property.</p> <p>1498½l. Library fund; claims.</p> <p>1498½m. White persons to have use of library; separate branches for negroes.</p> | <p>Art.
1498½n. Farmers' county libraries to continue; merger.</p> <p>1498½o. Cities or towns may receive benefits of county library; discontinuance of connection.</p> <p>1498½p. Counties may contract with cities or towns maintaining libraries.</p> <p>1498½q. Contracts between counties; tax; termination of contract.</p> <p>1498½r. Contract for service of established library; election; termination.</p> <p>1498½s. Joint county libraries.</p> <p>1498½t. Discontinuance of library.</p> <p>1498½u. Partial invalidity.</p> <p style="text-align: center;">LAW LIBRARIES.</p> <p>1498¾. To what counties act shall apply.</p> <p>1498¾a. Commissioners Court may establish library.</p> <p>1498¾b. Commissioners Court may establish library and provide for its maintenance.</p> <p>1498¾c. Custodian; bond; compensation.</p> <p>1498¾d. Rules and regulations.</p> <p>1498¾e. Gifts and bequests.</p> <p>1498¾f. Funds; claims.</p> <p>1498¾g. Partial invalidity.</p> |
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Article 1498½. Commissioners' Court may establish free libraries; joint libraries.—The County Commissioners' Court of the several counties shall have power and authority to establish, maintain, and operate within their respective counties, county free libraries, in the manner and with the functions prescribed in this Act. The said Commissioners' Court shall also have the power and authority to establish in co-operation with another county or counties a joint free county library for the benefit of the co-operating counties. [Acts 1919, 36th Leg. 2d C. S., ch. 75, § 2.]

Took effect 90 days after July 22, 1919, date of adjournment.

Explanatory.—This title consists of Acts 1915, 34th Leg., ch. 117, §§ 1-19, as amended by Acts 1917, 35th Leg., ch. 57, §§ 2-23, which was amended by Acts 1919, 36th Leg. 2d C. S., ch. 75, as set forth herein, and also of Acts 1921, 37th Leg. 1st C. S., ch. 19, superseding Acts 1921, 37th Leg., ch. 61, relating to law libraries.

Art. 1498½a. Free libraries for parts of counties outside cities and towns maintaining free public libraries.—The Commissioners' Court of any county may establish county free libraries for that part of such county lying outside of incorporated cities and towns already maintaining free public libraries, and for such additional parts of such counties as may elect to become a part of or to participate in such county free library system, as hereafter provided in this Act. On their own initiative, or when petitioned to do so by a majority of the voters of that part of the County to be affected by this Act, the Commissioners' Court shall proceed to establish and provide for the maintenance of such library according to the further provisions of this Act. [Id., § 3.]

Art. 1498½b. Location at county seat; service to all parts of county.—The county library shall be located at the county seat, in the court house, unless more suitable quarters are available. The librarian shall endeavor to give an equal and complete service to all parts of the county

through branch libraries and deposit stations in schools and other locations where suitable quarters may be obtained, thus distributing printed matter, books, and other educational matter as quickly as circumstances will permit. [Id., § 4.]

Art. 1498½c. Appointment of librarian; qualifications.—Upon the establishment of a county free library the Commissioners' Court shall appoint a county librarian who shall hold office for a term of two years subject to removal for cause after a hearing by said court. No person shall be eligible to the office of county librarian unless prior to his appointment he has received from the State Board of library examiners a certificate of qualification for office. [Id., § 5.]

Art. 1498½d. Board of library examiners; terms of members; compensation; expenses; meetings; examination of librarians.—A commission is hereby created to be known as the State Board of Library Examiners, consisting of the State librarian, who shall be ex-officio chairman of the Board; the librarian of the State University, who shall be an ex-officio member; and three other well trained librarians of the State who shall at first be selected by the State librarian and the librarian of the State University. The term of each shall be for six years, one of the appointive members retiring every two years. His successor shall be chosen by the remaining members of the board in executive session. The members of said board shall receive no compensation for their services except actual and necessary traveling expenses paid out of the State Library fund. Said board shall arrange for an annual meeting and for such other meetings as may be necessary in the pursuance of its duties. Said board shall pass upon the qualifications of all persons desiring to become county librarians in the State of Texas, and may in writing adopt rules and regulations not inconsistent with the law for its government and for the carrying out of the purposes of this Act. [Id., § 6.]

Art. 1498½e. Salaries of librarians and assistants.—The Commissioners' Court shall fix the salaries of the librarian and assistants at the time they fix the salary of the other appointive county officers. [Id., § 7.]

Art. 1498½f. Reports by librarians.—The librarian of each county library shall, on or before the 1st day of October in each year, report to the Commissioners' Court and to the State Librarian the operation of the county library during the year ending August 31st preceding. Such report shall be made on blanks furnished by the State library, and shall contain a statement of the condition of the library, its operation during the year, and such financial and book statistics as are kept in well regulated libraries. [Id., § 8.]

Art. 1498½g. Supervision; rules and regulations.—The County library shall be under the general supervision of the Commissioners' Court. The county librarian shall have the power to make rules and regulations for the county free library, to establish branches and stations throughout the county, to determine the number and kind of employees of such library, and, with the approval of the Commissioners' Court, to appoint and dismiss such employees. [Id., § 9.]

Art. 1498½h. Supervision by State Librarian; visitation.—The county free libraries of the State shall also be under the supervision of the State Librarian, who shall from time to time, either personally or by one of his assistants, visit the county free libraries and inquire into their condition, advising with the librarians and the Commissioners' Court,

and rendering such assistance in all matters as the State library may be able to give. [Id., § 10.]

Art. 1498 1/2 i. Oath and bond of librarian; duties; expenses.—The county librarian shall prior to entering upon the duties of his office file with the county clerk the usual oath of office and a bond conditioned upon the faithful performance of his duties with sufficient sureties, approved by a judge of the county court of the county of which the librarian is to be the county librarian, in such sum as may be determined by the Commissioners' Court. The county librarian shall, subject to the general rules adopted by the Commissioners' Court, build up and manage according to accepted rules of library management a library for the people of the county and shall determine what books and other library equipment shall be purchased. The county librarian and assistants shall be allowed actual and necessary traveling expenses incurred in the business of the library. [Id., § 11.]

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no tax is levied on one penny. Comes out of general fund.

Art. 1498 1/2 j. Levy of tax.—After a county free library has been established, the Commissioners' Court shall annually set aside from the general tax fund of the county, a sum sufficient for the maintenance of said library, but not to exceed five cents on the hundred dollars valuation of all property in such county outside of all incorporated cities and towns already supporting a free public library, and upon all property within all incorporated cities and towns already supporting a free public library, and upon all property within all incorporated cities and towns already supporting a free public library which have elected to become a part of such county free library systems provided in this Act for the purpose of maintaining county free libraries and for purchasing property therefor. [Id., § 12.]

Art. 1498 1/2 k. Donations; title to property.—The Commissioners' Court is authorized and empowered to receive on behalf of the county any gift, bequest, or devise for the county free library, or for any branch or subdivision thereof. The title to all property belonging to the county free library shall be vested in the county, but where gifts or bequests shall be made for the benefit of any branch or branches of the county free library, such gifts or bequests shall be administered as designated by the donor. [Id., § 13.]

Art. 1498 1/2 l. Library fund; claims.—All funds of the county free library shall be in the custody of the county treasurer, or other county official, who may discharge the duties commonly delegated to the county treasurer. They shall constitute a separate fund to be known as the county free library fund, and shall not be used for any other purposes except those of a county free library. Each claim against the county free library shall be authorized and approved by the county librarian, or in his absence from the county, by his assistant. It shall then be acted upon in the same manner as are all other claims against the county. [Id., § 14.]

Art. 1498 1/2 m. White persons to have use of library; separate branches for negroes.—Any white person of such county may use the county free library under the rules and regulations prescribed by the County Commissioners' Court and may be entitled to all the privileges thereof; provided, said court shall make proper provision for the negroes of said county to be served through a separate branch or branches of

the county free library, which shall be administered by custodian of the negro race under the supervision of the county librarian. [Id., § 15.]

Art. 1498½n. Farmers' county libraries to continue; merger.—In any county where a farmers' county library has been established as provided in Chapter 122 of the Acts of the Regular Session of the Thirty-Third Legislature, the same shall continue to operate as a farmers' county library, unless a county free library shall be established as provided for in this Act, in which case the former shall merge with and become a part of the latter. [Id., § 16.]

Art. 1498½o. Cities or towns may receive benefits of county library: discontinuance of connection.—After the establishment of a county free library as provided in this Act, the board of commissioners, city council, or other legislative body of any incorporated city or town in the county, maintaining a free public library, may notify the Commissioners' Court that such city or town desires to become a part of the county free library system, and thereafter such city or town shall be a part thereof, and its inhabitants shall be entitled to the benefits of such county free library, and the property within such town or city shall be included in computing the amount to be set aside as a fund for county free library purposes.

But the board of commissioners, city council, or other legislative body of such incorporated city or town may at any time after two years notify the Commissioners' Court that such city or town no longer desires to be a part of the county free library system and thereafter such city or town shall cease to participate in the benefits of such county free library system, and the property situated in said city or town shall no longer be assessed in computing the fund to be set aside for county free library purposes; provided, however, that the board of commissioners, city council or other legislative body of such incorporated city or town give the Commissioners' Court six months' notice and publish at least once a week for six successive weeks prior to either giving or withdrawing such notice in a county newspaper designated by the board of commissioners, city council, or other legislative body, and circulated throughout such city or town, notice of such contemplated action, giving date and place of meeting at which such contemplated action is proposed to be taken. [Id., § 17.]

Art. 1498½p. Counties may contract with cities or towns maintaining libraries.—The County Commissioners' Court, wherein a county free library has been established under the provisions of this Act, shall have full power and authority to enter into contracts with any incorporated city or town maintaining a free public library, and such incorporated city or town shall through its board of commissioners, city council, or other legislative body, have full power to enter into contracts with such county to secure to the residents of such incorporated city or town the same privileges of the county free library as are enjoyed by the residents of such county outside of such incorporated city or town, or such privileges as may be agreed upon in such contract, upon such consideration to be named in the contract as may be agreed upon, the same to be paid into the county library fund, and thereupon the residents of such incorporated city or town shall have the same privileges with regard to said county free library as are had by the residents of such county outside of such incorporated city or town, or such privileges as may be agreed upon by contract. [Id., § 18.]

Art. 1498¹/₂q. Contracts between counties; tax; termination of contract.—The Commissioners' Court of any county, wherein a county free library has been established under the provisions of this Act, shall have full power and authority to enter into contracts or agreements with the Commissioners' Court of any other county to secure to the residents of such other county such privileges of such county free library as may, by such contract, be agreed upon, the same to be paid into the county free library fund, and thereupon the inhabitants of such other county shall have the privileges of such county free library as may by such contract be agreed upon; and the Commissioners' Court shall have full power and authority to enter into a contract with the Commissioners' Court of another county wherein a county free library has been established, under the provisions of this Act, and shall have power to provide for and to set aside a county free library fund, in the manner already set out, for the purpose of carrying out such contract. But the making of such contract, shall not bar the Commissioners' Court of such county from establishing a county free library therein, and upon the establishment of such county free library such contract may be terminated upon such terms as may be agreed upon by the parties thereto, or may continue for the term thereof. [Id., § 19.]

✓ **Art. 1498¹/₂r. Contract for service of established library; election; termination.**—Instead of establishing a separate county free library, upon petition of a majority of the voters of the county, the Commissioners' Court shall have the power and are hereby authorized to contract for library privileges from some already established library. Such contract shall provide that said established library shall assume the functions of a county free library within the county with which the contract is made, including incorporated cities and towns therein. Such contract shall also provide that the librarian of such established library shall hold, or secure a county librarian's certificate from the State Board of Library Examiners. The Commissioners' Court may contract to pay annually into the library fund of said established library such sum as may be agreed upon. Said sum shall be paid out of the county library fund provided for in Section 12 of this Act [Art. 1498¹/₂j]. Either party to such contract may terminate the same by giving six months notice of intention to do so. Property acquired under such contract shall be subject to division at the termination of the contract upon such terms as are specified in such contract. [Id., § 20.]

Art. 1498¹/₂s. Joint county libraries.—Where found to be more practicable two or more adjacent counties may join for the purposes of this Act, and establish and maintain a free library under the terms and provisions above set forth for the establishment and maintenance of a county free library. In such cases the combined counties shall have the same powers and be subject to the same liabilities as a single county as provided in this Act. The Commissioners' Courts of the counties which have combined for the establishment and maintenance of a free library shall operate jointly in the same manner as does the Commissioners' Court of a single county in carrying out the provisions of this Act. Should any county desire to withdraw from such combination, it shall be entitled to a division of property in such proportion as agreed upon in the terms of combination at the time such joint action was taken. [Id., § 21.]

Art. 1498¹/₂t. Discontinuance of library.—After a county free library has been established, it may be disestablished in the following man-

ner: Upon petition of a majority of the voters of that part of the county maintaining a county free library, asking that said county free library system be no longer maintained, it shall become the duty of the Commissioners' Court upon the termination of existing contracts to call in all books and movable property of the defunct county free library, and to have the same sorted, inventoried, and stored under lock and seal in some dry and suitable place in the county court house. [Id., § 22.]

Art. 1498¹/₂u. Partial invalidity.—In case any section of this Act, and any provision therein is found unconstitutional or invalid for any reason, the same shall in no wise affect the remaining sections and provisions of this Act. [Id., § 23.]

LAW LIBRARIES

Art. 1498³/₄. To what counties act shall apply.—This Act shall apply to all counties in the State having a population in excess of 200,000 persons and containing a city having a population of over 160,000 persons as ascertained by the United States census last preceding the action of the Commissioners Court authorized by this Act. [Acts 1921, 37th Leg. 1st C. S., ch. 19, § 1.]

Explanatory.—Took effect Aug. 21, 1921. This act repeals Acts 1921, 37th. Leg., ch. 61, authorizing the establishment of a law library in Bexar county.

Art. 1498³/₄a. Commissioners court may establish library.—The Commissioners Court of any such county shall have power to establish, maintain and operate a law library in such county. [Id., § 2.]

Art. 1498³/₄b. Commissioners Court may establish library and provide for its maintenance.—The Commissioners Court of any such county may establish and provide for the maintenance of such county law library on its own initiative, and appropriate the sum of \$20,000.00 or such part thereof as it may deem necessary, to establish properly such library, and shall appropriate each year such sum as may be necessary to properly maintain and operate such county law library, which shall be established, maintained, and operated at the county seat. [Id., § 3.]

Art. 1498³/₄c. Custodian; bond; compensation.—Upon the establishment of a county law library the Commissioners Court shall employ a custodian or custodians of such library and shall require such custodians to execute and deliver a bond or bonds in such sum as may be fixed by such court payable to the County Judge, and his successors in office, of such county, and conditioned upon the faithful performance of his duties by the principal obligor. Such custodians shall receive such compensation as may be fixed by the Commissioners Court. [Id., § 4.]

Art. 1498³/₄d. Rules and regulations.—The Commissioners Court shall have power to make all rules and regulations necessary or proper for the establishment, maintenance, operation and use of said library not in conflict with the Constitution and laws of this State. [Id., § 5.]

Art. 1498³/₄e. Gifts and bequests.—The Commissioners Court of any county is hereby authorized and empowered to receive on behalf of the county any gift or bequest for such county law library. The title to all of such property shall be vested in the county. Where any gift or bequest is made with certain conditions, and accepted by the county, these conditions shall be administered as designated by the donor. [Id., § 6.]

Art. 1498³/₄f. Funds; claims.—All funds of the county law library shall be in the custody of the County Treasurer of such county, or other official who may discharge the duties commonly delegated to county treasurers. They shall constitute a separate fund and shall not be used for any other purpose than those of such county law library. Each claim against the county law library shall be acted upon and allowed or rejected in like manner as other claims against the county. [Id., § 7.]

Art. 1498³/₄g. Partial invalidity.—In case any section or part thereof in this Act is found unconstitutional or invalid for any reason, such invalid section or part thereof shall in no manner be held to affect any other section or portions of said Act. [Id., § 8.]

Sec. 9 of the act repeals Acts 1921, 37th Leg., ch. 61, and all laws in conflict.

TITLE 30
COUNTY TREASURER

Art.		Art.	
1499.	Election and term of office.	1506.	Shall keep true accounts and superintend collection of moneys, etc.
1500.	Oath and bond of.	1507.	Shall report to commissioners' court.
1504.	Appointee's oath, bond.	1509.	Shall not pay out money, except, etc.
1505.	Shall receive moneys belonging to counties, etc.		

Article 1499. [919] [987] Election and term of office.

Term.—County treasurer's term of office did not begin before election, within art. 7086, providing salaries of officers shall not be diminished during term of office, though political complexion of county was so predominately Democratic that only real contest was in primaries.—*Carver v. Wheeler County* (Civ. App.) 200 S. W. 537.

Art. 1500. [920] [988] Oath and bond of.

Validity of bond.—Bond of treasurer of county, in which the words substituted for words of the statute were equivalent thereto, held not invalid as statutory bond on ground that it was not conditioned as statute required.—*Morris County Nat. Bank v Parrish* (Civ. App.) 207 S. W. 939.

Liability on bond.—The bond required by this article is the same as that required by arts. 3728, 3729; and that the duties of the treasurer with regard to the permanent school fund, consisting of the proceeds of school lands, both with regard to the securities and the moneys belonging to such fund, were covered by the general bond. *Kempner v. Galveston County*, 73 Tex. 216, 11 S. W. 188.

Actions on bond.—Approval by commissioners' court of bond of county treasurer, if necessary to its validity, could be shown otherwise than by entry on minutes of court. *Morris County Nat. Bank v Parrish* (Civ. App.) 207 S. W. 939.

In county's action on county treasurer's bond, where it was claimed by drainage district that portion of funds turned over by county treasurer to his successor belonged to district, drainage district and its commissioners and depositary were proper parties defendant.—*Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

Art. 1504. [925] [993] Appointee shall take oath and give bonds.

See *Rochelle v. State* (Cr. App.) 232 S. W. 838.

Art. 1505. [926] [994] Shall receive moneys belonging to county, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.
Cited, *Wharton County v. Ahldag*, 84 Tex. 12, 19 S. W. 291; *McKinney v. Robinson*, 84 Tex. 489, 19 S. W. 699; *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

Control by commissioners and judge.—The commissioners' court cannot authorize the county judge to receive and disburse funds, though raised by the county for a special purpose.—*Bastrop County v. Hearn*, 70 Tex. 563, 8 S. W. 302.

It was no defense to the action against S. that he had devoted the proceeds of the bonds before their sale to the payment of the contractor for the erection of the courthouse, at the request of the county judge, and upon the latter's promise that the county would reimburse S. upon final settlement, as the county judge had no authority to bind the county.—*Nolan County v. Simpson*, 74 Tex. 218, 11 S. W. 1098.

Art. 1506. [927] [995] Shall keep true accounts and superintend collection of money, etc.

Suits for debts due county.—Under art. 366, district attorney may bring an action against county treasurer to recover loss sustained by reason of payments made under a statute which has been declared void by the Supreme Court, regardless of whether the prosecution is directed by the treasurer, under arts. 1505, 1506, or the commissioners' court. *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

Art. 1507. [928] [996] Shall report to commissioners' court.

Cited, *Wharton County v. Ahldag*, 84 Tex. 12, 19 S. W. 291; *McKinney v. Robinson*, 84 Tex. 489, 19 S. W. 699.

Art. 1509. [930] [998] Shall not pay out money except, etc.

Validity of order.—Warrant issued by clerk of district court against the county treasurer, pursuant to order of the judge, does not come from an officer authorized by

law to issue it, without which this article forbids such treasurer to pay any money out of the county treasury. *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

Effect of payment.—Where a county depository credits to the county the amount of a check drawn by county tax collector and deposited by county treasurer, it cannot be charged back to the county upon dishonor of the check. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Where a county judge approved fictitious claims against the county, on which the county clerk issued warrants on which, in turn, the county treasurer issued checks, which, after payees' signatures were forged, the county depository bank paid, and the county commissioners, after discovery of the fraud, took no steps to hold the bank accountable, the bank's payment was not the sole proximate cause of loss, and all such officers are jointly and severally liable therefor. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

This article gives treasurer no discretion to make payments without being authorized by certificate or warrant, and he is liable for so doing, regardless of custom whereby county treasurer paid claims without first obtaining warrants or certificates. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

Mandamus.—Under this article, and art. 2241, subd. 8, commissioners' court having refused to allow an account, the district court, though under Const. art. 5, § 8, having jurisdiction and general supervisory control over the commissioners' court, cannot, by original and direct mandamus proceeding against such treasurer, compel him to pay the claim. *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

TITLE 31

COURT—SUPREME

Chap.	Chap.
1. Judges of the Supreme Court.	8. Hearing Causes.
3. Jurisdiction of the Supreme Court.	9. Judgment of the Court.
6. The Writ of Error—Proceedings to Obtain, etc.	10. Rehearing.
7. Proceedings in Cases in the Supreme Court.	12. Reporter to the Supreme Court.
	13. Commission of Appeals.

CHAPTER ONE

JUDGES OF THE SUPREME COURT

Article 1516. [969] [1040] Disqualification of judges.

Cited, *Grigsby v. May*, 84 Tex. 240, 19 S. W. 343.

CHAPTER THREE

JURISDICTION OF THE SUPREME COURT

Art.	Art.
1521. Appellate jurisdiction.	1525. May ascertain jurisdictional facts.
1522. Writs of error; certification of questions.	1526. May issue certain writs.
1522a. When act takes effect; pending proceedings.	1527. May punish contempt.
1523. Court to make rules, etc.	1528. May issue mandamus to district judge to proceed to trial.
1524. To prescribe rules of practice.	1529. May issue writs of habeas corpus when, and admit to bail.

Art. 1521. Appellate jurisdiction of supreme court.

See *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139; *Penn v. Briscoe County* (Com. App.) 207 S. W. 990; *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608; *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; *Texas Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087.

Cited, *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917* (Sup.) 201 S. W. 390. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

In general.—Where judgments of the Courts of Civil Appeals are made final by art. 1591, as judgments in cases within the jurisdiction of the county courts, no writ of error lies to the Supreme Court under this article. *Missouri, K. & T. Ry. Co. of Texas v. Gregory* (Sup.) 226 S. W. 1075.

Disagreement of judges.—An action for divorce, in which one judge of the Court of Civil Appeals dissented from the opinion that the evidence was insufficient to warrant the decree for plaintiff, will not be certified to the Supreme Court, in view of this article, and arts. 1590, 1591, especially when it would result in great delay in the determination of the case to certify it. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Conflict of decisions.—In a case of which the Court of Civil Appeals has final jurisdiction, the Supreme Court has no authority to grant a writ of error because of conflict between the decision in such case and the decision of another Court of Civil Appeals. *Warren Hardware Co. v. Dodson*, 110 Tex. 576, 222 S. W. 157, dismissing writ of error (Civ. App.) *Dodson v. Warren Hardware Co.*, 162 S. W. 952.

Erroneous declaration of substantive law.—Where neither plaintiff's cause of action, nor any defendant's grounds of defense turned upon the evidence claimed to have been erroneously admitted or excluded, the question of whether such evidence was properly admitted or excluded was not one of substantive law. *Texas City Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087, denying rehearing 222 S. W. 541, which reverses judgment (Civ. App.) 193 S. W. 366; *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (Civ. App.) *Newsom v. Langford*, 174 S. W. 1036; *Moore v. Decker* (Com. App.) 220 S. W. 773, reversing judgment (Civ. App.) 176 S. W. 816; *Smith v. Butcher*, 110 Tex. 617, 223 S. W. 166, dismissing appeal (Civ. App.) *Butcher v. Smith*, 195 S. W. 1180; *Dallas Waste Mills v. Texas Cake & Linter Co.* (Com. App.) 228 S. W. 118.

In grantee's action to enjoin sale, of property conveyed, on execution against grantor, where plaintiff claimed that such property did not exceed in value the property conveyed to grantor in exchange therefor, the decision of Court of Civil Appeals as to

whether trial court erred in excluding testimony offered to impeach grantee's testimony as to the valuation placed by him upon the property conveyed to grantor held conclusive on Supreme Court; the question not being one of substantive law. *Slaton v. Citizens' Nat. Bank* (Com. App.) 221 S. W. 955, affirming judgment (Civ. App.) *Citizens' Nat. Bank of Plainview v. Slaton*, 189 S. W. 742.

Since an action for damages to cattle in shipment does not turn on the admission or rejection of testimony relating to the extent of the damage, an assignment complaining of the admission of such testimony does not present a question of substantive law. *Panhandle & S. F. Ry. Co. v. Vaughn* (Com. App.) 222 S. W. 206, affirming judgment (Civ. App.) 191 S. W. 142.

Holding of Court of Civil Appeals that judgment roll was inadmissible in evidence to prove no divorce had been granted from deceased's first wife, under allegation that she was his lawful wife at the time of his death, held reviewable by Supreme Court, being based upon a legal conclusion in contravention of established rule in the state. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

Assignments of error, not presenting questions of substantive law, are not within the jurisdiction of the Supreme Court, on writ of error to Court of Civil Appeals. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366.

Question as to the correctness of trial court's action in refusing to allow plaintiff to withdraw its announcement and file a supplemental petition is one of practice, not within the jurisdiction of the Supreme Court to review on writ of error to Court of Civil Appeals. *City of Ft. Worth v. Rosen* (Sup.) 228 S. W. 933.

In an action against a railroad under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to its switchman, assignments of error, complaining of the exclusion of certain testimony of defendant railroad's foreman giving his opinion of the manner in which plaintiff received his injuries, do not present questions of substantive law, and are not within the jurisdiction of the Supreme Court. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Com. App.) 228 S. W. 1087.

— **Questions of law or fact.**—Where relator, seeking to compel issuance of prospecting permit, alleged the land had been surveyed, which the defendant denied, there was an issue of fact necessary to be determined as determining rights of the parties, beyond the jurisdiction of the Supreme Court, on original application for mandamus. *Wagner v. Robison*, 109 Tex. 114, 201 S. W. 171.

A ruling of the Court of Civil Appeals in a particular case that there was some evidence warranting the submission of a given issue to the jury, or that there was no evidence justifying its submission, is not within this article, unless it can be fairly regarded as so flagrantly wrong as to amount to a virtual denial and abrogation of established rules of law. *Decker v. Kirlicks*, 110 Tex. 90, 216 S. W. 385.

In an action for death, an assignment of error complaining of the refusal to give a special charge directing a verdict for want of evidence of negligence presents purely a question of law, not within the final jurisdiction of the Court of Civil Appeals. *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753.

Importance of error.—Ruling of Court of Civil Appeals that issues both of an entire forfeiture and a partial forfeiture of oil lease should have been submitted to jury held, even if erroneous, not so clearly wrong as to bring it properly within the Supreme Court's jurisdiction. *Decker v. Kirlicks*, 110 Tex. 90, 216 S. W. 385.

The Supreme Court has no jurisdiction of writ of error to a Court of Civil Appeals in an action for failure of guaranty that cattle sold were immune from tick fever, brought against a seller and its agents, where the claimed error of the Court of Civil Appeals was in holding admissible certain evidence of custom as to making such guaranties, the jury having found that the alleged guaranties were not made, and the decision of the point by the jury not having turned on the evidence of custom. *Hartt v. Yturia Cattle Co.* (Com. App.) 228 S. W. 551.

Cases involving interlocutory injunctions.—Supreme Court has jurisdiction to grant writs of error in appeals from interlocutory orders granting injunctions under *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 4644, 4645, 4646, such not being of that class of cases in which determination of the Court of Civil Appeals is final under this article. *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

Questions determined.—Where the Court of Civil Appeals reversed a judgment for plaintiff on the ground that the evidence showed plaintiff's decedent was guilty of contributory negligence as a matter of law, and did not dispose of questions of adjective law relating to the admission of evidence, held that, the Supreme Court, which reversed a judgment of the Court of Civil Appeals on writ of error, will not determine the questions undecided, and will remand the case to the Court of Civil Appeals for that purpose. *Kirksey v. Southern Traction Co.*, 110 Tex. 190, 217 S. W. 139.

Where it does not appear that the judgment of the Court of Civil Appeals has become final—that is, it does not appear that a motion for rehearing has been overruled, and that time has expired for application for writ of error to the Supreme Court, or that appellee has failed to file motion for rehearing—it cannot be said, on motion to dismiss appellee's writ of error in the Supreme Court sued out subsequently to taking of appeal to the Court of Civil Appeals, that the judgment of such latter court is res judicata of the assignments presented in the Supreme Court. *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

The Supreme Court is without jurisdiction to pass on questions not of substantive law, though it has acquired general jurisdiction over the case. *Texas City Transp. Co.*

v. Winters (Conf. App.) 224 S. W. 1087, denying rehearing 222 S. W. 541, which reverses judgment (Civ. App.) 193 S. W. 366.

Concurrent jurisdiction.—Where it appears that the jurisdiction of the Court of Civil Appeals over an appeal attached prior to the suing out of writ of error in the Supreme Court by appellee who might have presented his contentions in the Court of Civil Appeals, the Court of Civil Appeals has jurisdiction, and the writ of error in the Supreme Court will be dismissed, since, where two courts have concurrent jurisdiction; that which first acquires jurisdiction will retain it. *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

The rule of comity between courts of concurrent jurisdiction does not depend for application on whether any judgment that may be rendered in the case first instituted could be pleaded in bar in the second suit as a former adjudication, the proper test being whether or not the court in which the first suit is filed has acquired jurisdiction of the same parties and same subject-matter of controversy. *Id.*

Decisions under the prior law.—Since, under the constitution, the supreme court's jurisdiction extends only to questions of law, in cases within the appellate jurisdiction of the court of civil appeals, and art. 1011, confined such jurisdiction to questions of law in cases wherein the latter court has appellate, but not final, jurisdiction, section 32 of the act organizing the courts of civil appeals, providing for certificates of "dissent as to any conclusion of law" from said courts to the supreme court, does not oblige the court of appeals to certify a dissent on a question of fact. *Gulf, C. & S. P. Ry. Co. v. Ramey*, 86 Tex. 455, 25 S. W. 406.

Art. 1522. Writ of error; certification of questions.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Mode of review in general.—See *Texas Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087.

Where petition for writ of error was filed under this act, it is governed wholly by such act. *Freeman v. Wilson* (Com. App.) 222 S. W. 551, affirming judgment (Civ. App.) 189 S. W. 1199.

Decisions under prior law.—Act April 13, 1892, provided that a judgment of the court of civil appeals shall be conclusive on the facts and law in the following cases, nor shall a writ of error be allowed thereto from the supreme court, to wit, (1) any civil case appealed from the county or district court, of which, under the constitution, the county court would have had original or appellate jurisdiction, except in probate matters, etc. Art. 1011, Rev. St., as amended by the act of the same date, provided that the supreme court shall have appellate jurisdiction, coextensive with the limits of the state, which shall extend to questions of law arising in all civil cases of which the courts of civil appeals have appellate, but not final, jurisdiction. Art. 1011a provided that all causes shall be carried up to the supreme court by writs of error issuing to the courts of civil appeals upon final judgment, and not upon judgments reversing and remanding causes, except in certain specified cases. Held not to mean that a writ would lie to any final judgment, but only that it would not lie to a judgment which was not final.—*Missouri, K. & T. Ry. Co. v. Trinity County Lumber Co.*, 85 Tex. 405, 21 S. W. 539.

Art. 1522a. When act takes effect; pending proceedings.

In general.—Art. 1545e, must be construed with this article and when so construed a motion for rehearing on application for writ of error to Supreme Court on ground of conflicting decisions of Courts of Civil Appeals, will not be granted where alleged conflicting opinion was rendered after decision in case wherein writ of error is sought. *Westchester Fire Ins. Co. v. Redditt*, 109 Tex. 211, 204 S. W. 106.

Art. 1523. [944] [1011d] Court to make rules, etc.

Adoption of rules.—The Supreme Court can make an order of court amending the rules for admission to the bar by adding to the list of law schools whose graduates are exempt from examination without announcing the order from the bench in open court. *In re Orders in Chambers* (Sup.) 226 S. W. 1075.

Rule 1.—See *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519; *Knodel v. Equitable Life Ins. Co.* (Com. App.) 221 S. W. 941, dismissing writ of error (Civ. App.) 193 S. W. 1138; notes under art. 1540.

Rule 5.—See *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; notes under art. 1542.

Rule 23.—See *Brown v. Martin* (Sup.) 7 S. W. 68.

Rule 24.—See *Brown v. Martin* (Sup.) 7 S. W. 68; *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443; *Lambert v. Williams*, 2 Civ. App. 413, 21 S. W. 108.

Rule 25.—See *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443.

Rule 26.—See *Hughes v. Galveston, H. & S. A. Ry. Co.*, 67 Tex. 595, 4 S. W. 219.

Art. 1524. [947] [1014] To prescribe rules of practice.

Construction and operation of rules in general.—A rule, deliberately adopted, declared, and uniformly followed by a court, should not be abandoned except upon the most urgent reasons.—*Gearheart v. State*, 81 Cr. R. 540, 197 S. W. 187.

Where the Supreme Court in its rules interprets a statute, such interpretation is binding on the Court of Civil Appeals. *Marvin v. Kennison Bros.* (Civ. App.) 230 S. W. 831.

Conflict with statute.—Court rule 101a (159 S. W. xi), if it intended to prevent review of record because there was no motion for a new trial, would be inconsistent with legislative enactment, and hence beyond the power of the Supreme Court, the procedure for criminal appeals being prescribed by statute. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

RULES FOR COURT OF CIVIL APPEALS

Rule 7.—See *San Antonio Drug Co. v. Red Cross Pharmacy* (Civ. App.) 199 S. W. 324; *Bartlett v. State* (Civ. App.) 222 S. W. 656; note under arts. 1909, 1910, 6401.

Rule 8.—See *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694; *Missouri, K. & T. R. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211; *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044; *Sypert v. Rogers Lumber Co.* (Civ. App.) 201 S. W. 1102; *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350; *Rhodes v. Coats* (Civ. App.) 215 S. W. 470; *Zarate v. Cantu* (Civ. App.) 225 S. W. 285; *Garrard v. Cantrell* (Civ. App.) 232 S. W. 911; notes under arts. 1592, 1614, 1626, 2104.

Rule 9.—See *Dunnagan v. East Texas Colonization & Development Co.* (Civ. App.) 198 S. W. 357; *Horn v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 201 S. W. 1101; *Garrard v. Cantrell* (Civ. App.) 232 S. W. 911.

Rule 11.—See *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044; *Rhodes v. Coats* (Civ. App.) 215 S. W. 470; notes under art. 1592 and at end of Title 37, ch. 20.

Rule 23.—*Nations v. Miller* (Civ. App.) 212 S. W. 742; *Smith v. Johnson* (Civ. App.) 221 S. W. 982; *Lewis v. Geddes* (Civ. App.) 223 S. W. 244; *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750; *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 228 S. W. 571; *Texas Blue Bonnet Oil Co. v. W. C. Jones Drilling Co.* (Civ. App.) 228 S. W. 972; notes under arts. 1612, 1614.

Rule 24.—See *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593; *Turner v. Turner* (Civ. App.) 195 S. W. 326; *Pate v. Gallup* (Civ. App.) 195 S. W. 1151; *Tolivar v. Beaumont Traction Co.* (Civ. App.) 196 S. W. 362; *Lee v. Zielinski* (Civ. App.) 197 S. W. 327; *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027; *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080; *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758; *Celli v. Sanderson* (Civ. App.) 207 S. W. 179; *Thames v. Clesi* (Civ. App.) 208 S. W. 195; *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709; *Neeley v. White* (Civ. App.) 208 S. W. 991; *Stein v. Roberts* (Civ. App.) 217 S. W. 166; *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280; *Smith v. Coburn* (Civ. App.) 222 S. W. 344; *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750; *Smith v. Kidd* (Civ. App.) 228 S. W. 348; *Green v. Windham* (Civ. App.) 230 S. W. 726; *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029; *Schaff v. Fancher* (Civ. App.) 215 S. W. 861; notes under arts. 1612, 2019, 2020.

Rule 25.—See *Turner v. Turner* (Civ. App.) 195 S. W. 326; *Pate v. Gallup* (Civ. App.) 195 S. W. 1151; *Tolivar v. Beaumont Traction Co.* (Civ. App.) 196 S. W. 362; *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135; *Thames v. Clesi* (Civ. App.) 208 S. W. 195; *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709; *Neeley v. White* (Civ. App.) 208 S. W. 991; *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705; *Stein v. Roberts* (Civ. App.) 217 S. W. 166; *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280; *El Paso Electric R. Co. v. Lee*, 110 Tex. 494, 221 S. W. 254, reversing judgment (Civ. App.) 157 S. W. 748; *Smith v. Coburn* (Civ. App.) 222 S. W. 344; *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750; *Smith v. Kidd* (Civ. App.) 228 S. W. 348; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *Green v. Windham* (Civ. App.) 230 S. W. 726; notes under arts. 1612, 1614, 1625.

Rule 26.—See *Pate v. Gallup* (Civ. App.) 195 S. W. 1151; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Miller v. P. W. Ezell Mercantile Co.* (Civ. App.) 201 S. W. 734; *Quanah, R. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709; *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705; *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271; *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280; *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; notes under art. 1612.

Rule 27.—See *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280.

Rule 29.—See *Texas & P. Ry. Co. v. Conner* (Sup.) 229 S. W. 844; *Turner v. Turner* (Civ. App.) 195 S. W. 326; *Slaughter v. Morton* (Civ. App.) 195 S. W. 897; *Pate v. Gallup* (Civ. App.) 195 S. W. 1151; *Buvens v. Barden* (Civ. App.) 196 S. W. 333; *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555; *Mansfield v. Mansfield* (Civ. App.) 198 S. W. 169; *Caffrey v. Bartlett Western Ry. Co.* (Civ. App.) 198 S. W. 810; *Ulrich v. Galveston-Seeburg Electric Piano Co.* (Civ. App.) 199 S. W. 310; *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644; *McAllen v. Wood* (Civ. App.) 201 S. W. 433; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080; *Schaff v. Scoggin* (Civ. App.) 202 S. W.

758; *Barkley v. Gibbs* (Civ. App.) 203 S. W. 161; *Dubois v. Lowery* (Civ. App.) 205 S. W. 853; *Johnson v. Johnson* (Civ. App.) 207 S. W. 202; *Waco Oil & Refining Co. v. Texas Refining Co.* (Civ. App.) 207 S. W. 987; *Chancellor v. Slaughter* (Civ. App.) 210 S. W. 239; *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705; *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825; *Evans v. Houston Oil Co. of Texas* (Civ. App.) 211 S. W. 605; *Green v. Wood* (Civ. App.) 211 S. W. 806; *Wyss v. Bookman* (Civ. App.) 212 S. W. 297; *Houston Oil Co. of Texas v. Jordan* (Civ. App.) 212 S. W. 544; *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720; *Lee v. Gilchrist Cotton Oil Co.* (Civ. App.) 215 S. W. 977; *Schaff v. Fancher* (Civ. App.) 215 S. W. 861; *Allen v. Crutcher* (Civ. App.) 216 S. W. 236; *Kibby v. Kessler* (Civ. App.) 225 S. W. 277; *Davis v. State* (Cr. App.) 226 S. W. 409; *Mason v. Gantz* (Civ. App.) 226 S. W. 435; *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114; *Olguin v. Apodaca* (Com. App.) 228 S. W. 166; *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 228 S. W. 571; *Texas Blue Bonnet Oil Co. v. W. C. Jones Drilling Co.* (Civ. App.) 228 S. W. 972; *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *McCrary v. McCrary* (Cr. App.) 230 S. W. 187; *Irwin v. Jackson* (Civ. App.) 230 S. W. 522; *Southwestern Oil Corporation v. Bois D'Arc Creek Oil & Gas Co.* (Civ. App.) 230 S. W. 821; *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029; notes under arts. 1607, 1612, 1614, 2115, 4644, 4645.

Rule 30.—See *Brittain v. Monsur* (Civ. App.) 195 S. W. 911; *Caffrey v. Bartlett Western R. Co.* (Civ. App.) 198 S. W. 810; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Merriman v. Swift & Co.* (Civ. App.) 204 S. W. 775; *Weld-Neville Cotton Co. v. Lewis* (Civ. App.) 208 S. W. 731; *Hughitt v. Trent* (Civ. App.) 209 S. W. 445; *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705; *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302; *Holmes v. Tennant* (Civ. App.) 211 S. W. 798; *Ater v. Ellis* (Civ. App.) 227 S. W. 222; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029; notes under arts. 1612, 1614.

Rule 31.—See *Freeman v. Bennett* (Civ. App.) 195 S. W. 238; *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256; *Jones v. Holmes* (Civ. App.) 195 S. W. 306; *Brittain v. Monsur* (Civ. App.) 195 S. W. 911; *C. R. Miller & Bro. v. Mummert* (Civ. App.) 196 S. W. 270; *St. Louis, B. & M. R. Co. v. Green* (Civ. App.) 196 S. W. 555; *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736; *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791; *Caffrey v. Bartlett Western R. Co.* (Civ. App.) 198 S. W. 810; *Ludtke v. Murray* (Civ. App.) 199 S. W. 321; *Texas Employers' Ins. Ass'n v. Mummy* (Civ. App.) 200 S. W. 251; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163; *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779; *Frost v. Smith* (Civ. App.) 207 S. W. 392; *Stowers v. H. L. Stevens & Co.* (Civ. App.) 208 S. W. 365; *Prince Line, Limited, of Newcastle, England v. Steger* (Civ. App.) 210 S. W. 223; *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307; *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825; *W. J. & F. J. Powers v. James* (Civ. App.) 220 S. W. 382; *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675; *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640; *Pawloskey v. Kusch* (Civ. App.) 223 S. W. 496; *Sample v. Drake* (Civ. App.) 224 S. W. 555; *Smith v. Kidd* (Civ. App.) 228 S. W. 348; *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 228 S. W. 571; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738; *Rawlings v. Ediger* (Civ. App.) 231 S. W. 163; *Western Union Telegraph Co. v. Brett* (Civ. App.) 231 S. W. 449; *Baker v. Hodges* (Civ. App.) 231 S. W. 844; notes under arts. 1612, 1614, 1902, 1953, 1974.

Rule 35.—See *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163; *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

Rule 36.—See *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 437; *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; notes under art. 1614.

Rule 37.—See *Johnson v. Mangum* (Civ. App.) 227 S. W. 750; notes under art. 1614.

Rule 39.—See *Missouri, K. & T. Ry. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211; *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852; *Smith v. Smith* (Civ. App.) 209 S. W. 682; *Forbes v. Cannon* (Civ. App.) 224 S. W. 944; *Reilly v. Hanagan* (Civ. App.) 225 S. W. 797; *Moncrief v. Southard* (Civ. App.) 228 S. W. 1119; *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802; notes under arts. 1612, 1614, 2115.

Rule 40.—See *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544; *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705; *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; *Blue v. Conner* (Civ. App.) 219 S. W. 533; *Leathers v. Craig* (Civ. App.) 228 S. W. 995; *Yates v. Buffalo State Bank* (Civ. App.) 229 S. W. 619; notes under arts. 1612, 1614, 1641.

Rule 41.—See *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986; *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544; *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; *Standard Rice Co. v. Broussard* (Civ. App.) 223 S. W. 323; *Leathers v. Craig* (Civ. App.) 228 S. W. 995; *Yates v. Buffalo State Bank* (Civ. App.) 229 S. W. 619; *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802; notes under art. 1614.

Rule 41a.—See *DuBois v. Tyler* (Civ. App.) 219 S. W. 211; notes under art. 2115.

Rule 42.—See *Arispe v. Clark* (Civ. App.) 199 S. W. 500; *Stocking v. Laas* (Civ. App.) 199 S. W. 500; *Bracht v. Adamson* (Civ. App.) 211 S. W. 624; *Edwards v. Holder* (Civ. App.) 215 S. W. 480; *Reece v. Langley* (Civ. App.) 230 S. W. 509; notes under arts. 1614, 2068.

- Rule 43.**—See *Lopez v. Vela* (Civ. App.) 200 S. W. 1111; notes under art. 1614.
- Rule 47.**—See *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 437; *Wyss v. Bookman* (Civ. App.) 212 S. W. 297; notes under art. 2007.
- Rule 53.**—Cited *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489.
- Rule 53a.**—Cited *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489.
- Rule 55.**—See *Ft. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910; *Ayo v. Robertson* (Civ. App.) 207 S. W. 979; notes under arts 1989, 2058.
- Rule 57.**—See *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044; notes at end of title 37, ch. 20.
- Rule 62a.**—See notes under arts. 1626, 1628.
- Rule 65.**—See *Henningsmeyer v. First State Bank of Conroe*, 109 Tex. 116, 195 S. W. 1137.

RULES FOR DISTRICT AND COUNTY COURTS

- Rule 5.**—See *Kiehn v. Willmann* (Civ. App.) 218 S. W. 15; notes under art. 1824.
- Rule 7.**—See *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256; *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750; notes under arts. 1909, 1910, 1947.
- Rule 12.**—See *Stuart v. Meyer* (Civ. App.) 196 S. W. 615; *Cox v. Cox* (Civ. App.) 214 S. W. 627; notes under art. 1824.
- Rule 14.**—See *Jones v. Fink* (Civ. App.) 209 S. W. 777; *Cox v. Cox* (Civ. App.) 214 S. W. 627; notes under art. 2109.
- Rule 15.**—See *Kiehn v. Willmann* (Civ. App.) 218 S. W. 15.
- Rule 16.**—See *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518; notes under art. 1917.
- Rule 24.**—See *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120; *Auds Creek Oil Co. v. Brooks Supply Co.* (Civ. App.) 221 S. W. 319; *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750; notes under arts. 1903, 1910.
- Rule 27.**—See *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287; *Russell v. Koennecke* (Civ. App.) 197 S. W. 1111; *Lumsden v. Jones* (Civ. App.) 205 S. W. 375; *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268; notes under arts. 1628, 1824.
- Rule 31.**—See *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Lott v. Ballew* (Civ. App.) 198 S. W. 645; *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639; *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591; *Carter v. Brown* (Civ. App.) 219 S. W. 292; *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881; notes under art. 1953.
- Rule 39.**—See *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575; *Missouri, K. & T. Ry. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211; *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163; *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779; *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456; notes at end of ch. 12 of title 37.
- Rule 40.**—See *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779.
- Rule 41.**—See *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575; *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779; *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.
- Rule 48.**—See *Chandler v. Riley* (Civ. App.) 210 S. W. 716.
- Rule 50.**—See *Lundy v. Little* (Civ. App.) 227 S. W. 538.
- Rule 53.**—See *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748; *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; notes under arts. 2058, 2062, 2073.
- Rule 54.**—See *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.
- Rule 55.**—See *Mother Mary Angela v. Battle* (Civ. App.) 198 S. W. 1630; *Moore v. Denman* (Civ. App.) 199 S. W. 1175; *Valdespino v. Dorrance & Co.* (Civ. App.) 207 S. W. 649; *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; notes under arts. 1989, 2058, 2073.
- Rule 57.**—See *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345; notes under art. 2058, 2059, Civil Statutes, and art. 744, Code of Criminal Procedure.
- Rule 58.**—See *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095; notes under art. 2058.
- Rule 65.**—See *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.
- Rule 66.**—See *Meredith v. Flanagan* (Civ. App.) 202 S. W. 787; *Richards v. Howard* (Civ. App.) 218 S. W. 95; notes under art. 1994.
- Rule 67.**—See *Lee v. Zielinski* (Civ. App.) 197 S. W. 327; *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.
- Rule 68.**—See *Quannah, A. & P. R. Co. v. Bone* (Civ. App.) 208 S. W. 709.
- Rule 70.**—See *St. Louis, B. & M. R. Co. v. Webber* (Civ. App.) 202 S. W. 519.
- Rule 71a.**—See *Neeley v. White* (Civ. App.) 203 S. W. 991; *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843; notes under arts. 1990, 1991, 2019.
- Rule 72.**—Cited *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489.

Rule 78.—See *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489; notes under art. 2070.

Rule 84.—See *Jones v. Fink* (Civ. App.) 209 S. W. 777.

Rule 85.—See *Baker v. Nipper* (Civ. App.) 198 S. W. 596.

Rule 90.—See *Johnson v. Mangum* (Civ. App.) 227 S. W. 750; notes under art. 2114.

Rule 94.—See *Baker v. Nipper* (Civ. App.) 198 S. W. 596.

Rule 100.—See *Baker v. Nipper* (Civ. App.) 198 S. W. 596; notes under art. 2109.

Rule 101.—See *Patterson v. Bushong* (Civ. App.) 196 S. W. 962; *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738; *Kennison Bros.* (Civ. App.) 230 S. W. 831; *Busbee v. Busbee* (Civ. App.) 231 S. W. 441; notes under arts. 1216, 2113.

Rule 101a.—See *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593; *Patterson v. Bushong* (Civ. App.) 196 S. W. 962; *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718; *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084; *St. Louis, B. & M. R. Co. v. Webber* (Civ. App.) 202 S. W. 519; *Pate v. Woodville Mercantile Co.* (Civ. App.) 29 S. W. 916; notes under art. 1612.

Rule 102.—See *Davis v. State* (Cr. App.) 226 S. W. 409; notes under art. 2115, Civil Statutes, and art. 962, Code of Criminal Procedure.

Rule 121.—See *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

Art. 1525. [945] [1011e] May ascertain jurisdictional facts.

Cited in dissenting opinion, *Henningsmeyer v. First State Bank of Conroe*, 109 Tex. 116, 195 S. W. 1137.

Art. 1526. May issue certain writs.

See *Texas Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Mandamus.—This article sufficiently complies with the constitutional requirement in Const. art. 5, § 3, as to specifying the cases for issuance of the writ of mandamus, and confers the original jurisdiction to issue such writ provided for in the constitution. *Pickle v. McCall*, 86 Tex. 212, 24 S. W. 265.

After the precincts of a county had adopted the local option law, the commissioners' court ordered an election for the whole county under the law. At the suit of two liquor dealers, the district court entered a rule requiring the commissioners to show cause why they should not be prohibited from making any decision as to the result of the election, basing its action on the ground that the election would be void if the electors of said precincts were allowed to vote. Held, that the Supreme Court would not issue a mandamus compelling the district judge to vacate his order, thus substituting its judgment for that of the district judge; and especially where there was a right of appeal. *State v. Morris*, 86 Tex. 226, 24 S. W. 393.

Supreme Court has no power to award original writ of mandamus against county judge, who is not an "officer of the state government" within statute. *Bostic v. County Judge of Rockwall County*, 108 Tex. 421, 195 S. W. 186.

The Supreme Court, under Const. art. 5, § 3, may issue writ of mandamus to require district court to enforce judgment, although prior thereto the Court of Civil Appeals under art. 1595, has issued a writ of mandamus directing court to retry case. *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

Supreme Court in original mandamus is without power to direct commissioner of insurance and banking to act in disregard of final judgment of district court having jurisdiction of subject-matter and of bonding company, especially where the acts of the commissioner in relation to bonding company would involve exercise of discretion. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Supreme Court, in original mandamus will not direct appointment of receiver by trial court, nor direct trial court to issue injunction. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Mandamus, while a strictly legal remedy, will be refused, by analogy to the principles of equity, in aid of those who do not come into court with clean hands; that is, those who have violated conscience or good faith or other equitable principles in their prior conduct connected with the controversy. *Westerman v. Mims* (Sup.) 227 S. W. 178.

— **Issues of fact.**—Where relator, seeking to compel issuance of prospecting permit, alleged the land had been surveyed, which the defendant denied, there was an issue of fact necessary to be determined as determining rights of the parties, beyond the jurisdiction of the Supreme Court, on original application for mandamus. *Wagner v. Robinson*, 109 Tex. 114, 201 S. W. 171.

Art. 1527. [948] [1015] May punish contempt.

Cited, *Hughitt v. Trent* (Civ. App.) 209 S. W. 445.

Art. 1528. [949] [1016] May issue mandamus to compel district judge to proceed to trial.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Validity.—Since Const. art. 5, vests appellate power in the Supreme Court, and not in the several judges, the clauses of this article, attempting to confer this power "upon

any judge of the said court," are void; but such clauses will not defeat the apparent purpose of the Legislature to confer jurisdiction on the court. *Kleiber v. McManus*, 66 Tex. 48, 17 S. W. 249.

Right to relief.—Where a complete transcript of the record accompanies an appeal from an order of a district judge refusing to proceed with a suit which he had caused to be taken to a federal court, but which the latter had remanded to him, the Supreme Court has jurisdiction to issue an order compelling such judge to proceed with the trial of the cause. *Kleiber v. McManus*, 66 Tex. 48, 17 S. W. 249.

Relators who sought no relief in trial court are not entitled to mandamus in Supreme Court to compel trial court to vacate its judgment, permit them to intervene, and grant certain other relief. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Art. 1529. May issue writs of habeas corpus when, and admit to bail.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Civil suit.—Under Const. art. 5, § 5, and Code Cr. Proc. 1911, arts. 69, 160, 174, 175, 181–183, Court of Criminal Appeals has jurisdiction to issue writ of habeas corpus in any case where person is illegally restrained of his liberty, and under Const. art. 5, § 3, and Rev. St. 1911, art. 1529, Supreme Court has concurrent jurisdiction where restraint grows out of civil case. *Ex parte Alderate*, 83 Cr. R. 358, 203 S. W. 763.

Relator, adjudged guilty of contempt in controversy over custody of dependent child, under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 2184–2190, a civil proceeding, will not be granted habeas corpus by Court of Criminal Appeals, but relegated to civil courts, in view of Const. art. 5, §§ 3, 5, and Rev. St. 1911, art. 1529. *Ex parte Little*, 83 Cr. R. 375, 203 S. W. 766.

Original application for writ of habeas corpus to obtain release from restraint under order of district court adjudging relator in contempt for refusing to obey an injunction issued in a divorce proceeding, pending in the court, to which relator and his wife were parties, should have been addressed to the Supreme Court, not to the Court of Criminal Appeals. *Ex parte Gregory*, 85 Cr. R. 115, 210 S. W. 204.

Application for habeas corpus writ of cases of restraint for violation of an injunction should be made to the Supreme Court. *Ex parte Houston*, 87 Cr. R. 8, 219 S. W. 826.

Where relator violated a restraining order, and was imprisoned for contempt, the Court of Criminal Appeals will not entertain an application for a writ of habeas corpus, for Rev. St. art. 1529, gives the Supreme Court authority to entertain applications for writs of habeas corpus in cases in which the restraint grows out of a civil case. *Ex parte Albritton*, 87 Cr. R. 453, 222 S. W. 561.

CHAPTER SIX

THE WRIT OF ERROR—PROCEEDINGS TO OBTAIN, ETC.

Art.		Art.	
1540.	Petition for writ of error; requisites of and bond.	1544.	Grant of writ of error or answer of questions.
1541.	Filing; time of, etc.	1545.	Bond required, when.
1542.	Petition with record, etc., to be forwarded; provided deposit, etc.	1545a.	Good cause to be shown for award of writ of error.
1542a.	Notice to defendant in error; copy of application to be delivered, etc.	1545b.	Designation of three justices of the courts of civil appeals.
1542b.	Defendant in error may file reply, etc.	1545e.	Supreme court may also act on application; must act on certain applications.
1543.	Referring case back to court of civil appeals for findings of fact.		

Article 1540. [942] [1011b] Petition for writ of error; requisites of and bond.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Petition—Requisites.—Under Supreme Court Rules, No. 1, § c (159 S. W. viii), it is essential to the jurisdiction of the Supreme Court to review a case on error to the Court of Civil Appeals, for the application for writ of error to show that a motion for rehearing was filed in the Court of Civil Appeals presenting the points on which the writ is asked. *Knodel v. Equitable Life Ins. Co. (Com. App.) 221 S. W. 941*, dismissing writ of error (Civ. App.) 193 S. W. 1138.

Right of review.—The holding of the Court of Civil Appeals that the giving of a charge was error, not having been called in question in the application for writ of error to that court, is not before the Commission of Appeals for review. *Pullman Co. v. Gulf, C. & S. F. Ry. Co. (Com. App.) 231 S. W. 741*.

Art. 1541. [942] [1011b] Filing, time of, etc.

See *Martin v. Granger* (Sup.) 205 S. W. 725.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair* (Sup.) 196 S. W. 1153.

Time of filing petition.—By filing successive motions for rehearing, the time allowed for filing petition for writ of error cannot be extended. *Henningsmeyer v. First State Bank of Conroe*, 109 Tex. 116, 195 S. W. 1137.

It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing. *Flattery v. Miller* (Sup.) 212 S. W. 932.

Art. 1542. [942] [1011b] Petition with record, etc., to be forwarded; etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1542a. Notice to defendant in error; copy of application to be delivered, etc.

Cited, *Texas Co. v. Charles Clark & Co.* (Civ. App.) 196 S. W. 251. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

In general.—This article is directory; and Supreme Court, upon failure, through oversight, of attorney to comply therewith, instead of dismissing, will direct delivery of copy of application to attorneys for defendant in error, and specify time in which to reply thereto. *Martin v. Granger* (Sup.) 205 S. W. 725.

Art. 1542b. Defendant in error may file reply, etc.

See *Martin v. Granger* (Sup.) 205 S. W. 725.

Filing answer without reservation.—Where the answer to an application for a writ of error did not reserve the right of oral argument, under court rule 5 (159 S. W. x), the Supreme Court may proceed without oral argument or unnecessary delay to decide the case. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Art. 1543. Referring case back to Court of Civil Appeals for findings of fact.

See *Texas Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1544. Grant of writ of error or answer of questions.

See *Texas City Transp. Co. v. Winters* (Com. App.) 224 S. W. 1087.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Effect of grant or denial of writ.—Supreme Court has jurisdiction to review action of Court of Civil Appeals in granting supplemental motion for rehearing of motion to vacate judgment of affirmance, made after Supreme Court had refused writ of error, thus affirming original judgment of affirmance of Court of Civil Appeals and trial court. *Gammel Statesman Pub. Co. v. Ben C. Jones & Co.* (Comp. App.) 206 S. W. 931.

Supreme Court by denying writ of error will be presumed to have concurred in the conclusion reached by the Court of Civil Appeals.—*Milner v. Gatlin* (Civ. App.) 211 S. W. 617.

Notations made on granting writs of error express only the tentative opinion of the court.—*Ball v. Beaty* (Civ. App.) 223 S. W. 552.

Art. 1545. [942] [1011b] Bond required, when.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1545a. Good cause to be shown for award of writ of error.

See *Scott v. Shine* (Sup.) 202 S. W. 726.

Cited, *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917* (Sup.) 201 S. W. 390.

Art. 1545b. Designation of three justices of the Courts of Civil Appeals.

Validity in general.—Acts 1917, c. 76, authorizing the Chief Justice or any two other justices of the Supreme Court to designate a committee of justices of the Courts of Civil Appeals to pass upon petitions to the Supreme Court for writs of error, is constitutional. *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 502, 1153.

Authority of legislature.—The Legislature has power to give to the Courts of Civil Appeals the authority of determining when an appeal from their judgments shall lie. *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 502, 1153.

The Legislature, which inaugurated writ of error practice as method whereby appellate jurisdiction of Supreme Court may be acquired, and lodged in it authority of determining merits of the grounds advanced for issuance of writ, may change that method.—Id.

Since, under Const. art. 5, § 6, the Legislature may confer generally on Courts of Civil Appeals other jurisdiction than that specifically conferred by the Constitution, it may impose additional judicial duties on the justices, such as that of passing on petitions to the Supreme Court for writs of error.—Id.

Since, under Const. art. 5, § 3, Legislature may limit and change appellate jurisdiction of Supreme Court, Legislature may, in absence of any constitutional provision as to how such jurisdiction may be invoked, establish mode of appeal and declare that authority of determining right to have it entertained shall rest on a committee of judges of Courts of Civil Appeals.—Id.

Effect of designation.—This article does not create a court, but simply adds certain duties to those of justices already existing, to be discharged by them only in their capacity as such. *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 502, 1153.

The Court of Civil Appeals, from which members of committee which passes upon petitions to Supreme Court for writs of error are appointed will not by such appointment be disabled from performing their functions, since majority of members constitute a quorum for dispatch of business.—Id.

Art. 1545e. Supreme Court may also act on applications; must act on certain applications.

Cited, *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917* (Sup.) 201 S. W. 390.

In general.—Motion for rehearing on application for writ of error to Supreme Court on ground of conflicting decisions of Courts of Civil Appeals under this article and art. 1522a, will not be granted where alleged conflicting opinion was rendered after decision in case wherein writ of error is sought. *Westchester Fire Ins. Co. v. Redditt*, 109 Tex. 211, 204 S. W. 106.

CHAPTER SEVEN

PROCEEDINGS IN CASES IN THE SUPREME COURT

Article 1546. [967] [1033] Trial to be on questions of law only.

Cited, *Falls Land & Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479.

Questions that can be considered.—The Supreme Court, while not empowered to revise the conclusions of fact of the court of appeals, may consider the evidence, in rendering its decision. *Clarendon Land, Investment Agency Co. v. McClelland*, 86 Tex. 179, 23 S. W. 1100, 22 L. R. A. 105.

Where the Court of Civil Appeals affirmed a judgment, refusing to consider the errors assigned, and a writ of error was granted, the whole case is before the Supreme Court for determination. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

A loss under a fire policy cannot properly be treated by the Supreme Court as total, where the case was submitted and determined on issues which would have been immaterial had the loss been total. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

The Supreme Court will not decide moot questions in an injunction suit merely to ascertain who is liable for costs. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

The appellate court should consider the evidence in the light most favorable to the party obtaining the verdict. *Kirksey v. Southern Traction Co.*, 110 Tex. 190, 217 S. W. 139.

On writ of error to a judgment of the Court of Civil Appeals, reversing a judgment of trial court because there was no evidence to sustain verdict, the question for determination is not the sufficiency or preponderance of the evidence, but whether there is any evidence to raise the issue, and if there was such evidence the verdict of the jury must be reinstated. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

Where the action was tried below solely as one for breach of contract, it will be so disposed of on appeal. *Brown v. Searls* (Com. App.) 228 S. W. 173.

In an action in trespass to try title, questions brought up on error held to have become merely academic, the parties having settled and adjusted their differences, so that the case should be dismissed. *Moore v. American Lumber Co.* (Com. App.) 231 S. W. 318.

Findings of fact by court sitting without jury are not conclusive on appeal, where a statement of facts appears in the record; and, where the Court of Civil Appeals has not passed on their sufficiency to support the judgment, the cause should be remanded for it to pass thereon. *Temple Hill Development Co. v. Lindholm* (Com. App.) 231 S. W. 321.

Treating the question as to the sufficiency of the proof to clearly and satisfactorily establish the contract as one of law, only, the evidence must be viewed most strongly in support of the trial court's judgment in favor of the contract. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

Assignments of error.—The Supreme Court cannot review the decision of the Court of Civil Appeals except on the specific assignments contained in the petition for writ of error. *Van Orden v. Pitts* (Com. App.) 206 S. W. 830.

The Supreme Court, on error to the Court of Civil Appeals, which erroneously reversed judgment for plaintiff, on the ground that a certain refused instruction should have been given, need not consider whether other instructions should have been given; defendant's brief containing no assignment of error to failure to give them. *Parham v. Western Union Telegraph Co.* (Com. App.) 206 S. W. 839.

An appellant may adopt either the assignments of error set out in his motion for new trial or the assignments filed independently of those in the motion. *Temple Hill Development Co. v. Lindholm* (Com. App.) 231 S. W. 321.

Appellant is not restricted to the assignments in the motion for a new trial, but may file assignments of error independently of those specified in such motion. *Harlan v. Acme Sanitary Flooring Co.* (Com. App.) 231 S. W. 348.

On writ of error, the jurisdiction of the Supreme Court is limited to the questions of law presented in the application, and it cannot review even fundamental errors which are not so presented. *Town of Jacksonville v. McCracken* (Com. App.) 232 S. W. 294.

Questions not raised in Court of Civil Appeals.—Where shipper sued initial, connecting, and terminal carrier, and judgment went for plaintiff as against terminal carrier on theory of verbal contract made with it, and shipper did not appeal or assign cross-assignments in Court of Civil Appeals, though terminal carrier appealed, on further appeal by shipper from adverse judgment to Supreme Court shipper would be held to have abandoned his cause of action against the other defendant. *Texas & P. Ry. Co. v. West Bros.* (Com. App.) 207 S. W. 918.

Where the trial court overruled all exceptions to the petition, thus holding it sufficient, and no error on appeal to the Court of Civil Appeals was assigned to the ruling, the Supreme Court, on error to review the judgments of the trial court and Court of Civil Appeals, should treat the petition as if no objection to its sufficiency had been made. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

Where the Court of Civil Appeals in its disposition of the case did not consider assignments of error presented by appellants relating to certain testimony, the Supreme Court is without jurisdiction of such assignments. *Mills v. Mills* (Sup.) 231 S. W. 697.

Issues of fact.—Where the evidence is conflicting, the jury's findings will not be disturbed. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849; *Calloway v. Booe & Collier* (Civ. App.) 195 S. W. 1174; *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

Findings of fact below supported by evidence in the record will not be disturbed by the Supreme Court on writ of error. *Cagle v. Sabine Valley Timber & Lumber Co.*, 109 Tex. 178, 202 S. W. 942, 6 A. L. R. 1426.

Supreme Court is bound by findings of fact of Court of Civil Appeals that a reasonable time for performance of the contract in suit had elapsed. *Bush v. Merrill* (Com. App.) 206 S. W. 834.

The jury determines the credibility of the witnesses, and they may disregard the testimony of an unimpeached and uncontradicted witness because of interest or bias shown by the witness or because the manner of testifying raises a doubt as to the truth so that such evidence does not warrant a conclusion by appellate court contrary to the verdict. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

If there is evidence in the record raising the issue of fact found by the trial court and the Court of Civil Appeals, the Supreme Court is bound thereby. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

The conclusion of the Court of Civil Appeals that the verdict was against the weight of the evidence is binding on the Supreme Court. *Nussbaum v. Blumenthal* (Com. App.) 221 S. W. 944, affirming judgment (Civ. App.) *Blumenthal v. Nussbaum*, 195 S. W. 275.

Where the Court of Civil Appeals reversed and remanded a judgment on the theory that the verdict was unauthorized by the evidence, its conclusion on the facts will not be disturbed on writ of error. *Moss v. Rishworth* (Com. App.) 222 S. W. 225, affirming judgment (Civ. App.) *Rishworth v. Moss*, 191 S. W. 843.

On a claim of title by adverse possession, where the facts necessary to constitute limitation were found by the trial court and approved by the Court of Civil Appeals, the Supreme Court was precluded from passing upon the question; it being purely one of fact. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) 200 S. W. 232. *Same v. Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

The rule that findings of the Court of Civil Appeals as to questions of fact are binding on the Commission of Appeals is applicable and binding only as to issues which are clearly found, and finding upon which is material and controlling in the decision of the case. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

The Supreme Court is bound by the finding of the Court of Civil Appeals, reversing judgment of trial court entered on verdict of jury, where evidence was conflicting. *Rea v. Luse* (Com. App.) 231 S. W. 310.

Determination by Court of Civil Appeals as to insufficiency of evidence to sustain the verdict is binding on the Supreme Court on writ of error to review the judgment of the Court of Civil Appeals. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344.

The Supreme Court on writ of error to review judgment of Court of Civil Appeals will not consider questions of fact, the Court of Civil Appeals having exclusive jurisdiction. *Haynes v. Western Union Telegraph Co.* (Com. App.) 231 S. W. 361.

The Supreme Court has no jurisdiction to pass upon the sufficiency of the proof to support the judgment; such question being within the exclusive province of the Court of Civil Appeals. *Morrison v. Neely* (Com. App.) 231 S. W. 728.

In an action by the children of deceased's first wife against his children by his second and third wives to recover certain land, evidence tending to discredit the testimony of defendants' witness as to the identity and payment of certain notes executed by deceased and witnessed by himself during deceased's second marriage will not be considered on appeal, if there was any evidence of sufficient probative force to support the trial court's finding that the land was paid for with funds of the second and third communities. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

Whether usury entered into notes being a matter demonstrable by calculation, and none being presented in the record to show that it did not, and the trial court's finding that it did having been approved by the Court of Civil Appeals, it is not within the province of the Commission of Appeals to consider the matter. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Com. App.) 231 S. W. 738.

That the witnesses may not have been disinterested or may have made conflicting statements, or that their credibility may have been attacked, are matters solely within the province of the jury subject to revision by the trial judge and Court of Civil Appeals, and are not matters with which it is the province of the Commission of Appeals to deal on appeal from the Court of Civil Appeals. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

Questions of law.—Whether the issue of contributory negligence was raised by the evidence is a question of law, and the finding of the Court of Civil Appeals that no such issue was raised is not binding on writ of error to review its decision. *Peden Iron & Steel Co. v. Jaimes* (Com. App.) 208 S. W. 898.

Where the Court of Civil Appeals on appeal from a judgment for plaintiff rendered judgment for defendant and did not exercise its province to determine the facts and order another trial because of its difference with the jury on the facts, its ruling is one purely upon the question of law whether there be any evidence under the required quantum of proof which will support the jury's finding. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

CHAPTER EIGHT

HEARING CAUSES

Article 1549. [973] [1044] Death of parties no abatement, when.

Construed.—This article is not applicable, where the questions involved on the appeal have become moot by reason of the death of a party, such as in a divorce case. *Ledbetter v. Ledbetter* (Civ. App.) 229 S. W. 576.

CHAPTER NINE

JUDGMENT OF THE COURT

Art. 1550. Judgments in open court; opinions in writing.	Art. 1555. Mandate to issue, when.
1551. Judgment on affirmance or rendition, etc.	1557. Affidavit of inability to pay or secure costs.
1552. If judgment reversed, may remand to court of civil appeals or district court.	1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.
1553. No reversal or dismissal for want of form.	

Article 1550. [974] [1047] Judgments in open court; opinions in writing.

Cited, in re Orders in Chambers (Sup.) 226 S. W. 1075.

Denial of writ of error.—Decision of Supreme Court denying writ of error to review decision of Court of Civil Appeals sustaining sufficiency of petition to state cause of action as against general demurrer was binding on subsequent appeal involving sufficiency of same petition. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

Stare decisis.—The foreign court is the only tribunal competent to decide upon either the common or statute law of its own state. *Lamb v. Hardy*, 109 Tex. 414, 211 S. W. 445.

Decisions of the Supreme Court of state of Oklahoma are not declaratory of the common law as it existed in Oklahoma territory, since the Supreme and Circuit Courts of the United States possessed revisory control over the judgments of the Supreme Court of Oklahoma territory.—Id.

Erroneous rule laid down in former opinion will not be upheld under rule of stare decisis, where no injurious or unjust consequences will result from failure to follow it. *Dalton v. Allen*, 110 Tex. 68, 215 S. W. 439.

The sufficiency of the petition as against a general demurrer was settled by a former appeal, in which a judgment sustaining a general demurrer was reversed and writ of error denied. *Potter County v. Boesen* (Com. App.) 221 S. W. 948, affirming judgment (Civ. App.) 191 S. W. 787.

Under the rule that courts of equity will depart from rigid rules of law when necessary for the ends of justice, a decision of the Supreme Court in a case at law will not be extended, so as to preclude the doing of justice. *Brokaw v. Collett* (Civ. App.) 230 S. W. 790.

Where plaintiff had agreed to dispose of a city's bonds upon their approval by plaintiff's attorneys and the proposition submitted to the voters stated that the issue was "not to exceed \$75,000," plaintiff's attorneys were justified in refusing to approve of the bonds because of a Court of Civil Appeals case deciding that such a submission did not comply with the statute where the Supreme Court on appeal held the decision of such proposition unnecessary, but did not disaffirm the opinion thereon. *Grant v. City of Mineral Wells* (Civ. App.) 230 S. W. 854.

— **Following decisions of Supreme Court and Court of Criminal Appeals.**—The Court of Civil Appeals is bound to follow the latest ruling of the Supreme Court upon the same proposition. *Camp v. Gourley* (Civ. App.) 201 S. W. 671; *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 195 S. W. 625; *Davis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 196 S. W. 603; *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

Where Supreme Court in action of trespass to try title has determined that deed was admissible and sufficient to show superior title, such holding will be adopted by this court in later case between parties similarly situated where identical deed is sought to be introduced in evidence. *Hennegan v. Nona Mills Co.* (Civ. App.) 195 S. W. 664.

A judgment of the Supreme Court of Texas that Act Cong. June 18, 1910, c. 309, does not supersede the state law as to the liability of a telegraph company for negligence in delivery of an interstate message is controlling authority upon the Court of Civil Appeals until the contrary is held by the Supreme Court of the United States. *Postal Telegraph-Cable Co. v. Prewitt* (Civ. App.) 199 S. W. 316.

Although the Supreme Court might have rested its decision upon one proposition only, where it went further and decided another, its decision thereon is binding on Court of Civil Appeals. *Park v. South Bend Chilled Plow Co.* (Civ. App.) 199 S. W. 843.

Supreme Court having held that art. 3970, declaring void every mortgage or lien attempted to be given by owner on stock in trade without change of possession, does not apply to a lien resulting from a conditional sale, the Court of Civil Appeals is bound by such decision.—*Id.*

In applying laws of another state authorizing recovery for mental anguish for negligence in delivery of an interstate telegraph message, held that a decision of the Supreme Court of this state, that state laws were not superseded by Congress, contrary to a decision in the other state, would be followed and recovery allowed.—*Western Union Telegraph Co. v. Brown* (Civ. App.) 202 S. W. 1049.

Decision of the Supreme Court as to constitutionality of statute is binding upon Court of Civil Appeals. *Fearis v. Gafford* (Civ. App.) 204 S. W. 675.

Decision of Texas Supreme Court on invalidity of provisions on back of interstate telegram limiting liability for error in transmission is controlling on Court of Civil Appeals. *Western Union Telegraph Co. v. Chihuahua Exchange* (Civ. App.) 206 S. W. 364.

The Court of Civil Appeals in an interstate telegram case, must follow decision of state Supreme Court, in absence of decision by federal Supreme Court. *Western Union Telegraph Co. v. Southwick* (Civ. App.) 214 S. W. 987.

Where the effect of an act of Congress has not been authoritatively settled by the Supreme Court of the United States, the Court of Civil Appeals will follow the decisions of the state Supreme Court. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

— **Decisions of federal courts.**—Any construction placed on an act of Congress by the Supreme Court of the United States is absolutely binding and controlling on the courts of any state. *Baker v. Grace* (Civ. App.) 213 S. W. 299; *Spencer v. Burke* (Civ. App.) 217 S. W. 1110; *Shroyer v. Chicago, R. I. & G. R. Co.* (Com. App.) 223 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified *Shroyer v. Chicago, R. I. & G. R. Co.* (Sup.) 226 S. W. 140.

In an action under federal Employers' Liability Act, constructions given act and proceedings thereunder by federal court are controlling. *Ft. Worth & R. G. Ry. Co. v. Bird* (Civ. App.) 196 S. W. 597; *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

Decision of United States Supreme Court involving application and construction of a federal statute held decisive, in suit in state court, that switching between stations is as much a part of interstate transportation as movement across state line, and that right of recovery, if any, for death of employé, killed while switching, is in his personal representative. *Pope v. Kansas City, M. & O. Ry. Co. of Texas*, 109 Tex. 311, 207 S. W. 514.

The decisions of the federal courts are controlling on a state court in determining whether a federal statute had taken effect at the time an interstate shipment was made. *Kansas City, M. & O. Ry. Co. of Texas v. Harral* (Civ. App.) 199 S. W. 659.

The construction placed upon state law by state courts will control, notwithstanding similarity to act of Congress, in absence of cases from United States courts construing act of Congress or the state law. *Citizens' Nat. Bank of Stamford v. Stevenson* (Civ. App.) 211 S. W. 644.

The decisions of the United States Supreme Court are controlling on a state court in determining whether a carrier's liability for the loss of an interstate shipment, is limited to the declared value. *Henderson v. Wells Fargo & Co. Express* (Civ. App.) 217 S. W. 962.

If the Supreme Court of the United States may entertain jurisdiction of action for damages for mental anguish, due to failure to send interstate message, the rule adopted by that court for determining the measure of damages is binding upon the courts of Texas. *Western Union Telegraph Co. v. Epley* (Civ. App.) 218 S. W. 528.

In view of Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), the state Supreme Court will adopt the rule of liability for damage to interstate shipment laid down by the United States Supreme Court, notwithstanding the state court is of the opinion that the contrary rule previously adhered to by the court is the sounder and more just rule. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070.

Question of construction of interstate bill of lading under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) and the Interstate Commerce Act is a federal question. *Shroyer v. Chicago, R. I. & G. R. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified *Shroyer v. Chicago, R. I. & G. R. Co.* (Sup.) 226 S. W. 140.

The resolution of Congress of July 16, 1918 (U. S. Comp. St. Ann. Supp. 1919, § 3115½, x), and the proclamation of the President, taking control of telegraph and telephone lines should be construed in conformity with federal decisions. *Western Union Telegraph Co. v. Condit* (Civ. App.) 223 S. W. 234.

An opinion by the United States Supreme Court, giving specific interpretation to an amendment to the federal Constitution, is conclusive and binding on a state court. *Ex parte Gilmore* (Cr. App.) 228 S. W. 159.

— **Dictum.**—Court of Civil Appeals would not feel bound by dictum of the Supreme Court. *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

Art. 1551. [975] [1049] Judgment on affirmance or rendition, etc.
—Whenever the Supreme Court, on the trial of a cause brought from any Court of Civil Appeals, shall affirm the judgment or decree of such Court, or when said Court shall proceed to render such judgment or decree as should have been rendered by the Court of Civil Appeals, said Supreme Court shall, at the same time, render judgment against the Plaintiff in Error and the sureties, on his appeal, or Supersedeas Bond, for the performance of said judgment or decree as rendered, (a copy of which bond is to always accompany the transcript of the record) and the Supreme Court shall make such disposition as to the costs as they may order. [Acts 1892, p. 19; Acts 1907, S. S., p. 467; Acts 1921, 37th Leg., ch. 23, § 1.]

Took effect 90 days after adjournment which occurred March 12, 1921.

See *Texas Trunk R. Co. v. Johnson*, 86 Tex. 421, 25 S. W. 417.

Cited, *Blair v. Sanborn*, 82 Tex. 686, 18 S. W. 159.

Judgment on bond.—Where a judgment, as rendered by the Supreme Court in plaintiff's favor, is for a materially less amount than the judgment decreed in the trial court, it is improper to render any judgment against the surety on the appeal bond. *Home Inv. Co. v. Strange*, 109 Tex. 342, 207 S. W. 307.

Art. 1552. [975] [1049] If judgment reversed, may remand to court of civil appeals or district court.

Affirmance.—Where an injunction against enforcement of assessments for street improvements was valid, in so far as the enforcement against homesteads and joint assessment against joint owners were concerned, and the city sought only complete reversal of the judgment, and did not furnish a basis for reform of the injunction, the judgment must be affirmed. *City of Dallas v. Atkins*, 110 Tex. 627, 223 S. W. 170, affirming judgment (Civ. App.) 197 S. W. 593.

In an action where there were numerous parties, the judgment of the Court of Civil Appeals will be affirmed with respect to those parties not questioning it by writ of error. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

Rendering final judgment.—Where Court of Civil Appeals on issues presented by pleadings and evidence correctly applied the law favorable to contention of plaintiffs in error, and where there was no further issue to be developed or determined, it should have rendered judgment for plaintiffs in error, in view of art. 1626, and its judgment reversing cause would be affirmed, and its judgment remanding it would be reversed, and judgment rendered for plaintiffs in error. *Arno Co-op. Irr. Co. v. Pugh* (Com. App.) 212 S. W. 470.

On review of a judgment of the Court of Civil Appeals affirming a judgment in favor of defendant, where the trial court was not warranted in rendering a judgment against the plaintiff on account of contradictory findings of the jury in answer to special issues, the Supreme Court cannot render judgment in favor of plaintiff on the findings, although the contradictory findings of the jury were found under an incorrect definition in the

trial court's charge. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

In a suit by a subscriber to corporate stock to cancel note and deed of trust given therefor, wherein receiver of company sought to recover on note in so far as it was given as a subscription to surplus, record held in such condition as to authorize rendition of judgment for receiver on note and deed of trust; subscriber alleging all necessary facts to show receiver was holder of note which fell due before receiver's plea in reconvention was filed. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Remand of cause in general.—Where court erroneously directed verdict without two essential findings, which the evidence would have sustained, but as to which it was not conclusive, the court on appeal could only remand the cause. *Horn v. Western Union Telegraph Co.*, 109 Tex. 229, 205 S. W. 831.

In an action involving title to land and the foreclosure of vendor's lien notes, where evidence was insufficient to support a recovery, but on another trial additional evidence might be offered, held, that judgment would be reversed and cause remanded. *Raley v. D. Sullivan & Co.* (Com. App.) 207 S. W. 906.

Where plaintiff claimed under a sheriff's deed, but the issue of the sheriff's authority to execute the deed was not fully developed, notwithstanding two prior trials, held, under circumstances, that a judgment for plaintiff, who did not show the sheriff's authority, should be reversed, and the cause remanded, instead of judgment being rendered for defendant. *Richards v. Rule* (Com. App.) 207 S. W. 912.

Where shipper of cattle suing initial, connecting, and terminal carriers elected to recover from terminal carrier, which sought judgment over against connecting carriers, but under the Carmack Amendment to the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa) and under the pleadings and evidence the terminal carrier could not have recovery over, it was not necessary to remand the cause as to connecting carrier on reversal of judgment for plaintiff against terminal carrier. *Texas & P. Ry. Co. v. West Bros.* (Com. App.) 207 S. W. 918.

In trespass to try title involving two distinct issues of fact, first, identity of the original grantee of the title, second, title by limitation in defendant's remote vendor, where the court rendered judgment for defendant on the finding for it on the title by limitation issue, so that defendant was not in a position to have the court pass on the sufficiency of the evidence to support the verdict on the identity of the grantee issue, there should be a new trial on the whole case on remand by the Supreme Court after rendition of judgment for plaintiff by the Court of Civil Appeals. *Houston Oil Co. of Texas v. Billingsley* (Com. App.) 213 S. W. 248.

Where, on reversal of a cause, it seems probable that the ends of justice may be better subserved by remand than by rendering judgment, the former course should be pursued, notwithstanding that it is apparent that a full consideration of the cause necessitates amendment of the pleadings. *Camden Fire Ins. Co. v. Yarbrough* (Com. App.) 215 S. W. 842.

Where defendant made no objection that an action to recover community property, which was also the homestead, should have been by the administrator of the deceased husband instead of the widow, and damages for withholding duly assessed by a jury, appeared to be less than might well have been assessed, a judgment in action on super-seas bond brought by the widow will not, in view of her rights, be reversed and the cause remanded, the only effect of which would be to prolong the litigation and increase the costs. *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

Where, in the trial court, the case was disposed of on defendant's demurrer to the petition on reversal by Supreme Court of district court and Court of Civil Appeal affirming, judgment should not be directed for plaintiff, but cause should be remanded. *Houston & T. C. R. Co. v. Diamond Press Brick Co.* (Sup.) 226 S. W. 140.

Where the record does not contain the findings of fact, and the court concludes that the ends of justice may be better served by reversal and remanding the cause to the trial court, the same may be done. *Graves v. Griffin* (Com. App.) 228 S. W. 913.

—**To court of civil appeals.**—Where the court of Civil Appeals erred in point upon which it reversed case, but did not pass upon other assignments of error, as to some of which its judgment is final, the Commission of Appeals will remand cause to Court of Civil Appeals for action upon such other assignments. *Bustillos v. Southwestern Portland Cement Co.* (Com. App.) 211 S. W. 929; *Bird v. Ft. Worth & R. G. Ry. Co.*, 109 Tex. 323, 207 S. W. 518; *Henry v. Kirby Lumber Co.*, 110 Tex. 218, 218 S. W. 363; *Baker v. Fogle*, 110 Tex. 301, 219 S. W. 450; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753; *Collins v. Pecos & N. T. Ry. Co.*, 110 Tex. 577, 222 S. W. 156, denying motion for rehearing (Com. App.) 212 S. W. 477; *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Sup.) 226 S. W. 140; *Temple Hill Development Co. v. Lindholm* (Com. App.) 231 S. W. 321; *Clark v. Texas Co-Op. Inv. Co.* (Com. App.) 231 S. W. 381.

On writ of error to review judgment of Court of Civil Appeals, where there are assignments of error questioning the sufficiency of the evidence to support the court's findings on material issues, the Supreme Court will on reversal remand the cause to the Court of Civil Appeals in order that it may consider such assignments. *Board of Trustees of Robstown Independent School Dist. v. American Indemnity Co.* (Com. App.) 228 S. W. 105.

Where the Court of Civil Appeals reversed and remanded a cause on the ground that an issue of negligence was erroneously submitted, and the Supreme Court found that such issue was properly submitted, held, that the Supreme Court could not set aside the judgment of the Court of Appeals and affirm that of the district court, but must affirm

the judgment of the Court of Appeals and remand the cause for further proceedings in accordance with opinion of Supreme Court. *Tisdale v. Panhandle & S. F. Ry. Co.* (Com. App.) 228 S. W. 133.

Where the Supreme Court has reversed judgment of Court of Civil Appeals and remanded the cause to the district court, and it is learned that the Court of Civil Appeals did not pass on certain assignments regarding testimony, the judgment remanding to the district court will be changed to a remand to the Court of Civil Appeals. *Mills v. Mills* (Sup.) 231 S. W. 697.

Affirmance of trial court.—Where the Court of Civil Appeals reversed and rendered the judgment of the trial court, and made no finding of fact which would defeat recovery, the Supreme Court may reverse such judgment and affirm that of the trial court. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

Where the Court of Civil Appeals does not find against any fact essential to plaintiff's recovery and the Supreme Court does not approve its conclusions of law on which it based its judgment reversing a judgment for plaintiff, its judgment will be reversed and the judgment of the trial court affirmed. *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

Where the determination by the Court of Civil Appeals that the evidence was insufficient to sustain the verdict of an injured employee was erroneous, but the Court of Civil Appeals made findings of fact under which the injured employee was not entitled to recover, the trial court's judgment cannot be affirmed on writ of error to the Court of Civil Appeals, but the cause must be remanded for a new trial. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 132 S. W. 290.

Dismissal.—On appeal from a judgment of the county court in an action begun in justice court wherein the appeal bond was not filed in time so as to give the county court jurisdiction, the judgment of the county court should be reversed, and the cause remanded, with directions to dismiss, and it is improper to reverse and dismiss the appeal thus charging the successful party with payment of costs. *Fruit Dispatch Co. v. Rainey* (Sup.) 232 S. W. 281.

Proceedings after remand.—Where shipper sued initial, connecting, and terminal carriers for injuries to shipment of live stock, but all causes of action were abandoned except as against terminal carrier and judgment went for plaintiff on theory of verbal contract with terminal carrier, though acts of negligence were also alleged, on reversal and remand for invalidity of contract shipper could recover on another trial on theory of negligence. *Texas & P. Ry. Co. v. West Bros.* (Com. App.) 207 S. W. 918.

Art. 1553. [972] [1043] No reversal or dismissal for want of form.

Rendering judgment.—On error to the Court of Civil Appeals it is the duty of the Supreme Court to dispose of the whole case, and reverse or affirm the judgment of the trial court as the law may demand. *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668.

Appellate court has no legal authority to modify judgment so as to make return of purchase money condition precedent to enforcement, where amount of purchase money has not been ascertained by jury. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849.

On appeal in trespass to try title, where it appeared judgment for plaintiff should not have been had without return of certain sums expended by defendant, the judgment will be modified on motion by plaintiff by crediting defendant with amounts expended, where evidence is undisputed as to amount, although jury made no finding thereon. *Home Inv. Co. v. Strange*, 109 Tex. 342, 204 S. W. 314, modifying judgment on rehearing 195 S. W. 849, which reversed (Civ. App.) 152 S. W. 510.

Where trial court of its own motion instructed a verdict against plaintiff without giving defendant an opportunity to offer any evidence under his denial of plaintiff's allegations, on appeal, judgment cannot be rendered by appellate court in favor of plaintiff. *Moore v. Jenkins*, 109 Tex. 401, 211 S. W. 975.

Harmless error.—Supreme Court Rule 62A (149 S. W. x) was not intended to deprive the Supreme Court of the power to determine for itself whether any erroneous action of the trial court was of such character as amounted "to such a denial of the rights of the plaintiffs as was reasonably calculated to cause and probably did cause the rendition of an improper judgment." *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 207 S. W. 904.

One not prejudiced by an award is in no position to complain of it on appeal. *Hanrick v. Hanrick*, 110 Tex. 59, 214 S. W. 321.

Rulings on pleadings. *Chicago, R. I. & G. Ry. Co. v. Trout* (Com. App.) 206 S. W. 829; *City of Dallas v. Shows* (Com. App.) 212 S. W. 633; *Hudmon v. Foster* (Com. App.) 231 S. W. 346.

Misjoinder of parties. *Crenwelge v. Ponder* (Com. App.) 228 S. W. 145.

Continuance. *Chicago, R. I. & G. Ry. Co. v. Trout* (Com. App.) 206 S. W. 829.

Evidence. *Houston Belt & Terminal Ry. Co. v. Stephens*, 109 Tex. 185, 203 S. W. 41; *Freeman v. Huffman* (Com. App.) 206 S. W. 819; *Hackney Mfg. Co. v. Celum* (Com. App.) 221 S. W. 577, affirming judgment (Civ. App.) 189 S. W. 988.

Instructions. *Peden Iron & Steel Co. v. Jaimes* (Com. App.) 208 S. W. 898; *Chicago, R. I. & G. Ry. Co. v. Smith* (Com. App.) 222 S. W. 1099, affirming judgment (Civ. App.) 197 S. W. 614; *Dallas Waste Mills v. Texas Cake & Linter Co.* (Com. App.) 228 S. W. 118; *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721; *Pullman Co. v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 741.

Special issues. *Foster v. Atkir* (Com. App.) 215 S. W. 955; *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366.

and rehearing denied (Com. App.) 224 S. W. 1087; *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

Art. 1555. [976] [1050] Mandate to issue, when.

Cited, *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668.

Art. 1557. [976] [1050] Affidavit of inability to pay or secure costs.

Sufficiency of affidavit.—This article is satisfied, in the absence of timely objection, by affidavit of a party on behalf of herself and husband made a party pro forma, she also stating he was away in the army. *Dignowity v. Fly*, 110 Tex. 613, 223 S. W. 165, enforcing former judgment 110 Tex. 613, 210 S. W. 505.

Art. 1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.

Right to mandate.—Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, § 3078¼d), authorizes the appellate court to grant a motion of an appellee, requesting it to instruct the clerk to issue a mandate, although costs had not been paid within one year from the reversal of a judgment in favor of appellee, it appearing that appellee entered the military service of the United States, before he became aware of reversal of his judgment, and served overseas until within three months of filing his motion, notwithstanding this article. *Kuehn v. Neugebauer* (Civ. App.) 216 S. W. 259.

Relators under judgment of the Supreme Court in mandamus to the Court of Civil Appeals to issue mandate to the trial court, in a certain suit in which there had been a reversal, at any time within 12 months from the date of the judgment of the Supreme Court in that suit, on the payment of costs in that suit or the making of affidavit in lieu thereof, having become entitled to the mandate by seasonably filing such affidavit, and it not being contested within the 12 months, though filed more than 50 days before expiration thereof, their rights could not be defeated by the clerk, the adverse parties in the original suit, and the Court of Civil Appeals by means of a subsequent contest and hearing. *Dignowity v. Fly*, 110 Tex. 613, 223 S. W. 165, enforcing former judgment, 110 Tex. 613, 210 S. W. 505.

Computation of period.—The 12 months allowed by statute for taking out a mandate runs from the day of judgment of the Supreme Court, in a case reversed and remanded by the Court of Civil Appeals, in which a writ of error is denied. *Dignowity v. Fly*, 110 Tex. 613, 210 S. W. 505.

The judgment of the Court of Civil Appeals is not the "final judgment" required by this article, since the appeal, with or without supersedeas, continues a suit, depriving the judgment of the finality necessary for admission in evidence. *Id.*

Certificate of no mandate.—The clerk of the Court of Civil Appeals is not required to make certificate stating only the date of judgment reversing and remanding the judgment of the court below, and that no mandate had been taken out. *Texas Co. v. Charles Clark & Co.* (Civ. App.) 196 S. W. 251.

The jurisdiction of the Court of Civil Appeals reversing and remanding a cause terminating with the expiration of the term in which such judgment was rendered and a motion for rehearing refused, such court has no original jurisdiction of a motion by appellant to require the clerk of that court to issue the certificate of no mandate taken out. *Id.*

Effect of failure to take out mandate.—Where judgment against defendant was reversed, if he desired to have matter retried in same action, he should have procured mandate within 12 months of decision on appeal, but, not having done so, he cannot, in another action by him, take advantage of dismissal of case from docket; parties stand as though no suit had ever been brought. *Gilmore v. Ladell* (Civ. App.) 196 S. W. 362.

CHAPTER TEN

REHEARING

Art.	Art.
1561. Motion for, when and how made.	1562-1565. [Note.]

Article 1561. [977] [1051] Motion for, when and how made.

Cited, *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725.

Application.—A motion for rehearing the action of the Supreme Court in refusing a writ of error, which in effect charges the court with negligently considering the question involved and obstinately refusing to be governed by controlling authorities, will not be considered but will be stricken from the files. *Batson-Milholme Co. v. Faulk*, 109 Tex. 480, 211 S. W. 972.

Art. 1562-1565. [978-981] [1052-1055].

Cited, *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725.

CHAPTER TWELVE

REPORTER TO THE SUPREME COURT

Article 1572. [959] Appointment and removal of reporter.—The Judges of the Supreme Court, after their election to each term of office, shall appoint some person or persons learned in the law, being a licensed attorney, to report the decisions of the Supreme Court, who shall be removable at the pleasure of the court, and who shall be paid for the services required, three thousand dollars per annum, payable monthly on the certificate of the Chief Justice. [Acts 1882, p. 71; Acts 1919, 36th Leg., ch. 36, § 5.]

Took effect 90 days after March 19, 1919, date of adjournment.

CHAPTER THIRTEEN

COMMISSION OF APPEALS

Art.	Art.
1579a. Establishment; members; appointment, etc.	1579g. Same; report to Supreme Court.
1579b. Sections of commission; clerk; reference to sections.	1579h. Same; opinions.
1579c. Causes referred by consent.	1579i. Refiling papers; costs.
1579d. Report on causes referred.	1579j. Sessions; stenographers; clerk.
1579e. Opinions.	1579k. Seal; records.
1579f. Reference of causes by Supreme Court.	1579l. Writs and process; contempt.
	1579m. Practice and procedure.
	1579n. To cease, when.

Article 1579a. Establishment; members; appointment, etc.—That a court, which shall be styled the Commission of Appeals of the State of Texas, to consist of six persons learned in the law, to be appointed by the Governor, by and with the advice and consent of the Senate, if in session, be and the same is hereby created. The members of said Commission of Appeals of the State of Texas shall have the same qualifications as are prescribed by law for the Judges of the Supreme Court of the State, and shall receive for their services the same salary to be paid in the same manner as are the salaries of the judges of the Supreme Court. The members of said Commission of Appeals shall, before entering upon the discharge of their duties as such, respectively, take the oath of office prescribed by the Constitution.

In case of a vacancy on said Commission of Appeals by the death, resignation or removal of any member thereof, during the vacation of the Legislature, it shall be the duty of the Governor to fill the same by appointment, and the persons appointed shall continue in office until the next regular session of the Legislature after the appointment. The concurrence of two of the judges of any section shall be necessary to the decision of any question or matter referred to them.

The term for which said Commission shall exist shall be from the first Monday in October, 1918, until the last Saturday in June 1923. Provided the term of office of the judges now appointed and acting upon said Commission of Appeals shall expire on the last Saturday in June, 1921, and the Governor is hereby empowered to appoint, at any time after this Act shall take effect, the judges of said Commission for the term beginning the last Saturday in June, 1921, and ending the last Saturday in June, 1923. Provided, further, that the names of the persons so appoint-

ed shall be submitted to the Senate for confirmation, if in session when such appointments are made, or if not in session, then to the first session of the Senate thereafter. [Acts 1918, 35th Leg. 4th C. S., ch. 81, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 34, § 1; Acts 1921, 37th Leg., ch. 119, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 1579b. Sections of commission; clerk; reference to sections.—Said Commission of Appeals shall be divided into, and it shall sit in, two sections to be known as Section A and Section B, each of which shall consist of three members, and the Governor, in making the appointments to membership on said Commission of Appeals shall designate for which section thereof the appointments are respectively made, and each section of said Commission of Appeals shall be a complete entity in and of itself and shall have all of the power and authority hereinafter conferred upon the Commission of Appeals; but there shall be only one clerk for said Commission of Appeals, and the entire Commission of Appeals shall sit and act together in the making and formulating of the rules of procedure hereinafter provided for. And when authority is given in this Act for the reference of any case to said Commission of Appeals, such case may be referred to either section thereof. [Acts 1918, 35th Leg. 4th C. S., ch. 81, § 2.]

Art. 1579c. Causes referred by consent.—Said Commission shall have the power to hear and pronounce award upon all Civil cases now and hereafter pending in the Supreme Court, wherein the parties or their attorneys may file consent, in writing, to the reference thereof to said Commission. [Id., § 3.]

Art. 1579d. Report on causes referred.—Said Commission shall report its conclusions or award to the Supreme Court in the cases so referred, and may accompany the same with a brief synopsis of the case and their opinion thereon; and the conclusions or award aforesaid shall be and become the judgment of said Supreme Court, and said court shall make and render such further order, judgment, or decree thereon as may be necessary or proper to make said award effective. [Id., § 4.]

Art. 1579e. Opinions.—The opinion of said Commission in the cases so referred to it by consent, in writing, shall not be published in the reports of the decisions of the Supreme Court, nor shall the same have any further or other effect than to determine the particular causes wherein rendered, and shall have no force or effect or authority as precedent in other causes, unless otherwise decided by the Supreme Court. [Id., § 5.]

Art. 1579f. Reference of causes by Supreme Court.—The Supreme Court is hereby authorized and empowered to refer to said Commission of Appeals of the State of Texas any case or cases now or hereafter pending before said Court, for examination and report thereon; and it shall be the duty of the Supreme Court, in order to relieve the docket of said Court of the great number of cases now [now] encumbering it, from time to time to refer to said Commission of Appeals so many of said cases now and hereafter pending in said Court as may be reasonably considered and acted upon by the same at the several sessions thereof, having respect in such reference to the length of time such cases have been pending as well as to promote an early disposition of the cases on the docket; provided, that when any case is referred by the Supreme

Court to said Commission of Appeals, the counsel for both parties shall have notice thereof, and shall have the right to be heard upon the same as if said cause were tried by the Supreme Court, and said Commission of Appeals shall make rules regulating the hearing of causes submitted to them. [Id., § 6.]

Art. 1579g. Same; report to Supreme Court.—When said Commission of Appeals has considered and determined upon the proper disposition of any cases referred to the same, according to Section 6 of this Act [Art. 1579f], their opinion shall be submitted, together with a brief synopsis of the case, to the Supreme Court, and the record shall be returned herewith; the report so made may be used by said Supreme Court to facilitate it in reaching a conclusion upon the law and facts of the case. [Id., § 7.]

Effect of approval.—The approval by the Supreme Court of judgments recommended by the Commission of Appeals merely adopts the view of the Commission as to the determination to be made of the cause, and is not an approval of the opinion in the particular case, or the reasons therein for the Commission's conclusion. *McKenzie v. Withers*, 109 Tex. 255, 206 S. W. 503.

Art. 1579h. Same; opinions.—The opinion of said Commission of Appeals in cases referred to it by the Supreme Court, when adopted by said court, shall be published as the opinion thereof, as in other cases, unless otherwise directed by the Supreme Court. [Id., § 8.]

Art. 1579i. Refiling papers; costs.—In cases referred to the Commission of Appeals under this Act, the papers shall not be re-filed with said Commission of Appeals, and only such additional costs as may be essential to carry into effect the provision hereof shall be incurred by the parties to such cases by reason of the reference thereof. [Id., § 9.]

Art. 1579j. Sessions; stenographers; clerk.—Said Commission of Appeals shall hold its sessions in Austin, Texas, at the same time and place as the Supreme Court, but the said Commission of Appeals shall continue their work during the vacation of the Supreme Court in mid-summer, subject, however, to the right of said judges of the Commission of Appeals to take a vacation, not to exceed eight weeks, during said period. They shall appoint as many stenographers not exceeding four, as said Commission may find necessary, and such stenographers shall perform the duties required of them by said Commission of Appeals, and each of whom shall receive an annual salary not to exceed fifteen hundred dollars. The salaries of said stenographers shall be paid in monthly installments, on warrants approved by the Chief Justice of the Supreme Court. The clerk of the Supreme Court shall perform the duties of clerk of said Commission of Appeals, and no extra fees shall be allowed the clerk of the Supreme Court, or his deputy, for services rendered said Commission save and except an additional compensation of fifteen hundred dollars per annum for such services, in addition to the compensation now allowed him by law, to be paid out of the fees of his office. [Id., § 10.]

Art. 1579k. Seal; records.—Said Commission of Appeals shall have a seal, being a star with five points and the words, "Commission of Appeals of the State of Texas" around the same. Regular dockets and minutes of all proceedings by or before said Commission of Appeals shall be kept, and the records and proceedings of courts of record, and all cases shall be docketed in the order in which they are transferred or referred by the Supreme Court. [Id., § 11.]

Art. 1579l. Writs and process; contempt.—Said Commission of Appeals shall have the right to issue writs of certiorari to perfect the record, and such process as the Supreme Court might issue to make parties, and shall have the power to punish for contempt. [Id., § 12.]

Art. 1579m. Practice and procedure.—All laws and rules regulating practice and procedure in the Supreme Court shall be of force in the practice and proceedings of said Commission of Appeals so far as the same are applicable, and all applications for rehearing in cases referred to said Commission of Appeals shall be made before and determined by the Commission of Appeals. [Id., § 13.]

Sec. 14 makes an appropriation. Acts 1919, 36th Leg. 2d C. S., ch. 34, sec. 1, also makes an appropriation.

Rehearing.—Since the Commission of Appeals acts only in an advisory capacity as to motions for rehearing, and such a motion must also be considered by the Supreme Court, oral arguments will not be heard by the Commission on rehearing, except in exceptional cases, where the motion raises a doubt in the minds of the members of the Commission as to the correctness of the original decision by them. *First Nat. Bank v. Rush* (Com. App.) 213 S. W. 931.

Art. 1579n. To cease, when.—The term for which the Commission of Appeals created hereby shall exist shall be from the first Monday in October, 1918, until the last Saturday in June, 1923. [Acts 1918, 35th Leg. 4th C. S., ch. 81, § 15; Acts 1919, 36th Leg. 2d C. S., ch. 34, § 1 (§ 15); Acts 1921, 37th Leg., ch. 119, § 1 (§ 15).]

TITLE 32

COURTS OF CIVIL APPEALS

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| <p>Chap.</p> <ol style="list-style-type: none"> 1. Judges of the Courts of Civil Appeals. 2. Terms of the Courts of Civil Appeals. 3. Jurisdiction of the Courts of Civil Appeals. 4. Clerks of the Courts of Civil Appeals. 5. Stenographers. 6. Proceedings in cases in the Courts of Civil Appeals. 7. Hearing causes. | <p>Chap.</p> <ol style="list-style-type: none"> 8. Certification of questions to Supreme Court, etc. 9. Judgment of the Court. 10. Conclusions of fact and law. 11. Rehearing. 12. Execution of judgment. 13. Reporter to the Courts of Civil Appeals. |
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CHAPTER ONE

JUDGES OF THE COURTS OF CIVIL APPEALS

Article 1584. [1021] Disqualification of judges.

Cited, *Grigsby v. May*, 84 Tex. 240, 19 S. W. 343.

Validity of statute.—This article, does not conflict with Const. art. 5, § 11, providing for such certification when "any member" is disqualified, as under the liberal provisions of art. 5, § 6, the legislature is permitted to confer such jurisdiction on the court as it may deem best: and the fact, therefore, that one member is alone disqualified to try a case, does not prevent the other members from proceeding therewith. *Nalle v. City of Austin* (Civ. App.) 21 S. W. 375.

Disqualification in general.—That two of justices of this court were connected with appellant's codefendant in local capacity held not to disqualify them. *Gulf Coast Transp. Co. v. Standard Milling Co.* (Civ. App.) 197 S. W. 874.

In insurance company's suit on premium note assigned to it by another insurance company, Chief Justice of Court of Civil Appeals, holder of policies in assignor company, and whose son-in-law was its vice president and acting manager, and had discussed the transaction in his presence, was disqualified to sit in the case. *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

A judge, who is a resident of a city and a taxpayer, although interested in a suit brought by certain persons in behalf of the taxpayers of the city as a class, is not a "party" to the suit, so as to be disqualified to hear it. *City of Dallas v. Armour & Co.* (Civ. App.) 216 S. W. 222.

Interest as taxpayer.—On appeal to the Court of Civil Appeals in condemnation proceedings instituted by a county, a judge who owns land in such county is not interested in the question to be determined within the meaning of this article. *Herf v. James*, 86 Tex. 230, 24 S. W. 396.

Judges, who are taxpayers of a city, although interested in a suit brought in behalf of the taxpayers of such city as a class to enjoin a purposed expenditure of the public funds and donation of land, they are not so immediately and directly "interested" as to be disqualified to try and hear the suit, under Const. art. 5, § 11, and this article. *City of Dallas v. Armour & Co.* (Civ. App.) 216 S. W. 222.

CHAPTER TWO

TERMS OF THE COURTS OF CIVIL APPEALS

Article 1588. [995] Quorum, what, and court adjourned, when.

Validity of statute.—This article is valid, though Const. art. 5, § 6, as amended in 1892, authorizing the establishment of such courts, does not prescribe the number requisite to constitute a quorum. *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668.

CHAPTER THREE

JURISDICTION OF THE COURTS OF CIVIL APPEALS

Art.	Art.
1589. Jurisdiction defined.	1592. Issue writs of mandamus, etc.
1590. Judgment conclusive, when.	1593. Inquire into facts of jurisdiction.
1591. Same.	1595. May mandamus district courts.

Article 1589. [996] Jurisdiction defined.

Jurisdiction in general.—A contempt proceeding, criminal in its nature, cannot be reviewed by the Court of Civil Appeals. *Beverly v. Roberts* (Civ. App.) 215 S. W. 975.

Where it appears that the jurisdiction of the Court of Civil Appeals over an appeal attached prior to the suing out of writ of error in the Supreme Court by appellee who might have presented his contentions in the Court of Civil Appeals, the Court of Civil Appeals has jurisdiction, and the writ of error in the Supreme Court will be dismissed, since, where two courts have concurrent jurisdiction, that which first acquires jurisdiction will retain it. *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

Appeals from county courts—Amount in controversy.—The court of civil appeals can take cognizance of an appeal from a county court only when the judgment appealed from shall exceed \$100, exclusive of interest and costs, though the case was heard in the county court on appeal from a justice's court without a trial *de novo*. (*Williams v. Sims* [Tex. App.] 16 S. W. 786, disapproved. *Pevito v. Rodgers*, 52 Tex. 581, explained.) *Gulf. C. & S. F. Ry. Co. v. Rowley* (Civ. App.) 22 S. W. 182.

Where plaintiff alleged he had paid \$42.30 usurious interest, and that defendant was asserting an illegal claim for \$20, the principal debt, and prayed for judgment for \$84.60, and for cancellation of the debt, and the amount was insufficient to give the Court of Civil Appeals jurisdiction. *Watson v. Evans* (Civ. App.) 195 S. W. 1170.

Justice court judgment being less than \$100, and plaintiff's amended petition claiming a larger sum on appeal to county court was insufficient to state cause of action, jurisdiction of county court was final. *Gibson v. St. Anthony Hotel* (Civ. App.) 198 S. W. 412.

Accrued interest on judgment sued upon is "interest" within subsec. 3, and cannot be included to make jurisdictional amount. *Midland Casualty Co. v. Arnott* (Civ. App.) 199 S. W. 890.

Although garnishment proceeding under Rev. St. 1911, art. 271, is ancillary to main action, yet in view of arts. 274, 293, 299, it is suit between judgment creditor and garnishee, in which the "amount in controversy" affecting jurisdiction is "the amount of plaintiff's judgment, with interest and costs," and where plaintiff's judgment is less than, but with interest called for by the judgment exceeds, \$100, this article does not apply. *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187.

Where plaintiff sued in justice court for damages for negligent death on a certain date of a horse valued at \$100, not asking for interest, the interest is not in controversy so that the Court of Civil Appeals is without jurisdiction. *International & G. N. Ry. Co. v. Lyon* (Civ. App.) 200 S. W. 228.

In suit by a railroad's employé for a month's wages of \$84.74, wherein the railroad cited in an assignee of plaintiff's wages, who filed cross-bill seeking to recover, not only the month's wages sued for by plaintiff, but the balance of \$142.90 claimed by him under plaintiff's assignment, \$142.90 was the amount in controversy, and the Court of Civil Appeals has jurisdiction of the appeal. *McKneely v. Armstrong* (Civ. App.) 212 S. W. 175.

Where in justice court defendant itemized the two amounts sued for as \$90 and an unpaid balance of \$15.60 for extra work, but stated the total amount due as \$98.64, and defendant in his cross-action asked for judgment for \$180 and costs, the amount in controversy brings the case within the jurisdiction of the Court of Civil Appeals. *Mackay Telegraph-Cable Co. v. Proctor* (Civ. App.) 212 S. W. 547.

The question of jurisdiction of Court of Civil Appeals in case originating in justice court is fixed by the amount involved in the justice court. *Id.*

The Court of Civil Appeals has appellate jurisdiction over a real estate commission claim of \$100 and interest, since interest is recoverable as damages, and not strictly as interest. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

In the trial of a cause appealed from the justice to the county court, where notes introduced show that defendant was indebted to plaintiff in the sum of \$280, but no suit was brought on these notes, and no judgment asked or rendered thereon, their only purpose in evidence being under the pleadings to show that appellant was indebted to appellee in an amount of \$80 or less, for which plaintiff asked and secured judgment, the real amount involved was but \$80. *Robson v. McKinney* (Civ. App.) 213 S. W. 314.

The appellate court has no jurisdiction of an appeal from the county court in a suit originating in justice court for \$80 damages and interest; interest being recoverable only for detention of money, and not as a distinct element of damages. *Rhone v. Russell* (Civ. App.) 219 S. W. 1113.

Where plaintiff sued out writ of garnishment after obtaining a judgment against defendant in the justice court, and where the only issue on appeal to the county court was the ownership of an amount less than \$100 which was in the hands of the garnishee, as between the defendant and intervener claiming ownership, the "amount

in controversy," on appeal to the Court of Civil Appeals from county court's judgment, was the amount so held by garnishee, and not the amount of the judgment rendered for plaintiff. *King & King v. Porter* (Civ. App.) 229 S. W. 646.

Art. 1590. [996] Judgment conclusive, when.

See *San Antonio Public Service Co. v. Tracy* (Civ. App.) 221 S. W. 637.

Construction in general.—The supreme court, while not empowered to revise the conclusions of fact of the court of appeals, may consider the evidence, in rendering its decision. *Clarendon Land, Investment Agency Co. v. McClelland*, 86 Tex. 179, 23 S. W. 1100, 22 L. R. A. 105.

Art. 1620 does not apply to any cases in which, by this article, exclusive jurisdiction is conferred on the court of civil appeals. *Herf v. James*, 86 Tex. 230, 24 S. W. 396.

An action for divorce, in which one judge of the Court of Civil Appeals dissented from the opinion that the evidence was insufficient to warrant the decree for plaintiff, will not be certified to the Supreme Court, in view of this article, arts. 1521, and 1591, making it conclusive on law and fact in cases of divorce, especially when it would result in great delay in the determination of the case to certify it. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Judgment conclusive on facts.—Excessiveness of verdict is ordinarily a question of fact, and the determination of the Court of Civil Appeals is final. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

Whether there is any evidence to support a jury's finding or verdict is purely a question of law, but where there is some evidence in support thereof, the question whether it is sufficient in the estimation of the trial court or of the Court of Civil Appeals to support a finding or verdict, is a question of fact, and not one of law, and the decision of the Court of Civil Appeals thereon is final, and not subject to review, in view of amended Const. art. 5, § 6, and this article. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Art. 1591. [996] Same.

See *Penn. v. Briscoe County* (Com. App.) 207 S. W. 990; *Perry v. Greer*, 110 Tex. 549, 221 S. W. 931; *Braumiller v. Burke* (Sup.) 230 S. W. 400.

Cited, in re Subdivision Six of Supreme Court Jurisdiction Act of 1917 (Sup.) 201 S. W. 390.

Construction in general.—Art. 1620 does not apply to any cases in which, by this article, exclusive jurisdiction is conferred on the court of civil appeals. *Herf v. James*, 86 Tex. 230, 24 S. W. 396.

Whether a case is one of boundary wherein the judgment of a Court of Civil Appeals is final, depends on the way in which it developed before the trial court, and not on the allegations of the parties and their pleadings alone. *Braumiller v. Burke* (Sup.) 230 S. W. 400.

The determination of whether the "case," which means suits, causes, or actions, is one in which the judgment of the Court of Civil Appeals is final, should depend on the case made by the pleadings of the parties on which they went to trial, not on the questions controverted at the trial; otherwise, in the same case on the same pleadings, the finality of the judgment rendered on appeal after different trials would depend on the evidence introduced at the particular trial. *Braumiller v. Burke* (Civ. App.) 232 S. W. 907.

Cases within county court's jurisdiction.—The decision of the Court of Civil Appeals in a garnishment proceeding based on a judgment is final, where the amount in controversy in the original suit was within the jurisdiction of the county court, and the case does not fall within any of the exceptions provided in this article. *Warren Hardware Co. v. Dodson*, 110 Tex. 576, 222 S. W. 157, dismissing writ of error (Civ. App.) *Dodson v. Warren Hardware Co.*, 162 S. W. 952.

On appeal from the judgment in an action to recover property of the value of \$250 or its value, the judgment of the Court of Civil Appeals is final, and the Supreme Court cannot review the same on error. *Clay v. Marmar* (Com. App.) 207 S. W. 84.

Where county court under the Constitution and but for art. 4653 would have had original jurisdiction of an action in which the judgment was rendered and jurisdiction of action to enjoin collection of such judgment, a judgment of Court of Civil Appeals upon appeal from district court in the injunction suit was final. *Walker Grain Co. v. Ft. Worth Grain & Elevator Co.* (Com. App.) 209 S. W. 398.

Subdivision I applies to adjunct or ancillary proceedings as well as to the original action. *Id.*

Where a cause was appealed from a county court, the judgment of the Court of Civil Appeals is conclusive upon questions of law or fact, except in probate matters and cases involving the revenue laws of the state, of the validity of a statute and questions presented, which are not within those exceptions, are not subject to review by the Supreme Court. *Freeman v. W. B. Walker & Sons* (Com. App.) 212 S. W. 637.

In a county court case, the jurisdiction of the Court of Civil Appeals is final, unless the Supreme Court has jurisdiction under art. 1623, because the decision of the Court of Civil Appeals is in conflict with the decisions of other Courts of Civil Appeals. *First Texas State Ins. Co. v. Hightower*, 110 Tex. 52, 214 S. W. 299.

While suit against a railroad for \$616.05 was filed in the district court, it was cognizable by the county court, and the Supreme Court is without jurisdiction to review

the judgment of the Court of Civil Appeals. *Panhandle & S. F. Ry. Co. v. Posey* (Com. App.) 215 S. W. 559.

Where judgments of the Courts of Civil Appeals are made final by this article, as judgments in cases within the jurisdiction of the county courts, no writ of error lies to the Supreme Court under art. 1521. *Missouri, K. & T. Ry. Co. of Texas v. Gregory* (Sup.) 226 S. W. 1075.

Cases of boundary.—A suit for the conversion of timber on a tract of land, the boundaries to which were in dispute, is not a case of boundary of which the Court of Appeals has final jurisdiction, where the right to damages for the alleged conversion did not depend wholly upon the location of the boundary line, since a case of boundary is one where the location of the boundary is the determining question of the entire case. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.* (Civ. App.) 182 S. W. 341.

Where a suit in trespass to try title to determine a boundary was joined with a cause of action for conversion of timber on the tract in controversy, the entire cause was not a case of boundary, and the Supreme Court has jurisdiction of an appeal therein, if the amount in controversy is sufficient. *Id.*

Where the decision of an action in which plaintiff sought to recover land and to restrain interference with the possession thereof depended solely upon the location of a disputed boundary line, it was a "case of boundary" in which the decision of the Court of Civil Appeals is final. *Maxfield v. E. C. Sterling & Sons*, 110 Tex. 212, 217 S. W. 937.

Suit wherein plaintiff alleged he was the owner and in possession of a survey, describing it, and alleged that defendants wrongfully entered on and took possession of a part of the land consisting of a strip of about 10 acres of the east side, with prayer for judgment for possession of the strip and for damages, held a "case of boundary." *Braumiller v. Burke* (Sup.) 230 S. W. 400.

Although the Supreme Court might determine boundary disputes where necessary on other matters properly appealed in an action of trespass to try title, yet where the whole case does not depend upon the determination of the boundary controversies, the finality of the judgment of the Court of Civil Appeals as to them should be respected. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683.

Upon error to review an action in trespass to try title, where the trial court's judgment on boundary disputes involved questions essentially of fact supported by evidence, the findings of the trial court and the Court of Civil Appeals are conclusive on the Supreme Court. *Id.*

Where there was conflicting evidence as to the eastern boundary of certain property, and the issue was submitted to the jury, which found for the interveners, and the Court of Civil Appeals, in reviewing the evidence, found that it sustained the verdict, an assignment of error raising that issue should be overruled. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

An action to recover possession of land, claimed by plaintiff and which was in the possession of the defendants, and to recover substantial damages for the removal of timber and gravel therefrom by defendants, is not a boundary case, in which the judgment of the Court of Civil Appeals is final, though plaintiff's right to recover depended upon the determination of the true location of the boundary line between his land and that claimed by two of the three defendants. *Braumiller v. Burke* (Civ. App.) 232 S. W. 907.

Cases of divorce.—An action for divorce, in which one judge of the Court of Civil Appeals dissented from the opinion that the evidence was insufficient to warrant the decree for plaintiff, will not be certified to the Supreme Court, in view of arts. 1521, 1590, and this article, especially when it would result in great delay in the determination of the case to certify it. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Contested elections.—Decision of Court of Civil Appeals affirming decision of trial court decreeing that relator recover the office of mayor is final. *Pease v. State* (Com. App.) 208 S. W. 162.

Art. 1592. [997] May issue writs of mandamus, etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Writs in aid of jurisdiction in general.—Since Court of Civil Appeals, under art. 3156, has no appellate jurisdiction of election contest for precinct office, such court has no power to issue an injunction restraining officers from placing respondent's name on official ballot in a primary election contest pending in district court, in view of this article. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Where it is necessary to issue a writ of injunction to maintain the status quo or to preserve the corpus of the subject-matter of the litigation pending appeal, the writ is in aid of the jurisdiction of the appellate court in which the appeal is pending. *Ford v. State* (Civ. App.) 209 S. W. 490.

Under arts. 3639, 4050, 4080, 4083, and 4297, until a judgment of the district court, affirmed by the Court of Civil Appeals, appointing a guardian, has been certified to the clerk of the county court, filed, recorded, and docketed, and orders made by that court fixing the amount of the bond, approving the bond, appointing appraisers, and directing the issuance of letters of guardianship, the Court of Civil Appeals has jurisdiction, by proper process under this article, to require the execution of the judgment affirmed by it. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Prohibition.—Prohibition will not issue to prevent lower court from entertaining suit to set aside, for fraud and perjury, judgment recovered by relator, on ground that petition in suit to set aside does not state cause of action. *State v. Stark* (Civ. App.) 203 S. W. 371.

Injunction.—Courts of Civil Appeals in Texas have no authority to issue original writs of injunction, but authority is conferred upon them by this article, to issue such writs where they may be necessary to enforce their jurisdiction. *Ford v. State* (Civ. App.) 209 S. W. 490.

Court of Civil Appeals has jurisdiction of subject-matter of state's suit to restrain defendant from selling intoxicants at retail, that is, prohibition of the sale of intoxicants, despite adoption of prohibition amendment to Constitution of United States; amendment not being a complete law, and Congress having enacted no law for its enforcement, while it gives states concurrent power. *Id.*

Where defendants appealed merely by giving a cost bond, and plaintiff commenced garnishment proceedings, the Court of Civil Appeals will not issue writs of injunction and mandamus to restrain enforcement of the garnishment judgment, for such writs will only be issued to enforce its jurisdiction, and the garnishee not having appealed from the judgment in garnishment, and not being a party to the original suit, the Court of Civil Appeals' jurisdiction is not involved. In such case defendants, if aggrieved by the garnishment judgment, whether it be final or interlocutory, have appropriate remedies in the trial court, and are not entitled to injunction or mandamus, issued by the Court of Civil Appeals; those writs being merely to protect its jurisdiction. *Durham v. Scrivener* (Civ. App.) 228 S. W. 282.

Though the purchaser, against whom judgment had been rendered on vendor's lien notes, and who had appealed therefrom, with cost bond only, was financially unable to give a supersedeas bond, that fact does not authorize the Court of Civil Appeals to grant an injunction against the execution of the judgment pending the appeal. *Spark v. Lasater* (Civ. App.) 232 S. W. 346.

Certiorari to bring up or correct record.—Where assignments have been lost or destroyed, and have been substituted for, as provided by Rev. St. 1911, arts. 2157-2163, inclusive, the transcript on appeal can be perfected by certiorari. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

Under rules 8 and 11 of the Court of Civil Appeals (142 S. W. xi), a motion by appellee for certiorari to perfect record made more than a year after filing of the transcript, was too late. *Rhodes v. Coats* (Civ. App.) 215 S. W. 470.

In a proper case motions by appellee for certiorari to perfect record, made more than 30 days after the filing of the transcript, may be entertained, notwithstanding the Court of Civil Appeals Rules 8 and 11 (142 S. W. xi), but it will not be done where fundamental error is presented in the brief of appellant. *Id.*

Art. 1593. [998] May inquire into facts touching jurisdiction.

Facts touching jurisdiction.—Court of Civil Appeals can take affidavits in aid of jurisdiction, but can know whether county court had jurisdiction of appeal from justice court only from record sent up from justice court. *Fruit Dispatch Co. v. Independent Fruit Co.* (Civ. App.) 198 S. W. 594.

Issue of whether late filing of bills of exceptions was due to appellee's fault, presented for the first time on appeal by affidavits, cannot be entertained. *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203.

Assignment that judgment is not final, because not disposing of certain plaintiffs, would not be sustained, where appellees showed by affidavit that parties named in judgment were same parties as such plaintiffs, there being no contrary showing. *Texas & P. Ry. Co. v. Beckham Bros. & Co.* (Civ. App.) 202 S. W. 991.

Where court adjourned March 31st and a new term began April 2d, a motion for appeal and an affidavit in lieu of bond filed April 7th was timely under art. 2084, although the order granting the appeal was not entered until May 5th; the Court of Civil Appeals having, by this article, power to ascertain matters of fact touching its jurisdiction. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

If the issue made on the question of settlement by the parties affected the jurisdiction of the Court of Civil Appeals it could consider, to determine the fact of jurisdiction only, the affidavits presented by appellant in opposition to appellee's motion to affirm on certificate. *Hedrick v. Matthews* (Civ. App.) 216 S. W. 424.

While Courts of Civil Appeals have power on affidavit or otherwise as thought proper to ascertain such matters of fact as may be necessary to proper exercise of their jurisdiction, the power is restricted to matters not appearing of record, and does not admit of facts contradicting the record. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

Art. 1595. [1000] May mandamus district courts.

See *Gulf, C. & S. F. Ry. Co. v. Muse*, 207 S. W. 897.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair* (Sup.) 196 S. W. 1153.

Extent of power conferred.—Court of Civil Appeals cannot issue writ of mandamus to compel district court to proceed with trial of cause pursuant to law, unless its action in continuing cause amounts to a refusal so to proceed. *Matagorda Canal Co. v. Styles* (Civ. App.) 207 S. W. 562.

The Court of Civil Appeals may, by mandamus, compel a judge of the district court to proceed to trial and judgment in a cause "agreeable to the principles and

usages of law," but cannot direct the character or kind of his decision. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

CHAPTER FOUR

CLERKS OF THE COURTS OF CIVIL APPEALS

Article 1602a. Deputy clerks, appointment of, and fees; salary.—Each of said clerks shall hereafter be authorized to employ a deputy clerk, at an annual salary of \$1500.00 per year, payable in equal monthly installments to be paid out of the General revenue of this State. (Acts 1919, 36th Leg., ch. 78, § 2.)

Took effect 90 days after March 19, 1919, date of adjournment.

CHAPTER FIVE

STENOGRAPHER

Article 1606. [1012] Appointment; oath; salary; bond.—Each Court of Civil Appeals shall be authorized to appoint one stenographer, who shall be a typewriter, who shall discharge such duties as may be required by the court, shall be sworn to keep secret all matters which may come to his knowledge as such stenographer and typewriter, and who shall receive a salary of fifteen hundred dollars per annum and shall give bond with two or more sureties in the sum of two thousand dollars, to be approved by the presiding Judge of said court, payable to the State of Texas, conditioned for the faithful performance of his duties as such stenographer and typewriter. [Acts 1893, p. 165; Acts 1895, p. 79; Acts 1899, p. 115; Acts 1905, p. 19; Acts 1915, 34th Leg., ch. 81, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 43, § 1.]

Sec. 2 repeals all laws in conflict. The act took effect 90 days after July 22, 1919, date of adjournment.

CHAPTER SIX

PROCEEDINGS IN CASES IN THE COURTS OF CIVIL APPEALS

Art. 1607. Cases, how brought before the courts for trial.	Art. 1612. Assignments of error; requisite of.
1608. Transcript filed, when.	1613. Docket of causes and disposition of same.
1609. New appeal bond allowed, when.	1614. Appearance by brief, etc.
1610. Certificate of affirmance, proceedings.	

Article 1607. [1014] Case, how brought before the court for trial.

See *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.
Cited, *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Errors that can be reviewed—in general.—Under this article, and article 1971, giving of peremptory instruction cannot be reviewed without objection if its propriety is doubtful, and a critical examination of the evidence is necessary. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

Appeal will be dismissed on the court's own motion, where absence of jurisdictional requirements appear on face of the record, though called to the court's attention by motion to dismiss, which need not be entertained. *Horn v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 201 S. W. 1101.

Where briefs have not been filed by any of the parties on appeal, the reviewing court can consider only fundamental errors. *Holguin v. Woodlawn Real Estate & Improvement Co.* (Civ. App.) 216 S. W. 899.

The jurisdiction of the Court of Civil Appeals is limited to the review of error assigned in the manner prescribed by law and error of law apparent on the face of the record. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

Reference to transcript, etc.—As statement of undisputed facts made by counsel for appellant is unchallenged, and facts therein stated are in accord with record, court on appeal may adopt statement as its finding of fact. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

Errors apparent on face of record.—A judgment unsupported by pleadings is an error of law apparent from record's face, which Court of Civil Appeals will correct on its own motion. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

Record disclosing that decree was void, because describing different tract of land than that sued for, shows fundamental error, reviewable for first time on appeal. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Error, to be reviewable without an assignment, where it must be discovered by an examination of the evidence, must be open and easily discovered by inspection. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

Error that judgment by default was without support of testimony was not "apparent on face of record," which it was duty of Court of Civil Appeals, to notice and correct without reference to whether validity of judgment was challenged below. *Brown v. Greenspun* (Civ. App.) 200 S. W. 174.

Where record discloses error apparent on its face, judgment must be reversed and judgment rendered in appellant's favor, though assignments cannot be sustained. *Davis v. Teal* (Civ. App.) 200 S. W. 1166.

In action to recover automobile, in alternative for purchase price, with foreclosure of lien, plaintiff having sued out writ of sequestration and car having been replevied later by defendant, failure of verdict and judgment for plaintiff against defendant and sureties on replevin bond to find value of car held error apparent on face of record requiring reversal, though not raised in motion for new trial. *Reeves v. Avina* (Civ. App.) 201 S. W. 729.

An error discovered by close scrutiny of the entire evidence is not "apparent," and there is no error of law where there is any evidence whatever to sustain a judgment. *Stewart v. McAllister* (Civ. App.) 209 S. W. 704.

When the pleadings are sufficient to support judgment, and the findings of the jury also sustain the judgment, there is no error of law apparent upon the face of the record, and the judgment, in the absence of a motion for new trial and other requisites for an appeal, cannot be assailed. *Id.*

An error which can be ascertained only by looking into the record and considering the evidence may not be considered without an assignment of error, as it is not an "error apparent upon the face of the record," which means that the error can be found upon looking on the face of the record, the fact pointed out showing good ground for the court to interfere. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Where appellant not only did not file a motion for a new trial, but also failed to file assignments of error in the trial court as required by *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 1612, 2113, appellant was not entitled to complain of the judgment except for error "in law apparent on the face of the record," under this article. *Ætna Accident & Liability Co. v. Trustees of First Christian Church of Paris* (Civ. App.) 218 S. W. 537.

Whether a complaint that specified finding is without evidence to support it, is well founded or not, requires a careful reading of the entire statement of facts, and, where the existence of error is discoverable only in that way, it is not error "apparent on the face of the record" within the meaning of this article. *Id.*

See notes 10 and 11 under art. 1612, in 1914 edition and 1918 Supplement.

Fundamental errors.—Error in rendering judgment unsupported by evidence in that it was uncontroverted that insurance policy sued on was not effective until after the loss, held fundamental. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

A judgment not conforming to the pleadings or based on insufficient pleadings is fundamentally erroneous, and should be revised, though there is no assignment. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

Where it cannot be said that answer discloses no defense, fundamental error is not apparent from pleadings, trial having resulted in verdict for defendant. *Old Faithful Oil Co. v. McGiveran* (Civ. App.) 200 S. W. 249.

Failure of the court to find the value of each item in a judgment in replevin is not fundamental error requiring reversal. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

While the suggestion that a pleading is not good as against a general demurrer raises a question of fundamental error, the rule does not apply to objections raised by special exception. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

In suit to foreclose chattel mortgage, failure to allege the value of the property mortgaged to secure the debt is fundamental error apparent of record, requiring reversal, whether or not there was an exception, plea, or other objection to the petition on that ground in the court below. *People's Ice Co. v. Phariss* (Civ. App.) 203 S. W. 66.

No action of the court can be said to be fundamental error if to discover the alleged error an examination of the entire statement of facts must be made. *Barkley v. Gibbs* (Civ. App.) 203 S. W. 161.

In an election contest, where court, by consent of both sides, heard law and evidence together, and entered judgment sustaining a general demurrer, there was not such fundamental error as required a reversal, where not complained of on appeal. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

A fundamental error is one apparent upon the face of the record, and affidavits showing error, being no part of the record, cannot be considered. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

Even were arts. 1970-1974, 2061, relating to the filing of objections and exceptions to giving and refusing of charges applicable when case is submitted on special issues, sufficiency of evidence to support a finding is an open question on appeal, not waived by submission without objection, having been made ground of motion for new trial. *Abilon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

Where defendant, by general demurrer and denials, merely joined issue on the facts, presenting in the Court of Civil Appeals for the first time question of the sufficiency of the pleadings, his action was permissible if the pleadings presented only one specific cause of action, and the judgment was founded on a fundamentally different one. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

Where averment of complaint was sufficient to admit certain necessary evidence, which, in fact, was admitted on trial without exception to the pleading or objection to the evidence, objection to the sufficiency of the complaint is not one going to foundations of action, and comes too late in Court of Civil Appeals. *Id.*

On appellee's plea for affirmance of judgment, Court of Civil Appeals is required to search the record for fundamental error, and a ruling sustaining exceptions to a petition and dismissing action, which in effect is a ruling that petition states no cause of action, if error, is fundamental error. *Schulz v. Davis* (Civ. App.) 207 S. W. 634.

To base a judgment in a conversion suit on the highest market price of the property converted is fundamental error, if such market value is not the proper measure of damages. *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224.

Though complaint, not objected to, alleges facts showing that plaintiff should have sued on an implied promise, and not on the note as he did, there is no fundamental error; the evidence in the record not sustaining the allegations. *Carver v. Caldwell* (Civ. App.) 208 S. W. 555.

Where defendants sufficiently presented the record in their briefs to make it apparent that it was error to peremptorily instruct a verdict for plaintiff, the matter may be reviewed as fundamentally erroneous. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Civ. App.) 209 S. W. 145.

Where there was no motion for new trial in trial court, there can be no assignments of error except those based on fundamental error. *Stewart v. McAllister* (Civ. App.) 209 S. W. 704.

Discrepancies between original and amended petitions will not be considered as fundamental error on appeal, where attention of trial court was not called thereto by defendants in their second amended original answer. *Jones v. Fink* (Civ. App.) 209 S. W. 777.

A decree and proceedings in partition held not to show fundamental error, reviewable in absence of bill of exceptions and statement of facts on the theory that the court in its first decree judicially determined that the land was susceptible of partition, and thereafter in conformity to the report of commissioners ordered it sold, and thus violated art. 6101. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

Though petition for partition alleged that one of the defendants was a minor without legal guardian, held that, though the record showed no appointment of a guardian ad litem, etc., for such defendant, no fundamental error appeared reviewable in absence of bill of exceptions and statement of facts, where the judgment of partition rendered two years later recited that another defendant, a minor, appeared by guardian ad litem and all of the other defendants by attorney. *Id.*

Where the jury's findings showed that one who had celebrated an invalid ceremonial marriage with deceased received more in rents out of his personal property than she had paid in securing title to certain lands in which she was given no share, held, that final decree of partition did not disclose fundamental error in her favor, reviewable in absence of bill of exceptions and statement of facts. *Id.*

In suit by lessor and sublessor of pasture lands, direction of verdict for plaintiffs, in view of testimony of a defendant, held not patently erroneous on an assignment of fundamental error in relation to the sublessees' plea that their cattle did not do well on the lands described in the sublease, and that the sublessor refused to furnish other lands as he had agreed to do. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

Where testimony admitted is wholly irrelevant and immaterial to any issue in the case and inadmissible upon any theory, the court's action in admitting it will be reviewed notwithstanding absence of objection on a specific ground. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

Where the record showed that all exceptions were waived, appellant must base his attacks on a judgment on the proposition that the petition states no cause of action, and that it was fundamental error to render a judgment based upon it. *Texas Auto Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 211 S. W. 629.

By art. 1971, all objections to the charge, not made and presented to the court before the charge was read to the jury, are waived, and may not be considered on appeal to have constituted fundamental error. *Mynatt v. Agee* (Civ. App.) 214 S. W. 935.

In an action involving thousands of dollars, an error in calculation amounting to \$415 will not be considered on appeal, where complaint is made there for the first time, even though the doctrine of fundamental error is applied. *Koger v. Clark* (Civ. App.) 216 S. W. 434.

If lease set out in *hæc verba* in petition for cancellation was void on its face for want of consideration, it was fundamental error apparent of record on the part of the court to sustain a general exception to the petition. *Price v. Biggs* (Civ. App.) 217 S. W. 236.

In determining the scope of review, a "fundamental error" is one which does not require an examination and weighing of the evidence. *First Nat. Bank v. Crespi & Co.* (Civ. App.) 217 S. W. 705.

The petition by its allegations affirmatively showing the infirmity of the demand asserted, and therefore being subject to a general demurrer, a question of fundamental error, necessitating reversal, is presented, though defendant filed no answer, offered no evidence, and has brought up no bills of exception, statement of fact, nor conclusions of fact and law. *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

Where the petition sought cancellation of an oil lease for fraud and failure of consideration with respect to the agreement to drill a well within six months, the omission of an express allegation that defendants failed to begin drilling within the time agreed is not fundamental error, and is cured by findings of the court to that effect. *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

In an action by two members of a firm against a third for an accounting as to salaries paid to such third member under duress, evidence as to a threat made not in the exact words alleged in the pleading held admissible in absence of exception or objection, and a judgment entered thereon was not fundamental error. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

—**Jurisdictional questions.**—In the absence of any assignment, the court must ascertain the court's jurisdiction and revise the judgment, if rendered without jurisdiction; such a judgment being fundamentally erroneous. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

It is the duty of appellate courts to pass upon the jurisdiction of the trial court to render the judgment, whether the question is raised or not. *Werner v. Needham* (Civ. App.) 201 S. W. 213.

Art. 1608. [1015] Transcript filed, when.

See *Early-Foster Co. v. Mid-Tex Mills* (Civ. App.) 232 S. W. 1117.

Time for filing transcript.—**Statement of facts.**—Document delivered to clerk of court on appeal will not be considered as a statement of facts, where not filed by plaintiff in error in the court below within 90 days from the date the citation in error was served, as required by this article and art. 2073. *Billingsley v. Texas Midland R. R.* (Civ. App.) 208 S. W. 408.

Under this article, where the transcript was filed as required, a statement of facts filed before the expiration of the time for filing the transcript was filed in time, though not presented to opposing counsel or to the court within 100 days after the court's adjournment. *Early-Foster Co. v. Mid-Tex Mills* (Civ. App.) 232 S. W. 1117.

Art. 1609. [1025] New appeal bond allowed, when.

See *Horn v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 201 S. W. 1101.

Defects in bond in general.—The court of civil appeals will permit a new bond to be filed in place of one which is defective in failing to specify that appellant shall pay all costs "which may accrue in the court of civil appeals and the supreme court." *Corley v. Renz* (Civ. App.) 25 S. W. 1130.

Dismissal because of defective bond.—Where the motion to dismiss the appeal because of a defective bond is entered at the proper time to entitle the appellant to file a new bond, the same should be presented before the hearing of the motion. *Texas Mexican Ry. Co. v. Cahill* (Civ. App.) 23 S. W. 45.

Art. 1610. [1016] Certificate of affirmance, and proceedings thereon.

Grounds for affirmance in general.—Where 90 days were allowed to file statement of facts and bills of exception, and neither have been presented to the appellate court more than 6 months later, and no good reason for failure is offered, a motion to affirm will be granted. *Brophy v. Kelly* (Civ. App.) 198 S. W. 413.

The appellee is not entitled to affirmance on certificate merely because the statement of facts is stricken from the record, since the only ground upon which there may be an affirmance on certificate is that specified in the statute. *Texas Portland Cement Co. v. Lumparoff* (Civ. App.) 204 S. W. 366.

Where the facts do not bring the case within the letter of the statute, which provides for an affirmance on certificate "in case the appellant or plaintiff in error shall fail to file a transcript of the record," etc., motion for affirmance on certificate will be denied. *Loring v. Keith* (Civ. App.) 219 S. W. 1114.

Excuses for failure to file transcript.—Upon a motion for affirmance of judgment for failure to file statement of facts within required time, that court reporter failed to transcribe testimony in form required by art. 1924, did not excuse appellant, where neither attempt to mandamus reporter nor to make statement of facts from memory under article 2068 was made. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714.

Jurisdiction of the Court of Civil Appeals having attached when appellant filed his supersedeas bond with the clerk of the county court, and the issues tried below being pending, the court will not consider the question whether there has been an agreement

to settle between the parties, though appellant in his affidavits in opposition to appellee's motion to affirm on certificate states facts tending to show such an agreement. *Hedrick v. Matthews* (Civ. App.) 216 S. W. 424.

Time for filing certificate and motion.—Where appeal bond was filed March 8th, motion to affirm on certificate, filed July 23d, after expiration of term to which appeal was returnable, must be denied. *Pontana v. T. S. Reed Grocery Co.* (Civ. App.) 208 S. W. 933.

Effect of subsequent writ of error.—Where the appellant, after perfecting his appeal by filing and having approved a bond, neglects to file transcript, the appellee may during the term of court to which the appeal is taken have the case affirmed on certificate, even though the appellant has by writ of error removed the proceeding to the appellate court and filed his transcript within the prescribed time. *Texas Portland Cement Co. v. Lumparoff* (Civ. App.) 204 S. W. 366.

Judgment on certificate.—Where, on motion in Court of Civil Appeals to affirm on certificate, appeal bond executed with sureties accompanies certificate, cause, being affirmed as to parties, will be also affirmed against sureties. *Burton v. Sells* (Civ. App.) 202 S. W. 357.

Art. 1612. Assignments of error; requisites of.

See *Celli v. Sanderson* (Civ. App.) 207 S. W. 179; *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721; *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675; *Riggs v. Baleman* (Com. App.) 228 S. W. 179; *Texas Blue Bonnet Oil Co. v. W. C. Jones Drilling Co.* (Civ. App.) 228 S. W. 972; *Canter v. Canter* (Civ. App.) 231 S. W. 796.

Cited, *Parker v. Fogarty*, 4 Civ. App. 615, 23 S. W. 700; *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330.

1. **Construction and operation of statute in general.**—This article pertains to civil cases only. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

Though the statute provides that an assignment shall be sufficient which directs attention to the error complained of, the rule of the Supreme Court, providing that assignments shall be copied into the brief, should always be complied with. *Olguin v. Apodaca* (Com. App.) 228 S. W. 166.

This article is to be liberally construed. *Morrison v. Neely* (Com. App.) 231 S. W. 728.

2. **Necessity for assignment of errors—in general.**—The Court of Civil Appeals cannot take cognizance of an error not properly assigned, unless it be an error of law apparent on the face of the record, or a fundamental error. *Nations v. Miller* (Civ. App.) 212 S. W. 742; *Ogg v. Loyd* (Civ. App.) 207 S. W. 553; *Lewis v. Geddes* (Civ. App.) 223 S. W. 244.

Where assignments had been lost or destroyed, it was incumbent on appellant to substitute them as provided by arts. 2157-2163, inclusive. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

Where appellant not only did not file a motion for a new trial, but also failed to file assignments of error in the trial court, appellant was not entitled to complain of the judgment, except for error "in law apparent on the face of the record," under article 1607. *Ætna Accident & Liability Co. v. Trustees of First Christian Church of Paris* (Civ. App.) 213 S. W. 537.

That a lease is unilateral and subject to revocation for reasons stated in petition cannot be raised on appeal when there were no assignments of this nature filed in the court below. *Tatum v. Fulton* (Civ. App.) 213 S. W. 1088.

Appellate courts in considering assignments of error, are confined to the reasons assigned as contained either in the assignments themselves or in the germane propositions thereunder. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

Where the trial is before the court, as well as where it is before the jury, the assignments of error presented in the brief must have been incorporated in the record either as formal assignments or in the motion for a new trial under this article, and Courts of Civil Appeals Rules 23 and 29 (142 S. W. xii). *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 223 S. W. 571.

A matter not assigned as error cannot be reviewed. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

5. — **Instructions.**—One who asked a special instruction on contributory negligence, which would cure the omission of such issue from a paragraph of the charge, but did not assign error for the failure to give it, error of the court in omitting such issue from the charge, was waived. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

There being no assignment complaining of refusal to submit a correct instruction of the issue of fraud it is unnecessary for the court on appeal to decide whether the evidence is sufficient to raise such issue. *Anders v. California State Life Ins. Co.* (Civ. App.) 214 S. W. 497.

In an action against several defendants, where evidence was introduced by plaintiff against all of the defendants, but the court ruled that it was not admissible against certain defendants, refusal of the court to submit certain issues raised by such evidence is not ground for reversal as far as the defendants against whom the court ruled the evidence was not admissible are concerned, where there is no assignment of error in the brief bringing up for review the action of the court in ruling on the admissibility of the evidence, although such ruling was excepted to. *Croom v. Croom* (Civ. App.) 214 S. W. 735.

Under art. 1607, and article 1971, as amended by Acts 33d Leg. c. 59, § 3, giving of peremptory instruction cannot be reviewed without assignment of error if its propriety is doubtful, and a critical examination of the evidence is necessary. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

Error in refusal of instruction, not assigned as error in appellate court, will be deemed waived. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

6. — **Verdict, findings, or judgment.**—Court's findings, where not challenged will be taken as true on appeal. *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642; *Temple Hill Development Co. v. Lindholm* (Civ. App.) 212 S. W. 984.

Where the assignments in appellant's brief do not challenge the sufficiency of the evidence to support the verdict, the Court of Civil Appeals is not called upon to do so by the oral argument of the parties on such question when the cause was submitted. *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183.

The action of the trial court in refusing to set the verdict aside cannot be reviewed, where not raised by an assignment of error. *Gulf, Colo. & S. F. Ry. Co. v. Clements* (Civ. App.) 203 S. W. 623.

Where plaintiff sought to recover a balance due for cutting and baling hay under a contract whereby defendant was to pay \$3 per ton for the first cutting and more for the second, and no special charge that, independent of plaintiff's right to recover for the balance due on the first cutting, he could not recover the amount claimed on the second cutting, was requested, and there was no assignment of error presenting that matter, the question of the sufficiency of the evidence to authorize a recovery for the second cutting was not presented. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

Where the findings that the contract of sale in suit was not an illegal future contract are not attacked in any of the assignments, they must be given effect, unless it can be said the contrary so conclusively appears from the face of the contract that the trial court should have declared it illegal as a matter of law. *Puckett v. Wilson Bros. Mercantile Co.* (Civ. App.) 211 S. W. 642.

The appellate court cannot, in the absence of an assignment of error, review a finding that plaintiff was contributorily negligent as being unsupported by the evidence, such error not being fundamental. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

A finding of fact will not be reviewed on appeal in absence of assignment of error attacking the finding. *Lovelady v. County Board of School Trustees* (Civ. App.) 214 S. W. 622.

Findings of fact by the trial court not assailed by any assignment of error are to be taken as facts by the Court of Appeals. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

9. **Errors reviewable without proper assignment—Jurisdictional questions.**—A jurisdictional question must be considered, though assigned as part of an assignment not germane to it. *Erwin v. Erwin* (Civ. App.) 231 S. W. 834.

10. — **Errors apparent on face of record.**—See art. 1607, and notes.

Where record shows, as to plaintiff in error's assignment that the evidence was insufficient to raise an issue which was submitted to the jury, that there was evidence on the point, and no motion was made to set aside the findings of the jury, or predicated on any action of the court in that connection, the appellate court is not required to go into an exhaustive examination of evidence. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

Where no assignment of error or briefs of either party appear in the record, and fundamental errors of law are not apparent on the record, the judgment of the trial court will be affirmed. *Laster v. Lefevre* (Civ. App.) 218 S. W. 654.

On appeal from a final judgment refusing relief in a suit to enjoin dipping of cattle, based upon the merits of the whole case, in the absence of assignments of error, the court will not consider any error but one of law apparent on the record in view of rule 23 (142 S. W. xii). *Smith v. Johnson* (Civ. App.) 221 S. W. 982.

Where plaintiff refused to go forward with his proof after court had sustained exceptions filed by defendant, and had overruled others in part and sustained them in part, action of court in rendering judgment for defendant instead of rendering judgment of dismissal, even if error, could not be corrected by the Court of Civil Appeals, in the absence of an assignment of error complaining of the form of the judgment, such error not being apparent on the face of the record. *Munger Oil & Cotton Co. v. Beckham* (Com. App.) 228 S. W. 128.

In an action to recover two tracts of land, brought by the children and heirs at law of the first wife of plaintiffs' father against his children and heirs of deceased children by two subsequent marriages, where plaintiffs made no claim to one of the tracts, other than that it was the separate property of their mother by virtue of its having been purchased with her separate estate, the holding of the trial court that the tract was the property of the children of the second and third marriages, under a finding of fact that it was paid for with funds of those communities, was not error of law apparent on the face of the record, such as the appellate court would have jurisdiction of without its having been assigned. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

11. — **Fundamental errors.**—See art. 1607, and notes.

If the judgment is not supported by any pleading, its rendition is fundamental error, and it should be set aside on appeal, whether the error is assigned or not. *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641; *Summerrill v. Jemison* (Civ. App.) 201 S. W. 216; *Southwest Texas Oil & Gas Co. v. Boykin* (Civ. App.) 206 S. W. 216.

Any error in ruling on a general demurrer to the petition is fundamental error, which will be considered on appeal, even if the assignment of error is insufficient.

Grayson County v. Harrell (Civ. App.) 202 S. W. 160; Cudahy Packing Co. v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 206 S. W. 854; Eldora Oil Co. v. Thompson (Civ. App.) 230 S. W. 738.

Action of trial court in directing a verdict presents a question of fundamental error, which it is the duty of court of Civil Appeals to consider without any assignments. Palm v. Nunn (Civ. App.) 203 S. W. 1124; Rowe v. Colorado & S. R. Co. (Civ. App.) 205 S. W. 731; Earhart v. Robinson (Civ. App.) 215 S. W. 973.

If persons who were indispensable parties to an effective disposition of the issues were not made parties, though this point is not raised in either court, the appellate court must take notice thereof. Bonner v. City of Texarkana (Civ. App.) 227 S. W. 505; Bartlett v. State (Civ. App.) 222 S. W. 656; Barmore v. Darragh (Civ. App.) 227 S. W. 522.

Fundamental error need not be assigned. Harlington Land & Water Co. v. Houston Motor Car Co. (Com. App.) 209 S. W. 145; Barkley v. Gibbs (Com. App.) 227 S. W. 1099.

Error in sustaining general demurrer to answer was a fundamental error which it was the duty of the court to consider, though ignored by the parties in their briefs. Barcus v. J. I. Case Threshing Mach. Co. (Civ. App.) 197 S. W. 478.

Assignments of error, not presented in a motion for a new trial or shown by the transcript, will not be considered, unless they present fundamental error. Hooker v. State (Civ. App.) 197 S. W. 481.

In view of evidence, held, that there was no fundamental error apparent on the face of the record, reviewable without proper assignment, in the district court's holding that the board of school trustees acted wrongly in detaching territory from one independent district and adding it to another. *Id.*

Assignment which requires study of statement of facts does not present question of fundamental error. Rockhill Country Club Co. v. Nix (Civ. App.) 198 S. W. 155.

Giving or refusal of peremptory instruction does not raise question of fundamental error. *Id.*

In the absence of proper assignments, all errors not apparent on the face of the record, except "fundamental errors," are waived, and errors are not fundamental, if it would be necessary to examine the entire statement of facts to decide on their merits. Riggs v. Baleman (Civ. App.) 198 S. W. 813.

Error in electing a special judge in the absence of the conditions for such election provided by Rev. St. 1911, art. 1678, is fundamental, and error need not be assigned. Texas & Pacific Coal Co. v. Ready (Civ. App.) 198 S. W. 1034.

Without proper assignments of error, court can only consider "fundamental error," which is error apparent of record and which lies at base of action. Hassell v. Rose (Civ. App.) 199 S. W. 845.

Sustaining demurrer to petition presents fundamental error authorizing review without assignment of error, where judgment recites ruling, exception thereto, and notice of appeal. Pearlstone v. Western Union Telegraph Co. (Civ. App.) 199 S. W. 860.

Insufficiency in judgment in boundary suit, in that it does not settle issue of boundary, is fundamental error necessitating reversal, though not assigned. Main v. Cartwright (Civ. App.) 200 S. W. 847.

Though an assignment that a judgment is excessive is too general to require consideration, yet, where a judgment includes 10 per cent. interest without any authority therefor, the error is fundamental. The Homesteaders v. Stapp (Civ. App.) 205 S. W. 743.

Assignment of error presenting overruling of defendant appellant's original motion for new trial as error, in that verdict and judgment were not sustained by evidence, on its face invites examination of entire record to determine sufficiency of evidence on each of the elements of fraud specified by plaintiff, and could not present fundamental error calling for reversal after judgment. Celli v. Sanderson (Civ. App.) 207 S. W. 179.

Where a judgment does not conform to the verdict, it presents fundamental error, which the appellate court will review without assignment. Holmes v. Long (Civ. App.) 207 S. W. 201.

A fundamental question is to be considered on appeal, regardless of the sufficiency of the assignment of error. McCoy v. Wichita Falls Motor Co. (Civ. App.) 207 S. W. 332.

An assignment of error which, with proposition under it, fails to indicate any error of which complaint is made presents a mere abstraction, instead of fundamental error. Falfurrias Mercantile Co. v. Citizens' State Bank (Civ. App.) 207 S. W. 568.

A verdict of negligence against one on whom no legal duty rested to use care may be attacked on appeal in absence of assignment of error. Old River Co. v. Barber (Civ. App.) 210 S. W. 758.

If exceptions to pleading were special exceptions and not assigned as error in compliance with this article, the appellate court would not be required to consider them, but where they are addressed to the merits and not the sufficiency of the allegations they are general demurrers, the overruling of which presents fundamental error. Richardson v. Terry (Civ. App.) 212 S. W. 523.

In an action for delay in transmitting to plaintiff a message announcing the death of his brother, error in that the verdict for \$1,120 was excessive held not fundamental so as to be reviewable by the Court of Civil Appeals under rule 29 (142 S. W. xiii), without an assignment of error. Western Union Telegraph Co. v. Campbell (Civ. App.) 212 S. W. 720.

In garnishment proceedings, court's refusal to suspend trial of cause pending outcome of action by judgment debtor to set aside judgment is not fundamental error, and cannot be considered on appeal, in absence of assignment of error. Bass v. Murray Co. (Civ. App.) 213 S. W. 673.

In garnishment proceedings to collect judgment, where judgment debtor intervened and moved to quash writ, rendition of judgment against judgment debtor as principal and sureties on replevy bond did not show fundamental error, and cannot be considered on appeal, in absence of assignments of error under Vernon's Sayles' Ann. Civ. St. 1914, art. 1612. *Id.*

In garnishment proceedings to collect judgment, wherein judgment debtor intervened and moved to quash writ of garnishment for defect in affidavit, court's refusal to sustain motion did not show fundamental error, and cannot be considered on appeal, in absence of assignment of error. *Id.*

In garnishment proceedings to collect judgment, wherein judgment debtor intervened and moved to quash writ of garnishment for defect in affidavit, court's refusal to permit jury to pass on issue of fact raised by pleadings of intervener and affidavit for garnishment did not show fundamental error and cannot be considered on appeal, in absence of assignment of error. *Id.*

Where the pleadings did not raise an issue as to the facts but only regarding the proper construction of a contract which was fully set out and as to whether certain pleaded facts avoided defendant bank's defense that its guaranty was void because ultra vires, held, that the decision upon such issues may be reviewed under the doctrine of fundamental error without assignments of error. *First Nat. Bank v. Crespi & Co. (Civ. App.) 217 S. W. 705.*

Judgment for defendant rendered on plaintiff's failure to appear will be reversed on plaintiff's appeal therefrom, notwithstanding there was no motion for new trial nor assignment of error filed, since the rendition of such judgment, instead of a dismissal without prejudice for want of prosecution, was fundamental error. *Commercial Credit Co. v. Wilson (Civ. App.) 219 S. W. 298.*

In an action for breach of warranty in the sale of an elevator disposed of on special issues, where the amounts expended by plaintiff in repairing the elevator were allowed as damages, such error was fundamental and may be corrected by the appellate court under art. 1626, though defendant did not assign same as error. *Otis Elevator Co. v. Cook (Civ. App.) 219 S. W. 546.*

Appellant waived the question of nonjoinder of proper parties by failing to raise it in the lower court. *Bingham v. Graham (Civ. App.) 220 S. W. 105.*

A verdict under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which awarded deceased's children damages for expected benefits not alleged in the pleadings, nor supported by the evidence constitutes fundamental error, which may be considered, although the assignment of error presented a question of law, and did not complain that there was no evidence supporting the verdict. *Hines v. Walker (Civ. App.) 225 S. W. 837.*

A failure of the record to indicate action on a general demurrer for want of facts does not prevent consideration of the sufficiency of the petition on appeal, since if it states no cause of action, the error would be fundamental. *Dingman v. Pahl (Civ. App.) 226 S. W. 446.*

Appellate court may take cognizance of fundamental error in overruling defendant's motion for a peremptory instruction in an action on an invalid contract, although there was no assignment of the invalidity of the contract as a reason for granting a peremptory instruction. *Caddell v. J. R. Watkins Medical Co. (Civ. App.) 227 S. W. 226.*

The objection that special findings of the jury conflicted, and so did not support the judgment, presents a question of fundamental error which need not be assigned in the motion for new trial to be available on appeal. *Kahn v. Cole (Civ. App.) 227 S. W. 556.*

In a suit to cancel oil and gas leases and recover a deposit made by the lessee to guarantee performance of the contract, the failure of the petition to state a cause of action for the recovery of the deposit was fundamental error. *Huber v. Smith (Civ. App.) 228 S. W. 339.*

A variance between the pleading and proof of the terms of a contract for the sale of realty by brokers is fundamental error, and though the assignment complaining thereof was not properly incorporated in the record, it will be considered. *McConnell v. Payne & Winfrey (Civ. App.) 229 S. W. 355.*

It being the statutory duty of the trial court to render judgment in accordance with the jury's verdict unless the same be set aside and a new trial granted, a failure so to do presents a fundamental error which can and should be considered by the Court of Civil Appeals whether properly assigned or not. *Stubblefield v. Jones (Civ. App.) 230 S. W. 720.*

Where appellees by an independent proposition have called to the attention of the appellate court an issue which the court erred in refusing to submit to the jury, it becomes the duty of such court to review the case on the error thus assigned, regardless of assignments by appellants; the appellants in their brief disclosing all the facts necessary to show that it was fundamental error. *Southwestern Settlement & Development Co. v. Village Mills Co. (Civ. App.) 230 S. W. 869.*

An assignment, "The court committed material error in failing and refusing to give to the jury defendant's special requested peremptory instruction to find for the defendants," did not present fundamental error, so that it could be considered in the absence of an exception, and on failure to present by bill of exceptions, where it would require the court in its consideration to look to the evidence and statement of facts. *Priddy v. Childers (Civ. App.) 231 S. W. 172.*

12. **Necessity of presenting assignment in motion for new trial.**—Where a ground of error in an assignment of error was not embodied in the motion for new trial, it cannot be considered on appeal unless the error is fundamental. *McCaskey v. McCall (Civ. App.) 226 S. W. 432; Patterson v. Bushong (Civ. App.) 196 S. W. 962; Hooker v. State (Civ. App.) 197 S. W. 481; Old Faithful Oil Co. v. McGiveran (Civ. App.) 200 S. W. 249;*

Pryor v. Scott (Civ. App.) 200 S. W. 909; *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080; *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164; *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335; *J. W. Jenkins' Sons' Music Co. v. Truex* (Civ. App.) 204 S. W. 872; *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749; *Citizens' Nat. Bank of Stamford v. Stevenson* (Civ. App.) 211 S. W. 644; *Hardin v. Hanson* (Civ. App.) 220 S. W. 368; *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750.

In a case tried prior to Acts 1913, c. 59, (arts. 1954, 1970, 1971, 1973, 1974, 1984a, 2061) requiring rulings in the giving or refusing of instructions to be specifically excepted to, it was not necessary that the refusal of a special charge be complained of in a motion for a new trial, and hence it was not necessary that the assignment of error in relation thereto should refer to the motion. *Southern Pac. Co. v. Walters*, 221 S. W. 264, 110 Tex. 496, affirming judgment (Civ. App.) 157 S. W. 753.

Under court rules 24 and 70 (142 S. W. xii, xxii), rules 1 and 101a (159 S. W. viii, xi), and this article, overruling of a plea of privilege for change of venue cannot be reviewed, where not set up in the motion for new trial. *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519.

An assignment of error which was not raised either in the motion for new trial or in any assignments filed in the trial court, but as copied in the brief is merely a quotation from a bill of exceptions shown in the transcript, cannot be considered. *Evans v. Houston Oil Co. of Texas* (Civ. App.) 211 S. W. 605.

If exceptions to pleading were special exceptions and not assigned as error in compliance with this article, the appellate court would not be required to consider them. *Richardson v. Terry* (Civ. App.) 212 S. W. 523.

An assignment of error that the verdict is contrary to a great preponderance of the evidence, filed after the motion for new trial was overruled, cannot be considered, since it could have been presented in the motion for new trial. *Baker v. Williams* (Civ. App.) 213 S. W. 986.

Where no motion for new trial was filed, only questions going to the foundation of the action or apparent of record will be considered on appeal, and, in the absence of any such questions, none attempted to be presented in appellant's brief will be considered. *Rountree v. Rowe* (Civ. App.) 227 S. W. 715.

Refusal of instruction not complained of in motion for new trial will not be considered on appeal. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Under Rule 101a (159 S. W. xi), governing the trial causes in the district court, which provides that in all cases in which a motion for new trial is filed the assignments contained therein shall constitute the assignments of error and all errors not specified shall be waived, the question of the sufficiency of the evidence to support the judgment cannot be reviewed where it was not presented by the motion for new trial original or amended, but was attempted to be presented by an independent assignment of errors filed after the overruling of the motion for new trial. *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

12a. — Where motion for new trial unnecessary.—A motion for new trial in a case tried before the court is not necessary, but where a motion is made, the assignments in the motion constitute the assignments of error on appeal under this article, and where they are reconstructed they cannot be reviewed. *Riggs v. Baleman* (Civ. App.) 198 S. W. 813.

Where a case is tried before court without jury, and appellant's motion for new trial is insufficient as an assignment of error, appellant is entitled to have considered formal assignments thereafter filed and duly incorporated in record. *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593.

12b. — Matters arising after motion for new trial.—Alleged errors based upon matters occurring after the motion for new trial is overruled may be raised by filing assignments of error in the trial court. *Werner v. Needham* (Civ. App.) 201 S. W. 213.

Assignments of error not included in the motion for new trial cannot be considered on appeal, unless the error assigned arose after filing of the motion. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

12d. — Copying of assignments contained in motion.—See *Brown v. Martin* (Sup.) 7 S. W. 68.

Assignments of error in the brief which are not correct copies of the grounds of the motion for new trial cannot be considered. *Mansfield v. Mansfield* (Civ. App.) 198 S. W. 169; *Turner v. Turner* (Civ. App.) 195 S. W. 326; *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084; *Olguin v. Apodoca* (Civ. App.) 202 S. W. 367; *Harlan v. Acme Sanitary Flooring Co.* (Civ. App.) 203 S. W. 412; *City of Sweetwater v. Biard Development Co.* (Civ. App.) 203 S. W. 801; *Schkade v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 1113.

Assignments of error urged in the brief must be, at least, substantially copies of the assignments presented in the motion for new trial filed in the trial court, and an assignment of error not embraced in such motion cannot be considered. *Ball v. Henderson* (Civ. App.) 228 S. W. 361; *Barkley v. Gibbs* (Civ. App.) 203 S. W. 161; *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

A variance in that an assignment of error is not a true copy of the assignment as it appears in the transcript, and which resulted from an error in copying which was slight and wholly unimportant, does not preclude the court in its discretion from passing upon the assignment. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 831.

Where a motion for new trial has been filed, the party appealing is confined to the matters therein assigned, under Court of Civil Appeals rule 24 (142 S. W. xii).—*Boedfeld v. Johnson* (Civ. App.) 201 S. W. 1027.

A proposition under an assignment of error which is not a copy of any ground set out in the motion for new trial, and does not show by the record where it may be found, nor that an exception was taken to the ruling thereon, will not be considered. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

An assignment of error, though not a full copy of the ground set up in motion for new trial, will be considered; it with the propositions under it stating enough of the ground to direct the court's attention to, and make plain, the error intended to be assigned. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

An assignment of error is sufficient where it is a substantial, although not a literal, copy of the assignment in plaintiff's motion for new trial. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

In cases tried before the court without a jury, the objection is no longer available that assignments cannot be considered because they are not the same as contained in the motion for new trial and were not filed at the same time. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

An assignment, complaining of a charge in "that it makes the defendant liable for the injury alleged to have been sustained by the plaintiff without reference to any negligence on the part of plaintiff that could attribute (contribute) to what was the true and proximate result (cause) of plaintiff's injuries," the words in parentheses, not being in the ground of error contained in the motion for new trial, will be considered; the changes not being material. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

Where the motion for new trial assigned error on the ground that the verdict was against the evidence, was vague, and was in conflict with the testimony, an assignment of error on appeal that it was the duty of the trial court to instruct the jury in writing will not be considered, for the assignment does not comply with this article. *Dixon v. Haymes* (Civ. App.) 220 S. W. 441.

An appellant may adopt the assignments of his motion for a new trial or not, as he chooses. *Barkley v. Gibbs* (Com. App.) 227 S. W. 1099.

An assignment of error to refusal to submit an issue being identical in the main with the assignment in the motion for new trial, differing only in the reasons assigned why the issue should have been submitted is entitled to consideration. *Green v. Hall* (Com. App.) 228 S. W. 183.

An assignment of error which violates Rules for the Courts of Civil Appeals, Nos. 24, 25, and 31 (142 S. W. xii, xiii), in reference to briefing, on account of lack of reference anywhere in the assignment, or in the proposition and statement thereunder, to the portion of the motion for new trial in which the error is complained of, will not be considered. *Smith v. Kidd* (Civ. App.) 228 S. W. 348.

Appellant's brief need not present the assignment in the motion for new trial, the statute being simply directory. *Marvin v. Kennison Bros.* (Civ. App.) 230 S. W. 831.

12a. — Reconstruction of assignments.—The appellate court will not consider assignments which have been reconstructed or are incorrectly copied in the brief. *Green v. Hall* (Civ. App.) 203 S. W. 1175.

Where an assignment of error practically followed two assignments in the motion for new trial, the fact that it was a reconstructed assignment, and presented the refusal to give two, instead of one, requested charge, will not prevent consideration. *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675.

An assignment of error which is not a copy of the corresponding ground set out in the motion for new trial, but is a reconstruction thereof and presents practically the same question, will be considered. *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

Appellant may file assignments of error independent of and subsequent to the motion for a new trial, where those assignments identify and are in consonance with the errors raised in the motion. *Barkley v. Gibbs* (Com. App.) 227 S. W. 1099.

13. Right to assign errors.—In jury trials filing of motion for new trial is prerequisite to appellant's right to assign error in Court of Civil Appeals. *Neeley v. White* (Civ. App.) 208 S. W. 991.

In action for death of shipper's employé against shipper and railroad, railroad could not complain on appeal of any errors relating to liability of shipper; such errors not affecting railroad. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

Where plaintiff appellant has no interest in a judgment rendered by one defendant against another, and neither defendant complains of that judgment, plaintiff's assignments of error attacking it will be overruled. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

The holder of a note which was by the district court made subject to the costs and expenses of the receivership and to the vendor's lien notes subordinate to such certificates and costs, who did not appeal from the judgment, cannot, after it was reversed in part by the Court of Civil Appeals so as to give the vendor's lien notes priority over the receiver's certificates, assign error to the judgment of the Court of Civil Appeals for failure to give his note also priority over the receiver's certificates, since he had elected to accept the judgment of the trial court, and the judgment of the Court of Civil Appeals placed him in no worse position. *Ford v. Van Valkenburg* (Com. App.) 228 S. W. 194.

In a suit to cancel an oil and gas lease, where the defendant assignee of the lease secured judgment against the defendant assignors, and the latter alone brought error and secured reversal of that portion of the judgment, they were not interested in the portion of judgment canceling the lease for fraud, and their assignments of error to that portion will not be considered. *White v. Murphy* (Civ. App.) 229 S. W. 641.

In a suit to enjoin an encroachment on an alley adjacent to plaintiff's lot, appellant

cannot complain of that part of the decree voluntarily laying out a passageway for the use of the public over defendant's lot. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

The question of district court's want of jurisdiction on appeal from the county court can be raised in the appellate court on appeal from the district court. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

15. Form and requisites in general.—Assignment of error covering 11 pages of the brief, consisting of arguments, statements of fact, reproduction in question and answer form of much of the testimony, does not merit consideration under a strict construction of the rules. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Under court rule 29 (142 S. W. xii), the Court of Civil Appeals will not consider any assignment of error in the brief subsequent to the first where three is the next number after one. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

It is a violation of rule 29 for Courts of Civil Appeals (142 S. W. xiii) for an appellant to number assignments from 1 to 16, and then from 7 to 24, because that causes a duplication of assignments of the same number. *Allen v. Crutcher* (Civ. App.) 216 S. W. 236.

Objection to the consideration of the fourth assignment of error, for the reason that appellant has erroneously numbered two assignments as the fourth, will not be sustained, and thereby deprive appellant of just ground of complaint. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

Where the assignments of error were not consecutively numbered from first to last, as prescribed by Court of Civil Appeals Rule 29 (142 S. W. xii), but were designated by numbers not running consecutively, the Court of Civil Appeals would be justified in disregarding those assignments, but it may consider them. *McCrary v. McCrary* (Cr. App.) 230 S. W. 187.

It is a violation of the rule requiring assignments of error to be numbered in a consecutive order to omit a number. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

16. Specification of errors—In general.—Assignments which do not distinctly specify error are waived. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

In case of a jury trial, where filing of motion for new trial is a prerequisite to the right of appeal, Rule 24 of the Court of Civil Appeals (142 S. W. xii) requires assignments of error to be set forth distinctly in motion for new trial, otherwise such assignments as do not comprehend fundamental error will be treated as waived. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

Notwithstanding rules 24 and 25 of Courts of Civil Appeals (142 S. W. vii), an assignment of prejudicial error in sustaining defendant's plea of limitation in an action on quantum meruit, not affirmatively specifying the grounds of error, would be considered, in view of the liberal rule adopted in reference to the briefing of cases. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

Though assignments of error do not "distinctly specify the grounds of error relied on," as required by Court of Civil Appeal Rules 24, 25 (142 S. W. xii), they will be considered, being sufficient to call attention to the state of the record, and any error being one of law; there being no conflict in the testimony. *Green v. Windham* (Civ. App.) 230 S. W. 726.

17. — Certainty and definiteness—In general.—Assignment that court erred in entering judgment for plaintiff on jury's verdict for reasons set forth and fully stated in defendant's bill of exceptions "to the court entering judgment for the plaintiff on the verdict of the jury" was too general. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

An assignment of error that the verdict was contrary to the evidence and was not supported by it, in that plaintiff's testimony was not corroborated, but was contradicted, is too general. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

Assignments of error that the court erred in overruling an exception, as shown in defendant's exception to the charge as a whole, giving the transcript page, is too general and vague to be considered. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

In action for damages to stock in shipment by delay of day in shipping 3 cars and of one day in shipping each of 2 bad order cars, where no damages could be assessed for the extra delay because of bad order under the findings of the jury, and the judgment did not show that any damages were allowed for the delay for bad order, and the assignment of error did not show that the judgment was in excess of the damages property assessable because 3 cars did not get into the first train, no error was shown. *Panhandle & S. F. Ry. Co. v. Matsler* (Civ. App.) 205 S. W. 155.

Assignments of error that judgment is contrary to evidence and law applicable to case, that trial court erred in not granting plaintiff's prayer for temporary injunction on case-made, and that judgment is contrary to law and unsupported by evidence or any evidence, held too general to require consideration. *Defferari v. City of Galveston* (Civ. App.) 208 S. W. 188.

Assignment, "The jury, after reading paragraph 4 of the court's charge, wherein their attention was specially called to paragraph 5, which was an instruction upon the weight of evidence and precluded the right of appellant to recover," contains nothing upon which a proposition of law can be founded and cannot be considered. *Schkade v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 1113.

In trespass to try title, assignments of error that the court erred in rendering judgment on defendant's cross-action "because the defendants did not show title to the land described in their cross-action," and "because such judgment is contrary to the evidence," and that "the court erred in failing and refusing to render and enter judgment in this cause for plaintiff for the land sued for by him," describing it, and that "the court erred in admitting in evidence" certain survey field notes, were too general, and failed, as required by rules 24 and 25 of the Court of Civil Appeals (142 S. W. xii), to

specify distinctly the grounds of error relied on. *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

Assignments of error that are general and indefinite will not be considered. *Merchants' Transfer Co. v. Wilkinson* (Civ. App.) 219 S. W. 391.

Assignment that court erred in admitting certain deeds in evidence will not be considered because too general. *Washington v. Giles* (Civ. App.) 220 S. W. 439.

While the Court of Civil Appeals is liberal in passing upon all assignments, it cannot search the pleadings, transcript, and statement of facts for supposed errors that are not distinctly disclosed in the assignment itself or propositions thereunder. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

Where it does not appear from the assignments, propositions, bill of exception, and statements just what the error asserted by a proposition was or how appellant was injured by the special issue complained of or its answer, the assignment will be overruled. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

18. — **Reasons and grounds of objection.**—A ground set out in assignment of error in appellant's brief, which does not appear in the record as one having been filed in the court below, cannot be considered. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

19. — **Rulings on pleadings.**—An assignment which presents error in overruling defendant's demurrer, both general and special, to the petition is too general to require consideration. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

Assignment of error complaining of overruling of motion to strike out an amended answer was deficient in failing to show what change was made in the pleading. *Aultz v. Zucht* (Civ. App.) 209 S. W. 475.

An assignment of error asserting that the court erred in overruling, and not sustaining, plaintiff's general and special demurrers is too general to be considered, as it attempts to call into question the court's action upon both general and special exceptions. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

21. — **Rulings as to evidence.**—Assignments of error, not followed by concrete propositions, unsupported by bills of exception, and referring to evidence taken by deposition, but failing to show what parts objected to were read to the jury, cannot be considered. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163.

Assignments of error to admission of evidence, merely referring to several bills of exceptions for the objections made, will not be considered.—*Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

An assignment of error complaining of admission of evidence, but not undertaking to set out even the substance of either question or answer, is insufficient, under the rules of the court of appeals, to require consideration. *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192.

In trespass to try title, assignment of error that the court erred in admitting in evidence "certain survey field notes" was too general to be considered under Rules 24 and 25 of Court of Civil Appeals (142 S. W. xii). *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

Where error is assigned to the exclusion of evidence, the ground of objection offered to the excluded testimony must appear from the assignments. *Guyler v. Guyler* (Civ. App.) 220 S. W. 604.

An assignment, complaining of court's failure to sustain objections "to the question propounded by plaintiff's counsel to Mrs. G. and her answer thereto, wherein said witness was asked as to her feelings for her mother, and as to what her relation was toward her mother, and was permitted to answer that she and her mother were specially devoted," held too general to require notice. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

An assignment of error complaining of action of court in admitting certain testimony will not be considered where the proposition thereunder and the bill of exception show that the complaint made below was at the refusal to admit testimony offered by appellant. *Haverbekken v. Johnson* (Civ. App.) 228 S. W. 256.

22. — **Submission of issues to jury.**—Defendants' assignment that court erred in submitting issue as to defect in gun used by servant in defendants' glass factory, because there was no testimony to show that the gun was defective, although general, was sufficient to present question that judgment should be reversed because of submission of such issue. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Assignments of error objecting to special issues as being on the weight of evidence, as assuming material facts, and as submitting more than one question in the same issue, were too general. *Baker v. Herndon* (Civ. App.) 209 S. W. 165.

Assignment of error seeking to place the whole case before the Court of Civil Appeals by asserting the trial court erred in failing and refusing to submit all material issues on which there was controverted evidence, thereby denying defendant appellant its right to have determined material issues presented by the pleadings, is too general for any appellate court to consider. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

The court's failure to submit a particular issue is not properly before the appellate court for consideration where it does not appear from assignment of error that appellant requested the submission of any such issue or filed any written objections to the charge because it was not submitted. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

23. — **Instructions.**—An assignment, stating merely that the court erred in giving a certain charge, is too general, and will not be considered. *Lambert v. Williams*, 2 Civ. App. 413, 21 S. W. 108; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445.

Assignment of error that the "court erred in failing to give the special charges,"

referring to them by number, held to violate Rev. St. art. 1612, requiring distinct specification of errors, and rules for preparing cause and briefs (142 S. W. xii). *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Bird v. Schaff* (Civ. App.) 206 S. W. 711.

Assignment of error "because court erred in instructing verdict contrary to law," held to violate Rev. St. art. 1612, requiring distinct specification of errors, and rules for preparing cause and briefs (142 S. W. xii). *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445.

Assignment of error that "the court erred in failing to give special charges," numbering them, was insufficient because special charges requested and refused were not set out in assignment itself, nor in statement following same. *Id.*

Where neither in the assignment of error nor in proposition thereunder was any specific ground given why error was committed, in refusal of requested instruction, such assignment need not be considered. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

A motion for new trial and an assignment of error, on the ground that the trial court erred in instructing the jury to return a verdict for plaintiff in any amount, is sufficient to be considered on appeal. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

An assignment of error on ground that trial court erred in instructing the jury to return a verdict for plaintiff in any amount is sufficient to be considered on appeal. *Id.*

Where asserted error was not apparent on face of record, it was necessary under statute that assignment of error, complaining of court's action, in order to entitle it to consideration, distinctly point out error relied on, which an assignment that court erred in refusing to give defendant's requested charge to return verdict for defendant did not do. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Where an assignment submitted as a proposition did not state the objection to the charge, nor did any statement thereunder point out specific objection, the assignment cannot be considered. *St. Louis Southwestern Ry. Co. of Texas v. Ristine* (Civ. App.) 219 S. W. 515.

An assignment of error that a court of record should instruct the jury contains nothing on which a proposition of law can be based, and cannot be considered. *Dixon v. Haymes* (Civ. App.) 220 S. W. 441.

Assignments of error complaining of giving of certain charges or refusal of others, without stating even substance of charges, should not be considered; a reference to bills of exceptions without giving substance of them not complying with rules of Courts of Civil Appeals, and it not being incumbent on an appellate court to search record for matters that should be supplied by appellant. *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

An assignment of error complaining of a charge cannot be considered, where the assignment refers to a particular bill of exception for the charge and the charge is not there set out. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

The Court of Civil Appeals will reverse case on ground that an instruction was erroneous, notwithstanding failure to complain thereof by assignment of error, where court refused a proper charge, and such refusal is complained of by assignment of error. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

A requested charge, "You are instructed that the evidence introduced in this case is insufficient to sustain a verdict for the plaintiff, and you will therefore find for the defendants and so say by your verdict," is not in fact a charge, and, not presenting fundamental error, an assignment that the court erred in refusing to give "defendant's special requested peremptory instruction to find for the defendants" was too general to entitle it to consideration. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

24. — **Verdict, findings, or decision.**—An assignment of error. "The verdict was contrary to the law and evidence," is too general and indefinite, within the condemnation of Court of Civil Appeals rule 26 (142 S. W. xii). *Miller v. P. W. Ezell Mercantile Co.* (Civ. App.) 201 S. W. 734; *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881; *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645; *Washington v. Giles* (Civ. App.) 220 S. W. 439; *Pawloskey v. Kusch* (Civ. App.) 223 S. W. 496; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432; *City of Greenville v. McAfee* (Civ. App.) 230 S. W. 752.

An assignment of error to the conclusions of law, because from the facts the appellee was not entitled to the judgment given; or "that plaintiff, who sues for himself and co-tenant, * * * when the petition does not show that any claim is set up by" plaintiff "for his co-tenants, nor are they made parties, nor do they claim anything;" or an assignment that the judgment from the facts ought to have been for the appellant,—is insufficient. *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443.

An assignment of error that the verdict is "contrary to the law and the evidence" is not sufficient, unless the error is fundamental, or imperatively requires a revision to prevent a manifest injustice. *Bonner v. Whitcomb*, 80 Tex. 178, 15 S. W. 899.

In damage action against building contractors, assignments of error that recovery of certain items was not authorized by contract or not sustained by proof, but not complaining of any ruling by court or of jury's verdict, are insufficient. *Echols Bros. v. Stevens* (Civ. App.) 196 S. W. 365.

Where neither assignment of error nor proposition contended that defendant failed to establish truth of his plea of privilege to be sued in another county, or assailed verdict for defendant on ground that evidence was insufficient to support it, no question was presented on appeal. *Obenhaus v. Allen* (Civ. App.) 199 S. W. 366.

An assignment that "the verdict of the jury as to A. is excessive" is too general for consideration. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

The question of sufficiency of the proof to sustain the findings of fact cannot be raised in assignments of error merely attacking the judgment for lack of such proof. *Morrison v. Neely* (Civ. App.) 214 S. W. 586.

An assignment that the verdict is contrary to the preponderance of the evidence, and against the evidence, and shows that the jury either misunderstood the case or disregarded the evidence, is so general that the trial court could not have been thereby apprised of the theory on which plaintiff requested that the verdict should be set aside. *Neill v. Pryor* (Civ. App.) 222 S. W. 296.

In partition suit, error, if any, in charging surviving husband with the entire sum taken by him from the separate funds of his children and applied on the purchase price of community property, his deceased wife's share in which was inherited by his children, could not be reviewed on an assignment of error alleging error, in that the judgment was contrary to law in fixing a lien on his homestead in their favor to secure such sum, instead of determining their interest in said property in amount. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

In suit to cancel a deed, assignment of error of plaintiff appellant that the court erred in the calculation of interest due on the notes sued on in a cross-action, and entering judgment erroneously and in excess of the sums due other than a \$500 note sued upon, is too general, as is the proposition thereunder, the statement in the assignment not showing what interest was allowed in the judgment, nor even the amount of the judgment. *Powell v. Dyer* (Civ. App.) 227 S. W. 731.

Assignment of error to overruling motion for new trial because the verdict developed that it was arrived at on sympathy or prejudice is insufficient; it not attempting to direct attention to any evidence indicating that the jury were influenced by prejudice or sympathy. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Com. App.) 228 S. W. 119.

Under rules 24, 29, and 30 of the Courts of Civil Appeals (142 S. W. xii, xiii), assignments of error attacking the court's conclusion of law that defendants and their predecessors had not established title by limitation were insufficient to warrant a review of the evidence on that issue. *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029.

25. — Motions for new trial.—Assignment of error that the court erred in overruling motion for new trial, because the verdict of the jury is against the great preponderance of the evidence and is not supported by the great weight of the evidence, specifying that the evidence shows that plaintiff's damage would have resulted independent of the negligence of defendant, was insufficient, as too general, in view of art. 2020. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 204 S. W. 1026.

Assignment of error that "court erred in overruling defendant's motion for new trial because of error in giving paragraph 8 of the charge, as fully shown by defendant's written exceptions and objections filed thereto," was sufficient to permit its consideration on appeal. *Id.*

Assignment of error, complaining of trial court's refusal to set aside the verdict and judgment and to grant a new trial "because the verdict of the jury is contrary to the law and to the evidence," without specially pointing out the particular ruling complained of, held too general to be considered. *Ft. Smith Couch & Bedding Co. v. George* (Civ. App.) 222 S. W. 335.

Assignments of error to overruling motion for new trial on the ground of the verdict being against the great weight of testimony as to certain matters held sufficient to direct the court's attention to the phase of the testimony which received its attention when the defensive charges were given, and so to direct the court's attention to the error complained of, which is all that *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1612, requires. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Com. App.) 228 S. W. 119.

Assignment of error, complaining of denial of new trial for excessiveness of verdict, but not specifying in what particulars under the facts it is excessive, is too general. *Id.*

26. — Judgment.—Assignment of error that the judgment for special damages is excessive, contrary to the law, and unsupported by the pleadings and testimony, is too general. *Brooks Supply Co. v. Hines* (Civ. App.) 223 S. W. 709; *Fuller v. Follis* (Civ. App.) 24 S. W. 368; *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641; *Houston Tie & Lumber Co. v. Hankins* (Civ. App.) 200 S. W. 237; *Williford v. Simpson* (Civ. App.) 217 S. W. 191; *Allen v. Williams* (Civ. App.) 218 S. W. 135; *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645; *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502; *Washington v. Giles* (Civ. App.) 220 S. W. 439; *Melsheimer v. Shaw* (Civ. App.) 223 S. W. 261; *Pawloskey v. Kusch* (Civ. App.) 223 S. W. 496; *City of Greenville v. McAfee* (Civ. App.) 220 S. W. 752.

Assignments of error that court erred in rendering judgment because verdict of jury was unsupported by evidence or contrary to weight of the evidence will be overruled, since judgment must follow verdict, however erroneous it may be, and even though the verdict may be subject to attack on same grounds. *Blackmon v. Texas Securities Co.* (Civ. App.) 196 S. W. 590.

Assignments of error questioning the sufficiency of the law and evidence to support the verdict and judgment, which do not undertake to point out or show the insufficiency, are not entitled to consideration. *Stephens v. Miller* (Civ. App.) 202 S. W. 1051.

An assignment that a judgment is excessive is, in so far as excessiveness is con-

cerned, too general to require consideration. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

Assignment of error by one defendant to the rendering of judgment against it in favor of the other defendant as not warranted by facts in evidence, findings or law, being sufficient to direct court's attention to the error complained of, will be considered, notwithstanding its generality. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

Assignments of error that "the court erred in rendering judgment because the evidence is insufficient to support same," or "because there was no evidence introduced in the trial to support the judgment," are too general and indefinite for consideration. *Fisher v. Sands* (Civ. App.) 211 S. W. 269.

An assignment of error in a partition suit that "the court erred in rendering judgment which divested the plaintiff of the title to the land in controversy" is insufficient as being too general. *Allen v. Williams* (Civ. App.) 218 S. W. 135.

The sufficiency of the evidence to support the judgment must be raised by an assignment of error attacking the evidence and not the pleading. *Newcom v. Ford* (Civ. App.) 222 S. W. 592.

An assignment that court erred in rendering a judgment granting an injunction was too general to be considered. *Ahrens v. Lowther* (Civ. App.) 223 S. W. 235.

An assignment that the court erred in not rendering judgment that plaintiff take nothing by her suit, that defendants go hence and recover of plaintiff all costs of suit, was too general to be considered. *Id.*

In order to present a question for decision, an assignment, that court erred in its judgment in some recital of fact or conclusion of law, should go further than to merely complain that such recital of fact or conclusion of law was erroneous. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

An assignment that the court erred in holding that defendants were entitled to judgment on the pleadings and evidence, since such pleadings and evidence were sufficient to entitle plaintiff to judgment, is too general to require consideration on appeal. *Sample v. Drake* (Civ. App.) 224 S. W. 555.

Assignment of error that the judgment rendered "is contrary to law and evidence in this cause and is not supported by same but on the contrary was with plaintiff" held too general, failing to point out with any definiteness the error to which it is desired to direct the court's attention. *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750.

A garnishment case had to be disposed of by a judgment of some character, and an assignment of error, complaining that any judgment whatever was rendered, was without merit. *Childs v. Gearhart* (Civ. App.) 229 S. W. 702.

28. Including errors in one assignment.—A multifarious assignment of error will not be considered. *McKay v. Lucas* (Civ. App.) 220 S. W. 172; *Hughes v. Galveston, H. & S. A. Ry. Co.*, 67 Tex. 595, 4 S. W. 219; *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555; *Palm v. Theumann* (Civ. App.) 201 S. W. 421; *Dubois v. Lowery* (Civ. App.) 205 S. W. 858; *Hall v. White* (Civ. App.) 208 S. W. 669; *Aultz v. Zucht* (Civ. App.) 209 S. W. 475; *Southwestern Oil Corporation v. Bois D'Arc Creek Oil & Gas Co.* (Civ. App.) 230 S. W. 821.

Assignment of error wherein complaint is made of two separate and independent rulings of court is bad for multifariousness. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051; *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791; *Sanitary Mfg. Co. v. Gamer* (Civ. App.) 201 S. W. 1068.

Under rules of Court of Civil Appeals 24-26 and 29 (142 S. W. xii), relating to assignments of error, assignments presenting several distinct propositions will not be considered. *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

An assignment of error is not multifarious, which states various reasons why a conclusion of law is erroneous. *C. R. Miller & Bro. v. Mummert* (Civ. App.) 196 S. W. 270.

Assignment held duplicitous and multifarious. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Where appellant grouped in its brief several specifications of error, to the effect that addressee of a telegram should not have been misled, and that the question was one of law for the court, but left out the fact that the court had refused to give a directed verdict, the grouping was multifarious and the propositions not germane. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

An assignment, though multifarious, which directs the court to the error complained of, is sufficient. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

An assignment consisting of entire motion for new trial, not submitted as a proposition in itself, nor followed by one, with no appended statement of facts, but containing eight distinct alleged errors, cumulatively violates Court of Civil Appeals rules 25-31 (142 S. W. xii, xiii), and cannot be considered. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

The rule that each ground of error relied on shall be separately presented in the briefs under an assignment of error is not complied with, where the assignments are treated as being part of and mixed up with the statement of facts, following a proposition which in turn follows an assignment. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

Assignment of error, divided into six separate paragraphs, each separately numbered, except the first, and each paragraph within itself being a separate assignment, which is followed by no statement whatever, except "See testimony V., S. F. 3 et seq., testimony R., S. F. 50 et seq., testimony H., S. F. 30 et seq.," is improper as multifarious,

having propositions under each paragraph not germane to the assignment, and as not supported by adequate statements, and should not be considered, in view of the Rules for the Courts of Civil Appeals, Nos. 25, 26, and 30 (142 S. W. xii, xiii). *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

On appeal from judgment for plaintiffs, assignment of error held multifarious, in that it complains of four express errors alleged below. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

An assignment as to a general demurrer to the petition should not be joined with an assignment questioning the sufficiency of the evidence to sustain a verdict for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Seligman* (Civ. App.) 219 S. W. 303.

Assignment attacking finding as against the evidence and assignments complaining of refusal to give requested instructions, where grouped together, in violation of Court of Civil Appeals rule No. 29 (142 S. W. xii) will not be considered. *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114.

An assignment of error objected to because containing several distinct and unrelated propositions of law cannot be considered. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699.

29. — Rulings on pleadings.—Assignment assailing action of court in overruling defendant's general and special demurrers is multifarious, and not entitled to consideration. *Johnson v. McBee* (Civ. App.) 205 S. W. 159; *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

30. — Rulings as to evidence.—Assignment that court erred in admitting deed to N., "and also several tax deeds to plaintiff W., more thoroughly explained in the official stenographer's notes," will not be considered, being multifarious and too general. *Washington v. Giles* (Civ. App.) 220 S. W. 439.

If separate and distinct portions of a letter are objected to as evidence, and the objector wishes such separate objections considered, they should be presented in separate and distinct assignments. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

An assignment of error complaining of failure to exclude testimony of a plaintiff and of exclusion of testimony of a defendant is multifarious. *Johnson v. Frost* (Civ. App.) 229 S. W. 558.

31. — Instructions.—Assignment that court erred in not submitting special questions Nos. 4 to 10, inclusive, which covered practically every phase of case, cannot be considered because multifarious. *Thornton v. Daniel* (Civ. App.) 199 S. W. 331.

An assignment of error that the court erred in failing to grant "the special charge requested by defendant," then setting out seven such charges, is multifarious. *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645.

An assignment of error complaining of the giving of various instructions and the refusal to give a requested instruction was multifarious and need not have been considered. *Flores v. Garcia* (Civ. App.) 226 S. W. 743.

An assignment of error, complaining not only of the submission of an issue of contributory negligence, but of the refusal of a charge on the issue of discovered peril, is multifarious. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

32. — Verdict, findings, or judgment.—An assignment of error that the verdict was contrary to the evidence and was not supported by it, in that plaintiff's testimony was not corroborated, but was contradicted, is multifarious. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

An assignment of error complaining of the court's refusal to submit certain different issues was multifarious, and for that reason should be disregarded. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

Assignments of error complaining that some undisclosed paragraph, from a given number to a given number, inclusive, found in a motion for the court to file conclusions of fact, had been ignored by the court, none of them being followed by a statement, cannot be considered. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

A single assignment of error complaining of refusal of trial court to submit 19 special issues requested, the charges not being germane to each other but presenting several propositions of law and fact, will not be considered, in view of Court of Civil Appeals Rule 26 (142 S. W. xii). *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

An assignment that the court erred in finding that the cotton replevied was middling lint cotton, and in fixing the value thereof it stated price at the time of the trial without deducting the expenses, of marketing, is multifarious, under Courts of Civil Appeals rules 24, 25 (142 S. W. xii), apparently stating three different errors in one assignment. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

34. Propositions and statements accompanying assignments of error.—Division in brief of assignment of error into several parts with separate propositions violates rule 29 (142 S. W. xiii) for Court of Civil Appeals, and assignment cannot be reviewed. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

35. — Necessity of propositions with accompanying statements.—To entitle an assignment of error to consideration, it must be followed by a proper proposition, and a question not presented in the proposition will not be considered, under rule 29 (142 S. W. xii). *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563; *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571; *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328; *Caffrey v. Bartlett Western R. Co.* (Civ. App.) 193 S. W. 810; *Panhandle & S. F. R. Co. v. Tisdale* (Civ. App.) 199 S. W. 347; *Flores v. Flores* (Civ. App.) 200 S. W. 1157; *Hudson v. Salley* (Civ. App.) 201 S. W. 665; *Alamo Trust Co. v. Cunningham* (Civ. App.) 203 S. W. 413; *Merriman v. Swift & Co.* (Civ. App.)

204 S. W. 775; *Water, Light & Ice Co., of Weatherford, v. Barnett* (Civ. App.) 212 S. W. 236; *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605; *Hines v. Jordan* (Civ. App.) 228 S. W. 633.

Assignment purporting to be a composite creation from first, second, third, and fourth assignments of error, but stating no proposition, furnishes nothing for consideration. *Schkade v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 1113.

Assignment of error, "The appellant insisted before court that he should have a new trial upon the ground of newly discovered evidence, to wit," etc., cannot be considered; it not being followed by a proposition or statement, but merely by what is styled an argument. *Id.*

An assignment of error complaining of the refusal of a special charge, and followed by a statement that the testimony disclosed that the person with whom plaintiff contracted was not defendant's agent, was defective under Rules 29 and 30 for Courts of Civil Appeals (142 S. W. xii, xiii), where it was followed by no proposition, since an assignment not itself a proposition and not followed by a proposition is waived. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

An assignment of error that "the verdict of the jury is contrary to the evidence and the law in the case" should be followed by appropriate proposition or statement and is too general to be considered. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

36. — Sufficiency of propositions in general.—Propositions following assignment of error, as to its being prejudicial in submitting special issues to give undue prominence to a party's theory, and that repeating issues renders the charge argumentative, held not distinct specifications of error required by court rule. *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

Assignments of error, assailing a verdict as excessive in the aggregate, with subjoined propositions, that there was no right to recover at all, and that other causes were responsible for the damage, could not be considered as to the subjoined propositions. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 204 S. W. 1026.

In an action against defendant railroad for death of its brakeman when a car ahead of him dumped coal on the track, neither objection to the court's charge on burden of proof nor the proposition thereunder held sufficient to raise the point that the charge was erroneous as putting on defendant railroad the burden to prove that the car ahead was in a reasonably safe condition. *Colorado & S. R. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

In a suit to cancel vendor's lien notes under a contract in adjustment of differences under an earlier contract and for damages for false representations, propositions under assignment of error held insufficient to present any question as to the measure of damages, or the question whether they should be measured as of the date of the earlier contract or the date of the second contract. *United Land & Irrigation Co. v. Fleming Co.* (Civ. App.) 225 S. W. 843.

An assignment of error, "The court erred in overruling and in not sustaining plaintiff's plea in abatement to defendants' cross-action," was insufficient when supported only by the proposition that, "It is improper to permit a cross-action by defendants to be maintained on account of alleged improper filing of his pendens notice in a suit filed by plaintiff on a note disconnected with plaintiff's cause of action, especially where the alleged cross-action is unliquidated"; there being no argument under the assignment, and the statement simply referring the court generally to all the pleadings in the case. *Nesbit v. Richardson* (Civ. App.) 229 S. W. 595.

A proposition under an assignment of error asserting that letters against the interest of the party are not admissible against him unless the proof shows, or tends to show, that they were written by him or by some one shown to be authorized by him to write them, does not raise the question that the apparent writer was not appellant's agent, but rather that the execution of the letters by the party purporting to sign them was not proved. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

A proposition following a too general assignment that the court erred in refusing defendant's requested peremptory instruction that, "If the evidence introduced on the trial is insufficient under any theory of the case to sustain a verdict for the plaintiff, the court should on request of the defendants give peremptory instructions to the jury to find for the defendants, and a refusal to give such requested instruction is such error as will require a reversal of the case on appeal," did not specify wherein the evidence was insufficient and did not cure the defect in the assignment. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

37. — Necessity of specific proposition.—A proposition under an assignment of error as to sufficiency of the petition in a telegraph company's appeal from a judgment for failure to deliver a death message held bad as being too general. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

In suit to cancel a deed, assignment of error of plaintiff appellant that the court erred in the calculation of interest due on the notes sued on in a cross-action, and entering judgment erroneously and in excess of the sums due other than a \$500 note sued upon, is too general, as is the proposition thereunder, the statement in the assignment not showing what interest was allowed in the judgment, nor even the amount of the judgment. *Powell v. Dyer* (Civ. App.) 227 S. W. 731.

A proposition, "It was competent to prove by M. on cross-examination, if it was a fact, that he neglected his duty in the taking of the acknowledgments of another married woman to other oil and gas leases executed about the same time as the one in controversy, just as he neglected his duty in the taking of Mrs. R.'s acknowledgment," held too general to require consideration. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

38. — **Assignment treated as proposition.**—Where several distinct grounds are urged in assignment of error, it cannot be treated as a proposition. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

An assignment of error that the court erred in instructing as to the control of calls that generally natural objects are the highest, artificial objects next, and course and distance the lowest grade, is not in itself a proposition of law. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

Assignment of error that "court erred in rendering judgment contrary to law," W. xii), in that it is not followed by any proposition. *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445.

Assignment of error that "the court erred in rendering judgment contrary to law" is too general to be considered as proposition within itself, and violates this article and rules 24, 25, and 26 for Courts of Civil Appeals (142 S. W. xii). *Id.*

Assignment of error not submitted as proposition, so that reasons relied on to show that judgment is erroneous are left to surmise, will not be considered. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

In an action on a life policy tried to the court, an assignment of error presented as a proposition held not sufficient, because including numerous errors in one assignment, to call in question any of the fact findings of the court, though sufficient to raise the question of law whether the facts found showed delivery of the policy and payment of the first premium which were required to make it a binding obligation. *American Nat. Ins. Co. v. Blyssard* (Civ. App.) 207 S. W. 162.

An assignment of error can be treated as a proposition stating a principle of law only when such assignment, standing alone, announces a statement of a proposed legal principle, so assignments which do not announce a legal principle will be disregarded, when they are treated as propositions. *Angelina County Lumber Co. v. Mast* (Civ. App.) 208 S. W. 360.

Where an assignment of error consisted of paragraphs from the motion for new trial complaining that the court erred in not sustaining objections to testimony, the paragraphs constituted no proposition, and the assignments will not be considered. *Id.*

Under rules of Court of Civil Appeals, an assignment of error, not submitting any proposition, but attempting to adopt the assignment as its proposition, will not be considered. *Weid-Neville Cotton Co. v. Lewis* (Civ. App.) 208 S. W. 731.

Assignment of error submitted as proposition that court erred in refusing to grant defendant new trial, for reason set forth in specified paragraphs of defendant's amended motion for new trial, held insufficient, as not calling attention to any proposition of law, first proposition not being itself proposition, and as unsupported, together with its propositions, by any statement showing truth of allegations of paragraph of motion for new trial. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Under rule 20 of the Court of Civil Appeals (142 S. W. xiii), an assignment, submitted as a proposition, that "the court erred in overruling plaintiffs' motion to withdraw their announcement of ready for trial and continue this cause, as shown by plaintiffs' bill of exceptions," etc., to which there was no proposition subjoined, cannot be considered, not being in itself a proposition. *Holmes v. Tennant* (Civ. App.) 211 S. W. 798.

Assignment of error: "The fifth ground of motion for a new trial. In the third paragraph of the charge of the court the jury were instructed upon proximate cause, wherein they were told 'that it was that cause which in a continuous sequence unbroken by any new independent cause, and but for which the same would not have occurred'"—contains no proposition of law or fact. *Sehkade v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 1113.

A multifarious assignment of error cannot be considered as a proposition. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

An assignment of error to the fixing the value of replevied cotton without deducting the expenses of marketing is not in itself a proposition, and where it is not supported by a proposition of law it cannot be considered. *Smith v. Colburn* (Civ. App.) 222 S. W. 344.

Assignment of error submitted as a proposition, without being followed by a specific proposition, that "it was error for the court to submit the charge to the jury *at failed and refused* to instruct the jury upon whom rested the burden of proof" without record references, and without setting out the charge given by the court, held too general for consideration. *Holden v. Evans* (Civ. App.) 231 S. W. 146.

40. — **Relevancy of proposition to assignment.**—A proposition not germane to the assignment of error does not merit consideration. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574; *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740; *Richardson v. Maves* (Civ. App.) 223 S. W. 546; *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

Under assignment of error asserting that question and answer were too general and indefinite to prove agency to transfer note, propositions as to agency, extent of authority, and questions of law or fact held irrelevant. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Propositions asserting that finding and judgment were unsupported by pleadings held not germane to assignment asserting error in rendering judgment, in that there was no evidence to support it. *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641.

Under assignment complaining of court's charge as to measure of damages, propositions as to negligence were not germane. *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983.

Propositions that evidence would not warrant judgment for delay in completion of \$5 for each day held not relevant to assignment that court erred in entering judgment for plaintiffs for \$5 a day for 78 days, etc. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Proposition that in no event could foreclosure of landlord's lien be decreed for amount in excess of particular amount is not germane to assignment that no foreclosure at all should have been decreed. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

The proposition that pleadings did not raise certain issue was not relevant under assignment of error that court erred in rendering judgment on findings of the jury on such issue. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

Assignment of error, divided into six separate paragraphs, each separately numbered, except the first, and each paragraph within itself being a separate assignment, which is followed by no statement whatever, except "See testimony V., S. F. 3 et seq., testimony R., S. F. 50 et seq., testimony H., S. F. 30 et seq.," is improper as multifarious, having propositions under each paragraph not germane to the assignment, and as not supported by adequate statements, and should not be considered, in view of the Rules for the Courts of Civil Appeals, Nos. 25, 26, and 30 (142 S. W. xii, xiii). *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

An assignment of error complaining of the error in admitting interrogatory to witness and his answer thereto: "Q. If you have stated that cattle were roughly handled, * * * then state whether or not you complained about this. * * * A. I did complain of this to the conductor and the brakeman"—is not sustained by proposition that any statement made by the brakeman as to why the engineer was handling the train roughly would be an opinion of the witness. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

Where the assignment of error complained of refusal to give peremptory instruction for defendant on the sole ground that the negligence was not shown to be the proximate cause of the injury, propositions that the evidence showed contributory negligence are not germane to the assignment and cannot be considered. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

An assignment of error based on an act of the trial judge in peremptorily instructing the jury for either party presents fundamental error, so that it will be reviewed, though propositions under assignment are not germane. *Farhart v. Robinson* (Civ. App.) 215 S. W. 973.

An assignment of error that the judgment was contrary to the verdict cannot be sustained, where the proposition and statement thereunder merely tended to show that the verdict was not warranted under the evidence and charge, for such assignment merely challenged the sufficiency of the verdict to support the judgment, and not the sufficiency of the evidence to support the verdict. *W. J. & F. J. Powers v. James* (Civ. App.) 220 S. W. 382.

In an action to quiet title to an oil lease, where the assignee of the lease assigned as error on appeal from an adverse judgment that as soon as he discovered rental was due he tendered the same, a proposition that there was no evidence showing that the well was not commenced within the time within which it was to be commenced, or the lease terminate in event of nonpayment of rent, is not germane to the assignment and cannot be considered. *Ford v. Cochran* (Civ. App.) 223 S. W. 1041.

An assignment of error complaining that the court erred in finding as a matter of law that an oil lease assigned to plaintiff was void for nonpayment of rent will not be reversed, where the proposition submitted complained of lack of proof that the lease contract had not been fully complied with; the proposition not being germane to the assignment of error which questioned the findings of fact, while the assignment questioned the conclusions of law based on the finding. *Id.*

41. — **Relevancy of proposition to case.**—Where an assignment of error complained of a paragraph of the charge and the proposition thereunder complained that certain issues were not within the law of the case as shown by objections filed, and the page of the transcript referred to showed more than one objection, but the proposition assailed the issues on entirely different grounds, no error was presented requiring a consideration of the assignment. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

44. — **Reference in propositions to other propositions or to record or assignment.**—An assignment which is not a distinct specification of error, but includes three or four propositions relating to different matters not related to each other, without setting out the bill or bills of exception, or referring to the record where they may be found, is insufficiently briefed to require consideration over appellee's objection. *Schaff v. Fancher* (Civ. App.) 215 S. W. 861.

46. — **Grouping assignments.**—Assignments of error to refusal of charges, not followed by appropriate statements showing what the requested issues were, which assignments were grouped in the brief, followed by one proposition, and were not signed by appellant or his counsel, were not to be considered. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

An assignment that the court's finding was not supported by evidence, and an assignment that the court erred in its conclusion of law as to a certain matter held to deal with entirely different legal propositions, and to be improperly grouped. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

Assignments of error which are grouped, though they are on different subjects, none being followed by a proposition or a statement, will not be considered. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Assignments of error, two challenging the court's ruling on exceptions to defendant's averments of the contract's illegality and certain oral undertakings, and one

as to the admission of parol evidence in regard to the oral contract, being matters involving different propositions of law, were improperly grouped together and cannot be considered. *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302.

47. — **Statement accompanying proposition—Necessity.**—An assignment of error must under rule for briefing be followed by statement from which it can be determined whether any error was committed. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699; *Water, Light & Ice Co., of Weatherford, v. Barnett* (Civ. App.) 212 S. W. 236; *Guyler v. Guyler* (Civ. App.) 220 S. W. 604; *Modern Order of Praetorians v. Neimann* (Civ. App.) 226 S. W. 438; *Holden v. Evans* (Civ. App.) 231 S. W. 146.

Assignments of error not followed by a statement from the record, as required by the rules for the Court of Civil Appeals, are not entitled to consideration. *Jones v. Holmes* (Civ. App.) 195 S. W. 306.

An assignment of error, not accompanied by such a statement from record as required by rules for briefing cases appealed to the Court of Civil Appeals, is not entitled to consideration. *Freeman v. Bennett* (Civ. App.) 195 S. W. 233.

Where assignments of error are not followed by sufficient statement to explain and support the propositions as required by rule 31 (142 S. W. xiii), they will not be considered. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163.

An assignment of error would not be considered where it pointed out no error which would authorize a reversal of judgment and was not followed by a sufficient statement. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

An assignment of error not followed by a statement will not be considered. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

An assignment of error, which does not contain a statement after the propositions under it, as required by court rules for the preparation of briefs, will not be considered on appeal. *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302.

Assignments of error in appellant's brief cannot be considered where there is no reference to the transcript or statement of facts in connection with the statements made under the propositions as required by Court of Civil Appeals Rule 31 (142 S. W. xiii), and the assignments point out no fundamental error authorizing reversal under Rule 23 (142 S. W. xii). *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 235 S. W. 571.

An assignment of error not followed by any proposition, statement, or authority in support thereof will not be considered. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

Assignment of error in terms merely to allowance of interest to which plaintiffs were not entitled, not being followed by proposition or statement pursuant to Courts of Civil Appeals rule 31 (142 S. W. xiii), will not be considered. *Hudson v. Salley* (Civ. App.) 201 S. W. 665.

Assignments of error will not be considered where they are multifarious and where a brief statement of the proceedings was not subjoined to propositions as required by rules 29 and 31 (142 S. W. xi). *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

An assignment of error, that evidence of the one witness was insufficient to support the verdict, having neither a proposition nor statement following it, cannot be considered. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

Assignment of error to overruling a special exception found in the special answer referred to and made a part of the assignment, but not followed by proposition or statement, neither the exception nor the paragraph appearing in the brief, held not to be considered. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

Where assignment is not followed by such proposition of law as is required by rules, and statement thereunder is not as required, it will not be considered on appeal. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Assignments of error that trial court committed reversible error by instructing jury to return verdict for defendant are not properly briefed, when not followed either by propositions or statement showing why error was committed. *Caffrey v. Bartlett Western Ry. Co.* (Civ. App.) 198 S. W. 810.

Plaintiff's assignment of error that "court erred in rendering judgment contrary to law," not being followed by statement showing what, if any, evidence was introduced to sustain allegations of plaintiff's petition, violates rule 31 (142 S. W. xiii) in regard to briefing cases. *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445.

Assignments of error in permitting plaintiffs' attorney, in reply argument, to refer to evidence referred to by counsel for defendant in his argument, not followed by sufficient statements, and without suggestion of what evidence was referred to or of any harmful results, should not be considered. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163.

Assignments of error under which no statement is given, as required by rule 29 for the Courts of Civil Appeals (142 S. W. x), will be regarded as abandoned. *Evans v. Houston Oil Co. of Texas* (Civ. App.) 211 S. W. 605.

On appeal from judgment on directed verdict, insufficiency of appellant's brief, in that the assignments are not supported by statements of fact sufficient to maintain the propositions, held not to require dismissal of appeal, where brief was filed by appellee, and in view of fundamental character of error. *Lopez v. Garcia* (Civ. App.) 221 S. W. 665.

Where the statements of the proceedings made in connection with the presentation of assignments of error are insufficient to enable the Court of Civil Appeals to pass on the assignments without an independent examination of the record and search for some of the proceedings, the court might properly refuse to consider such assignments, but the matter is within its discretion. *Frye v. Wayland* (Civ. App.) 223 S. W. 975.

Under rule 31 for Courts of Civil Appeals, an assignment of error, complaining of a finding that plaintiff was not guilty of contributory negligence, should be supported by a

full and fair statement of all the evidence in the record bearing upon the question of contributory negligence. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

48. — **Sufficiency of statement in general.**—Facts set forth in the statement under assignment of error cannot be presumed, in order to sustain assignment. *Southern Engine & Pump Co. v. Tencha Light & Power Co.* (Civ. App.) 196 S. W. 260.

Under rule 31 for Courts of Civil Appeals (142 S. W. xiii), assignment of error need not be considered, where propositions were not supported by a statement of germane facts, court not being required to search record for such matters. *Ludtke v. Murray* (Civ. App.) 199 S. W. 321.

Where statement under assignment of error was unsatisfactory and failed to show that finding of court complained of was not supported by statement of facts, appellate court need not examine statement of facts in order to determine that question. *Wells Fargo & Co. v. Sprague* (Civ. App.) 199 S. W. 657.

Where from statement under an assignment of error in admission of evidence court cannot determine basis of objection, the assignment will be overruled. *Hall v. White* (Civ. App.) 208 S. W. 669.

Statement of facts under assignment of error held not in compliance with the rules. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

The statement under an assignment of error: "This injury occurred about July 24, 1916. Claim for compensation was filed with the State Board April 30, 1917. Claimant testified that he was confined to his bed 115 days after his injuries and was then out occasionally driving in a car"—was insufficient to enable the court to review the trial court's finding that the claim was filed within the time provided by art. 5246ppp. *U. S. Fidelity & Guaranty Co. v. Parker* (Civ. App.) 217 S. W. 195.

Though the contention is made that the judgment improperly awards plaintiffs judgment against defendant for property which the record shows was sequestered by plaintiffs and was in possession of the sheriff by virtue of the writ, neither party having replevied, the Court of Civil Appeals is not required to make even a cursory comparison of the property sequestered with that enumerated in the judgment, where the brief contains no facts established at the trial. *Evans v. Caldwell* (Civ. App.) 219 S. W. 512.

A statement in support of an assignment of error that the petition shows clearly the relief sought and the evidence shows clearly plaintiff's right to the relief is only a conclusion of appellant, and not sufficient statement to comply with the requirement of Court of Civil Appeals, rule 31 (142 S. W. xiii). *Sample v. Drake* (Civ. App.) 224 S. W. 555.

49. — **Bill of exceptions as sufficient statement.**—The court is not required to consider an assignment of error not followed by any statement, but only by a reference to the bill of exceptions for any information desired in considering it. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

50. — **References to record, assignment, or brief.**—A reference in an assignment of error to a page of the record for a bill of exceptions, without giving it in full or at least the substance, is not the statement contemplated by rule 31 (142 S. W. xiii), and such assignment is defective. *Stowers v. H. L. Stevens & Co.* (Civ. App.) 208 S. W. 365; *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333; *Falfurrias Mercantile Co. v. Citizens' State Bank* (Civ. App.) 207 S. W. 563.

Court rule 31 (142 S. W. xiii), providing that propositions under assignments of error shall be followed by a brief statement, in substance, of the record bearing on it, contemplates records of ordinary size; and where the record is voluminous, preventing compliance, and counsel has done his best by referring to the pages and lines of the record, the assignment will be considered. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

Reference, under proposition following assignment of error, to a statement of 100 pages in brief, reproducing evidence and pleadings, held not sufficient for a distinct specification of error, required by Courts of Civil Appeals, rule 24 (142 S. W. xii). *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

Assignment of error, statement under which refers to the evidence set out on preceding pages 24-132 of the brief, a part of which had no bearing on the issues presented, need not be considered the statement of the evidence being insufficient under rule 31 for the Courts of Civil Appeals (142 S. W. xiii). *Prince Line, Limited, of Newcastle, England, v. Steger* (Civ. App.) 210 S. W. 223.

Rule requiring there shall be subjoined to each proposition asserted in the brief a brief statement in substance of such proceedings, or part, contained in the record, as will be sufficient to explain and support the proposition, is not satisfied by a simple reference to the pages of the statement of facts where the testimony of the witnesses and other matters bearing on the proposition may be found; statement of substance of testimony at least being required as well. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Statement, supporting assignment of error, which vaguely referred to other parts of the voluminous brief and the record, did not comply with the rules of the Courts of Civil Appeals as to such statements. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Statement of assignment of error that the court erred in refusing to give a decision "upon the several demurrers set out in the several answers of defendants, filed in each of said causes," giving the numbers, "and in ruling that all such demurrers had been waived," is not in compliance with the rules of the Courts of Civil Appeals, being merely a reference to the record and other parts of the brief. *Id.*

An assignment of error in a personal injury action that instructions relative to medical expenses were not authorized by the evidence will not be considered, where it

does not contain any statement as required by the rules, but merely refers practically to the entire statement of facts. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

While the reference to the bill of exceptions and to the motion for new trial may be a technical violation of rule 31 as to making statements, it will not prevent consideration of an assignment of error. *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675.

Where the assignment itself was a copy of the refused charge, and referred to the transcript page where the bill of exceptions showed the charge was requested and refused, such matters need not be repeated in the statement. *Id.*

A statement under an assignment of error to refusal of instruction, asserting that the testimony disclosed a certain fact followed by a reference to the entire statement of facts, was not sufficient under Rule 31 for Courts of Civil Appeals (142 S. W. xii) to entitle the assignment to be considered. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

The Court of Civil Appeals will not examine the 62 grounds for a new trial to discover an assignment of error where statement under assignment failed to show what paragraph in the motion is used in the assignment. *Stockyards Nat. Bank v. Wilkinson* (Civ. App.) 230 S. W. 1040.

Assignments of error complaining of action of court in overruling special exceptions, without a statement thereunder and without the special exceptions being set out, in substance or otherwise, and without record references being given or a showing made as to action taken on the exceptions, will not be considered. *Holden v. Evans* (Civ. App.) 231 S. W. 146.

Assignments of error complaining of refusal to submit requested special issue will not be considered, where no record references are given in the statement under the assignment, either as to the issues given or the issues tendered, and where the appellate court is unable to determine from the brief whether or not the issue tendered was embraced in the special issues actually given. *Id.*

Assignments of error, submitted as propositions, cannot be considered on appeal, where there is not a reference in appellant's brief to the transcript or statement of facts, in connection with statements made under such assignments, as required by rule 31 (142 S. W. xiii). *Western Union Telegraph Co. v. Brett* (Civ. App.) 231 S. W. 449.

51. — Reference from one statement to another.—In suit to set aside default judgment, an assignment, whose proposition is that plaintiff's failure to appear and answer was not chargeable to defendant's fraud, referring for statement to that of another assignment which contains none of the testimony on the issue of diligence, etc., must be overruled. *Ramirez v. Martinez* (Civ. App.) 208 S. W. 380.

Statement under third assignment of error, "Same as under first assignment of error," which asserted court erred in instructing to find for defendants, held not in compliance with rules as to briefing, statement under first assignment covering four pages of typewritten brief, and including nearly all testimony. *Wittliff v. Tucker* (Civ. App.) 208 S. W. 751.

52. — Relevancy to assignment or proposition.—Assignment of error will not be considered, statement following it being foreign to it. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

54. — Setting out proceedings, rulings, exceptions, and facts showing error and injury therefrom.—Rule 31 of Court of Civil Appeals (142 S. W. xiii) providing that a brief statement of proceedings shall be subjoined to each proposition in the brief, is complied with when the testimony, findings, and proceedings are stated in abbreviated form. *C. R. Miller & Bro. v. Mummert* (Civ. App.) 196 S. W. 270.

Assignments of error relating to errors in the admission or rejection of evidence cannot be reviewed, where the statements subjoined do not show that the issues were saved by bill of exceptions. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

If bill of exceptions to overruling of objection to question to witness does not, as it should, disclose what answer was, if question was in fact answered, etc., statement in support of assignment of error should. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

Objection to consideration of assignment that it violates rule 31 for Courts of Civil Appeals (142 S. W. xiii), in that the statement subjoined does not quote from record trial court's action on special demurrer to petition, is well taken, where it would require search of record to determine action court took. *Texas Employers' Ins. Ass'n v. Mummey* (Civ. App.) 200 S. W. 251.

In a cause tried prior to amendment of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1974, by Acts 35th Leg. c. 177 (Supp. 1918, art. 1974), assignment complaining of refusal of requested charges will not be reviewed, unless statement shows exception at proper time with proper bill of exceptions and reference to page of record where the exception may be found, in view of court rule 31 (142 S. W. xiii). *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779.

Assignment of error, merely complaining that court permitted witness to answer a certain question without stating what he answered, not followed by a statement by which its propriety can be tested, will not be considered. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

Assignments of error in refusing special requested charges submitting the issue of appellees' good faith could not be sustained where the statement submitted thereunder contained no facts showing such bad faith. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

In action by sleeping car passenger for injuries from being carried in an unheated car, an assignment of error of the company complaining of refusal of instruction that the comfort of passengers who were asleep could not be sacrificed in the interest of those awake by putting on the heat could not be sustained, where, in the statement following the assignment, appellant failed to point out how any such sacrifice would have resulted. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

Matters presented by assignments to the admission of testimony are not reviewable by the Court of Civil Appeals, under Rules for the Courts of Civil Appeals, No. 31 (142 S. W. xiii), where none of the statements show that any bill of exceptions was reserved, while in only two cases does it appear that any objection was offered. *Pawloskey v. Kusch* (Civ. App.) 223 S. W. 496.

Assignments of error to the charge may be ignored, the statement following them, and having reference to them under the rules, failing to show that the objections were timely and properly made, and the court's attention called thereto before the charge was given, though in the brief counsel say this was done. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

Assignment of error to admission of telegram, over objection, which refers to or mentions no bill of exceptions, cannot be sustained, not being supported by the statement thereunder, which does not show what objection was made, nor that any exception was taken. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 227 S. W. 211.

Assignments of error, assailing the correctness of findings of fact, will be overruled when they are not followed by any statement showing that objections were made or indicating what the findings were, or wherein they were inaccurate. *Childs v. Gearhart* (Civ. App.) 229 S. W. 702.

Assignments of error, complaining of the overruling of a special exception, and of motions to quash the garnishment, and of certain conclusions of law, will be overruled where they are not followed by statements showing such exception, motions and conclusions. *Id.*

Assignments that court erred in overruling exceptions to court's main charge, without informing court in the brief what the exceptions were and what parts of the main charge they were directed against are without sufficient statements under the assignments, as required by Court of Civil Appeals rule 31 (142 S. W. xiii), and will not be considered. *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738.

56. Setting out pleadings or averments therein.—Statement under assignment attempting to urge error in overruling general demurrer to petition in action by city against fire insurance company for taxes on certain property merely stating as to contents of petition that the petition alleges defendant's name to be "M. Mutual Fire Insurance Company" is insufficient under Court of Civil Appeals rule 31 (142 S. W. xiii), and will not support a proposition based on defendant being a "mutual insurance company" operating under Acts 28th Leg. c. 109, and by section 10 exempt from tax other than on gross premiums. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

57. — Setting out instructions complained of.—An assignment of error, in a suit by a shipper against carriers for a shipment of cabbage damaged, to a certain paragraph of a charge, which does not show what such paragraph contained and is not followed by any statement as to what such paragraph contained, cannot be considered on appeal. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son* (Civ. App.) 212 S. W. 530.

59. — Setting out matters of evidence.—An assignment that the trial court erred in refusing to give a requested charge cannot be considered, where the testimony, on which the right to the charge as claimed was based, is nowise set out in the statement made under the assignment. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307; *Patterson v. Bushong* (Civ. App.) 196 S. W. 962; *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

Where statement accompanying assignments of error did not show in what particular documentary evidence failed to authorize the judgment, court held not required to search the evidence in the statement of facts. *Hooker v. State* (Civ. App.) 197 S. W. 481.

Where the statement merely sets out the petition, without the evidence, under a proposition that court erred in not directing verdict, the assignment will not be considered. *Texas & N. O. R. Co. v. Jones* (Civ. App.) 201 S. W. 1085.

A statement under a proposition, which is confined to a statement of the pleadings and the issues sought to be raised, and does not undertake to set out the substance of the evidence bearing on the proposition, is insufficient. *Thomas v. Derrick* (Civ. App.) 207 S. W. 140.

Statement under assignment of error stating or quoting no testimony in support of assertion of assignment that verdict was contrary to undisputed evidence held insufficient to require consideration of assignment. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Court of Civil Appeals is not required to examine all the evidence contained in the statement of facts to determine whether an assertion of an assignment of error is true, where it cannot be said that the error claimed is not one apparent on the face of the record. *Id.*

In an action for injuries to shipment of live stock, an assignment of error that account sales were admitted in evidence without preliminary proof need not be considered, where statement following assignment does not show what evidence was given in reference to account sales, and bill of exceptions is in same condition. *Schaff v. Holmes* (Civ. App.) 215 S. W. 864.

An assignment complaining of the erroneous admission of evidence cannot be considered, where not followed by statement as required by rule 31 for Courts of Civil Appeals. *W. J. & F. J. Powers v. James* (Civ. App.) 220 S. W. 382.

The appellate court will not search the record to ascertain testimony as bearing on peremptory instructions, no mention of which is made in the statement. *Walker v. Kellar* (Civ. App.) 226 S. W. 736.

62. — **Conclusiveness and effect.**—Where an assignment of error, touching liability for negligence of a fellow servant was followed by a proposition relying on Rev. St. 1911, art. 6640, the Court of Civil Appeals rightfully refused to consider later contention that article 6648 was the applicable article. *Houston Belt & Terminal Co. v. Glover* (Com. App.) 213 S. W. 597.

64. — **Counter propositions in appellee's brief.**—A counter proposition attacking finding of verdict on issue of limitations, which attacked the sufficiency of evidence to establish a trust in plaintiff's favor, was not a sufficient assignment to require a consideration of sufficiency of evidence. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

65. — **References to motion for new trial or other parts of record.**—Assignment of error, stating that the error was complained of in the motion for new trial, followed by a reference to the transcript, giving the page containing part of the motion where such complaint was made, sufficiently complies with court rule 25 (142 S. W. xii). *El Paso Electric Ry. Co. v. Lee*, 110 Tex. 494, 221 S. W. 254, reversing judgment (Civ. App.) 157 S. W. 748.

Violation of rule 31 for the Courts of Civil Appeals (142 S. W. xiii), by not giving pages of the record or brief in the statement of proceedings following assignments of error, prevents consideration of such assignments. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

Assignments of error will not be considered, when not in substantial compliance with rule 25 (142 S. W. xii), requiring reference to the part of the motion of new trial wherein the error assigned is complained of. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

An assignment of error containing no reference to the record, showing that the assignment was part of the motion for new trial in the court below, will not be considered. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

In action for loss of baggage, where jury found that plaintiff was a guest, assignment of error to refusal of requested instruction, assuming the contrary and submitting the issue of gross negligence, which failed to show any reference to the record warranting submission of such issue, could not be sustained. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

An assignment of error not being followed by a statement, reference to the petition to ascertain the allegations attacked through the special demurrer, the overruling of which is assigned as error, is not a compliance with the rule as to briefing. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

66. **Time for filing.**—Consideration of assignments of error will not be refused because they and appellant's brief were not filed in the trial court in the time prescribed; it being apparent this occasioned no harm, and motion to dismiss appeal, with opportunity for counter showing, contemplated by Courts of Civil Appeals Rule 39 (142 S. W. xiii) not being filed. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

67. **Filing and annexing to record.**—Where examination of record shows the single assignment of error was not filed below, either in motion for new trial or otherwise, assignment cannot be considered under this article, rule 67 for District and County Courts (142 S. W. xxii), and rule 24 for Courts of Civil Appeals (142 S. W. xii). *Lee v. Zielinski* (Civ. App.) 197 S. W. 327.

New or original assignments of error filed subsequent to filing of transcript in Court of Civil Appeals are unauthorized and cannot be considered. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

On appeal from a judgment in a case tried before the court without a jury, assignments of error in appellant's brief cannot be considered, where none were filed in lower court, though it is not necessary to file a motion for new trial. *Canter v. Canter* (Civ. App.) 231 S. W. 736.

68. — **Including in transcript.**—Assignments of error, not presented in motion for a new trial or shown by the transcript, will not be considered, unless they present fundamental error. *Hooker v. State* (Civ. App.) 197 S. W. 481.

Assignments of error not appearing in the transcript cannot be considered. *Moody v. First National Bank of Aransas Pass* (Civ. App.) 198 S. W. 169.

Where findings of fact and conclusions of law were filed after the final judgment was rendered, under rule 101 (142 S. W. xxiv) appellants had the right to complain thereof by assignments of error presented in their brief, though not contained in the transcript, and not filed in the court below. *Busbee v. Busbee* (Civ. App.) 231 S. W. 441.

70. **Cross-assignments—Right to assign.**—Where plea of privilege was sustained as to one defendant and overruled as to others, and only the latter defendants appeal, plaintiff by cross-assignment cannot complain of the judgment as to the other defendants. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

71. — **Necessity.**—Special exceptions to a petition in quo warranto presented in the court below, which were overruled, cannot be reviewed on appeal where not presented by cross-assignments. *State v. Vincent* (Civ. App.) 217 S. W. 402.

The appellate court will not reform a judgment in favor of an appellee who has

sued out no cross-appeal nor filed cross-assignments of error. Independent Order of Puritans v. Manley (Civ. App.) 220 S. W. 647.

Whether the court's conclusions of law which were partly favorable to defendant and partly unfavorable were inconsistent as a whole need not be determined, where there is no cross-assignment of error by plaintiff. Hull v. Guaranty State Bank of Carthage (Civ. App.) 231 S. W. 810.

72. — **Filing and annexing to record.**—Cross-assignment not having been filed in the court below as required by district court rule 101 (159 S. W. xi), and not presenting fundamental error, will be disregarded. Eldora Oil Co. v. Thompson (Civ. App.) 230 S. W. 738.

74. **Defects, objections, and amendments.**—Assignments of error defective because containing statements of fact outside record, etc., may be considered; appellants, and counsel representing them being negroes. Woods v. Bell (Civ. App.) 195 S. W. 902.

76. **Scope and effect of assignment—Rulings on pleadings.**—A plea in abatement, the overruling of which was assigned as error, must be considered as presented to the judge, and an addition attempted to be made in the assignment cannot be considered. American Automobile Ins. Co. v. Struwe (Civ. App.) 218 S. W. 534.

77. — **Rulings as to evidence.**—Question whether or not evidence was sufficient to support jury's verdict requiring decree of foreclosure of landlord's lien cannot be raised by assignment of error in rendition of judgment foreclosing landlord's lien. Pantaze v. Farmer (Civ. App.) 205 S. W. 521.

Assignments of error sufficient to direct the court's attention to the fact that appellant claimed that the evidence was not sufficient to support the judgment held to present question as to sufficiency of evidence to support the findings of fact of the trial court, though the assignments do not directly and specifically attack the findings of fact. Morrison v. Neely (Com. App.) 231 S. W. 728.

80. — **Verdict, findings, or judgment.**—Assignment that trial court erred in its findings of fact presents nothing for review, where case was dismissed upon demurrer. Pearlstone v. Western Union Telegraph Co. (Civ. App.) 199 S. W. 860.

82. **Relation to record.**—A complaint of the refusal of the trial court to suppress the deposition of a witness because he failed to answer certain cross-interrogatories propounded will not be considered, where the record fails to show that the motion was seasonably made. Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co. (Civ. App.) 220 S. W. 781.

Assignments of error to the rejection of testimony are not entitled to consideration where the bills of exceptions do not show the objections made to the evidence nor the ground on which they were sustained. Ellerd v. Sodeberg (Civ. App.) 222 S. W. 674.

An assignment that the court erred in sustaining defendant's exception to plaintiff's plea shows no error, where the statement in the brief and the record itself do not show any exception to the plea. Walker v. J. N. Hirsch Cooperage Co. (Civ. App.) 222 S. W. 1116.

The overruling of plaintiff's exceptions to defendant's cross-action cannot be considered where the record fails to show that any of the exceptions were ever presented to the court or any ruling made thereon. Irwin v. Jackson (Civ. App.) 230 S. W. 522.

84. **Effect of failure to properly assign or file.**—Where appellants' brief contains no assignment of error, judgment must be affirmed unless the record discloses fundamental error. Busbee v. Busbee (Civ. App.) 231 S. W. 441; Mansfield v. Mansfield (Civ. App.) 198 S. W. 169; Blalock v. Wright (Civ. App.) 202 S. W. 809; Harlan v. Acme Sanitary Flooring Co. (Civ. App.) 203 S. W. 412; Dickey v. Gulf, T. & W. Ry. Co. (Civ. App.) 210 S. W. 552.

Where there is no bill of exceptions, statement of facts, nor assignment of errors in the record, judgment will be affirmed. Draper v. Hillen (Sup.) 10 S. W. 457.

Where appellant's brief is not in conformity with rules 24 and 25 of Court of Civil Appeals (142 S. W. xii) and this article, in that it does not set out particular error with sufficient certainty to identify it, etc., it cannot be considered. Tolivar v. Beaumont Traction Co. (Civ. App.) 196 S. W. 362.

Where assignments are not followed by propositions or statements, and brief does not comply with rules governing appellate courts, the court will not on its own motion consider brief in detail. Hooks v. Pate (Civ. App.) 197 S. W. 613.

Where there was no assignment that verdict for plaintiff was excessive, errors in instructions which could have only caused an excessive verdict, and which had no bearing on question of liability, would not authorize a reversal. Southern Traction Co. v. Dillon (Civ. App.) 199 S. W. 698.

Though the propositions in appellant's brief were not germane, yet, where the brief as a whole was sufficient to present the error relied upon for reversal, the matter should be reviewed by the appellate court, for the statutes and rules requiring errors to be assigned are primarily for relief of appellate courts, and should not be given a construction calculated to embarrass suitors. Harlington Land & Water Co. v. Houston Motor Car Co. (Civ. App.) 209 S. W. 145.

Where no assignments of error are brought up in the record, there is nothing upon which to base a brief; and, where the record fails to show that motion for new trial was filed, judgment will be affirmed. Burk v. Burk (Civ. App.) 209 S. W. 495.

In an action against the charterer of a vessel, where the trial court, as a condition to overruling a motion for new trial, required the charterer to remit a judgment over in his favor, held that assignments of error predicated on the judgment in favor of the charterer should not be disregarded on the ground that that matter was no longer

in the case, but should be treated as a general attack on the verdict and judgment. *Prince Line, Limited, of Newcastle, England, v. Steger* (Civ. App.) 210 S. W. 223.

In an action against several defendants, where evidence was introduced by plaintiff against all of the defendants, but the court ruled that it was not admissible against certain defendants, refusal of the court to submit certain issues raised by such evidence is not ground for reversal as far as the defendants against whom the court ruled the evidence was not admissible are concerned, where there is no assignment of error in the brief bringing up for review the action of the court in ruling on the admissibility of the evidence, although such ruling was excepted to. *Croom v. Croom* (Civ. App.) 214 S. W. 735.

Where all bills of exception and assignments of error were stricken from the record, and there was no fundamental error apparent in the pleadings, charge, or judgment, the judgment must be affirmed. *Gulf Refining Co. v. Nelson* (Civ. App.) 227 S. W. 549.

85. Waiver or abandonment of assignment.—Though errors are assigned in the motion for a new trial in the court below, they will be considered as waived, unless briefed and urged in the appellate court. *Magee v. Cavins* (Civ. App.) 197 S. W. 1015.

Where there was no assignment of errors filed in the court below, except in the motion for a new trial, those in such motion should be copied in the brief, and while such copied assignment need not be letter perfect, a reconstructed assignment is insufficient, and authorizes the Court of Appeals to hold the assignment waived and abandoned under Court of Civil Appeals, rule 29 (142 S. W. xii), notwithstanding appellant's statement that they were not waived. *Schaff v. Fancher* (Civ. App.) 215 S. W. 861.

Art. 1613. [1022] Docket of causes and disposition of same.

In general.—Where record on appeal was filed in the Court of Civil Appeals December 6th, and on December 8th the cause was set for submission on February 24th following of which appellant's counsel were duly notified on December 10th, but appellant left no brief at appellee's attorney's office until after office hours on February 19th, held, the appeal would be dismissed for failure to file briefs in time required by art. 2115 and the rules of the Court of Civil Appeals, although appellant's leading counsel, being from another state, did not know of the requirement of the rules as to briefs. *West Louisiana Bank v. Terry* (Civ. App.) 229 S. W. 639.

Art. 1614. [1019] Appearance by brief, etc.—When any cause or suit may be taken up from any inferior court to the Court of Civil Appeals, by appeal, writ of error, or otherwise, it shall be lawful for the attorney of both plaintiff and defendant to file papers of said suit or cause, written, typewritten, or printed briefs or arguments, if written, not to exceed fifteen pages, and said court shall be required to notice the same as if it were the person appearing for said attorney and shall not dismiss any suit or cause where such brief or argument is filed, for want of further prosecution. [Acts 1909, S. S., p. 270; Acts 1921, 37th Leg., ch. 107, § 1, amending art. 1614, Rev. Civ. St., 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

1. Necessity of briefs.—Assignments of error that the judgment is contrary to and not supported by the evidence, and that the court erred in giving judgment for plaintiff as against defendant, for the reason the evidence is insufficient to show plaintiff complied with the contract sued on, without a brief are insufficient to require the Court of Civil Appeals to review them. *Stump v. Riley* (Civ. App.) 210 S. W. 603.

Failure to file statement of facts is not alone ground for affirmance; and, if the defendant in error desires to have an affirmance, it is necessary for him to file briefs in accordance with rule 42 for the Courts of Civil Appeals (142 S. W. xiv), and where he fails to do so the court can only dismiss the writ of error for want of prosecution. *Edwards v. Holder* (Civ. App.) 215 S. W. 480.

An appellant is not required to brief the cause to have his appeal considered, but in case of failure the court is left to make its own search of the record for error. *Williams v. Roberts* (Civ. App.) 217 S. W. 1117.

Though an assignment of error was poorly briefed, yet where the error was obvious, it will be considered. *Kibby v. Kessler* (Civ. App.) 225 S. W. 277.

The action of the trial court in sustaining general demurrer to the petition constituted a holding that the facts stated in the petition, if proved, would not constitute a cause of action, a proceeding which raised the question of fundamental error and must be considered by the Court of Civil Appeals regardless of the proper briefing of the case. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

2. Form and requisites in general.—If appellant on appeal under art. 4644, from order on temporary injunction, elects under art. 4645 to brief the case, brief need not comply with rules for ordinary appeals. *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644.

The Court of Civil Appeals now considers all questions upon their merits in the absence of disregard of statutory provisions or flagrant or inexcusable disregard of the rules of briefing. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

Appellant's brief, which does not contain all that is necessary to enable Court of

Civil Appeals to decide some questions sought to be presented, has not been prepared in accordance with the rules. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Where court is simply left to presume that exceptions were taken to admission of evidence complained of, and that proper bills were prepared, approved, and filed, in such condition of brief appellant is not entitled to have ruling complained of reviewed. *Wittliff v. Tucker* (Civ. App.) 208 S. W. 751.

3. Statement of case or of facts—In general.—An assignment that the court erred in sustaining defendant's exception to plaintiff's plea shows no error, where the statement in the brief and the record itself do not show any exception to the plea. *Walker v. J. N. Hirsch Cooperage Co.* (Civ. App.) 222 S. W. 1116.

4. Statement of evidence.—In view of rule 31 (142 S. W. xiii), court will not review submitted special issue on ground that it assumed facts where evidence was not incorporated in the brief. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256.

An instruction as to damages which limited jury in its award to damages accruing only up to time of trial cannot be held erroneous, where appellant does not state in his brief that there was any evidence that all the damages had not accrued at time of trial. *El Paso Electric Ry. Co. v. Carruth* (Civ. App.) 208 S. W. 984.

Where testimony of contestants in will contest as to insanity is not set out in the brief, the court on appeal will not go to the statement of facts or the transcript for the testimony to pass on its admissibility. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

When a statement is made of the evidence in assignment of error in appellant's brief, the brief should set out the evidence quoted from the statement of facts, and not the conclusions of the attorney as to what the evidence shows; such conclusions being a matter for the court to decide. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

5. — Setting out instructions.—Assignments of error to the refusal of the trial court to submit three special issues cannot be considered, where there was no statement in the brief showing that the special issues were requested in the writing before the case was submitted to the jury, nor even that they were requested and refused by the court at any time. *Walker v. J. N. Hirsch Cooperage Co.* (Civ. App.) 222 S. W. 1116.

7. Specification of errors.—Assignments of error contained in a brief should, under rule 29 for Courts of Civil Appeals (142 S. W. xii), be separately numbered. *Ulrich v. Galveston-Seeburg Electric Piano Co.* (Civ. App.) 199 S. W. 310.

Assignments complaining of the argument of plaintiff's counsel in his closing speech, taken in full by the stenographer and incorporated in a bill of exceptions, and copied at length in appellant's brief, were not so presented under the rules as to require consideration. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

8. Incorporation of assignment of errors.—In view of Court of Civil Appeals Rule No. 29 (142 S. W. xiii), assignments of error not copied in the brief are considered waived. *Mason v. Gantz* (Civ. App.) 226 S. W. 435; *McKelvy v. Gugenheim* (Civ. App.) 208 S. W. 757; *Chancellor v. Slaughter* (Civ. App.) 210 S. W. 239; *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825; *Evans v. Houston Oil Co. of Texas* (Civ. App.) 211 S. W. 605; *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630; *McKay v. Lucas* (Civ. App.) 220 S. W. 172; *Kibby v. Kessler* (Civ. App.) 225 S. W. 277; *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

Assignments of error urged in the brief must be, at least, substantially copies of the assignments presented in the motion for new trial filed in the trial court, and an assignment of error not embraced in such motion cannot be considered. *Ball v. Henderson* (Civ. App.) 228 S. W. 361; *McFarland v. Burkburnett-Harris Oil Co.* (Civ. App.) 228 S. W. 571.

Assignments of error are insufficient where they consist of the motion for new trial, and the paragraphs thereof are not copied in the brief as required by court rule 29 (142 S. W. x), but are radically revised or reconstructed. *Waco Oil & Refining Co. v. Texas Refining Co.* (Civ. App.) 207 S. W. 987.

Under Rules for the Courts of Civil Appeals, No. 29 (142 S. W. xii), a brief where-in the assignments were numbered from 1 to 10, consecutively, omitting 4 and 5, was improper, as not numbering all the assignments consecutively. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

Where there are no assignments carried into the brief presenting the exclusion of evidence as error, it cannot be considered. *Holmes v. Tennant* (Civ. App.) 211 S. W. 798.

Where there was no assignment of errors filed in the court below, except in the motion for a new trial, those in such motion should be copied in the brief, and while such copied assignment need not be letter perfect, a reconstructed assignment is insufficient, and authorizes the Court of Civil Appeals to hold the assignment waived and abandoned under Court of Civil Appeals rule 29 (142 S. W. xii), notwithstanding appellant's statement that they were not waived. *Schaff v. Fancher* (Civ. App.) 215 S. W. 861.

Claim of appellant in its motion for new trial that the verdict was excessive, not being brought forward in its brief, is to be considered abandoned. *Dallas Power & Light Co. v. Edwards* (Civ. App.) 216 S. W. 910.

Assignments of error contained in the motion for new trial are not required to be copied in the brief, where subsequent assignments filed are copied and properly identify the paragraphs of the motion. *Barkley v. Gibbs* (Com. App.) 227 S. W. 1099.

Though the statute provides that an assignment shall be sufficient which directs attention to the error complained of, the rule of the Supreme Court, providing that assignments shall be copied into the brief, should always be complied with. *Olguin v. Apodaca* (Com. App.) 228 S. W. 166.

Assignments of error in appellant's brief which are reconstructed from the motion for a new trial and are not substantial copies of any assignments of error contained in the record are not entitled to be considered under art. 1612, and Rules 23 and 29 (142 S. W. xii) for Courts of Civil Appeals. *Texas Blue Bonnet Oil Co. v. W. C. Jones Drilling Co.* (Civ. App.) 228 S. W. 972.

Under Rev. St. 1911, art. 2113, appellant's brief need not present the assignment in the motion for new trial, the statute being simply directory. *Marvin v. Kennison Bros.* (Civ. App.) 230 S. W. 831.

Under Supreme Court rule 101 (142 S. W. xxiv), as amended to conform to art. 1612, appellant could present in his brief, without incorporating in the transcript, an assignment of error relating to the failure of the court after final judgment to file findings of fact and conclusions of law, as requested by appellant, the rule being a construction of the statute, and binding on the Courts of Civil Appeal. *Id.*

Brief of appellant held not to contain assignments of error, though it referred to copies certain of the trial court's findings of fact and designated them assignments of error, such alleged assignments not charging that the trial court committed any error, and not being followed up by any proposition in the brief, as required by the rules, although it contained what were called propositions, which were mere recitals of certain testimony contained in the statement of facts, not asserting any proposition of law. *Busbee v. Busbee* (Civ. App.) 231 S. W. 440.

9. Citation of authorities.—Under rule 36 (142 S. W. xiii) of the Court of Civil Appeals, it is improper to present in the brief letters and statements from universities and colleges of the United States as to the construction to be placed upon the language of a statute. *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 437.

The statement of the brief that authorities will be found "in argument under separate cover" is not in compliance with Rules of the Courts of Civil Appeals, No. 36 (142 S. W. xiii), requiring the authorities to be annexed to each proposition with its statement, and at the end of it a reference simply to the authorities relied on, if any, in support of it, giving the order in which they should be cited. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

10. References to record.—Where there are references in plaintiff's brief reading, "S. of F. p. —," it is not duty of Court of Civil Appeals to read entire statement of facts to verify statements in brief that certain facts were proved; such statements being followed by references. *Caffrey v. Bartlett Western Ry. Co.* (Civ. App.) 198 S. W. 810.

Brief, which clearly presented the points relied upon for reversal with sufficient references to the record to enable court to apply facts without unnecessary labor in searching the record, held sufficient, though rules, in some respects, were not technically complied with. *Lee v. Gilchrist Cotton Oil Co.* (Civ. App.) 215 S. W. 977.

12. Printing and typewriting.—Briefs consisting of 19 pages, each of single-spaced typewritten matter, were not in compliance with the rules, and, in the absence of good excuse, the appeal will be dismissed. *Smith v. Smith* (Civ. App.) 209 S. W. 682.

Typewritten briefs should be double spaced and typewritten on good paper. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

A typewritten brief is "written" as distinguished from "printed," and must be limited in its number of pages to 15, under Rev. St. art. 1614, and Rules of the Courts of Civil Appeals, No. 37 (149 S. W. x). *Johnson v. Mangum* (Civ. App.) 227 S. W. 750.

13. Filing and time for filing.—In appellate court.—Where record on appeal in divorce case was filed in Court of Civil Appeals, September 18, 1918, appellant's briefs, filed January 25, 1919, twelve days before case was submitted, and after appellant had been notified it was set for submission February 5th, were not filed in time required. *Smith v. Smith* (Civ. App.) 209 S. W. 682.

15. Defects, objections, and amendments.—An appellant's brief, violating rules of Court of Civil Appeals, will not be considered, except generally, though no objection has been urged against it. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646.

A brief on appeal which fails to comply with the rules will not be considered. *Buven v. Barden* (Civ. App.) 196 S. W. 333.

Failure to comply with rules of Supreme Court on subject of briefing cases, especially rules 29, 30, and 31 (142 S. W. xii, xiii), constitutes abandonment of assignment, resulting in affirmance, unless fundamental error is discovered. *Caffrey v. Bartlett Western Ry. Co.* (Civ. App.) 198 S. W. 810.

Appellees' brief, consisting of 53 pages, in gross violation of rules, will not be considered by Court of Civil Appeals. *Lopez v. Vela* (Civ. App.) 200 S. W. 1111.

16. Striking out brief.—A motion to strike out appellant's brief and assignments of error on the ground that they do not comply with the rules, and were filed too late to afford reasonable time to properly reply, will be overruled, where appellee has filed a comprehensive answering brief. *Ward v. Compton* (Civ. App.) 203 S. W. 129.

17. Scope and effect.—Under rules 40, 41, for the Courts of Civil Appeals (142 S. W. xiv), where appellants alone have filed a brief, the court must regard such brief as a proper presentation of the case without examining the record. *Yates v. Buffalo State Bank* (Civ. App.) 229 S. W. 619; *Hodge v. Keels* (Civ. App.) 196 S. W. 645; *Blue v. Conner* (Civ. App.) 219 S. W. 533; *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

Where defendant did not deny in brief that certain testimony stood uncontradicted, appellate court will accept statement as true in view of rule 41 (142 S. W. xiv). *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

Where appellants make no statement, and do not file a supplemental brief contesting the statements made by appellees, the Court of Civil Appeals will take such state-

ments as correctly reflecting the facts of the record. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

Under Supreme Rules of Court 40 and 41 (142 S. W. xiv), court will accept unchallenged statement of facts in appellant's brief as part of statement of facts. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

Instruction, the giving of which is not assigned as error in appellant's brief, will not be considered; objection thereto having been waived. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

Court of Civil Appeals rule 41 (142 S. W. xiv), that "whatever of the statement of the appellant * * * in his brief is not contested will be considered as acquiesced in," requires acceptance of a statement so made by appellant. *Standard Rice Co. v. Broussard* (Civ. App.) 223 S. W. 323.

Where defendants, on appeal from an order overruling their plea of privilege, advanced a proposition as to the construction of Rev. St. art. 1830, exception 5, which was conceded by plaintiff, the defendants cannot thereafter question the soundness of the proposition. *Union Woolen Mills v. Starke* (Civ. App.) 228 S. W. 357.

Under rule 42 governing Courts of Civil Appeals (142 S. W. xiv), providing that, when appellant or plaintiff in error fails to prepare a cause for submission, appellee may file a brief in the manner required of appellant, except shaping proposition to show correctness of judgment, appellee's brief must be accepted as correct presentation of case without examining record further. *Réce v. Langley* (Civ. App.) 230 S. W. 509.

Execution by defendant in error of an agreement on file among the papers that plaintiff in error could file the transcript and record in the Court of Civil Appeals and file its briefs at any time before a specified date, and that defendant in error might file his briefs at any time prior to two weeks before submission of the cause, operated as an appearance in the Court of Civil Appeals by defendant in error. *Indemnity Co. of America v. Mahaffey* (Civ. App.) 231 S. W. 861.

18. Failure to file, or to file in time—Effect in general.—Consideration of assignments of error will not be refused because they and appellant's brief were not filed in the trial court in the time prescribed; it being apparent this occasioned no harm, and motion to dismiss appeal, with opportunity for counter showing, contemplated by Courts of Civil Appeals Rule 39 (142 S. W. xiii) not being filed. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

Where briefs have not been filed by any of the parties on appeal, the reviewing court can consider only fundamental errors. *Holguin v. Woodlawn Real Estate & Improvement Co.* (Civ. App.) 216 S. W. 899.

A complaint that the brief of plaintiff in error was not filed in time for defendant in error to file a brief cannot be entertained where defendant in error filed a brief. *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330.

19. — Excuses.—An alleged verbal agreement by appellee's attorneys regarding the time for filing of briefs will not be considered, when disputed by appellee's attorneys, although undisputed verbal agreement would be recognized. *Daniel v. Nixon* (Civ. App.) 225 S. W. 579; *Western Union Telegraph Co. v. King* (Civ. App.) 224 S. W. 318; *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

Upon a motion for affirmance of judgment for failure to file brief within required time, that court reporter failed to transcribe testimony in form required by art. 1924, did not excuse appellants, where no attempt to mandamus the reporter under article 2068 was made. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714.

21. — Dismissal.—Where no briefs had been filed at the time writ of error was submitted, and no sufficient cause for the failure was shown, a motion to dismiss the writ for want of prosecution is well taken. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285; *Burnett v. Foster* (Civ. App.) 225 S. W. 574.

Appellant failing to file brief, and appellee's brief not complying with Courts of Civil Appeals rule 42 (142 S. W. xiv), there must be a dismissal of appeal, instead of an affirmance. *Arispe v. Clark* (Civ. App.) 199 S. W. 500; *Stocking v. Laas* (Civ. App.) 199 S. W. 500.

Where no briefs are filed on an appeal from an order refusing to vacate a receivership, the appeal will be dismissed. *Hamilton v. American Nat. Ins. Co.* (Civ. App.) 200 S. W. 259.

Motion, under rule 39 (142 S. W. xiii), to dismiss appeal for noncompliance with Rev. St. 1911, art. 2115, as to time for filing brief, held not governed by rule 8 (142 S. W. xi) as to time for motions affecting formalities attending the filing of transcripts. *Missouri, K. & T. Ry. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211.

No briefs having been filed by appellant, appellee's motion to dismiss appeal will be granted; there being no showing that a copy of appellant's brief was filed in trial court, or that there was a waiver of such filing. *Kuehn v. Leubner* (Civ. App.) 202 S. W. 993.

Where appellant telegraph company claims that the federal law precludes recovery in an action for mental anguish arising on interstate messages, and that it is apparent on the face of the proceedings that appellee was not entitled to judgment, appeal will not be dismissed by reason of mere failure of one of the parties to brief the cause within the prescribed time; the claimed error being fundamental. *Western Telegraph Co. v. King* (Civ. App.) 224 S. W. 318.

Rules for the Courts of Civil Appeals, No. 8 (142 S. W. xi), relative to time for filing motion to dismiss after filing of the record in the Court of Civil Appeals, is without application when a question of jurisdiction is involved, and cannot apply to a motion to dismiss for failure to file briefs. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

23. — Affirmance.—Where no briefs for appellants have been filed, and no fundamental error appears, judgment appealed from will be affirmed. *Skinner v. Spencer* (Civ. App.) 229 S. W. 347; *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 320; *Houston Oil Co. of Texas v. Jordan* (Civ. App.) 212 S. W. 544; *Laster v. Lefevre* (Civ. App.) 218 S. W. 654; *Sovereign Camp, Woodmen of the World, v. Wood* (Civ. App.) 219 S. W. 501; *Sunshine Oil Corporation v. Avery* (Civ. App.) 225 S. W. 409; *Stanfield v. Williams* (Civ. App.) 227 S. W. 1114; *Barefield v. Allen* (Civ. App.) 231 S. W. 170.

Where appellants have filed no brief, the court is not required to search the record for the errors assigned in appellants' motion for new trial, and, upon consideration of appellees' brief and finding that the judgment is authorized by the pleadings, the case must be affirmed. *City of Orange v. Plant* (Civ. App.) 208 S. W. 238.

Where no brief has been filed by appellant, court will consider that appellee's brief, filed under court rule 42 (142 S. W. xiv), correctly presents case, and will affirm judgment if it is one that can be affirmed under such presentation of case. *Bracht v. Adamson* (Civ. App.) 211 S. W. 624.

Where there are no briefs filed in the Court of Civil Appeals by either party, the judgment will be affirmed if an examination of the record shows the cause is one of which the trial court had jurisdiction, and that the judgment is one which the court had power to render under the pleadings and evidence, so that no fundamental error is apparent. *Green v. Wood* (Civ. App.) 211 S. W. 806.

Though it is the established rule of the Court of Civil Appeals when appellant fails to file his brief and the court's attention is called to such failure to dismiss the appeal for want of prosecution, yet where court's attention was not called to omission to file briefs, and no error was apparent of record, affirmance was proper. *Randolph v. Stewart* (Civ. App.) 228 S. W. 988.

A judgment based on the verdict of the jury will not be disturbed; neither party having filed briefs in the appellate court, where no fundamental error appeared. *Carlson v. Tidwell* (Civ. App.) 229 S. W. 592.

CHAPTER SEVEN

HEARING CAUSES

Art.
1616. Hearing of cases, order of.
1617. Order of decision, etc.

Art.
1618. Death does not abate, when.

Article 1616. [1022] Hearing of cases, order of.

Dismissal for want of prosecution.—Where record on appeal was filed in the Court of Civil Appeals December 6th, and on December 8th the cause was set for submission on February 24th following of which appellant's counsel were duly notified on December 10th, but appellant left no brief at appellee's attorney's office until after office hours on February 19th, held the appeal would be dismissed for failure to file briefs in time required by art. 2115 and the rules of the Court of Civil Appeals, although appellant's leading counsel, being from another state, did not know of the requirement of the rules as to briefs. *West Louisiana Bank v. Terry* (Civ. App.) 229 S. W. 639.

Art. 1617. [1023] Cases decided in their order, except, etc.

Submission of causes.—Where defendant in error confesses the error, and moves to advance and determine the cause, which motion is consented to by plaintiff in error, the cause will be advanced and determined. *Phoenix Fire Ins. Co. of Brooklyn v. Cain* (Civ. App.) 21 S. W. 709.

Submission of an appeal will be postponed on motion filed prior to the submission to permit the taking of proper proceedings in the district court to perfect the record. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

Art. 1618. [1026] Death does not abate, when.

Effect of death in general.—This article is not applicable, where the questions involved on the appeal have become moot by reason of the death of a party, such as in a divorce case. *Ledbetter v. Ledbetter* (Civ. App.) 229 S. W. 576.

Under the practice adopted in the state which, in the absence of statute, must be followed, where a party dies after judgment in his favor, but before a writ of error is sued out, it is a necessary condition to review that the petition for error show this fact and ask for service on the executor or administrator if there be one, and, if not, state this fact, and show that there is no necessity for such a legal representative, and pray for citation against decedent's heirs, whose names and places of residence should be given since error cannot be sued out against a party who died after judgment. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

The showing, where a successful party has died after judgment, but before error is sued out, that there was no administrator on his estate, and no necessity for any, so as to allow writ of error to be prosecuted against his heirs, should be made in trial court, in the petition for error, and cannot be first made in the appellate court, especially after the time for suing out the writ has expired. *Id.*

CHAPTER EIGHT

CERTIFICATION OF QUESTIONS TO SUPREME COURT, ETC.

Art.	Art.
1619. Questions of law certified to supreme court.	1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court.
1620. Dissenting opinion; point of dissent certified to supreme court.	1625. Action of supreme court on; effect and finality of.

Article 1619. [1043] Questions of law certified to supreme court.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Certification of questions in general.—A motion to certify to Supreme Court will not be granted by the Court of Civil Appeals where a writ of error will lie to invoke the Supreme Court's jurisdiction. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

Questions which may be certified—Dependent on Arts. 1521, 1522.—On appeal to the court of civil appeals in condemnation proceedings instituted by a county, a judge who owns land in such county is not "interested in the question to be determined," within the meaning of the statute, and, where there is a dissent to his right to sit in such case, the cause will not be certified to the supreme court, because, though the question whether he is "interested," within the meaning of the Constitution, is raised, there is no question as to the "validity of a statute." *Herrf v. James*, 86 Tex. 230, 24 S. W. 396.

— **Dependent on Art. 1591.**—In cases where the decision of the Court of Civil Appeals is final, the Supreme Court has no jurisdiction of a certificate of dissent; but the appellate court may in such cases certify a question because deemed by it advisable, or because of conflict with the decisions of other Courts of Civil Appeals. *Perry v. Greer*, 110 Tex. 549, 221 S. W. 931; *Wilson v. Giraud* (Sup.) 195 S. W. 848.

Where Court of Civil Appeals concurred in original opinion and overruled motion for rehearing with a dissent, a certificate to Supreme Court, stating that order overruling rehearing motion was set aside on court's own motion and questions certified because of doubt regarding original decision, the certificate is not based on art. 1620, authorizing certificate where judge dissents, but on this article and the Supreme Court may decide the questions, though the case is within the final jurisdiction of the Court of Civil Appeals. *Wilson v. Giraud* (Sup.) 195 S. W. 848.

The Court of Civil Appeals had the authority to certify question as to whether negligence of defendant was the proximate cause of the death of plaintiff's horse to the Supreme Court, either because it deemed it advisable to do so under this article, or because of probable conflict between its holding and that of other Courts of Civil Appeals under art. 1623, although the case was one of which its jurisdiction was final. *Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 110 Tex. 546, 221 S. W. 929, answering certified questions (Civ. App.) 179 S. W. 1111, and answers conformed to 223 S. W. 1024.

The Supreme Court has authority to answer a question certified by the Court of Civil Appeals, as one which such court deems it advisable to present, though the case in which the question arises falls within the final jurisdiction of the Court of Civil Appeals. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

Answer of Supreme Court.—Supreme Court's consideration of case on certified question from Court of Civil Appeals is restricted by statute, to the certified question, and its answer thereto must be made in the light of the certified facts. *Goldstein v. Union Nat. Bank*, 109 Tex. 555, 213 S. W. 584.

Since the certificate of questions to the Supreme Court does not, under the statute, authorize the transfer of the entire case, or substitute the Supreme Court's jurisdiction for that of the Court of Civil Appeals, the Supreme Court will express no opinion on certified questions as to the sufficiency of the evidence, excluding that not admissible, to support the trial court's judgment. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

It is statutory and settled practice in Supreme Court to confine its answer strictly to the very question certified to it by a Court of Civil Appeals. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Art. 1620. [1040] Dissenting opinion; point of dissent certified to supreme court.

Certification of questions in general.—In cases where the decision of the Court of Civil Appeals is final, the Supreme Court has no jurisdiction of a certificate of dissent. *Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 110 Tex. 546, 221 S. W. 929, answering certified questions (Civ. App.) 179 S. W. 1111, and answers conformed to 223 S. W. 1024; *Herrf v. James*, 86 Tex. 230, 24 S. W. 396; *Gulf, C. & S. F. Ry. Co. v. Ramey*, 86 Tex. 455, 25 S. W. 406; *Wilson v. Giraud* (Sup.) 195 S. W. 848; *Perry v. Greer*, 110 Tex. 549, 221 S. W. 931; *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

Questions which should be certified.—An action for divorce, in which one judge of the Court of Civil Appeals dissented from the opinion that the evidence was insufficient to warrant the decree for plaintiff, will not be certified to the Supreme Court, in view of arts. 1521, 1590, and 1591, especially when it would result in great delay in the determination of the case to certify it. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Scope of review in Supreme Court.—In action for negligent delay in shipment of cattle, the only ground for reversal of judgment of the Court of Civil Appeals presenting a question within the jurisdiction of the Supreme Court is a point of the admissibility of evidence as to which one judge of the Court of Civil Appeals dissents; questions of the admissibility of other evidence, as to which all the members of the Court of Civil Appeals were agreed, and of the insufficiency of the evidence to warrant the judgment, on which they were also agreed, being exclusively within the jurisdiction of such court. *Gatewood v. Fort Worth & D. C. Ry. Co.* (Sup.) 232 S. W. 493.

Art. 1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court.

Duty and propriety of certification in general.—In a county court case, the jurisdiction of the Court of Civil Appeals is final, unless the Supreme Court has jurisdiction under this article. *First Texas State Ins. Co. v. Hightower*, 110 Tex. 52, 214 S. W. 299.

The Court of Civil Appeals had the authority to certify question as to whether negligence of defendant was the proximate cause of the death of plaintiff's horse to the Supreme Court, either because it deemed it advisable to do so under art. 1619, or because of probable conflict between its holding and that of other Courts of Civil Appeals under article 1623, although the case was one of which its jurisdiction was final. *Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 110 Tex. 546, 221 S. W. 929, answering certified questions (Civ. App.) 179 S. W. 1111, and answers conformed to 223 S. W. 1024.

In cases where the decision of the Court of Civil Appeals is final, the appellate court may certify a question because of conflict with the decisions of other Courts of Civil Appeals. *Perry v. Greer*, 110 Tex. 549, 221 S. W. 931.

Where there is a conflict between decisions of the Courts of Civil Appeals, mandamus to compel certification of the question to the Supreme Court will be issued; the Court of Civil Appeals having final jurisdiction over the case. *Fruit Dispatch Co. v. Rainey* (Sup.) 232 S. W. 281.

In a case in which the judgment of a Court of Civil Appeals is not final, the questions therein need not be certified to the Supreme Court, regardless of any conflict between the decision in that case and the decisions of other Courts of Civil Appeals. *Braumiller v. Burke* (Civ. App.) 232 S. W. 907.

Nature and extent of conflict in decisions.—Action to recover corporate stock transferred pursuant to a written agreement, holdings that plaintiff was not precluded from establishing a larger parol contract of which written transfer of stock to defendant was but a part, and that defendant bore a trust relationship to plaintiff, held not in conflict with decisions of other Courts of Civil Appeals. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

In determining what constitutes a conflict in opinions of appellate courts such as would warrant a certification of the question, the cases must be of such a nature that one would operate to overrule the other in case they were both rendered in the same court. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

A decision, merely sustaining a right of appeal from a judgment, in the absence of a motion to set aside a special verdict or for a new trial, is not in conflict with the decision that a review may be had on appeal of the sufficiency of the evidence to support the jury's special verdict, so as to give the Supreme Court jurisdiction in a case appealed from the county court, where the jurisdiction of the Court of Civil Appeals is otherwise final. *First Texas State Ins. Co. v. Hightower*, 110 Tex. 52, 214 S. W. 299.

There is no conflict between decisions sustaining the right to attack findings of the court for insufficient support in the evidence and a decision denying the right to attack special findings of the jury for lack of evidence to support them, so as to sustain the jurisdiction of the Supreme Court in a county court case. *Id.*

In an action for land in which defendant pleaded a parol sale to him, a holding that plaintiff was precluded from introducing under the general denial interposed by statute evidence showing that the property was a homestead of himself and his wife, and that the sale was therefore void, held not in conflict with another case holding that defendant had failed to establish prima facie title by agreement or estoppel as pleaded by him so that there was no necessity for avoidance, and the latter case need not be certified to the Supreme Court because of conflict. *Davies v. Rutland* (Civ. App.) 219 S. W. 1114.

Opinion of the Court of Civil Appeals, in a case involving a question of boundary, and therefore within its exclusive jurisdiction under art. 1591, held in conflict with opinions of other Courts of Civil Appeals so as to require certificate of questions to Supreme Court. *Braumiller v. Burke* (Sup.) 230 S. W. 400.

A decision that evidence of a marked line, which did not agree with the courses and distances in the field notes or with described monuments, is incompetent to contradict the boundary established by the courses and distances, does not conflict with decisions of other Courts of Civil Appeals that a marked line, which was presumably made by the original surveyor, was evidence of the location of the boundary, though it was not on the line marked on the plat. *Braumiller v. Burke* (Civ. App.) 232 S. W. 907.

Conflict with decisions of Supreme Court.—A conflict with a decision of the Supreme Court is not authority for certifying a question to the Supreme Court. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

Art. 1625. Action of supreme court on; effect and finality of.

Judgment after certification.—Where the Court of Civil Appeals certified a question to the Supreme Court, which answered it in the affirmative, affirming the opinion of the Court of Civil Appeals, such opinion of the Court of Civil Appeals, originally handed down, reversing and rendering the judgment, stands as the law of the case. *Kanaman v. Gahagan* (Civ. App.) 231 S. W. 797.

DECISIONS RELATING TO SUBJECT IN GENERAL

Questions which should be certified.—Questions will not be certified by the appellate court to the Supreme Court unless some useful purpose will be served by doing so. *Texas & N. O. R. Co. v. Peveto* (Civ. App.) 224 S. W. 552.

CHAPTER NINE

JUDGMENT OF THE COURT

Art.	Art.
1626. If judgment reversed, when reformed and when remanded.	1629. Affirmance with damages in case of delay.
1627. Judgment on affirmance or rendition, etc.; damages adjudged, when finality.	1631. Suggestion of remittitur.
1628. No reversal for want of form.	1633. Mandate issued, when.
	1635. Affidavit of inability to secure or pay costs.

Article 1626. [1027] If judgment reversed, when reformed, when remanded.

See *Bowen v. El Paso Valley Water Users' Ass'n* (Civ. App.) 204 S. W. 441.

Dismissal of appeal.—Where no motion was made by party to dismiss appeal because of defective bond, it is too late for court, after it has rendered judgment, to dismiss it upon its own motion. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Appeal from judgment requiring school trustees to observe teacher's contract will be dismissed, where contract term had expired. *Hart v. Britton* (Civ. App.) 197 S. W. 592.

Appeal from interlocutory order requiring board of trustees to open bids and award depository contract will be dismissed where the board has opened the bids and awarded the contract. *Stamper v. Alice State Bank & Trust Co.* (Civ. App.) 198 S. W. 604.

Where plaintiff sought injunction as well as damages, held that, despite conveyance of business for benefit of which injunction was sought pending appeal, appeal will not be dismissed though damages claimed were below jurisdictional amount of district court whence appeal was had. *Schluter v. McLeod* (Civ. App.) 199 S. W. 311.

Motion to dismiss appeal because appellants are alien enemies will be overruled, where it does not appear they are aliens or citizens of country with which United States is at war, although residents thereof. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 204 S. W. 252.

It does not follow necessarily that appeal prosecuted by citizen of Austria-Hungary will be dismissed because of fact that since appeal was perfected our government has declared war on such country. *Id.*

Where the judgment appealed from was favorable to appellee, the appellant had the inherent right to dismiss the appeal. *Texas Portland Cement Co. v. Lumparoff* (Civ. App.) 204 S. W. 366.

Appeal which leaves nothing to litigate except costs should be dismissed. *Adams v. Van Mourick* (Civ. App.) 206 S. W. 721.

It is not the practice of the Court of Civil Appeals to review any question affecting the merits of the controversy on motion to dismiss the appeal. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 209 S. W. 186.

Appellate courts will not retain jurisdiction of an appeal to determine supposed rights, when the subject-matter of the suit has terminated, merely to decide the question of costs, but appeal will be dismissed. *Whitesides v. Wood* (Civ. App.) 210 S. W. 333.

Notice to dismiss appeal will be considered, though not filed within 30 days from the filing of transcript, where no notice of filing of transcript was given by the clerk, notwithstanding court rule No. 8 (142 S. W. xi), requiring such motion to be made within 30 days after filing of transcript. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

Where parties have actually settled or agreed on terms of settlement of the matters in dispute pending an appeal, and the fact is shown in the Court of Civil Appeals, the appeal should be dismissed, having become moot. *Hedrick v. Matthews* (Civ. App.) 216 S. W. 424.

Where pending appeal the case became abstract, the appellate court will dismiss the case and will not consider the merits for determining against which party costs should be assessed. *Roberson v. City of Terrell* (Civ. App.) 218 S. W. 813.

Where plaintiffs' suit to restrain the board of commissioners from appointing a particular individual municipal manager resulted in judgment against plaintiffs, and after plaintiffs' appeal the commissioners appointed another as manager who duly qualified, the case became moot and will be dismissed. *Id.*

Where an application to enjoin the commissioners of a road district from paying an attorney's fee was denied, and the appeal did not suspend the order denying the writ, and the fee was paid, the appeal must be dismissed; the case having become moot. *Odum v. Cain* (Civ. App.) 218 S. W. 1079.

Though there is no rule of court requiring the names of attorneys to be signed in ink to motions to dismiss appeals, it is the better practice, and should be done, if practicable. *Liz Mar Plantation Co. v. Whitfill* (Civ. App.) 224 S. W. 1118.

In suit to compel tax collector to give plaintiff receipt to entitle her to vote in primary election, the Court of Civil Appeals in disposing of plaintiff's appeal subsequent to the election will dismiss appeal, since rendition of judgment compelling issuance of poll tax receipt for such purpose subsequent to the election would be a vain thing. *Koy v. Schneider* (Civ. App.) 225 S. W. 188.

Where, pending a motion for a rehearing on appeal from an injunction to restrain the party committee from entertaining a contest of the primary election, the general election was held, the case has become moot and will be dismissed; each party under art. 2030, paying the costs incurred by him. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Where there had been a complete settlement between the parties, and plaintiff in error, in response to a communication, requested that the writ of error be dismissed, motion of defendant in error for dismissal should be granted. *McMurtry v. Brown* (Civ. App.) 228 S. W. 1087.

The payment of the judgment by one who was a stranger to the record precludes recovery against the judgment debtor, and renders the case moot, so that a writ of error to the judgment will be dismissed without a determination of the questions raised. *Padgett v. Young County* (Sup.) 229 S. W. 459.

Affirmance.—Where by motion for rehearing on appeal appellants dismissed as to defendant not properly served with citation, an affirmance will be granted as to others instead of reversing for such defect. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341.

Appellee, on appeal by defendants, may dismiss as to one against whom the petition states no cause of action and have an affirmance as to the other. *Shannon v. Childers* (Civ. App.) 202 S. W. 1030.

Where there was no motion for new trial or assignment of error appearing in the record, and there was no brief filed by either party, and no motion filed in Court of Civil Appeals to dismiss appeal for want of prosecution, the case will be affirmed. *Burkhalter v. Webb* (Civ. App.) 209 S. W. 216.

In the absence of material error in the conduct of a case, an appellate court should affirm the judgment of the trial court, if it can do so upon any theory presented by the pleadings and sustained by the evidence. *Hudimon v. Foster* (Civ. App.) 210 S. W. 262.

No findings of fact or conclusions of law having been filed by the court below, the judgment must be sustained, if there is sufficient evidence to support it upon any theory of the case. *Pennington v. Fleming* (Civ. App.) 212 S. W. 303.

Inconsistencies in the evidence, in the absence of findings of fact, must be resolved on appeal so as to support the judgment. *Crisp v. Christian Moerlein Brewing Co.* (Civ. App.) 212 S. W. 531.

It is the duty of the court to affirm the judgment of the lower court if there be any ground to support it. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 436.

Modification or reformation of judgment.—In suit by contractor against railroad company and its receiver, that judgment was erroneously entered against receiver is an error which may be corrected on appeal without reversal of judgment. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

Where appellee beneficiary suing fraternal benefit society was not entitled to recover on her pleadings, appellate court could look to appellant's pleadings, which conceded a smaller sum due appellee on another theory, and reform the judgment to adjudge appellee's recovery of the smaller sum.—*Eminent Household of Columbian Woodmen v. Freeman* (Civ. App.) 200 S. W. 186.

Where appellant before trial tendered appellee a smaller sum than sued for, the appellee court, in reforming judgment for appellee by reducing it to such smaller sum, could further reform it to adjudge against appellee costs accruing in trial court after such tender. *Id.*

A judgment against a surety on a replevin bond, wrongly stating surety's last name, held clerical error, in view of correct naming of surety in findings, and that surety, in such correct name, appealed therefrom, and such error can be corrected by appellate court. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Where jury found on special verdict that insured was disabled for 21 weeks and 3 days, the court's error in rendering judgment for 39 weeks did not require reversal, where there was sufficient evidence to sustain the verdict, and the judgment would merely be reformed. *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779.

In suit on benefit certificate, where there was no pleading of any contract or facts authorizing entry of judgment bearing interest at 10 per cent. from its date, it would be reformed on appeal to bear 6 per cent. interest from its date and affirmed. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

A monetary judgment for \$160, otherwise proper, will not be reversed because it was excessive in the amount of \$7. *Bryson v. Abney* (Civ. App.) 207 S. W. 945.

Where a judgment was excessive to the amount of \$38, and the error is plainly dis-

cernible, held that that is not ground for reversal, as the judgment might be reformed and affirmed. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

Where a purchaser did not avail herself of the contract privilege of naming the number of notes and times of payment, she will not be heard to complain, on appeal in a suit for specific performance, that the decree ordered her to execute one note, and ask the appellate court to enter into a calculation to ascertain whether she would be compelled to pay a trifle more on one note than on several she might have made, since the court should not be called upon to solve problems in partial payments based on supposititious premises. *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

In suit on vendor's lien notes, where some of the vendors, owning 55 acres of the land among themselves, were under the consent judgment entitled to have their lands free through releases on payment of costs, but the matter was not originally assigned as constituting error, and the incoherent and bulky record does not disclose precisely who the parties were, or what tracts were owned, the Court of Civil Appeals cannot declare the judgment void, or reform it to decree releases to those entitled. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

In action against shipping agent for delay in furnishing ship, the rendition of judgment, awarding plaintiff amount of premiums on insurance from March 1, instead of from April 1, on which date court found default had been made, was not ground for reversal of judgment, since judgment could be reformed and made to conform with such finding. *Langben v. Crespi & Co.* (Civ. App.) 218 S. W. 144.

Where in the state of the pleadings and the evidence, as found by the trial court, a judgment should have been for plaintiff against all the defendants, the court on appeal will reform and affirm the judgment, though defendants might by amendment set up other defenses. *Archenhold Co. v. Smith* (Civ. App.) 218 S. W. 808.

Rendition of judgment, including interest at a rate in excess of the statutory rate, is not ground for reversal, but judgment should be reformed and made to draw the statutory rate. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

In an action for breach of warranty in the sale of an elevator disposed of on special issues, where the amounts expended by plaintiff in repairing the elevator were allowed as damages, such error was fundamental and may be corrected by the appellate court, though defendant did not assign same as error. *Otis Elevator Co. v. Cook* (Civ. App.) 219 S. W. 546.

Where the court in a breach of marriage case erred in submitting as an element of damages money expended in purchasing articles in preparation for marriage, the error may be cured on appeal by subtracting the money expended from the amount of the judgment. *Vogt v. Guidry* (Civ. App.) 220 S. W. 343.

A judgment in an amount less than that allowed by verdict may be corrected on appeal without remanding cause for retrial. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647.

The authority to render such judgment as the trial court should have rendered "except when it is necessary that some matter of fact be ascertained or the damage to be assessed," in either of which cases the cause shall be remanded for new trial, gives no power where a finding on a special material issue is unsupported by the evidence, but the evidence thereon is conflicting, to make a finding thereon, and modify the judgment accordingly. *Houston Belt & Terminal Ry. Co. v. Lynch* (Com. App.) 221 S. W. 959, affirming judgment (Civ. App.) 185 S. W. 362.

An admitted error in the judgment against appellant, in that judgments were rendered against him for the same sum in favor of different parties, without providing that payment of one of the sums should be in full satisfaction of both judgments, will be corrected on appeal. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

In a suit against an independent executor and residuary legatees based upon an agreement by decedent to make a bequest in plaintiff's favor, a lien on specific property in the hands of the legatees could not be created on appeal, since the property shown to have been in the hands of the legatees might since have passed into the ownership and possession of others. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

A decree for specific performance, which fails to provide that, should plaintiff fail to file with the clerk of the trial court his assumption of indebtedness required by the judgment within 30 days of the date mandate is filed in the lower court, the title should reinvest in the defendant, will be amended to so read. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

Judgment against railroad company and Director General for injury to employee during government control, so far as imposing individual liability on the company, can be modified on appeal. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

In an action on a fire policy, providing the sum for which the insurer was liable should be payable 60 days after due notice, ascertainment, and proof of loss, where plaintiff insured's petition alleged proof of loss had been made October 13, 1913, judgment for him, awarding interest from December 3d of that year, was erroneous. The evidence showing that proof of loss was made, but not showing the date of making such proof, the Court of Civil Appeals will add the stipulated 60 days to the date of filing of suit, and render judgment for interest from such date. *Camden Fire Ins. Ass'n v. Yarborough* (Civ. App.) 229 S. W. 336.

On appeal from a judgment foreclosing lien against mortgaged personalty in hands of purchaser from the mortgagor, and for conversion of the property, where the suit for conversion was for less than \$200 and below the jurisdiction of the court, the suit for conversion should be dismissed, and judgment limited to the one foreclosing the mortgagee's lien on the property, and the judgment accordingly reformed and affirmed. *Smith v. Wall* (Civ. App.) 230 S. W. 759.

Affirmance in part and reversal in part.—In action against two defendants, where plaintiff, who recovered against only one of them, did not complain of that portion of judgment denying recovery, it will on appeal by unsuccessful defendant be affirmed, though judgment in favor of plaintiff was reversed and remanded. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

Adults who did not answer, and against whom default judgment was rendered, are not entitled to relief, though the judgment, which was adverse to other parties having the same title, was reversed on the appeal of such parties. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

Judgment, being one canceling a lien and note held jointly by defendants, should be reversed as to both, where there was no valid citation or appearance giving jurisdiction of one defendant, and assignment that it should be held that the other defendant entered an appearance is immaterial. *Schleicher v. Schmedt* (Civ. App.) 209 S. W. 185.

In action against railroad and sleeping car company, in which the railroad asks for judgment over against sleeping car company in case judgment is recovered against it, where there was judgment for plaintiff against railroad and for sleeping car company as to railroad's plea over, court on appeal therefrom by railroad, where the only errors disclosed are those affecting issue between railroad and sleeping car company, will affirm the judgment in favor of plaintiff against railroad and reverse and remand the judgment as to the issue between railroad and sleeping car company, in view of rule 62a (149 S. W. x). *Gulf, C. & S. F. Ry. Co. v. Scripture* (Civ. App.) 210 S. W. 269.

It is within appellate court's discretion to reverse as to one and affirm as to the other, or to reverse generally as to all of two joint tort-feasors who were sued in the same action, from which one of them receiving a judgment in its favor did not appeal. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

Where, in an action by owner of cotton against carrier and insurance company for loss of the cotton, with action over by insurer against carrier, there must be a reversal of the judgment for plaintiff against insurer, judgment in favor of defendant carrier will also be reversed. *Hartford Fire Ins. Co. v. Triplett* (Civ. App.) 223 S. W. 305.

Where a judgment was rendered against two defendants, and there was no appeal by one of them, it cannot be disturbed as to him, although it be null and void. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 224 S. W. 203.

Under Rules of the Courts of Civil Appeals No. 62a (149 S. W. x), in suit on an open account for goods sold and delivered, wherein defendant reconvened for damages from wrongful attachment and garnishment, where there is no error inhering in the disposition of plaintiff's cause of action, but there is reversible error in the disposition of defendant's reconventional demand, the case will be affirmed as to plaintiff's recovery, and the judgment as to defendant's reconventional suit alone reversed and remanded. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

In an action in quo warranto where the judgment removed defendant from the office and denied a recovery of salary, fees, or emoluments, the judgment denying recovery, which was not appealed from, will be permitted to stand, though the suit for the office is dismissed. *Griffith v. State* (Civ. App.) 226 S. W. 423.

On defendant's appeal from judgment for plaintiff, where plaintiff presented cross-assignment complaining of exclusion of claims for items of damages separate and distinct from the items on which plaintiff had recovered, the court, in reversing and remanding the judgment for insufficiency of evidence to warrant submission to jury of issue on which plaintiff had recovered, should limit reversal to that part of judgment by which plaintiff recovered damages, and should affirm judgment in so far as it denied plaintiff recovery on the excluded claims as to which there was no evidence. *Galveston, H. & S. A. Ry. Co. v. Rich* (Civ. App.) 228 S. W. 631.

On plaintiff's appeal from judgment for one defendant, where a codefendant did not appeal from judgment for plaintiff against such codefendant, the appellate court, in reversing and remanding the cause as between plaintiff and such first defendant, will leave the judgment for plaintiff against codefendant undisturbed. *White v. Holland* (Civ. App.) 229 S. W. 611.

Reversal—In general.—Where appellees confessed the error pointed out in appellant's brief, judgment will be reversed, and cause remanded. *City of Tioga v. Graves* (Civ. App.) 220 S. W. 1110; *Hemman v. Jannsen Ostertag Mfg. Co.* (Civ. App.) 201 S. W. 1162.

A judgment will be reversed where the parties agree that contradictory jury findings render such a course necessary. *Ratcliff v. Harkness* (Civ. App.) 195 S. W. 347.

Where judgment was rendered in cross-action against original holders of notes transferred as collateral, and the notes were ordered canceled, held that, on appeal by the original holders, court had jurisdiction to reverse the judgment as against the transferee, though it did not appeal. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

A judgment rendered in a cause while the appeal from the judgment in an action to set aside the former default judgment therein was pending in the Court of Civil Appeals must be reversed. *Godshalk v. Martin* (Civ. App.) 203 S. W. 1161.

The appellate court on reversing an adverse judgment on appeal of some of the parties, etc., will protect the interest of minors having the same title, though they did not appeal. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

The Court of Civil Appeals will not reverse and remand a case alone on agreement of counsel. *Missouri, K. & T. Ry. Co. v. Miller* (Civ. App.) 211 S. W. 543.

In action on notes and to foreclose vendor's lien against the vendee and others who had purchased part of the land from vendee, a judgment against the vendee for the amount due upon the notes, and against all of the defendants foreclosing the lien, the decree foreclosing the lien and ordering the sale of the land, in directing the officers making the sale, in event the lands should sell for more than sufficient to satisfy the

judgment, to pay the excess to the "defendants," was not indefinite nor uncertain, so as to require that it be reversed or reformed. *Clark v. Taylor* (Civ. App.) 212 S. W. 231.

The failure of the trial judge, though requested to file findings of fact and conclusions of law within the time provided by art. 2075, necessitates reversal; the court on appeal being unable to review case without a statement of facts which is not before it. *Stryker v. Van Velzer* (Civ. App.) 212 S. W. 674.

Where petition for shortage in acreage of land sold by the acre did not allege the value of the 14 acres shortage, and the trial court adopted rule that value of shortage was the measure of damages, the case will be reversed on defendant seller's appeal, though the correct rule for measuring the purchaser's damage has not been invoked by him. *Gillispie v. Gray* (Civ. App.) 214 S. W. 730.

The appellate court cannot reverse a judgment so that at another trial losing party might have the court compel a certain witness to make a disclosure by reason of waiver of privilege after the prior trial, where he was not entitled to have court compel witness to make such disclosure at the first trial. *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364.

Where two issues of negligence were submitted to the jury, one of which was improperly submitted, and the appellate court is unable to tell upon which issue a verdict rested, judgment for plaintiff must be reversed. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

In action for injuries to horses in transit, where two issues of negligence were submitted to jury, one allowing recovery for an improper element of damage, and jury found for plaintiff on both, and in response to another special issue awarded lump sum as damages, there must be a reversal and a new trial. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Civ. App.) 216 S. W. 457.

Where there was a general verdict for plaintiffs, and it is impossible for the court on appeal to know, or for appellant to show, that the verdict was not based on the theory of discovered peril erroneously submitted, the judgment will be reversed. *Schaff v. Gooch* (Civ. App.) 218 S. W. 783.

An order dissolving an injunction restraining the holding of a school district election, which contained no provision continuing it in force pending appeal, so that the election has presumably already been held, will not be reversed because the petition for injunction showed injury to the plaintiffs because of the expense which they would be called upon as taxpayers to pay. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

The facts that the official reporter had lost the shorthand notes of the hearing which he was required to take and preserve under arts. 1923 and 1924, so that he could not prepare a statement of facts, and that the attorneys who represented appellant at hearing had moved from the county, do not entitle appellant to reversal, where the record shows that the citation in error was served more than four months after final judgment, and appellant made no showing of an attempt to prepare a written statement of facts under art. 2068, or to secure an agreed statement of facts under art. 2112, or to seasonably apply for proper process to compel the reporter to file transcript of his notes or substitute them as provided under arts. 2157 and 2158. *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569.

The Court of Civil Appeals is authorized, and in a proper case required, to reverse on a question of fact when the facts are fully developed and uncontradicted. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

On reversal of a judgment on a question of fact, the Court of Civil Appeals can only give effect to the findings of the trial court and cannot make new findings of fact. *Id.*

Error in dismissing on the court's own motion a cross-action between the defendants does not require reversal of judgment for the plaintiff. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

— **Rendering final judgment.**—Where judgment is reversed, and it appears that the case was fully developed and that no different result would probably be reached by remanding, judgment will be rendered for appellant. *Texas & P. Ry. Co. v. McDowell* (Civ. App.) 222 S. W. 1109; *Kelly v. Pelt* (Civ. App.) 220 S. W. 199; *Kirby Lumber Co. v. Boyett* (Civ. App.) 221 S. W. 669; *Houston, E. & W. T. Ry. Co. v. Tanner* (Civ. App.) 227 S. W. 713.

Where the record on appeal discloses reversible error, the appellate court need not remand the cause for a new trial, but may itself render judgment, if there is no material fact necessary to be ascertained in order to render a proper judgment. *Hermes v. Vaughn*, 3 Tex. App. 607, 22 S. W. 817.

In employé's action for injuries where it appears that case was fully developed in trial court, and that there was no reasonable probability apparent from record that plaintiff could make out case of liability against defendant on another trial, appellate court must reverse judgment for plaintiff and render judgment for defendant. *Kirby Lumber Co. v. Hardy* (Civ. App.) 196 S. W. 211.

Where trial court failed to declare law arising from undisputed facts regarding contribution between tort-feasors, it became appellate court's duty to do so. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

Where judgment against telephone company and electric company as joint wrongdoers was recovered, judgment of indemnity in electric company's cross-action against the telephone company may be rendered by Court of Civil Appeals. *Id.*

In a case tried upon agreed facts, where the trial court does not render the proper judgment, it is the duty of the Court of Civil Appeals to render the judgment which should have been rendered by the trial court. *Green v. Prince* (Civ. App.) 201 S. W. 200.

Where appellee, in motion for rehearing, expressly states he cannot produce any more evidence to sustain his claim of liability against defendant appellant than was

produced below, judgment, having been reversed on the appeal, will be rendered by Court of Appeals for appellant. *Houston E. & W. T. Ry. Co. v. Ratcliff* (Civ. App.) 202 S. W. 525.

Pleadings and evidence held to authorize appellate court to render judgment for defendant M. against defendant D. on his warranty, on reversal of judgment for M. as innocent purchaser from D. *Markley v. Martin* (Civ. App.) 204 S. W. 123.

In an action against a telegraph company for failing to deliver a message, where a plea that notice of damages had not been made within 95 days as required by contract was stricken, judgment for defendant could not, in view of art. 5714, be entered on appeal on the ground that the undisputed evidence showed that the stipulation for notice was reasonable. *Western Union Telegraph Co. v. Verhalen* (Civ. App.) 204 S. W. 240.

The Court of Civil Appeals, upon reversing judgment of trial court rendered upon a verdict, may enter a final judgment, when it appears that one of the parties as a matter of law is entitled to such judgment. *Heimer v. Yates* (Com. App.) 210 S. W. 680.

Where Court of Civil Appeals on issues presented by pleadings and evidence correctly applied the law favorable to contention of plaintiffs in error, and where there was no further issue to be developed or determined, it should have rendered judgment for plaintiffs in error, and its judgment reversing cause would be affirmed, and its judgment remanding it would be reversed, and judgment rendered for plaintiffs in error. *Arno Co-op. Irr. Co. v. Pugh* (Com. App.) 212 S. W. 470.

Where Court of Civil Appeals reverses sustaining of plea of privilege by defendant, which is only point that prevented recovery by plaintiffs, judgment will be rendered for plaintiffs in appellate court. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

A judgment of the county court rendered on appeal from justice court from a judgment allowing neither party any relief will on appeal be reversed and the case dismissed if the county court did not acquire jurisdiction of the cause of action by appeal. *Wall & Stabe Co. v. Berger* (Civ. App.) 212 S. W. 975.

That plaintiff permitted court to prematurely try issue on a plea of privilege filed under art. 1903, and thus waived his controverting affidavit, would not require the court on appeal to render judgment sustaining the plea, where the judgment must be reversed for other reasons. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Where it is clear that judgment should have been rendered sustaining plea of privilege under art. 1903, to be sued in another county, the appellate court on reversing the trial court's order will not remand, but will render judgment sustaining the plea and directing transfer of the cause to the proper county as provided by art. 1833. *Lewis & Knight v. Florence* (Civ. App.) 217 S. W. 1116.

In a negligence case, where the answer of the jury to one special issue was to the effect that plaintiff had not exercised due care, and the answer to another special issue was that plaintiff had exercised due care, on reversal of a judgment in favor of plaintiff the appellate court cannot render a judgment for defendant. *Texas & N. O. R. Co. v. Houston Undertaking Co.* (Civ. App.) 218 S. W. 84.

Rents accruing after trial of a suit to set aside an execution sale, which was set aside on appeal, must be demanded in a separate suit and cannot be awarded by the appellate court. *Wagner v. Huddler* (Civ. App.) 218 S. W. 100.

On an appeal in trespass to try title where appellee was satisfied with the findings of fact and no effort was made to alter, amend, or add to them, and such findings did not support the judgment, the case need not be remanded, but the judgment may be reversed and the judgment rendered in the appellate court, since the cause must be considered on those findings which appellee deemed were sufficient to uphold the judgment below. *Benavides v. Benavides* (Civ. App.) 218 S. W. 566.

The general rule is that, when there are findings of fact and no error has been committed other than rendering judgment for the wrong party, the appellate court when it reverses will render the judgment which should have been rendered; but the rule is not of universal application. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

Where case was tried below without a jury, all facts were fully developed, and the undisputed evidence showed defendant was entitled to judgment, the trial court's judgment for plaintiff will be reversed on appeal to the Court of Civil Appeals, and judgment rendered for defendant, pursuant to *Vernon's Sayles' Ann. Civ. St. 1914, art. 1626*. *Hines v. Wicks* (Civ. App.) 220 S. W. 581.

Though, under art. 1990, the trial court, in case of a special verdict, must render judgment thereon or set it aside, a Court of Civil Appeals, under the authority given it by this article 1626, on reversal of a judgment, to render such judgment as the court below should have rendered, is not limited to such judgment as the trial judge should have rendered on such verdict; "the court," as used therein, meaning the body organized to administer justice, and including judge and jury. *Houston Belt & Terminal Ry. Co. v. Lynch* (Com. App.) 221 S. W. 959, affirming judgment (Civ. App.) 185 S. W. 362.

Where the Court of Civil Appeals reversed a judgment for defendant, it could not render judgment for plaintiff, where the amount of damages depended solely on the testimony of an interested witness, though such testimony was not contradicted. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

Where appellees filed motion to enter judgment in their favor on the jury's verdict, disregarding certain findings on issues erroneously submitted, and refused to move for new trial, they cannot on appeal question the authority of appellate court to enter judgment in favor of appellants in accordance with the findings on such issues that the trial court should have entered. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

It is the duty of appellate court to render such judgment on the undisputed facts as the trial judge should have rendered, where it clearly appears that the case was fully developed; and, where it clearly appears that no judgment can be rendered against defendant appellant, the court will not reverse and remand simply in order that other persons who might be liable be made parties defendant. *Western Union Telegraph Co. v. Robinson* (Civ. App.) 225 S. W. 877.

Where the record brings to the notice of an appellate court that necessary parties have been omitted from the suit, it will refuse to render a judgment, which would not be binding upon the parties and would render the action nugatory and vain. *Barmore v. Darragh* (Civ. App.) 227 S. W. 522.

On appeal in a suit for the construction of the will, where the only issue of fact was the determination of the persons included in the expression "families" used in the will, the petition, alleging that defendants were the only brothers and sisters of testator or the heirs of a deceased brother, and that they died without issue, the answer, admitting that the defendants were the only heirs at law of the testator, and an agreed statement of facts that the defendants were the only heirs at law of testator, sufficiently determined that defendants were the family of testator to warrant a rendition of judgment for them by the Court of Appeals without remand. *Norton v. Smith* (Civ. App.) 227 S. W. 542.

The Court of Civil Appeals in reversing a case should not render judgment, unless the evidence was of such character that the district court should have directed a verdict. *Mills v. Mills* (Com. App.) 223 S. W. 919.

On appeal the Court of Civil Appeals may render the judgment which it concludes the trial court should have rendered. *Lucky Pat Oil & Gas Ass'n v. Cox* (Civ. App.) 230 S. W. 858.

Where the testimony on the record as made does not raise the issue submitted to the jury, and the trial court should have instructed a verdict for the appellants, it is duty of Court of Civil Appeals to reverse the judgment of the trial court and render judgment, particularly since it affirmatively appears from the record both on pleadings and evidence that appellees cannot strengthen their case on another trial. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

Where the case had been fully developed showing plaintiff's action to be barred by limitations, the Court of Civil Appeals in reversing judgment for plaintiff will not remand the cause, but will render judgment for defendant. *Dillard v. Dugger Grocery Co.* (Civ. App.) 232 S. W. 360.

— **Remand for new trial or further proceedings.**—Judgment for defendant, in action by plaintiff as owner for possession of buggies, will be reversed, and plaintiff allowed to amend its petition to allege the proper grounds for relief, where the petition shows plaintiff to be in law a mortgagee entitled to relief. *Joseph W. Moon Buggy Co. v. Moore-Hustead Co.* (Civ. App.) 196 S. W. 328.

In trespass to try title, where it incidentally appeared that if proper parties were in the case the defendant might be entitled to affirmative relief by reforming a mortgage through which he was claiming, the judgment will not be reversed for the purpose of allowing defendant for the first time to make application to make additional parties. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

In an action to cancel a deed, and to restrain foreclosure of a vendor's lien thereon reserved in a note assigned to defendant, where judgment refusing relief against the holder of the note is reversed on facts showing plaintiffs are entitled to the relief asked, judgment will be entered without remand to enable defendant to recover a personal judgment on the note; no such relief having been demanded. *Sessions v. Sanders* (Civ. App.) 200 S. W. 180.

Where the files were lost, and appellant made no attempt to substitute records under arts. 2157-2163, and his bills and assignments showed no error, he was not entitled to remand for new trial "to permit intelligent consideration by the Court of Civil Appeals." *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

Where a case has been tried on an improper theory, the cause must be remanded, where it appears that, under a proper view of the case, the appellee might make out a case, although, as tried, he did not. *Missouri, K. & T. Ry. Co. of Texas v. Langford* (Civ. App.) 201 S. W. 1087.

Where it cannot be said there was no testimony tending to show waiver of a policy provision for payment of life insurance premiums and the case must be reversed for erroneous instructions, judgment will not be rendered for the insurer, but the cause will be remanded for new trial. *Ætna Life Ins. Co. v. Dunken* (Civ. App.) 204 S. W. 241.

Where neither pleadings nor evidence in a chattel mortgage foreclosure in a county court showed the value of the property, the judgment will be reversed, with instructions to amend, and the cause will not be dismissed, on the ground that no jurisdiction is shown. *Houston Harbor Sales Co. v. Levand* (Civ. App.) 206 S. W. 379.

In an action for injuries to a shipment of live stock, where plaintiff called all the witnesses, who knew anything about the accident, and the evidence was wholly insufficient to establish the railroad company's negligence, a judgment for plaintiff should be reversed without remand. *San Antonio & A. P. Ry. Co. v. Hinnant* (Civ. App.) 206 S. W. 860.

Judgment being warranted only for fraud or upon some other equitable ground, the court on appeal will not render judgment, but will reverse and remand, where it is unable to determine whether court based judgment upon finding that power of attorney was insufficient or upon a finding of fraud. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

Where the lower court erred in overruling a demurrer on the ground that a contract

sued on was illegal on its face under Penal Code, arts. 538-547, relating to dealing in futures, a judgment for plaintiff will only be reversed and remanded, and a judgment will not be rendered for defendant, because plaintiff, if the demurrer had been sustained, might have amended his petition and alleged fraud, accident, or mistake. *Pate v. Wilson Bros. Mercantile Co.* (Civ. App.) 208 S. W. 235.

Where plaintiff, suing for balance due of \$298.46, by his own admissions in testifying is not entitled to recover over \$168.11, and it also appears that very probably he is not entitled to recover in excess of \$22.20, instead of reforming judgment for plaintiff for \$200, the case will be reversed for new trial. *Jennings v. Pollard* (Civ. App.) 208 S. W. 415.

Court on appeal is not authorized to reverse and remand to enable a party to amend his pleading. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

Where appellate court sustains exceptions to petition because cause of action has been defectively or insufficiently pleaded, it is proper to remand case to give opportunity to amend; but where amendment would state new cause of action, the case will not be remanded. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

Though the statutes under which plaintiffs sought relief were not enforceable at the time suit was tried, they having been amended pending appeal, so as to be enforceable, the case must be remanded for trial. *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

As the burden is on one claiming land by adverse possession for the period of limitation by fencing to identify the particular land to which he was entitled under plea of limitation, he cannot complain that on appeal the cause was remanded to afford him an opportunity to supply the defect by evidence without grant of new trial. *Fielder v. Houston Oil Co.* (Com. App.) 210 S. W. 797.

Where court on appeal concludes that great preponderance of the evidence shows verdict to be excessive, but cannot determine to what extent it is excessive, court will reverse judgment and remand cause. *Baker v. Nance* (Civ. App.) 211 S. W. 615.

Where plaintiff was led to believe by trial courts that he had made a perfect case, appellate court in reversing for insufficient evidence will remand case to give him opportunity to produce legal testimony to sustain in case, if he can do so. *Ft. Worth & R. G. Ry. Co. v. Fleming* (Civ. App.) 212 S. W. 233.

A judgment, which grants improper relief to a seller suing the buyer, under a conditional sale contract, cannot be reformed and affirmed where neither the verdict, the lower court's finding of fact, nor the evidence in the record shows what judgment should have been rendered, so that the judgment will be reversed, and the cause remanded. *Black v. Southern Film Service* (Civ. App.) 212 S. W. 295.

Where the record shows that plaintiff cannot recover for reasons other than those stated by the trial court, a new trial will not be ordered, though plaintiffs contended that they were misled by the decision of the trial court. *McBride v. United Irr. Co.* (Civ. App.) 213 S. W. 988.

Where plaintiffs were unable to show that citations dated August 9, 1916, the day after the filing of the original petition, had been in fact issued by the clerk and due diligence used to obtain service on defendants, because plaintiffs' former attorney was then in military service, held, though judgment for plaintiffs must be reversed because the evidence did not show issuance of the citations and diligence sufficient to stop the running of limitations, the cause will be remanded, where plaintiffs asserted they would on retrial be able to prove by their former attorney that the citations had been in fact issued, etc. *Ferguson v. Estes & Alexander* (Civ. App.) 214 S. W. 465.

Where it appears on appeal that the case has not been fully developed as to the truth of the allegations of defendants' plea of privilege, controverted by plaintiff, it becomes the duty of the Court of Civil Appeals to reverse and remand for trial of the issue, rather than to remand with instruction to make the transfer under the statute, though the plea should have been sustained, in the absence of proof on either side. *Hayes v. Penney* (Civ. App.) 215 S. W. 571.

In an action on a fire policy, in the absence not of evidence on the point, but of the necessary pleading of estoppel against defendant insurer to assert forfeiture of the policy for noncompliance with the inventory clause, insured's contention that the insurer is estopped will not be considered further than to determine whether, in view of the necessity of reversing, the cause should be remanded for amendment of the pleadings to make the issue of estoppel, and for subsequent trial on that issue. *Camden Fire Ins. Co. v. Yarbrough* (Com. App.) 215 S. W. 542.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) by a widow, as administratrix, for the benefit of heirs and minor children, a judgment which awarded damages in favor of the widow and a minor son, but denied all recovery to a minor daughter who had married shortly after the death of her father, is error necessitating reversal of the entire judgment and a remand, for rule 62A is not applicable, the issue of negligence being a single one applicable to all of the beneficiary plaintiffs jointly, and not singly. *Davis v. Wight* (Civ. App.) 218 S. W. 26.

A correct judgment will not be reversed and remanded to permit appellant to adduce proof he should have offered on the trial. *Simmons v. Dickson*, 110 Tex. 230, 218 S. W. 365.

In an attorney's action to recover fees based in part upon fraudulent representations by defendant's agent relative to defendant's ability to pay, where the issue of plaintiff's right to maintain suit in the county where the services were performed was not determined, the judgment may be reversed, and the case remanded for trial upon such remaining issue. *Fears v. Fish* (Civ. App.) 218 S. W. 507.

In lessor's action to cancel oil lease, where lower court found that the lease was

executed by the husband alone and was a homestead, and where there were no pleadings setting up forgery, and no sufficient evidence to impeach the instrument, which appears to have been duly signed and acknowledged by both husband and wife, appellate court, in reversing judgment canceling the lease, will not render judgment for defendants, but will remand case. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

Defendant appellee, having shown by cross-assignments judgment is erroneous and must be set aside, cannot contend it should be set aside in part and affirmed in part, there having been no separable issues, Court of Civil Appeals having right simply to reverse and remand for new trial, particularly where it appears evidence has not been fully developed, and cause was tried on incorrect theory of law. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

On appeal from a judgment of the county court in a case within the jurisdiction of the justice of the peace, where the record does not show that the county court acquired jurisdiction by appeal from the justice, the Court of Civil Appeals should reverse the judgment and remand the case, with directions to dismiss it unless the lower court's jurisdiction was properly made to appear, not merely dismiss the appeal. *Perry v. Greer*, 110 Tex. 549, 221 S. W. 931.

Instead of dismissing appeal from judgment of the county court in a case in which, because of the small amount in controversy, it could have jurisdiction only on appeal from final judgment of a justice, the record not affirmatively showing that there was any trial or judgment in the justice court, and the parties having failed to supply the missing record, though having ample time after suggestion of the defect, judgment will be reversed, and cause remanded, with direction to dismiss, unless the jurisdictional fact be legally shown. *Perry v. Greer* (Civ. App.) 223 S. W. 714.

In tenants' action to restrain landlord from taking further steps in court to oust them from possession, where the trial judge only passed on the sufficiency of the petition as against a general demurrer, and the case must be reversed, it may be ordered that the temporary restraining order issued by the Court of Civil Appeals shall remain in force until a further hearing on the application for temporary injunction shall be had by the trial judge after remand. *Phœbus v. Connellee* (Civ. App.) 223 S. W. 1019.

On reversing a judgment for error in overruling a demurrer to the petition, the cause will not be remanded, where the undisputed facts show that there was no cause of action which could be stated by an amended petition. *Pye v. Cardwell* (Civ. App.) 224 S. W. 542, conforming to answers to certified questions 110 Tex. 572, 222 S. W. 153.

In action to cancel deed for fraud, the appellate court, in reversing judgment for grantor rescinding the sale because of delay in suing, will remand the case for new trial, where it is possible that a further showing as to right to equitable remedy may be shown. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

On reversing an order overruling a plea of privilege, where it is apparent from the record as a whole that proof of the location of a certain town can be supplied, the correctness of the decision of the case being dependent upon the location of such town, the cause will be remanded for a trial upon that issue so that the case may be fully developed. *Cassidy-Southwestern Commission Co. v. Chupick Bros.* (Civ. App.) 225 S. W. 215.

Where judgment for plaintiff in suit to cancel deeds for mental weakness of grantor and general overreaching by her brother, the grantee, must be reversed for insufficiency of evidence to sustain the findings of the court, but the facts may not have been fully developed, the cause will be remanded for a new trial. *Duckels v. Dougherty* (Civ. App.) 226 S. W. 720.

Where cross-action of one defendant against another was dismissed without prejudice to the right of the first defendant to institute new suit for the damages claimed, such ruling in effect sustained the exceptions interposed by the second defendant to the cross-bill of the first, so that appeal of the first defendant is virtually an appeal from an order dismissing its suit, and on reversal the cause should be remanded for trial of the issues raised by the cross-suit of the first defendant. *R. W. Taylor & Co. v. Ferguson* (Civ. App.) 226 S. W. 1102.

Where insufficiency of proof to warrant submission of issue to jury requires a reversal of judgment for plaintiff, but where the court is not of the opinion that the facts were developed to such an extent as to make it impossible for plaintiff to supply the missing links, the court on reversing judgment will not render judgment for defendant, but will remand the case for new trial. *Galveston, H. & S. A. Ry. Co. v. Rich* (Civ. App.) 228 S. W. 631.

Where the statement of facts is obviously incomplete and does not contain important parts of the evidence, the Court of Civil Appeals, on reversing judgment of lower court, will not render judgment for adverse party, but will remand the case for another trial. *Mills v. Mills* (Com. App.) 228 S. W. 919.

It appearing that the findings of the jury were without support in evidence, the Court of Civil Appeals properly could do but one thing, reverse the judgment and remand the cause for new trial for error of the trial court in overruling appellants' motion for new trial. *Tompkins v. Hooker* (Civ. App.) 229 S. W. 351.

On appeal in an action involving title to land, a prayer for reversal of the judgment and the privilege of going to the jury on an issue of limitation will not be granted where it is impossible to raise such issue upon another trial. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

Ordinarily, in cases of appeals from the county court, which had no jurisdiction on account of the amount of the matter in controversy, the proper practice is to reverse the judgment and remand, with instructions to the county court to dismiss the cause,

but where it was only by amended petition that the jurisdictional amount was exceeded, and defendant appellant, by exception, and in the motion for new trial, raised the jurisdictional question only in the most general terms, while the excess in amount was hidden by a miscalculation due to inadvertence, the Court of Civil Appeals will not order dismissal, but merely remand, that plaintiff may amend if he so desires. *Gulf, C. & S. F. Ry. Co. v. Hamrick* (Civ. App.) 231 S. W. 166.

The Court of Civil Appeals, on reversing judgment for insufficiency of conflicting evidence to sustain the verdict, has no right to render judgment, but must remand the case to the lower court for new trial. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344.

Where the language of an issue submitted to the jury indicated that the jury found the value of an oil lease as an entirety, and not the value of the interest in controversy, but the trial court, which knew the arguments made upon such issue, construed it as a finding of the value of the interest in controversy, the Court of Appeals will not render a judgment on the issue as a finding of the entire value, which would preclude appellee from showing that the jury intended the contrary, but will remand the case for a new trial. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

Where plaintiff in trespass to try title should not have been permitted to recover without offering to reimburse defendant, who claimed under mortgage foreclosure, the court on appeal will not render judgment for defendant, but will remand, that plaintiff have opportunity to amend and the court to adjust the equities. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

— **Proceedings after remand.**—Where an appellate court has rendered a decision and remanded a cause, the district court should confine its trial to the issues remanded, and, the others being *res judicata*, it was error not to instruct jury to find in accordance with opinion. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 199 S. W. 829.

Holding, on appeal, that plea of privilege was properly overruled, is the law of the case on remand. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 209 S. W. 205.

On retrial, lower court is required to obey orders of appellate court in remanding case. *Roberts v. Armstrong* (Civ. App.) 212 S. W. 227.

The law of the case controlling the decision becomes authority, and is not *obiter dicta*, though the court was mistaken in the assumption of the premise of the decision upon which the law was announced. *Allen v. Berkmier* (Civ. App.) 216 S. W. 647.

Where the pleadings and facts on second trial were not identical with those on the first, the opinion and judgment of the Court of Civil Appeals on the former appeal did not so finally and fully adjudicate both the law and the facts as to justify the trial court on the second trial in striking out the answer of defendants, containing both general denial and other defensive pleas, and in rendering judgment for plaintiff without proof of any facts except the value of the rents sued for. *Roberts v. Armstrong* (Com. App.) 231 S. W. 371.

Construction and effect of judgment.—The Court of Civil Appeals has full control over its judgments during its term. *Henningsmeyer v. First State Bank of Conroe*, 109 Tex. 116, 195 S. W. 1137.

Determination of an incidental question on appeal from a judgment for defendant on plea of *res judicata*, held not *dictum*. *Sutherland v. Friedenbloom* (Civ. App.) 200 S. W. 1099.

Holding of a Court of Civil Appeals that a judgment was not a final decree, unappealed from, is controlling in another Court of Civil Appeals on lack of finality of such judgment. *Wootton v. Jones* (Civ. App.) 204 S. W. 237.

Where on reversal judgment was rendered in trespass to try title giving defendant right to writ if plaintiff did not make certain payment within 12 months, and on default defendant to make a payment within six months after such 12 months, and retain possession, time within which payment could be made did not start running where writ of error was asked for, until application therefor had been passed on. *Hume v. Moore* (Civ. App.) 204 S. W. 381.

An opinion on a former appeal of a case which recited certain facts shown by the evidence as strongly tending to support the defense of settlement, but which stated in substance that the issue of such settlement was one of fact for the jury, did not justify the giving of an instruction on the issue of settlement which pointed out the circumstances so as to be on the weight of the evidence. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

An appellant, after judgment appealed from has been affirmed because of his failure to present his appeal in accordance with the statute, cannot go back to the trial court, bring proceedings to set aside the judgment setting up the identical grounds of his original motion for a new trial, and obtain the benefit of two appeals from the same judgment. *Andrle v. Fajkus* (Civ. App.) 227 S. W. 245.

Art. 1627. [1028] Judgment on affirmance or rendition, etc.; damages adjudged, when; finality.—Whenever the Courts of Civil Appeals on the trial of cases brought from an inferior Court shall affirm the judgment or decree of said inferior court, or when said courts shall proceed to render such judgment or decree as should have been rendered by the court below, said court shall, at the same time, render judgment against the Appellant, or plaintiff in error, and the sureties on his Appeal Bond

(a copy of which Bond shall always accompany the transcript of the record) subject to such disposition as to costs on said Appeal as said courts may order; and said Courts of Civil Appeals shall, in their discretion, include in said judgment or decree, such damages, not exceeding 10% of the amount of the original judgment, as the court may deem proper, and the judgment or decree of said courts rendered as contemplated in this Article shall be final. [Acts 1892, S. S., p. 25, § 37; Acts 1921, 37th Leg., ch. 23, § 2, amending art. 1627, Rev. Civ. St. 1911.]

Took effect 90 days after adjournment which occurred March 12, 1921.

See Texas Trunk R. Co. v. Johnson, 86 Tex. 421, 25 S. W. 417.

Award of damages.—Where plaintiff, who recovered nothing below, appealed, there is no basis for defendant's request for assessment of damages for delay, and hence, without consideration of the matter, the appellate court will grant plaintiff's motion to dismiss the appeal. Major v. Dannelly (Civ. App.) 220 S. W. 1110.

Art. 1628. [1024] No reversal for want of form.

2. Prejudice to rights of party as ground of review.—In general.—To authorize the appellate court to reverse a judgment for error, it must appear that the error was reasonably calculated to, and probably did, injure the appellant. Lancaster v. Mays (Civ. App.) 207 S. W. 676; Ferguson v. Johnson (Civ. App.) 205 S. W. 512.

In partition suit, where there was nothing in the record to indicate that appellant would have fared any better, had the court enlarged the interest of others in the property, instead of awarding them a money judgment, made a charge against his interest, he could not complain. Leach v. Leach (Civ. App.) 223 S. W. 287.

The rule that the admission of immaterial evidence requires reversal unless it appears that no injury could have resulted does not obtain in Texas, where the rule is that there shall be no reversal for error of law in course of trial unless the appellate court shall be of opinion the error complained of amounted to a denial of the rights of appellant, causing rendition of improper judgment. Rule No. 62a, 149 S. W. x. Howell v. West (Civ. App.) 227 S. W. 251.

3. — Errors not affecting result.—Error not calculated to cause and which did not probably cause rendition of improper judgment does not authorize reversal. Shipley v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 199 S. W. 661; Texas & P. Ry. Co. v. Jones (Civ. App.) 196 S. W. 357; Muir v. Stevens (Civ. App.) 221 S. W. 1119; Harrison v. First Nat. Bank of Lewisville (Civ. App.) 224 S. W. 269; Panhandle & S. F. Ry. Co. v. Haywood (Civ. App.) 227 S. W. 347; Eastern Texas Electric Co. v. Hunsucker (Civ. App.) 230 S. W. 817.

In suit by purchasers of railway securities against seller, erroneous holding that interest coupons attached to bonds sold were included in exception of the contract of sale, held harmless to purchasers, where they had been credited therewith. West v. Carlisle (Civ. App.) 199 S. W. 515.

5. — Errors as affecting party not entitled to succeed in any event.—In an action of trespass to try title to land which plaintiff claimed, his wife acquired with community funds, where the jury found that such property was the separate property of the wife, the improper submission of issues as to the wife's right to sell the same if it was community was harmless, and judgment for defendant will not be disturbed; plaintiff having utterly failed to make out any title. Moss v. Ingram (Civ. App.) 224 S. W. 258.

Erroneous submission of issue of negligent speed of train is harmless, where finding of negligent failure to keep a proper lookout sustains the judgment. Panhandle & S. F. Ry. Co. v. Haywood (Civ. App.) 227 S. W. 347.

Complaint could not be made by plaintiff of action of the court in sustaining special exceptions to his petition so far as it was for conversion of an automobile, where there was no testimony whatever that a particular car among those belonging to defendant was ever designated or in any way identified as one defendant had sold to plaintiff, and plaintiff's testimony clearly indicated that no particular car was ever so designated, under Rule 62a for the government of Courts of Civil Appeals (149 S. W. x). Minnick v. Dreyer Motor Co. (Civ. App.) 227 S. W. 365.

A statement by the trial court that he was doubtful whether the evidence justified submission to the jury of the issue whether the contract claimed by plaintiff was made was not prejudicial to plaintiff where the evidence would have authorized the court to refuse to submit the issue. Harrison v. Harrison (Civ. App.) 230 S. W. 803.

7. Presumption as to effect of error.—Despite Rule 62a for Courts of Civil Appeals (149 S. W. x), injury will be presumed when trial court erroneously excluded evidence constituting foundation of action or defense under such circumstances that it cannot reasonably be expected that it can be supplied by other evidence. Morris County Nat. Bank v. Parrish (Civ. App.) 207 S. W. 939.

Where an objection is made to argument of counsel not set out in the bill, concerning special instructions, but the court states that the same was almost incoherent, in view of court rule 62a and of the discretion of the trial judge, it must be presumed that the jury was not misled, but were governed by the charge of the court, unless made to appear otherwise. El Paso Electric Ry. Co. v. Terrazas (Civ. App.) 208 S. W. 387.

It must be presumed that jurors understood and obeyed the instruction of the court, and that a withdrawal of remarks either by the attorney making them, or a direction by

the court to disregard them, has removed any prejudice caused, and cured the error, unless injury is shown. *Id.*

8. Burden to show prejudice from error.—Appellant must point out reversible errors in order to secure reversal. *Schaff v. Riha* (Civ. App.) 201 S. W. 210; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758; *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Ordinarily failure of judge to file conclusions of law and fact where proper request is made is ground for reversal, unless record shows failure resulted in no injury. *Daugherty v. Daugherty* (Civ. App.) 193 S. W. 985.

In trespass to try title, exclusion of deeds offered by defendant, though erroneous, is harmless, where it prima facie appeared from statement that deeds showed chain of title from sovereignty to admitted common source of title under whom both parties claimed. *Ludtke v. Murray* (Civ. App.) 199 S. W. 321.

Where plaintiff in error claimed that answer to the special issues showed that the jury was actuated by prejudice, but no single fact or circumstance was pointed out tending to show that the jury was prejudiced, an assignment of error on the ground of such prejudice will be overruled. *Du Bois v. Tyler* (Civ. App.) 219 S. W. 211.

9. Errors favorable to party complaining.—Appellant cannot complain of charge which was more favorable to him than he was entitled to. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928; *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237; *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105; *St. Louis Southwestern Ry. Co. of Texas v. Barrett* (Civ. App.) 207 S. W. 557; *El Paso Electric Ry. Co. v. Carruth* (Civ. App.) 208 S. W. 984; *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679; *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430; *Wm. Cameron & Co. v. Gamble* (Civ. App.) 216 S. W. 459; *American Automobile Ins. Co. v. Fox* (Civ. App.) 218 S. W. 92; *Pecos & N. T. Ry. Co. v. Suito*, 110 Tex. 250, 218 S. W. 1034; *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

A party cannot complain on appeal that the judgment was erroneous, where it is for a less amount than it should have been. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647; *Smith v. Railroad Employés Development Co.* (Civ. App.) 195 S. W. 220; *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Inconsistency in charge is harmless to appellant; only error being against appellee. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665; *Compton v. Franks* (Civ. App.) 222 S. W. 988.

Admission of evidence more favorable to appellant than against him was not prejudicial to appellant. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630; *Hallam v. Duckworth* (Civ. App.) 209 S. W. 222.

Defendant cannot complain of error in submitting an issue, favorable to plaintiff, which infringed on plaintiff's legal rights only. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Where plaintiff requested deduction of part of recovery although defendants were not entitled thereto, defendants not having objected cannot complain of deduction; it being to their advantage. *Mindes Millinery Co. v. Wellborn* (Civ. App.) 201 S. W. 1059.

In action for destruction of cotton where plaintiff claimed damages of \$900, the defendant could not complain that the court required a remittitur and rendered judgment for \$500. *New Fenfield Townsite Co. v. King* (Civ. App.) 204 S. W. 788.

Appellant cannot complain of a ruling of the trial court unduly favorable to him. *Taylor Cotton Oil Co. v. Early-Foster Co.* (Civ. App.) 204 S. W. 1179.

In suit by tenant to recover possession from a subtenant holding under a parol lease for the term of the original lease where the only theory on which plaintiff could recover was that he had secured a renewal of the original lease after the commencement of the action, plaintiff cannot complain of the judgment which correctly found for defendant on all other issues in the case, including costs. *Adams v. Van Mourick* (Civ. App.) 206 S. W. 721.

If trial court gave seller of machines, sued by buyer for damages from fraud, credit for what buyer received from farmers who bought machines from it, seller cannot complain; it having profited to that extent. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

Defendant cannot complain that the court's charge required the jury to find in favor of the plaintiff mere evidential facts as well as the material issues. *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

In an action on a certificate of assessment, if there was both a personal liability and a lien on land, no complaint could be made by certain defendants because the judgment relieved them from personal liability. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

10. Technical or formal errors.—Where the only errors disclosed are technical, the judgment will not be reversed in view of rule 52a (149 S. W. x). *Wofford v. Herndon* (Civ. App.) 204 S. W. 353; *Kerwin v. Mead* (Civ. App.) 229 S. W. 677.

Where defendant insurer admitted actual receipt of proofs of loss before suit was filed, there could be no possible injury to it from premature filing of suit, where costs were adjudged against plaintiffs. *Royal Ins. Co. of Liverpool, England, v. Humphrey* (Civ. App.) 201 S. W. 426.

Under the maxim *de minimis lex non curat*, an error of less than three dollars in the assessment of damages will not work a reversal. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

11. Parties.—Misjoinder of parties is not cause for reversal where no prejudice appears. *Langford v. Power* (Civ. App.) 196 S. W. 662; *Western Union Telegraph Co. v.*

Morrow (Civ. App.) 208 S. W. 689; Patton v. Texas Pac. Coal & Oil Co. (Civ. App.) 225 S. W. 857.

In trespass to try title, any error in permitting one to intervene and prosecute suit, though corporation plaintiff had been dissolved, leaving, as contended, no suit in which to intervene, furnishes no ground for reversal; intervener being in fact a plaintiff and there being nothing to indicate that course pursued prejudiced appellants. *Edwards v. Roberts* (Civ. App.) 209 S. W. 247.

If a necessary party, for whose use and benefit plaintiff assumed to sue, were personally present at trial of the suit, directing the suit as far as it affected his interests, judgment therein would bind him, and there would be no reversible error in refusing to make him an actual party of record. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

12. **Process.**—Where appellant sustained no injury from trial court's overruling of motion to quash distress warrant, reversible error is not shown. *Thames-Forward Realty Co. v. Melaun* (Civ. App.) 211 S. W. 268.

13. **Pleading**—In general.—Immaterial allegations. —*Western Union Telegraph Co. v. Morrow* (Civ. App.) 208 S. W. 689; *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205; *Southern Commercial & Savings Bank v. Combs* (Civ. App.) 203 S. W. 1169; *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221; *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

Form and sufficiency of allegations. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555; *Britton v. Eagan* (Civ. App.) 196 S. W. 972; *Wolf v. Gardner* (Civ. App.) 209 S. W. 752.

Misjoinder. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225; *Missouri, K. & T. Ry. Co. of Texas v. Grimes* (Civ. App.) 196 S. W. 691.

Waiver. *McCoy v. Bankers' Trust Co.* (Civ. App.) 200 S. W. 1138.

Variance. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 201 S. W. 417.

Effect of verdict. *Galveston, H. & S. A. Ry. Co. v. Hopkins* (Civ. App.) 202 S. W. 222; *Baker v. East* (Civ. App.) 197 S. W. 1123; *Old Faithful Oil Co. v. McGiveran* (Civ. App.) 200 S. W. 249; *Burnett v. Summerour* (Civ. App.) 228 S. W. 1013; *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

Cure by evidence. *Sims v. Ford* (Civ. App.) 209 S. W. 699; *Ulrich v. Galveston-Seeburg Electric Piano Co.* (Civ. App.) 199 S. W. 310; *Wilkinson v. Bradford* (Civ. App.) 200 S. W. 1094; *Hall v. White* (Civ. App.) 208 S. W. 669.

Election. *Texas Co-op. Inv. Co. v. Clark* (Civ. App.) 212 S. W. 245.

Severance. *American Cent. Ins. Co. v. Robinson* (Civ. App.) 219 S. W. 277.

14. — **Demurrers or exceptions.**—Overruling exceptions held harmless. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139; *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521; *National Surety Co. v. Masters* (Civ. App.) 200 S. W. 1123; *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247; *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164; *Slaughter v. Oakes* (Civ. App.) 203 S. W. 405; *Padgett v. Young County* (Civ. App.) 204 S. W. 1046; *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192; *Hall v. White* (Civ. App.) 208 S. W. 669; *Hickory Jones Co. v. Mettauer* (Civ. App.) 208 S. W. 745; *Ferguson v. Mansfield* (Civ. App.) 215 S. W. 234; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; *Green v. Missouri State Life Ins. Co.* (Civ. App.) 219 S. W. 552; *Schwander v. Noble* (Civ. App.) 220 S. W. 443; *Scheps v. Giles* (Civ. App.) 222 S. W. 348; *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631; *Bivins v. Oldham* (Civ. App.) 224 S. W. 240; *Brenard Mfg. Co. v. Watkins* (Civ. App.) 224 S. W. 522; *Feris v. Bassett* (Civ. App.) 227 S. W. 233; *Baker v. Davis* (Civ. App.) 227 S. W. 534; *Hines v. Warden* (Civ. App.) 229 S. W. 957; *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

Overruling demurrer held harmless. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240; *Davis v. White* (Civ. App.) 207 S. W. 679; *Polk v. Inman* (Civ. App.) 211 S. W. 261; *Clark v. Scott* (Civ. App.) 212 S. W. 728; *Midland & N. W. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 216 S. W. 627; *Greenmeyer v. McFarlane* (Civ. App.) 220 S. W. 613; *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113; *Harris v. Harris* (Civ. App.) 230 S. W. 224.

Sustaining demurrer held prejudicial. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

Sustaining exceptions held harmless. *Laas-Jersig Co. v. San Antonio & A. P. Ry. Co.* (Civ. App.) 197 S. W. 1002; *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057; *Hays v. Deeley* (Civ. App.) 204 S. W. 1177; *Rosser v. Levi* (Civ. App.) 210 S. W. 314; *J. L. Collins Piano Co. v. Adams & Allcorn* (Civ. App.) 216 S. W. 420; *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214; *Guyler v. Guyler* (Civ. App.) 220 S. W. 604; *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 731; *Harrison v. Harrison* (Civ. App.) 230 S. W. 803; *Ater v. Moore* (Civ. App.) 231 S. W. 457.

15. — **Amendments and supplemental pleadings.**—Refusal to permit amended or supplemental pleading held harmless. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200; *Guaranty Trust Co. of New York v. Green* (Civ. App.) 197 S. W. 1026; *Henderson v. Beggs* (Civ. App.) 207 S. W. 565; *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466; *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Permitting amended or supplemental pleading held harmless. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375; *De Berry v. Chambers* (Civ. App.) 200 S. W. 1141.

Improper allegations in supplemental pleading held harmless. *Britton v. Eagan* (Civ. App.) 196 S. W. 972.

16. — Striking out or dismissing.—Striking pleading or part thereof held harmless. *Guyler v. Guyler* (Civ. App.) 220 S. W. 604; *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032; *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

Dismissal as to one defendant or issue held harmless. *Ford v. Cochran* (Civ. App.) 223 S. W. 1041; *Kanner v. Startz* (Civ. App.) 203 S. W. 603; *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

Striking pleading held harmless. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

17. Interlocutory proceedings.—Denial of continuance held harmless. *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365; *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863; *Hahl v. Davidson* (Civ. App.) 202 S. W. 792; *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798; *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842; *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283; *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365; *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.) 216 S. W. 444; *Blair v. Paggi* (Civ. App.) 219 S. W. 287; *Barlow v. Greer* (Civ. App.) 222 S. W. 301; *Woodmen of the World v. Holmes* (Civ. App.) 232 S. W. 575.

Injunctions. *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330; *Nimmo v. O'Keefe* (Civ. App.) 204 S. W. 883.

Rulings on motions. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441; *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Trial court's refusal to allow absent witness' deposition to be taken at close of trial pursuant to stipulation held harmless, where such testimony would not have affected result. *Palm v. Theumann* (Civ. App.) 201 S. W. 421.

Receivers. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

Denial of jury trial. *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

18. Selection and impaneling of jurors.—Overruling challenge for cause held harmless. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397; *Horn v. Price* (Civ. App.) 200 S. W. 590.

Disqualified juror. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

Peremptory challenges. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

19. Conduct of trial or hearing in general.—Remarks by the court. *Morales v. Cline* (Civ. App.) 202 S. W. 754; *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340; *Cohn v. Saenz* (Civ. App.) 211 S. W. 492; *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364; *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282; *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102; *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085.

Denial of right to open and close. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240; *Carter v. Brown* (Civ. App.) 219 S. W. 292.

Control of argument. *Hines v. Kelly* (Civ. App.) 222 S. W. 648.

20. Rulings as to evidence in general.—Order of proof. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Reading documentary evidence. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

21. Rulings on questions to witnesses.—Permitting improper questions. *Williams v. Gardner* (Civ. App.) 215 S. W. 981; *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328; *Galveston, H. & S. A. Ry. Co. v. Hill* (Civ. App.) 202 S. W. 358; *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192; *Hall v. Hayter* (Civ. App.) 209 S. W. 436; *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

Cross-examination. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 201 S. W. 1040.

Leading questions. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 203 S. W. 90; *Rosborough v. Cerveni* (Civ. App.) 197 S. W. 319; *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

Irresponsive answers. *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

22. Admission of evidence—Prejudicial effect in general.—Admission of evidence held harmless. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238; *Winfree v. Winfree* (Civ. App.) 195 S. W. 245; *Schaff v. Shephard* (Civ. App.) 196 S. W. 232; *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287; *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874; *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328; *Farmers' Nat. Bank v. Collis* (Civ. App.) 197 S. W. 782; *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150; *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Provident Nat. Bank of Waco v. Howard* (Civ. App.) 199 S. W. 658; *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863; *Gonzales v. Flores* (Civ. App.) 200 S. W. 851; *Missouri, K. & T. Ry. Co. of Texas v. Humphries* (Civ. App.) 200 S. W. 909; *Jones v. Schnauffer* (Civ. App.) 202 S. W. 367; *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798; *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408; *Kanner v. Startz* (Civ. App.) 203 S. W. 603; *Southern Commercial & Savings Bank v. Combs* (Civ. App.) 203 S. W. 1169; *Sweetman v. Laredo Electric & Ry. Co.* (Civ. App.) 204 S. W. 701; *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010; *Johnson v. McBee* (Civ. App.) 205 S. W. 159; *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696; *Burnett v. Anderson* (Civ. App.) 207 S. W. 540; *Western Union Telegraph Co. v. Morrow* (Civ. App.) 208 S. W. 689; *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714; *Houston Oil Co. v. Bunn* (Civ. App.) 209 S. W. 830; *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596; *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255; *Cohn v. Saenz* (Civ. App.) 211 S. W. 492; *Douglass v. Wallace* (Civ. App.) 211 S. W. 530; *Freeport Town-Site Co. v. S. H. Hudgins & Sons* (Civ. App.) 212 S. W. 287; *St. Louis, B. & M. Ry. Co. v.*

Broughton (Civ. App.) 212 S. W. 664; Marshall v. Campbell (Civ. App.) 212 S. W. 723; Clark v. Scott (Civ. App.) 212 S. W. 723; Ball v. McDuffie (Civ. App.) 212 S. W. 844; Southwestern Portland Cement Co. v. Schwartz (Civ. App.) 212 S. W. 977; Donoho v. Carwile (Civ. App.) 214 S. W. 553; Van v. Moeller (Civ. App.) 216 S. W. 234; Westchester Fire Ins. Co. v. Biggs (Civ. App.) 216 S. W. 274; Stein v. Roberts (Civ. App.) 217 S. W. 166; Jackson v. Pure Oil Operating Co. (Civ. App.) 217 S. W. 959; Foster v. Guerra (Civ. App.) 219 S. W. 295; Moorman v. Small (Civ. App.) 220 S. W. 127; Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co. (Civ. App.) 220 S. W. 781; Wortman v. Young (Civ. App.) 221 S. W. 660; J. M. Radford Grocery Co. v. Jamison (Civ. App.) 221 S. W. 998; Western Union Telegraph Co. v. Carver (Civ. App.) 222 S. W. 333; San Antonio & A. P. Ry. Co. v. McGill (Civ. App.) 222 S. W. 699; Bivins v. Oldham (Civ. App.) 224 S. W. 240; Padgett v. Hines (Civ. App.) 224 S. W. 558; Bomar v. Runge (Civ. App.) 225 S. W. 287; St. Louis Southwestern Ry. Co. of Texas v. Turner (Civ. App.) 225 S. W. 383; City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co. (Civ. App.) 225 S. W. 391; Givens v. Turner (Civ. App.) 225 S. W. 403; Montgomery v. Gallas (Civ. App.) 225 S. W. 557; Hines v. Kelley (Civ. App.) 226 S. W. 493; Howell v. West (Civ. App.) 227 S. W. 251; Camden Fire Ins. Ass'n v. Yarborough (Civ. App.) 229 S. W. 336; Vogt v. Guidry (Civ. App.) 229 S. W. 656; Lewis v. Harrison (Civ. App.) 229 S. W. 691; Irwin v. Jackson (Civ. App.) 230 S. W. 522; Eldora Oil Co. v. Thompson (Civ. App.) 230 S. W. 738; Amerman v. Bourland (Civ. App.) 230 S. W. 804; Southwestern Settlement & Development Co. v. Village Mills Co. (Civ. App.) 230 S. W. 869; Canon v. Scott (Civ. App.) 230 S. W. 1042; Corn v. McNutt (Civ. App.) 230 S. W. 1052; Golden Rod Mills v. Green (Civ. App.) 230 S. W. 1089; Avery v. Llano Cotton Seed Oil Mill Ass'n (Civ. App.) 196 S. W. 351.

Admission of evidence held prejudicial. Smith v. Roberts (Civ. App.) 218 S. W. 27; Texas & N. O. R. Co. v. Stephens (Civ. App.) 198 S. W. 396; Galveston, H. & S. A. Ry. Co. v. Schelling (Civ. App.) 198 S. W. 1018; Perez v. Maverick (Civ. App.) 202 S. W. 199; Bartlesville Zinc Co. v. Compania Minera Ygnacio Rodriguez Ramos, S. A. (Civ. App.) 202 S. W. 1048; Lester v. Park (Civ. App.) 205 S. W. 734; Ravel v. Haymon Krupp & Co. (Civ. App.) 206 S. W. 211; Quanah, A. & P. Ry. Co. v. Lancaster (Civ. App.) 207 S. W. 606; Providence-Washington Ins. Co. v. Owens (Civ. App.) 207 S. W. 666; Water, Light & Ice Co. of Weatherford v. Barnett (Civ. App.) 212 S. W. 236; Wall & Stabe Co. v. Berger (Civ. App.) 212 S. W. 975; Theuber v. Marek (Civ. App.) 222 S. W. 293; Panhandle & S. F. Ry. Co. v. Laird (Civ. App.) 224 S. W. 305; Montgomery v. Gallas (Civ. App.) 225 S. W. 557; Howard v. Franklin Ins. Co. (Civ. App.) 226 S. W. 447; Hines v. Collins (Civ. App.) 227 S. W. 332; Burchill v. Hermsmeyer (Civ. App.) 230 S. W. 809.

The rule that the introduction of incompetent evidence is harmless where sufficient legal evidence is introduced to sustain the verdict does not apply where the trial is before a jury. Texarkana & Ft. S. Ry. Co. v. Wilson (Civ. App.) 204 S. W. 491.

Good intent on the part of a person introducing prejudicial and irrelevant evidence does not render its admission harmless. Walker v. Kellar (Civ. App.) 218 S. W. 792.

Question of whether improper admission of opinion testimony without foundation being made by showing qualification of witness, and whether the statement of facts upon which opinion is based is ground for reversal, depends on facts in the case, and involves the exercise of certain discretion by the court. Houston & T. C. R. Co. v. Long (Civ. App.) 219 S. W. 212.

23. — Facts otherwise established.—Admission of similar evidence without objection. Texas & P. Ry. Co. v. Max Hahn Packing Co. (Civ. App.) 197 S. W. 1146; Moore v. Coleman (Civ. App.) 195 S. W. 212; Missouri, K. & T. Ry. Co. of Texas v. Storey (Civ. App.) 195 S. W. 350; Red River, T. & S. Ry. Co. v. Davis (Civ. App.) 195 S. W. 1160; Hackler v. Ingram (Civ. App.) 196 S. W. 279; Chicago, R. I. & G. Ry. Co. v. Hensley (Civ. App.) 196 S. W. 974; Hadnot v. Hicks (Civ. App.) 198 S. W. 359; McKinley v. Bone (Civ. App.) 199 S. W. 298; Provident Nat. Bank of Waco v. Howard (Civ. App.) 199 S. W. 658; Southern Pac. Co. v. Stephens (Civ. App.) 201 S. W. 1076; Farmers' Petroleum Co. v. Shelton (Civ. App.) 202 S. W. 194; Strachbein v. Gilmer (Civ. App.) 202 S. W. 333; Edens v. Cleaves (Civ. App.) 202 S. W. 355; Pantaze v. Farmer (Civ. App.) 205 S. W. 521; Delaware Underwriters v. Brock (Civ. App.) 206 S. W. 377; Manton v. City of San Antonio (Civ. App.) 207 S. W. 951; Ft. Worth & D. C. Ry. Co. v. Strickland (Civ. App.) 208 S. W. 410; Houston E. & W. T. Ry. Co. v. Lynch (Civ. App.) 208 S. W. 714; Cochran v. Taylor (Civ. App.) 209 S. W. 253; Batson-Milholme Co. v. Faulk (Civ. App.) 209 S. W. 837; Pullman Co. v. McGowan (Civ. App.) 210 S. W. 842; Southern Traction Co. v. Coley (Civ. App.) 211 S. W. 265; Texas & P. Ry. Co. v. Stivers (Civ. App.) 211 S. W. 319; Sugarland Ry. Co. v. Dew Bros. (Civ. App.) 212 S. W. 190; Lee v. Buie (Civ. App.) 212 S. W. 230; Railroad Commission of Texas v. Pecos & N. T. Ry. Co. (Civ. App.) 212 S. W. 535; Clark v. Scott (Civ. App.) 212 S. W. 728; Donoho v. Carwile (Civ. App.) 214 S. W. 553; Walker v. Kellar (Civ. App.) 218 S. W. 792; Davis v. Burkholder (Civ. App.) 218 S. W. 1101; Southland Life Ins. Co. v. Hopkins (Civ. App.) 219 S. W. 254; Schwander v. Noble (Civ. App.) 220 S. W. 443; Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co. (Civ. App.) 220 S. W. 781; Massey v. Allen (Civ. App.) 222 S. W. 682; Burchard v. Woodward (Civ. App.) 223 S. W. 707; Western Union Telegraph Co. v. Gresham (Civ. App.) 223 S. W. 1052; Von Hatzfeld v. Haubert (Civ. App.) 224 S. W. 220; St. Louis Southwestern Ry. Co. of Texas v. Turner (Civ. App.) 225 S. W. 383; Kubena v. Mikulasick (Civ. App.) 228 S. W. 1105; Werthan Bag Co. v. Houston Bag & Bagging Co. (Civ. App.) 230 S. W. 1055; Great Southern Oil & Refining Ass'n v. Cooper (Civ. App.) 231 S. W. 157; City of Dallas v. Maxwell (Civ. App.) 231 S. W. 429.

Undisputed fact. *Early-Foster Co. v. Gottlieb* (Civ. App.) 214 S. W. 520; *Chicago, R. I. & G. Ry. Co. v. Jenkins* (Civ. App.) 196 S. W. 679; *Fowell v. Archer County* (Civ. App.) 198 S. W. 1037; *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193; *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170; *Lester v. Park* (Civ. App.) 205 S. W. 734; *Western Union Telegraph Co. v. Fulton* (Civ. App.) 211 S. W. 285; *McDonald v. Stafford* (Civ. App.) 213 S. W. 732; *Martinez v. Bruni* (Civ. App.) 216 S. W. 655; *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534; *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631; *Bell v. First Nat. Bank* (Civ. App.) 226 S. W. 1107; *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726; *Pease v. State* (Civ. App.) 228 S. W. 269; *Stone v. Light* (Civ. App.) 228 S. W. 1108; *Walker v. Irby* (Civ. App.) 229 S. W. 331; *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916; *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208; *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157; *Kurz v. Soliz* (Civ. App.) 231 S. W. 424.

Conclusion drawn from facts in evidence. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 201 S. W. 1040; *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014; *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496; *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472; *Land v. Dunn* (Civ. App.) 226 S. W. 801; *Nesbit v. Richardson* (Civ. App.) 229 S. W. 595; *Werthan Bag Co. v. Houston Bag & Bagging Co.* (Civ. App.) 230 S. W. 1055.

Fact sufficiently shown by other evidence. *Cunningham v. Ault* (Civ. App.) 211 S. W. 477; *Texas & P. Ry. Co. v. Max Hahn Packing Co.* (Civ. App.) 197 S. W. 1146; *International & G. N. Ry. Co. v. Reed* (Civ. App.) 203 S. W. 410; *Jefferson County Traction Co. v. Giles* (Civ. App.) 206 S. W. 224; *Burnett v. Anderson* (Civ. App.) 207 S. W. 540; *Kansas City, M. & O. Ry. Co. of Texas v. Bomar* (Civ. App.) 207 S. W. 570; *Bivins v. Oldham* (Civ. App.) 224 S. W. 240; *Hartford Life Ins. Co. v. Patterson* (Civ. App.) 231 S. W. 814.

Any error in admitting in evidence statements or admissions in abandoned answer held harmless. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 200 S. W. 263.

In action to rescind sale because of seller's misrepresentations regarding indebtedness which buyer assumed, error in admitting hearsay testimony as to size of such indebtedness is not rendered harmless by appellee testifying seller admitted making misrepresentations where seller denied making admission. *Richardson v. Cantrell* (Civ. App.) 201 S. W. 702.

Where oil scouts admitted on the stand that an oil lease was worth what it could be sold for, it was harmless, if error, to allow the other party to show what oil leases and stock were selling for in the locality at the time. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Admission of testimony as to telephone conversation, by witness to whom conversation had been related by one of the parties thereto, was not prejudicial to plaintiff, where only fact testified to by such witness, not testified to by the party who had related conversation to him, was a fact alleged by petition, and as to that fact party stated he could not remember. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

Any error in admitting evidence of a fact which is presumed, with no evidence to the contrary, is harmless. *Hughes v. Robinson* (Civ. App.) 214 S. W. 946.

Where defendant's witnesses contradicted plaintiff's testimony as to the rail which was being handled when plaintiff claimed to have been injured, and plaintiff in rebuttal testified that defendant's witnesses were correct and his testimony was incorrect, the admission of the original petition, which alleged the facts in accordance with the corrected testimony, if error, was not prejudicial to defendant. *Hines v. Bost* (Civ. App.) 224 S. W. 698.

24. — **Defect supplied or objection removed subsequently.**—Error cured by verdict. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778; *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918; *Baker v. East* (Civ. App.) 197 S. W. 1123; *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676; *Powell v. Archer County* (Civ. App.) 198 S. W. 1037; *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347; *Youngblood v. Hoeffle* (Civ. App.) 201 S. W. 1057.

Parol evidence as to written instrument subsequently admitted. *Haynie v. Stovall* (Civ. App.) 212 S. W. 792; *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668; *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

If evidence received was inadmissible, error, if any, became harmless where court properly took case from jury. *Planters' Oil Co. v. Gresham* (Civ. App.) 202 S. W. 145.

If clerical error in the copy of a judgment offered by plaintiff in evidence rendered the judgment inadmissible, defendant by offering a correct copy cured any such error, and no injury resulted to him. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

Assignments of error in permitting a surveyor to point out on a map where the lines covered by deeds would be according to the descriptions become immaterial, where the deeds were held not admissible. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

25. — **Error cured by withdrawal, striking out, or instructions to jury.**—Instruction not to consider. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113; *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555; *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676; *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332; *Edens v. Cleaves* (Civ. App.) 202 S. W. 355; *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996; *Panhandle & S. F. Ry. Co. v. Arnett* (Civ. App.) 219 S. W. 232.

Ignoring issue raised. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918; *Kanner v. Startz* (Civ. App.) 203 S. W. 603; *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134; *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190; *Wortman v. Young* (Civ. App.) 221 S. W. 660.

Instruction held not to cure error. *Mumme v. Sutherland* (Civ. App.) 198 S. W. 395; *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

26. — **On trial without a jury.**—In an action tried to court without a jury, the admission of irrelevant and immaterial evidence not shown to have been harmful is no ground for reversal. *Cooper Grocery Co. v. H. T. Hamrick & Co.* (Civ. App.) 229 S. W. 356; *National Bank of Garland v. Gough* (Civ. App.) 197 S. W. 1119; *McAllen v. Wood* (Civ. App.) 201 S. W. 433; *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163; *Hallam v. Duckworth* (Civ. App.) 209 S. W. 222; *Early-Foster Co. v. El Campo Rice Milling Co.* (Civ. App.) 212 S. W. 964; *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587; *Cummins v. Cummins* (Civ. App.) 224 S. W. 903; *Magee v. Paul* (Civ. App.) 224 S. W. 1118, conforming to answers to certified questions, 110 Tex. 470, 221 S. W. 254; *Holland v. De Walt* (Civ. App.) 225 S. W. 216; *Pease v. State* (Civ. App.) 228 S. W. 269; *Morrison v. Bennette* (Civ. App.) 228 S. W. 307; *Johnson v. Frost* (Civ. App.) 229 S. W. 558; *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

Admission of evidence held harmless. *Hallam v. Duckworth* (Civ. App.) 209 S. W. 222; *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656; *Cooper v. Newsom* (Civ. App.) 224 S. W. 568; *Lewis Bros. v. Pendleton* (Civ. App.) 227 S. W. 502.

Judgment based upon inadmissible testimony should be reversed. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

27. **Exclusion of evidence—Prejudicial effect in general.**—Exclusion of evidence held harmless. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208; *Bomar v. Smith* (Civ. App.) 195 S. W. 964; *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240; *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Youngblood v. Hoefle* (Civ. App.) 201 S. W. 1057; *Dixon v. Winters* (Civ. App.) 201 S. W. 1103; *Morales v. Cline* (Civ. App.) 202 S. W. 754; *Hopkins v. King* (Civ. App.) 204 S. W. 360; *Frost v. Smith* (Civ. App.) 207 S. W. 392; *Lancaster v. Snider* (Civ. App.) 207 S. W. 560; *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592; *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954; *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567; *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571; *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710; *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 220 S. W. 354; *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632; *Meyers v. Ables* (Civ. App.) 222 S. W. 339; *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421; *Todd v. Hand* (Civ. App.) 225 S. W. 770; *Campbell v. Jones* (Civ. App.) 230 S. W. 710; *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

Exclusion cured by verdict or findings. *Kiehn v. Willmayer* (Civ. App.) 218 S. W. 15; *Ford v. Cole* (Civ. App.) 195 S. W. 661; *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397; *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642; *Kubena v. Mikulascik* (Civ. App.) 228 S. W. 1105; *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

A cause will not be reversed by reason of error in exclusion of evidence where appellant would not have prevailed in any event. *Burlington Buggy Co. v. Usrey* (Civ. App.) 209 S. W. 684; *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

The relevancy of testimony as to cranial depressions being the result of injury, as determined by the trial judge, will be disturbed only where it appears that complaining party was deprived of substantial benefit by exclusion of proper testimony. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149.

28. — **Facts otherwise established.**—Admitted facts. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044; *Schaff v. Wilson* (Civ. App.) 204 S. W. 251; *Walker v. Kellar* (Civ. App.) 218 S. W. 702; *Benavides v. Houston Ice & Brewing Ass'n* (Civ. App.) 224 S. W. 385.

Facts found by court. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

Undisputed facts. *Foster v. Guerra* (Civ. App.) 219 S. W. 295; *Federal Ins. Co. v. Munden* (Civ. App.) 203 S. W. 917; *Western Union Telegraph Co. v. Fulton* (Civ. App.) 211 S. W. 285; *Petterson v. Clay* (Civ. App.) 225 S. W. 1112.

29. — **Same or similar evidence otherwise admitted.**—Exclusion of evidence was harmless where evidence to the same purport was admitted by the court. *Aurelius v. Stewart* (Civ. App.) 219 S. W. 863; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Hines v. Collins* (Civ. App.) 227 S. W. 332; *Wrather v. Parks* (Civ. App.) 227 S. W. 513; *Johnson v. Mangum* (Civ. App.) 227 S. W. 750; *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

Other testimony by same witness. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405; *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Golden Rod Mills v. Green* (Civ. App.) 230 S. W. 1089.

Similar testimony of same witness. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238; *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636; *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 200 S. W. 1120; *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333; *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198; *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452; *Metropolitan Casualty Ins. Co. v. Edwards* (Civ. App.) 210 S. W. 856.

Same or similar testimony from other witnesses. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571; *Freeman v. Bennett* (Civ. App.) 195 S. W. 238; *Couch v. Biggers* (Civ. App.) 198 S. W. 1101; *Sanitary Mfg. Co. v. Gamer* (Civ. App.) 201 S. W. 1068; *Harlan v. Falfurrias Mercantile Co.* (Civ. App.) 214 S. W. 649; *Walker v. Kellar* (Civ. App.) 218 S. W. 792; *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Justice v. McRuffin* (Civ. App.) 224 S. W. 204; *Lancaster v. Corsicana Nat. Bank* (Civ. App.) 229 S. W. 580; *Nesbit v. Richardson* (Civ. App.) 229 S. W. 595.

30. — **Error cured by instructions to jury.**—Instruction assuming fact cures exclusion of evidence thereof. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131; *Carothers v. Finley* (Civ. App.) 209 S. W. 891.

Failure to request charge held to cure error. *Ft. Worth & R. G. Ry. Co. v. Ellis* (Civ. App.) 225 S. W. 409.

31. **Arguments and conduct of counsel.**—Argument held not prejudicial. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636; *Thornton v. Daniel* (Civ. App.) 199 S. W. 831; *Hall v. Collier* (Civ. App.) 200 S. W. 880; *Edens v. Cleaves* (Civ. App.) 202 S. W. 355; *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105; *City of Lubbock v. Bagwell* (Civ. App.) 206 S. W. 371; *Collier & Love v. Welborn* (Civ. App.) 206 S. W. 708; *San Antonio Portland Cement Co. v. Gschwendner* (Civ. App.) 207 S. W. 967; *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207; *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739; *San Antonio & A. P. Ry. Co. v. Moore* (Civ. App.) 208 S. W. 754; *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935; *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247; *Evans v. McKay* (Civ. App.) 212 S. W. 680; *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807; *McDonald v. Stafford* (Civ. App.) 213 S. W. 732; *Galveston, H. & S. A. Ry. Co. v. White* (Civ. App.) 216 S. W. 265; *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644; *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013; *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703; *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378; *Earl v. Mundy* (Civ. App.) 227 S. W. 716; *Watson v. Watson* (Civ. App.) 229 S. W. 893; *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

Although counsel's argument to jury was improper, it will not call for reversal, where it does not appear that it caused jury to render an improper verdict. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

Argument held prejudicial. *S. A. Pace Grocery Co. v. Guynes* (Civ. App.) 204 S. W. 794; *Southern Pac. Co. v. Miller* (Civ. App.) 207 S. W. 554; *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779; *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456; *Dean v. Dean* (Civ. App.) 214 S. W. 505; *Huston v. Scarborough* (Civ. App.) 221 S. W. 703.

Improper argument alone may be sufficient to reverse the case. *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779.

Whether improper argument by plaintiff's counsel in address to the jury is reversible error depends upon the facts in each case and involves the exercise of certain discretion by the court. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

Error cured by withdrawal of statement. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

32. **Demurrer to evidence, dismissal, nonsuit, or direction of verdict.**—Direction of verdict held harmless. *Leeper-Curd Lumber Co. v. Barbuzza* (Civ. App.) 216 S. W. 216; *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374; *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212; *Hines v. Rush* (Civ. App.) 229 S. W. 973.

That the trial court on defendant's motion discharged the jury and rendered judgment for defendants without verdict was merely equivalent to instruction of verdict for defendants, which would have been proper, so that no error prejudicial to plaintiffs was committed. *Peterson v. City of Houston* (Civ. App.) 224 S. W. 580.

33. **Submission of issues or questions to jury.**—Cure by jury's finding on erroneous issue or other issues. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636; *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614; *Robinson v. Aldredge* (Civ. App.) 198 S. W. 413; *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Brown v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 198 S. W. 986; *Western Union Telegraph Co. v. McGaughy* (Civ. App.) 198 S. W. 1084; *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698; *Hix v. Tomlinson* (Civ. App.) 200 S. W. 897; *Hahl v. Davidson* (Civ. App.) 202 S. W. 792; *Dutton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 204 S. W. 352; *Marshall v. Campbell* (Civ. App.) 212 S. W. 723; *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758; *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539; *Pyle v. Park* (Civ. App.) 214 S. W. 652; *Weil v. Miller* (Civ. App.) 215 S. W. 142; *Sutherland v. Citizens' State Bank* (Civ. App.) 220 S. W. 115; *St. Louis Southwestern Ry. Co. of Texas v. Lamkin* (Civ. App.) 220 S. W. 179; *Vogt v. Guidry* (Civ. App.) 220 S. W. 343; *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 220 S. W. 354; *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625; *Lopez v. Garcia* (Civ. App.) 221 S. W. 665; *Mackenzie v. Pugh* (Civ. App.) 221 S. W. 1010; *Baker v. Streater* (Civ. App.) 221 S. W. 1039; *Neill v. Pryor* (Civ. App.) 222 S. W. 296; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305; *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

Immaterial issue. *Crafts v. McAllen* (Civ. App.) 196 S. W. 729; *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758; *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151; *Dubois v. Lowery* (Civ. App.) 205 S. W. 858; *Penelope Real Estate Co. v. Dawson* (Civ. App.) 206 S. W. 702; *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224; *Rowe v. Guderian* (Civ. App.) 212 S. W.

960; *Smith v. Smith* (Civ. App.) 213 S. W. 273; *Pollack v. Perry* (Civ. App.) 217 S. W. 967; *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502; *Greenameyer v. McFarlane* (Civ. App.) 220 S. W. 613; *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

Undisputed issues. *Settegast v. Blakely* (Civ. App.) 196 S. W. 253; *National Fire Ins. Co. of Hartford, Conn. v. Humphrey* (Civ. App.) 199 S. W. 865; *Royal Ins. Co. of Liverpool, England v. Humphrey* (Civ. App.) 201 S. W. 426; *Lancaster v. Mays* (Civ. App.) 207 S. W. 676; *Gulf, C. & S. F. Ry. Co. v. Scripture* (Civ. App.) 210 S. W. 269; *Evans v. McKay* (Civ. App.) 212 S. W. 680; *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539; *Pollack v. Perry* (Civ. App.) 217 S. W. 967; *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282; *Lawson v. Armstrong* (Civ. App.) 227 S. W. 687.

Form of submission held not prejudicial. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343; *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135; *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739; *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807; *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456; *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305; *Northern Texas Traction Co. v. Martin* (Civ. App.) 224 S. W. 319; *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472; *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928; *Thomas v. Calahan* (Civ. App.) 229 S. W. 602.

Relation to pleadings and evidence. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777; *Lancaster v. Snider* (Civ. App.) 207 S. W. 560; *Hickory Jones Co. v. Mettauert* (Civ. App.) 208 S. W. 745; *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502.

Failure or refusal to submit issue held prejudicial. *Langford v. Power* (Civ. App.) 196 S. W. 662; *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858; *Western Union Telegraph Co. v. Goodson* (Civ. App.) 202 S. W. 766.

Submission of issue held prejudicial. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901; *Fults v. Waterman Lumber Co.* (Civ. App.) 217 S. W. 1105; *Tisdale v. Panhandle & S. F. Ry. Co.* (Com. App.) 228 S. W. 133.

Withdrawal of issues. *North American Dredging Co. v. Pugh* (Civ. App.) 196 S. W. 255; *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668.

Cure by other issues. *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521; *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

Invited error. *Turner v. Robertson* (Civ. App.) 224 S. W. 252; *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

Failure to submit issue subordinate to issue submitted. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Though, in an action for personal injuries, the special findings did not show negligence, the failure of the court to submit the issue of negligence to the jury did not entitle defendant to a reversal and rendition of judgment in its favor, where it expressly objected to a remand for a new trial. *North Texas Gas Co. v. Young* (Civ. App.) 220 S. W. 254.

It is not reversible error to refuse the submission of evidentiary issues. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

34. Instructions to jury—Prejudicial effect in general.—Instruction held harmless. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Turner v. Garrard* (Civ. App.) 198 S. W. 655; *Powell v. Archer County* (Civ. App.) 198 S. W. 1037; *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149; *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781; *Schallert v. Boyd* (Civ. App.) 203 S. W. 940; *Delano v. Delano* (Civ. App.) 203 S. W. 1145; *Missouri, K. & T. Ry. Co. of Texas v. Silber* (Civ. App.) 209 S. W. 188; *Houston Belt & T. Ry. Co. v. Christian* (Civ. App.) 209 S. W. 816; *Campbell Banking Co. v. Hamilton* (Civ. App.) 210 S. W. 621; *Carl v. Settegast* (Civ. App.) 211 S. W. 506; *First Nat. Bank v. Todd* (Civ. App.) 212 S. W. 219; *Texas & Pacific Coal Co. v. Ervin* (Civ. App.) 212 S. W. 234; *Marshall v. Campbell* (Civ. App.) 212 S. W. 723; *Graves v. Haynes* (Civ. App.) 214 S. W. 665; *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870; *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208; *Padgett v. Hines* (Civ. App.) 224 S. W. 558; *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911; *Powell v. Mulder* (Civ. App.) 228 S. W. 302; *McDonald v. Whaley* (Civ. App.) 228 S. W. 313; *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

Improper term in instruction held harmless. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686; *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781; *Barkley v. Gibbs* (Civ. App.) 203 S. W. 161; *Schoellkopf Saddlery Co. v. Crawley* (Civ. App.) 203 S. W. 1172; *St. Louis Southwestern Ry. Co. of Texas v. Barrett* (Civ. App.) 207 S. W. 557; *Akers v. Moore* (Civ. App.) 209 S. W. 241; *Ward v. Cathey* (Civ. App.) 210 S. W. 289; *Baker v. Brown* (Civ. App.) 210 S. W. 312.

Instruction held prejudicial. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393; *St. Louis Southwestern Ry. Co. of Texas v. Johnson* (Civ. App.) 199 S. W. 1175; *Chicago, R. I. & G. Ry. Co. v. Word* (Com. App.) 207 S. W. 902; *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 207 S. W. 904; *International & G. N. Ry. Co. v. Isaacs* (Com. App.) 208 S. W. 897; *Dodson v. Watson* (Civ. App.) 225 S. W. 586; *Hines v. Walker* (Civ. App.) 225 S. W. 837.

Where peremptory charge for plaintiff would have been justified, defendant cannot complain of errors in charge. *Temple Trust Co. v. Pirtle* (Civ. App.) 198 S. W. 627; *Saenz v. Hamilton Hotel Co.* (Civ. App.) 207 S. W. 159; *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

Oral charge held harmless. *Alamo Trust Co. v. Cunningham* (Civ. App.) 203 S. W. 413; *Meyer-Forster Realty Co. v. Read* (Civ. App.) 195 S. W. 987; *Blair v. Colorado Canal Co.* (Civ. App.) 203 S. W. 176.

It was illegal for the trial judge orally to advise the jury after their retirement without the knowledge or presence of plaintiffs and such action is sufficient cause for reversal of the judgment, whether or not it affected the verdict. *Holman Bros. v. Cusenbary* (Civ. App.) 225 S. W. 65.

35. — **Applicability to issues and evidence.**—Instruction held harmless. *St. Louis Southwestern Ry. Co. of Texas v. McCalister* (Civ. App.) 198 S. W. 1082; *Town of Jacksonville v. Ragsdale* (Civ. App.) 202 S. W. 774; *Smith v. Bryan* (Civ. App.) 204 S. W. 359; *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378; *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708; *Western Union Telegraph Co. v. Morrow* (Civ. App.) 208 S. W. 689; *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364; *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

Error in charge held immaterial under evidence. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668; *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 220 S. W. 354; *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

Instruction held prejudicial. *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 207 S. W. 904; *Texas City Terminal Co. v. McGee* (Civ. App.) 201 S. W. 673; *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.) 216 S. W. 444.

36. — **Failure or refusal to charge.**—Refusal held harmless. *Levy v. Jarrett* (Civ. App.) 198 S. W. 333; *Rick Furniture Co. v. Smith* (Civ. App.) 202 S. W. 99; *Duke v. Hatcher* (Civ. App.) 207 S. W. 575; *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502; *Nolan v. Young* (Civ. App.) 220 S. W. 154; *Buchanan v. Williams* (Civ. App.) 225 S. W. 59; *Hines v. Kelley* (Civ. App.) 226 S. W. 493; *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994; *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432; *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1162.

Refusal held prejudicial. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168; *Smith v. Smith* (Civ. App.) 200 S. W. 540; *Hannes v. Raube* (Civ. App.) 210 S. W. 955; *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 223 S. W. 490.

Failure to charge held harmless. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151; *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198; *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

Failure to charge held prejudicial. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

37. — **Error cured by verdict or judgment.**—Error in charge held cured. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003; *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149; *Youngblood v. Hoeffle* (Civ. App.) 201 S. W. 1057; *Turrentine v. Doering* (Civ. App.) 203 S. W. 802; *Hamilton v. Harris* (Civ. App.) 204 S. W. 450; *Dallas Waste Mills v. Texas Cake & Linter Co.* (Civ. App.) 204 S. W. 868; *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198; *Ward v. Cathey* (Civ. App.) 210 S. W. 289; *Yoes v. Texas & P. Ry. Co.* (Civ. App.) 211 S. W. 311; *Melton v. Manning* (Civ. App.) 216 S. W. 488; *Foster v. Wright* (Civ. App.) 217 S. W. 1090; *Sutherland v. Citizens' State Bank* (Civ. App.) 220 S. W. 115; *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318; *Moss v. Ingram* (Civ. App.) 224 S. W. 258; *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 225 S. W. 1094; *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928; *Hines v. Whiteman* (Civ. App.) 228 S. W. 979.

Refusal or failure to charge held cured. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397; *Brown v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 198 S. W. 986; *St. Louis Southwestern Ry. Co. of Texas v. McCalister* (Civ. App.) 198 S. W. 1082; *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600; *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Civ. App.) 212 S. W. 981; *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208; *Kendrick v. Polk* (Civ. App.) 225 S. W. 826; *Rosser v. Cole* (Civ. App.) 226 S. W. 510; *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

Where there was no assignment that verdict for plaintiff was excessive, errors in instructions which could have only caused an excessive verdict, and which had no bearing on question of liability, would not authorize a reversal. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698; *Neely v. Dublin Fruit Co.* (Civ. App.) 199 S. W. 827; *Duke v. Hatcher* (Civ. App.) 207 S. W. 575; *Texas & N. O. R. Co. v. Miller* (Civ. App.) 211 S. W. 246; *Lancaster v. Pitzer* (Civ. App.) 211 S. W. 313; *Texas Electric Ry. v. Williams* (Civ. App.) 213 S. W. 730; *Empire Transfer & Storage Co. v. Botto* (Civ. App.) 232 S. W. 347.

38. **Conduct and deliberations of jury.**—Misconduct of jurors held harmless. *Dallas Power & Light Co. v. Edwards* (Civ. App.) 216 S. W. 910; *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157; *Gonzales v. Flores* (Civ. App.) 200 S. W. 851; *Bishop v. Paul* (Civ. App.) 217 S. W. 435; *Payne v. Harris* (Civ. App.) 228 S. W. 350.

Misconduct of jurors held prejudicial. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

Where court, upon written request from jury after it had retired for deliberation, sent jury written answer containing the further instructions, its failure to summon the jury into open court to further instruct it, as required by Rev. St. arts. 1961 and 1962, was not reversible error, in view of rule 62a (149 S. W. x) where written instruction was handed to officer in charge of jury, who handed instruction to jury foreman. *Oates v. Maxcy* (Civ. App.) 206 S. W. 535.

39. **Verdict.**—Special findings held harmless. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621; *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213; *Hahl v. Davidson*

(Civ. App.) 202 S. W. 792; *Dubois v. Lowery* (Civ. App.) 205 S. W. 858; *Pollack v. Perry* (Civ. App.) 217 S. W. 967; *Wisdom v. Peek* (Civ. App.) 220 S. W. 210; *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281; *Schaff v. Morris* (Civ. App.) 227 S. W. 199; *Wallace v. Prairie Oil & Gas Co.* (Civ. App.) 229 S. W. 353.

In action for servant's death, the employer cannot complain of verdict apportioning damages among all those having a right of action, since the lump sum judgment would protect it against any subsequent action. *Gulf, C. & S. F. Ry. Co. v. Carpenter* (Civ. App.) 201 S. W. 270.

In a railroad's condemnation proceedings, where the jury found that the land was not increased in value by the taking of the part condemned, failure to require it to state the amount of any increase in the value of the rest of the owners' land was harmless. *Gulf & Interstate Ry. Co. of Texas v. Stephenson* (Civ. App.) 212 S. W. 215.

The fact that a verdict was returned in accordance with the general charge, instead of an erroneous special charge tendered by appellant, does not constitute reversible error. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

40. Findings by court or referee.—See *Hill v. Pavelka* (Civ. App.) 209 S. W. 709.

Erroneous finding held harmless. *Robinson v. Street* (Civ. App.) 220 S. W. 648; *Stine & Clark v. Mundy Fuel Co.* (Civ. App.) 204 S. W. 798; *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275; *Beaumont Traction Co. v. Cooper* (Civ. App.) 211 S. W. 278; *Volpe v. Benavides* (Civ. App.) 214 S. W. 593; *Langben v. Crespi & Co.* (Civ. App.) 218 S. W. 144; *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

Failure to file findings held prejudicial. *Mueller v. Spencer* (Civ. App.) 225 S. W. 223; *Stewart & Threadgill v. El Paso & S. W. Co.* (Civ. App.) 207 S. W. 594; *Anderson v. Lockhart* (Civ. App.) 209 S. W. 218; *Carley Printing Co. v. Fleming* (Civ. App.) 220 S. W. 789; *Gerhart v. Moore* (Civ. App.) 229 S. W. 876.

Failure to file findings held harmless. *Gerhart v. Moore* (Civ. App.) 229 S. W. 876; *Daugherty v. Daugherty* (Civ. App.) 193 S. W. 985; *Stewart v. Patterson* (Civ. App.) 204 S. W. 768; *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939; *Johnson v. Frost* (Civ. App.) 229 S. W. 558.

Since the right of a party on proper demand to have findings of fact and conclusions of law filed in a case tried without a jury is one given by statute, the court on appeal cannot say that the failure to make them, or, having made them, to file them in time, is harmless error. *Owen v. Smith* (Civ. App.) 203 S. W. 1171; *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

The finding of immaterial facts is not ground for reversal, if the judgment is not in conflict with the findings upon material issues. *Stein v. Roberts* (Civ. App.) 217 S. W. 166; *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

Court's failure to file findings is not reversible error, when the record contains a statement of the facts from which it can be deduced that the appellant has not been prejudiced by such failure. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959; *Harlan v. Falfurrias Mercantile Co.* (Civ. App.) 214 S. W. 649.

Failure of trial court to expressly embrace undisputed facts in his findings, if error at all, was harmless. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

41. Decisions on motion for new trial or rehearing.—Overruling of motion for new trial for newly discovered evidence was harmless, where it is manifest, from answers made by jury to several of special issues submitted, that such evidence would not have been believed by jury, and would not have changed result of trial, and where the finding of the jury with such evidence admitted would still have been overwhelmingly supported by facts. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

42. Judgment or order.—Special provisions in judgment. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791; *Doby v. Sanders* (Civ. App.) 198 S. W. 806; *Hale v. McKenzie* (Civ. App.) 198 S. W. 1004; *Cozier v. Andrews* (Civ. App.) 206 S. W. 975; *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978; *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

Entry of judgment. *Armstrong v. Palmer* (Civ. App.) 218 S. W. 627; *Woytek v. King* (Civ. App.) 218 S. W. 1081.

Allowance of interest for one day longer than prayed, held such a trivial error that the maxim, "de minimis non curat lex," applied. *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521.

Failure of the court to find the value of each item in a judgment in replevin is not fundamental error requiring reversal. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

If the facts in mandamus did not show that defendant had denied plaintiff a right commanded by the judgment to be accorded him, the defendant was not prejudiced thereby, where the writ was properly granted upon other grounds. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

43. Proceedings after judgment.—Where court was warranted in dismissing suit for lack of prosecution, failure to permit plaintiff to incorporate in bill of exceptions his amended petition, showing why he should be permitted to cite unserved defendants by publication was harmless. *Cain v. Wharton* (Civ. App.) 196 S. W. 952.

In lessor's action against lessee and lessee's assignee, where only relief sought against lessee was cancellation of lease, the opening of default entered against lessee was harmless, where plaintiff showed no valid ground for cancellation of lease as against assignee. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

Plaintiff's contention on rehearing, after a reversal of judgment in his favor, that the proceeding, which was in trespass to try title and to reform a judgment, was not to correct any error in the rendition of the judgment, but merely to correct an error in its entry, and that such cause of action was not subject to the four-year limitation,

cannot avail where the pleadings under such construction would not raise any issue as to the ownership of the land in question. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

44. **Parties entitled to allege error.**—Invited error. *Porter v. Cox* (Civ. App.) 225 S. W. 84; *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

Waiver of right. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

Estoppel. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

Art. 1629. [1024] Affirmance with damages in case of delay.

Damages for delay.—In determining whether an appeal is one for delay only, the whole record should be looked to. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

Where no evidence was brought up in the record, although the judgment was rendered on evidence, and no assignment was briefed on a ground upon which the trial court had been called upon to act, the appeal will be deemed one for delay only, and 10 per cent. damages will be awarded respondent. *Id.*

An appellee's suggestion that the appeal was taken for delay opens the entire record for consideration. *Southwestern Portland Cement Co. v. Schwartz* (Civ. App.) 212 S. W. 977.

Art. 1631. [1029a] Suggestion of remittitur.

Directing remittitur in general.—Appellee need not file motion to remit, nor need appellant be given notice. *Galveston, H. & S. A. Ry. Co. v. Duelm* (Civ. App.) 24 S. W. 334.

The Court of Civil Appeals, when of opinion that verdict is excessive, must indicate the excess, and allow remittitur, and not reverse the case. *Southwestern Portland Cement Co. v. Graves* (Civ. App.) 208 S. W. 979.

The authority given a Court of Civil Appeals to suggest a remittitur, and, on it being filed, to reform and affirm the judgment accordingly, applies where the judgment was on two special findings, and one of them, in the amount found, was not supported by the evidence, but there was evidence to authorize a finding in some amount, and though the assignment of error was that the finding was contrary to the evidence; the substance of the assignment being the excessiveness of the judgment. *Houston Belt & Terminal Ry. Co. v. Lynch* (Com. App.) 221 S. W. 959, affirming judgment (Civ. App.) 185 S. W. 362.

Amount of recovery indicating passion or prejudice.—Rendition of verdict so large that it shows on its face that it is result of prejudice or passion constitutes error requiring reversal, unless suitable remittitur is entered. *Fisherries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

A showing that verdict for death of plaintiff's daughter was grossly excessive alone would not be sufficient to authorize the Court of Civil Appeals to reverse judgment rendered on the verdict after remittitur, on the ground that the excessive amount indicated prejudice or passion of the jury not curable by mere remittitur; there must be some showing that the verdict was outrageously excessive to justify reversal. *Houston Electric Co. v. Flattery* (Civ. App.) 217 S. W. 960.

Art. 1633. [1029] Mandate issued when.

Right to mandate.—Either party after decision of appeal by Court of Civil Appeals had right to procure issuance of mandate. *Gilmore v. Ladell* (Civ. App.) 196 S. W. 362.

Time for issuance.—Court of Appeals was without authority to act on supplemental motion of appellant for rehearing of motion to vacate judgment of affirmance, in substance a "motion for rehearing," within arts. 1633, 1641, not filed within time for motions for rehearing, and not acted on at term at which original judgment was rendered; Supreme Court having denied writ of error. *Gammel Statesman Pub. Co. v. Ben C. Jones & Co.* (Com. App.) 206 S. W. 931.

Order directing issuance of mandate within 12 months from certain date, "upon the paying of costs or making affidavit in lieu thereof," did not require motion for issuance of mandate within such time, but merely that costs be paid or affidavit in lieu thereof be made within the 12 months. *Hambleton v. Dignowity* (Civ. App.) 213 S. W. 957.

Construction and effect of mandate.—Setting aside judgment as void on grounds not passed upon an appeal held not a violation of the judgment or mandate of the Court of Civil Appeals. *First State Bank & Trust Co. of Abilene v. Overshiner* (Civ. App.) 198 S. W. 979.

Where court denied motion to set aside judgment, which had been affirmed, on ground that it was void, but temporarily suspended it and stayed execution and abstract, held that such suspension and stay was not a violation of the judgment and mandate of the Court of Civil Appeals. *Id.*

Art. 1635. [1036] Affidavit of inability to pay or secure costs.

Sufficiency of affidavit.—Where judgment for husband and wife was reversed and cause remanded, with costs to appellant, the filing of wife's affidavit of inability to pay costs or give security, in which she did not purport to act as husband's agent, as authorized by art. 11, but merely excused his failure to join therein, was not sufficient compliance with this article to warrant issuance of mandate without costs; the affidavit of all parties being necessary under the statute. *Hambleton v. Dignowity* (Civ. App.) 213 S. W. 957.

Inability to pay costs.—Persons who own property not exempt are not entitled to issuance of mandate upon affidavit of inability to pay costs or give security, but are required to sell property and pay costs. *Hambleton v. Dignowity* (Civ. App.) 213 S. W. 957.

CHAPTER TEN

CONCLUSIONS OF FACT AND LAW

<p>Art. 1636. Conclusions of law and fact to be filed, when. 1637. Reason for judgment to be stated, when. 1638. Supplemental findings, motion for; refusal assignable as error.</p>	<p>Art. 1639. Court shall decide all issues of fact or law, and announce conclusions. 1640. Supreme Court shall return record for supplemental conclusions, when.</p>
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Article 1636. [1039] Conclusions of fact and law to be filed, when.

See *Burnett v. Powell*, 86 Tex. 382, 25 S. W. 17.

Construction and application.—The statute requires the Court of Civil Appeals to specifically pass upon each assignment of error. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 229 S. W. 781.

Conclusions of fact and law.—Appellate court, in concluding that court erred in making findings, is not authorized to make a different finding, where the evidence is conflicting, its sole province in such case being to remand case for new trial. *McGuffey v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 211 S. W. 335; *State v. Elza*, 109 Tex. 256, 206 S. W. 342.

The court of civil appeals, need not incorporate in its conclusions of fact, documentary evidence. *Galveston, H. & S. A. Ry. Co. v. Arispe*, 5 Civ. App. 611, 24 S. W. 33.

Where there was no evidence to support a finding of fact by trial court, the Court of Civil Appeals was authorized to substitute its own finding and thereon reverse and render the judgment. *Lieber v. Nicholson* (Com. App.) 296 S. W. 512.

Where the Appellate Court found that a special verdict was supported by the evidence, it need not find evidentiary facts. *United Sav. Bank v. Castro* (Civ. App.) 230 S. W. 223.

Conclusiveness of findings.—The Commission of Appeals is bound by the finding of the Court of Civil Appeals, if there is any evidence to sustain the finding. *International & G. N. Ry. Co. v. Williams* (Com. App.) 213 S. W. 594.

The Supreme Court is bound by the finding of the Court of Civil Appeals, reversing judgment of trial court entered on verdict of jury, where evidence was conflicting. *Rea v. Luse* (Com. App.) 231 S. W. 310.

Opinion.—Where most of appellant's assignments presented questions of fact, and where the evidence supported the trial court's findings, and the findings in turn supported the judgment, it was sufficient for the Court of Civil Appeals to discuss merely those assignments which did not raise issues of fact; it being unnecessary for the court to pass on the several assignments specifically, notwithstanding arts. 1636, 1638, 1639. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

Art. 1637. [1039] Reason for judgment to be stated, when.

Construction and application in general.—Judgment of Court of Civil Appeals in case of reversal need not state in mandate reasons for judgment, nor is it mandatory that certified copy of opinion of court accompany mandate. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

Art. 1638. Supplemental findings, motion for; refusal assignable as error.

Sufficiency of findings.—Where most of appellant's assignments presented questions of fact, and where the evidence supported the trial court's findings, and the findings in turn supported the judgment, it was sufficient for the Court of Civil Appeals to discuss merely those assignments which did not raise issues of fact; it being unnecessary for the court to pass on the several assignments specifically, notwithstanding arts. 1636, 1638, 1639. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

Art. 1639. Court shall decide all issues of fact or law, and announce conclusions.

See *San Antonio Public Service Co. v. Tracy* (Civ. App.) 221 S. W. 637.

1. Scope of review in general.—In view of Acts 34th Leg. c. 36, § 4 (art. 2749c) held, that contention on appeal that order of consolidation of common school districts was a nullity because not made upon petition of majority of electors of such districts will not

be considered, where there was no allegation that consolidation was to establish a high school. *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623.

Objections to rulings made for first time on motion for new trial cannot be reviewed on appeal. *Texas-Mexican Ry. Co. v. Creekmore* (Civ. App.) 204 S. W. 682.

An appellee's suggestion that the appeal was taken for delay opens the entire record for consideration. *Southwestern Portland Cement Co. v. Schwartz* (Civ. App.) 212 S. W. 977.

On review of refusal of peremptory instruction the only question is whether there was no evidence as a matter of law, not the weight or sufficiency of evidence as a matter of fact. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

2. — **Matters considered in determining question.**—Affidavit used in answer to a motion to postpone a hearing may be considered by the trial court, and the appellate court may look to the supporting affidavits to determine whether the trial court erred in overruling the motion. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

The Court of Civil Appeals, in reviewing lower court's ruling on motion to set aside a default, cannot consider an affidavit which was not before lower court. *Counts v. Southwestern Land Co.* (Civ. App.) 206 S. W. 267.

The sufficiency of a petition challenged by general demurrer cannot be tested on appeal by any fact in evidence before the court, but must be tested by its allegations. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

Evidence, which the court excluded, after admitting it, without exception being made, cannot be considered by the appellate court under an assignment that the court erred in peremptorily directing a verdict, even though the evidence was improperly excluded. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701.

The Court of Civil Appeals is without authority to consider evidence offered for the first time in that court affecting the issues passed on by the jury. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

3. — **Questions considered.**—In trespass to try title, where appellee establishes record title, it is unnecessary to consider his claim of title by adverse possession. *Houston Oil Co. of Texas v. Miller* (Civ. App.) 196 S. W. 189.

In employe's action for injuries sustained before enactment of Workmen's Compensation Act, where all phases of assumed risk were specifically interposed by defendant on trial, appellate court has only to determine whether evidence bearing upon defense was practically without conflict. *Kirby Lumber Co. v. Hardy* (Civ. App.) 196 S. W. 211.

A defendant against whom a default judgment had been rendered was precluded on proceedings in error from asserting any defense as to its liability, and was limited to the question of the amount of the judgment rendered. *Southwestern Surety Ins. Co. v. Gulf, T. & W. Ry. Co.* (Civ. App.) 196 S. W. 276.

Where defendant surety company's liability is founded on common-law principles, it is unnecessary to consider appellee's contention that it is also liable under statute pursuant to which it was incorporated. *Texas Fidelity & Bonding Co. v. Rosenberg Independent School Dist.* (Civ. App.) 196 S. W. 366, denying rehearing 195 S. W. 298.

In suit against trustees of common school district to enjoin application of funds to build schoolhouse, held, the appellate court will only determine question of validity of order of consolidation. *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623.

On appeal from a judgment of a state court appointing a receiver, the assignments of error relating to the appointment of the receiver become moot questions, where a petition in bankruptcy has been filed within four months, and will not be reviewed. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

On appeal by city from judgment denying relief in suit to collect taxes on viaduct on theory it was personalty, appellate court need not, having determined viaduct was real property, determine further question whether it had been so dedicated by defendants to public as to exempt it from taxation. *City of Texarkana v. Texas & P. Ry. Co.* (Civ. App.) 198 S. W. 804.

Assignments of error in admission of evidence, in view of fact that trial below was before court without jury, need not be discussed. *McKinley v. Bone* (Civ. App.) 199 S. W. 298.

On appeal where petition is found demurrable, and case is to be remanded therefor, sufficiency of evidence will not be reviewed for purpose of rendering judgment. *Hart-Parr Co. v. Paine* (Civ. App.) 199 S. W. 822.

Whether the trial court should have proceeded to trial without waiting for decision of appeal from overruling of plea of privilege to be sued in another county is an academic question, as decision thereof would not expedite a trial on the merits. *Cummer Mfg. Co. v. Kellam Bros.* (Civ. App.) 203 S. W. 463.

It is unnecessary to determine the effect given to the jury's answer to a special issue concerning agreement by defendant to hold goods in warehouse, where neither such agreement nor claim for breach thereof were pleaded, and the cause must be reversed on other grounds. *Coffin v. Green* (Civ. App.) 204 S. W. 708.

Where court, having appointed a receiver for irrigation company, determined water rates to be paid by landowners, the water rights of owners under contracts made with company was a moot question as to irrigation company, its president, trustee, receiver, and the holder of receiver's certificates, upon appeal by owners from judgment rendered on plea of intervention, alleging such rights, interposed after sale of irrigation plant under court's order. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

Assignments urging that evidence is insufficient to sustain that part of decree canceling instruments need not be considered in view of the holding that such portion of decree must be set aside for want of jurisdiction. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

Where, in an action to foreclose lien on piano, there was a judgment of foreclosure, but a finding in favor of defendant on counterclaim for conversion of piano stool not covered by lien, on appeal by defendant from that part of judgment foreclosing the lien, he could not complain that judgment on counterclaim was not entered against sureties on sequestration bond given by plaintiff. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

In suit by bank, assignor of cotton receipts issued by public weigher, against weigher and sureties for breach of duty in releasing cotton without surrender of receipts by assignor, where weigher and sureties did not make, in trial court, defense that there was no indorsement of receipts and no notice to weigher of assignment, it is not available to them on appeal. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

Whether appellant, by making no objection to peremptory instruction given, waived objection to refusal of court to submit case upon requested issues need not be passed upon, where the same result is reached in considering assignments of error based upon said refusal. *National Equitable Soc. v. Reveire* (Civ. App.) 209 S. W. 790.

Where appellee in his brief concedes that collateral is worthless and consents to reformation of judgment by striking out all mention of any lien, it is unnecessary to determine whether trial court, although it found the existence of a lien, could enter judgment of foreclosure, where jury did not so find. *Id.*

Where breach of warranty that silo would withstand ordinary winds was established by proof, court on appeal need not determine admissibility of evidence that other silos made by defendant failed to withstand wind. *Bell v. Self* (Civ. App.) 210 S. W. 304.

Where case must be reversed and remanded because of the erroneous appointment of a receiver and error committed on the trial, it becomes unnecessary to pass upon other assignments or dismiss them. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

Since defendants' plea of privilege cannot be sustained, it is unnecessary to consider whether it was waived. *Sykes v. Fischl* (Civ. App.) 212 S. W. 217.

Where the trial court disposed of a case solely on defendant's plea of privilege, although the case was also submitted to the jury on the merits, held that on appeal by plaintiff from an order transferring the case to another county only the question of venue will be disposed of. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

Since ruling with reference to release will result in an affirmation, regardless of conclusions on certain other questions, it is unnecessary to consider such other questions. *Anders v. California State Life Ins. Co.* (Civ. App.) 214 S. W. 497.

Where there were sufficient pleadings and evidence on the issue of actual damages to justify the damages awarded, and the court made no special finding and no request was made of him, there being only a general finding against defendant for actual damages, assignments that court erred in considering certain items of damage alleged need not be considered on appeal. *Chrono v. Gonzales* (Civ. App.) 215 S. W. 368.

Question as to effect of Const. art. 12, § 6, on liability of a stock subscriber not being involved in the case under consideration, or necessary to its decision, motion to express an opinion on the question will be overruled. *Park v. Rich* (Com. App.) 216 S. W. 146.

Where a tax sale of a minor ward's land is invalid, it becomes unnecessary on appeal to decide whether the general principle that one who owes the duty to pay the tax cannot acquire the title at a sale thereof is applicable to the guardian. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

Where the trial court improperly directed a verdict in favor of plaintiffs in trespass to try title, held, that the appellate court will not review rulings on special exceptions to defendant's answer which set up a lease to the land involved from the holder of the record title. *Canon v. Scott* (Civ. App.) 217 S. W. 429.

Where a special jury finding that plaintiff was guilty of contributory negligence proximately causing his injury justifies the judgment entered, the verdict and judgment will be sustained on appeal without considering possible errors in other issues submitted to the jury. *Templeton v. Northern Texas Traction Co.* (Civ. App.) 217 S. W. 440.

It is unnecessary to determine whether the trial court erred in overruling a special exception to appellee's petition on the ground of indefiniteness, where, if held error, it must be treated as harmless within rule 62a (149 S. W. v). *Ætna Accident & Liability Co. v. Trustees of First Christian Church of Paris* (Civ. App.) 218 S. W. 537.

Negligence is generally an issue for the jury, and certainly for the jury or trial court, and it is not the province of the Court of Civil Appeals to decide the fact of negligence. *North Texas Gas Co. v. Young* (Civ. App.) 220 S. W. 254.

Where most of appellant's assignments presented questions of fact, and where the evidence supported the trial court's findings, and the findings in turn supported the judgment, it was sufficient for the Court of Civil Appeals to discuss merely those assignments which did not raise issues of fact; it being unnecessary for the court to pass on the several assignments specifically, notwithstanding arts. 1636, 1638, 1639. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

The Court of Appeals need not consider assignments of error entirely directed at defendant's pleading, which could only become material on reversal, where it reaches a decision affirming action of the trial court in favor of defendant upon demurrer to plaintiff's petition, notwithstanding this article, as the law never requires the doing of a useless thing. *Zucht v. King* (Civ. App.) 225 S. W. 267.

On appeal from an order sustaining a general demurrer and certain exceptions to appellant's petition, the judgment will be tested by the ruling on the general demurrer, and cannot be aided by fact that special exceptions may have been properly sustained. *Fleming v. Stringer* (Civ. App.) 225 S. W. 801.

As affecting the title to cattle confiscated by the military government of Mexico, the Court of Civil Appeals may inquire only into the acts of the military government

to determine whether it acted in a given way on the subject-matter, and may not inquire into the validity of its acts. *Terrazas v. Donohue* (Civ. App.) 227 S. W. 206.

In trespass to try title where defendant showed good title by deed, the appellate court need not review plaintiff's assignments attacking findings of the court on issue of limitations or refusal to grant new trial on the ground of newly discovered evidence on the question of defendant's occupancy. *Zabawa v. Allen* (Civ. App.) 238 S. W. 664.

The appellate court will not concern itself with decision of abstract and moot questions which can lead to no practical relief. *Ledbetter v. Ledbetter* (Civ. App.) 229 S. W. 576.

4. — Theory and grounds of decision of lower court.—The fact that an erroneous reason is given in a judgment for its rendition does not require that it be reversed. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631; *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224; *Fisher v. Russell* (Civ. App.) 204 S. W. 143; *Waco Development Co. v. McNeese* (Civ. App.) 209 S. W. 464; *Evans v. Houston Oil Co. of Texas* (Civ. App.) 211 S. W. 605; *Hohertz v. Durham* (Civ. App.) 224 S. W. 549.

Judgment based on untenable ground will not be set aside, if sustainable on another ground. *McCaslin v. Veasy* (Civ. App.) 199 S. W. 1173.

Where plaintiff sought to establish public road on railroad right of way by prescription, and to establish a further right by claiming a way of necessity, the court on appeal would not revise a judgment in his favor, though it erroneously found that he was entitled to a way of necessity, where prescription was established. *Gulf, C. & S. F. Ry. Co. v. Bluit* (Civ. App.) 204 S. W. 441.

In determining an assignment of error in overruling a motion for a new trial, the appellate court will not consider insufficient reasons for its action recited by the lower court in its order denying the new trial where the facts justifying the denial of a new trial are shown by the record. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

In suit by one partner against the other and his grantees for an accounting, where the record did not show the reason of the trial judge for holding the sale by one void, the court will not disturb the judgment rendered which could be supported on the question of fraud in making the sale. *Diamond v. Gust* (Civ. App.) 206 S. W. 366.

Where evidence did not support finding on which a judgment was based, it will be affirmed, where the record conclusively shows, on other theories, that the judgment rendered was the proper judgment. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

Judgment will not be reversed for error in excluding testimony on objection to which it was not subject, where it was inadmissible on other grounds not raised. *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571.

If a decree refusing to grant an injunction was permissible under the verified pleadings of the parties, and did not constitute a clear abuse of discretion, its validity is not affected, nor will it be reversed on appeal, merely because the trial court based his decision upon an erroneous ground. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

Where an order overruling a motion is general, if there is any theory on which the ruling can be sustained, the appellate court will assume that it was made on that ground. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Judgment for plaintiff, though on a wrong theory of measure of damages, will not be reversed; the petition authorizing recovery on the proper theory, and the evidence showing plaintiff entitled to an amount equal to the judgment. *Dallas Waste Mills v. Early-Foster Co.* (Civ. App.) 218 S. W. 515.

That court gave as its reason for denying recovery on a foreign judgment that it had no jurisdiction because the judgment sued on was not a final one merely stated a wrong reason for a correct judgment and does not require reversal. *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397; *Walker v. Same* (Civ. App.) 220 S. W. 399.

In an action by plaintiff on notes given to a trust company, where the petition alleged the corporate existence of the company, and the case was submitted on such theory, plaintiff cannot complain of the refusal of a directed charge on the theory that the trust company was not organized at the time the notes were executed, and hence, though the notes were given for its stock, they were not invalid under Const. art. 12, § 6. *Masteron v. Turnley* (Civ. App.) 220 S. W. 428.

Parties who not only failed to plead the unconstitutionality of an act, but invoked the benefit of act by their petition, cannot complain of unconstitutionality of the act for first time on appeal. *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

Where the parties agreed that the defendant owned an entire grant if it did not extend beyond the disputed corner, and that plaintiffs were the owners of the grant extending beyond that corner, and the case was tried on that theory, plaintiffs could not contend on appeal that, under the undisputed evidence, they were entitled to recover a part of the tract in controversy, even though the disputed grant did not extend beyond the corner in question. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. Western Lumber Co.*, 182 S. W. 341.

Where appellant's contention was that the supplemental petition alleging an implied contract was barred because the original petition alleged an express contract, he cannot rely on the construction of the original petition as alleging a cause of action for recovery of property and for conversion of proceeds of the sale. *Kuhn v. Shaw* (Civ. App.) 223 S. W. 343.

Where the judgment of the trial court may be sustained on any issue raised by the pleadings and the evidence, it should be upheld by the appellate court. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

Where the court passed only on sufficiency of plaintiff's petition as against a general demurrer, it is unnecessary on appeal to determine any question other than the one decided. *Phœbus v. Connellee* (Civ. App.) 223 S. W. 1019.

Where court sustained general and several exceptions to answer without indicating on what ground the general demurrer was sustained, judgment will be affirmed, where there was a ground on which to base ruling. *Zimmerman v. Keith* (Civ. App.) 224 S. W. 288.

Where plaintiff had pleaded defendant's liability, both as partners and as principal, a judgment against defendant, based on a court's finding that he was a partner, will not be reversed because the evidence failed to establish the partnership, where it did show his liability as principal. *Kuykendall v. Schell* (Civ. App.) 224 S. W. 298.

Where the only issue submitted to the jury was the issue of false imprisonment, which was not supported by the evidence, the verdict for plaintiff cannot be sustained on the ground that the petition is sufficient to support recovery on another theory which was not submitted to the jury. *S. H. Kress & Co. v. De Mont* (Civ. App.) 224 S. W. 520.

An appellant city cannot seek to overthrow an injunction restraining collection of taxes on lands newly incorporated therein on the ground that the landowner failed to prove that his lands were agricultural, where the trial court excluded evidence as to the character of the lands and granted the injunction because the charter amendment extending the city boundaries was unconstitutional. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084.

A judgment discharging a garnishee will not be reversed for error in the court's legal conclusion that the burden was on plaintiff to prove that the garnishee knew the judgment debtor had an interest in an account standing in another name, though proof that the garnishee had knowledge of facts putting it on inquiry would have been sufficient, where the court made no finding that the garnishee had knowledge of facts putting it on inquiry and plaintiff made no exception to the finding and no request for additional finding, since a wrong reason for the right result is immaterial. *Magnolia Petroleum Co. v. Lockwood Nat. Bank* (Civ. App.) 227 S. W. 363.

Defendant appellant cannot concede both in the trial court and by his assignments of error in the Court of Civil Appeals that the case involved an issue of fact for the jury, and then inconsistently call on the court to look through the record to discover that his position is not correct, and that the jury should have been instructed peremptorily to find for him. *McElroy v. Dobbs* (Civ. App.) 229 S. W. 674.

Where plaintiffs' petition was attacked by general demurrer and special exceptions, which were sustained, on appeal from dismissal the only question is whether the petition was sufficient as against general demurrer, and the ruling on special exceptions need not be considered. *Cooper v. Casselberry* (Civ. App.) 230 S. W. 231.

On appeal, parties are irrevocably committed to the theories and facts presented by them respectively in the court below and on appeal. *Rogers v. Rogers* (Civ. App.) 230 S. W. 489.

6. Issues determined on prior appeal.—On subsequent appeal, Court of Civil Appeals will follow law as announced by decision on former appeal, where it has not been reversed or modified by Supreme Court. *Roberts v. Armstrong* (Civ. App.) 212 S. W. 227; *Kimmell v. Edwards* (Civ. App.) 211 S. W. 284.

Where plaintiff, in suit to foreclose deed of trust, purchased property under order that lands and nursery stock thereon be sold separately, decision on appeal that purchaser could not enjoin removal of nursery stock in accordance with order held not determination of question whether such nursery stock was personal property. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 196 S. W. 626.

A determination of the Court of Civil Appeals held to have been affirmed by Supreme Court, application for writ of error having been denied, and hence the matter could not be reopened on a subsequent appeal. *Sutherland v. Friedenbloom* (Civ. App.) 200 S. W. 1099.

A former decision of Court of Civil Appeals, in same case, constitutes no bar to a further consideration of same question upon a subsequent appeal. *Id.*

Action of appellate court in affirming uncomplained of finding on an issue, not presenting fundamental error, court having reversed as to other issues, cannot be assailed on appeal from judgment on retrial of reversed issues in view of rule 62a (149 S. W. x), permitting affirmance and reversal as to severable issues. *Palm v. Nunn* (Civ. App.) 203 S. W. 1124.

Express holdings on former appeal that limits of city were legally extended, and that even were this not so there was a de facto municipality which could be attacked only by the state, foreclose the questions. *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

The Court of Civil Appeals having previously determined that the true location of the section involved was a question of fact, it will not review a finding of the trial court with reference thereto on this appeal. *Miller Link Lumber Co. v. Thompson* (Civ. App.) 208 S. W. 546.

A statement unnecessary to the decision of a former appeal is not conclusive on subsequent appeal. *Stark v. Brown* (Civ. App.) 210 S. W. 811.

Where appellants refer in their brief to the former appeal in the case for a full statement of facts, and such statement is not contested by appellees, questions of fact decided on former appeal are concluded on the subsequent appeal. *Id.*

The decision upon a former appeal was the law of the case, and, the trial court having followed the instructions of the appellate court in instructing the jury, it will decline to reconsider such questions upon a subsequent appeal. *Baker v. Williams* (Civ. App.) 213 S. W. 986.

Where the Supreme Court reversed a determination of one of the Circuit Courts of Appeals, which found that plaintiff was guilty of contributory negligence as a matter of law, held that, on appeal from a later judgment in plaintiff's favor, the decision of the Circuit Court of Appeals, though the facts were the same as on the subsequent trial, is not conclusive that plaintiff was guilty of contributory negligence. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 214 S. W. 699.

Where reversal of same judgment on former appeal was based upon lack of sufficient and satisfactory evidence to support an allegation of fraud, a decision of the appellate court on such appeal was the law of the case, and where the evidence was the same on the second trial as on the first, the judgment must be reversed and rendered on the second appeal. *Campbell v. Turley* (Civ. App.) 229 S. W. 595.

The decision on a previous appeal that there was insufficient evidence to support verdict is the law of the case on a subsequent appeal on identical facts. *Sheffield v. Meyer* (Civ. App.) 229 S. W. 614.

7. **Issues not passed on by court or jury.**—A defect of parties plaintiff may always be taken advantage of, even for the first time in the appellate court. *McKay v. Peterson* (Civ. App.) 220 S. W. 178; *Nail v. Taylor* (Civ. App.) 223 S. W. 719.

An assignment of error as to a matter to which no complaint was made in the trial court cannot be considered. *Oakes v. Freeman* (Civ. App.) 204 S. W. 360.

Appellant's complaint of the taxation of costs cannot be heard in the absence of a motion to retax below. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

Assignments of error based upon alleged action of court in overruling certain exceptions cannot be considered, where transcript contains no order showing that court ever considered or ruled upon exceptions. *First Nat. Bank of Canadian v. Jones* (Civ. App.) 209 S. W. 468.

Issues pleaded, but not ruled upon by the trial court, are not properly before the court on appeal for review. *City of San Antonio v. Besteiro* (Civ. App.) 209 S. W. 472.

Where the record does not contain an order of the court on the plea of special privilege and does not show any exception to the court's action in overruling it, the question cannot be reviewed. *St. Louis, B. & M. Ry. Co. v. Webber*, 109 Tex. 333, 210 S. W. 677.

Where there is no ruling in the record, in reference to the action of the trial court, showing that an exception was ever presented to the court, or that he acted on it, the assignment of error based thereon cannot be considered. *Logan v. Martinez* (Civ. App.) 211 S. W. 624.

Failure to invoke action of the trial judge upon a general demurrer and special exceptions was a waiver of the exceptions, and the case will be viewed on appeal as though they were never filed. *Texas Auto Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 211 S. W. 629.

A waiver of a right not pleaded cannot be urged for the first time on appeal. *Western Union Telegraph Co. v. Janko* (Civ. App.) 212 S. W. 243.

In trespass to try title to public free school lands by the purchaser on forfeiture thereof against the original applicant to purchase and his lessee, defendant appellants held unable, for the first time in the Court of Civil Appeals, to question the sufficiency of the procedure of the land commissioner in making forfeiture. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

Questions raised in the pleadings, but which the trial court in refusing a temporary injunction refused to consider, so that the record is not in such condition as to allow an intelligent passing thereon, and which are not necessary to a proper disposition of the appeal, will not be considered. *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 214 S. W. 490.

Where the trial court has never ruled on the question of marshaling of assets, it would be improper for the Court of Civil Appeals to undertake to do so. *Loya v. Bowen* (Civ. App.) 215 S. W. 474.

In action by grantor's heirs to cancel deed executed in consideration of grantee's agreement to support grantor for life, where grantee sought no affirmative relief, in his pleading, for improvements, support, or maintenance, and asked no issues to be submitted to the jury for its finding in reference to value of use of the property, he could not complain on appeal of the relief given him on plaintiff's pleading or of failure to give him other relief. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

In a suit for publishing the delinquent tax list under a contract providing for payment as the taxes were paid, where the action was brought prior to the expiration of a reasonable time for collection of the taxes as found by the jury, but an amended petition was filed after the date so found, and no question of abatement was presented, the judgment could not be disturbed because the suit was prematurely brought. *Potter County v. Boesen* (Com. App.) 221 S. W. 948, affirming judgment (Civ. App.) 191 S. W. 787.

In a suit against an independent executor and residuary legatees based on an agreement by decedent to make a bequest to plaintiff, a lien against specific property in the hands of the legatees could not be established on appeal where not sought below. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

Where the evidence does not show that plaintiff was contributorily negligent as a matter of law for the reason stated in an assignment of error, and no request was made for the submission of contributory negligence to the jury, and it was not submitted, the verdict for plaintiff cannot be reversed because of his contributory negligence. *Hines v. Bost* (Civ. App.) 224 S. W. 698.

If an executor, who resides in a county other than that in which the will was probated, can only be sued in the county of probate, under art. 1830, § 6, he waives that

right by failure to present a plea of privilege in the court below, and cannot raise the question on appeal. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

The form of affidavit verifying petition for injunction under art. 4649, may be questioned for the first time on appeal. *Butler v. Remington* (Civ. App.) 230 S. W. 224.

Objection that persons whose land was sold under judgment purporting to foreclose a vendor's lien did not, in suit to avoid the judgment and sale, offer to repay what the purchaser paid for the land, may not be raised for the first time on appeal. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

In an action by the children of the first wife of deceased to recover two tracts of land from his children by his second and third wives, the finding of the trial court that title vested in the latter will not be disturbed, where the claim that the land was purchased during the first marriage and plaintiffs inherited their mother's interest therein was raised for the first time on appeal, as the community property of husband and wife is subject to the payment of the debts contracted by either of them during the marriage, and evidence might have been presented by defendants requiring a vesting of plaintiff's interest in a manner not inconsistent with the judgment of the trial court. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

Where the issue of undue influence by an attorney in procuring a contract with a client was not submitted to the jury, and no request for submission was made, and deceased was in full possession of his faculties and was competent to make a contract, and there was evidence to support a finding that he voluntarily made it, it could not be held by Court of Civil Appeals as a matter of law that the contract was procured by undue influence and was therefore nudum pactum. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

8. Review of facts—Power and duty to review.—Where a district judge on objection that he was disqualified, determined that he had jurisdiction of an action, the Court of Civil Appeals will not disturb his decision, unless manifest error appears. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646.

A telegraph company's assignments of error on appeal from a judgment for failure to deliver a death message merely raising a question of fact held to present no error. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

A judgment in a personal injury action wherein exceptions to plea of res adjudicata were overruled will not be reversed where it does not appear whether a directed verdict was based on such plea or on the evidence as to the merits which justified the verdict. *McLane v. San Antonio Sewer Pipe Co.* (Civ. App.) 202 S. W. 210.

The question of dependency within the Workmen's Compensation Act is one of fact rather than of law. *Southern Surety Co. v. Hibbs* (Civ. App.) 221 S. W. 303.

Juries are exclusive judges of credibility of witnesses and the weight to be given their testimony, and the only other court that can legally inquire into the facts of a case is the Court of Civil Appeals, which alone is charged with the ultimate duty of decision as to the facts. *San Antonio Public Service Co. v. Tracy* (Civ. App.) 221 S. W. 637.

When a given state of facts is such that reasonable men may fairly differ on the question involved, the determination of the matter is for the judge or jury trying the case, and it is only when the facts are such that all reasonable men must draw the same conclusion from them that the appellate court is authorized to interfere. *Duckels v. Dougherty* (Civ. App.) 226 S. W. 720.

Appellate courts are not authorized to set aside judgments supported by affirmative evidence as shown by the statement of facts. *Kerwin v. Mead* (Civ. App.) 229 S. W. 677.

Whether the conductor of a freight train, standing on a passing track for the purpose of allowing a passenger train to pass, acted as an ordinarily prudent person in failing to place some member of the crew at the crossing as a flagman until the passenger train had passed held a question for the trial court sitting as a jury. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

9. — Extent of review in general.—The appellate court should consider the evidence in the light most favorable to the party obtaining the verdict. *Neill v. Pryor* (Civ. App.) 222 S. W. 296; *Anderson v. Smith* (Civ. App.) 231 S. W. 142; *W. T. Rawleigh Co. v. Smith* (Civ. App.) 231 S. W. 799.

Where trial court did not file findings of fact and conclusions of law, case is before Court of Civil Appeals to determine whether there was evidence on trial sufficient to support judgment. *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

The jurors are the exclusive judges of credibility of witnesses, and weight to be given to their testimony, and in determining whether or not the verdict is supported by the evidence, the court on appeal will look only to the evidence in support of the verdict. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

In determining on appeal the issues presented in suit to vacate a judgment entered on agreement of attorneys claimed not to have been authorized, the Court of Civil Appeals must view the testimony in its most favorable light from the standpoint of defendants, appellees, who secured judgment below. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

11. — Credibility of witnesses.—On a trial without a jury, it is the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight to be given their testimony. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581; *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208; *Brown v. First State Bank of Weimar* (Civ. App.) 199 S. W. 895; *Burkitt v. Moxley* (Civ. App.) 206 S. W. 373; *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811; *Brannan v. First State Bank of Comanche* (Civ. App.) 211 S. W. 945; *Currie v. Glasscock County* (Civ. App.)

212 S. W. 533; Spivey v. Hooks (Civ. App.) 216 S. W. 486; Williford v. Simpson (Civ. App.) 217 S. W. 191.

It is the province of the jury to pass on the credibility of witnesses, and court on appeal cannot substitute its judgment for that of the jury. Southern Traction Co. v. Jones (Civ. App.) 209 S. W. 457; Bay Lumber Co. v. Snelling (Civ. App.) 205 S. W. 763; Funderburgh v. Skinner (Civ. App.) 209 S. W. 452; Texas Power & Light Co. v. Bristow (Civ. App.) 213 S. W. 702; Houston & T. C. R. Co. v. Long (Civ. App.) 219 S. W. 212.

The appellate court cannot weigh each fact and decide as to the credibility of the several witnesses. Texas & N. O. R. Co. v. Jones (Civ. App.) 201 S. W. 1085; Missouri, K. & T. Ry. Co. of Texas v. Storey (Civ. App.) 195 S. W. 350.

Where defendants had to rely upon their own testimony to establish their defense, jury was entitled to pass upon weight and value of testimony, and court on appeal will not disturb verdict. Turrentine v. Doering (Civ. App.) 203 S. W. 802.

Where witnesses testified directly that the accident occurred by breaking of hand-hold, it is the province of the jury, and not the appellate court, to weigh the evidence, no matter how strong the circumstances may be that the witnesses were falsifying. Kansas City, M. & O. Ry. Co. v. Swift (Civ. App.) 204 S. W. 135.

Appellants cannot contend that the appellate court is authorized to discredit the testimony of an adverse party, whom they placed on the stand and whom the jury believed. Leahy v. Timon, (Civ. App.) 204 S. W. 1029.

It was peculiarly within the province of the trial court to determine the weight of the testimony of plaintiff, and the only witness for defendant, and their credibility. San Jacinto Life Ins. Co. v. Boyd (Civ. App.) 214 S. W. 482.

In an action for injuries suffered by plaintiff, who was struck by defendant's motor-car while riding on his motorcycle, where there was conflicting testimony as to whether plaintiff had a light on his motorcycle, the question of credibility of witnesses was for the jury, and their verdict will not be disturbed. American Automobile Ins. Co. v. Struwe (Civ. App.) 213 S. W. 534.

12. — Probative force of evidence.—Where evidence is conflicting, weight thereof is a question for court or jury trying the issues not for the appellate court. Lockin v. Johnson (Civ. App.) 202 S. W. 168; Texas & P. Ry. Co. v. Schelb (Civ. App.) 196 S. W. 881; Bay Lumber Co. v. Snelling (Civ. App.) 205 S. W. 763; Texas Lumber & Loan Co. v. First Nat. Bank (Civ. App.) 209 S. W. 811.

Reasonableness of a conclusion from undisputed facts is to be tested by the inherent soundness or reasonableness of the conclusion itself, and an appellate court must decide the question for itself. Gulf, C. & S. F. Ry. Co. v. Gaddis (Com. App.) 203 S. W. 895.

13. — Conclusiveness of verdicts in general.—The jury's verdict on issues of fact is conclusive on appeal. Lasater v. Lopez, 110 Tex. 179, 217 S. W. 373; Wheelock v. Mayfield (Civ. App.) 197 S. W. 475; Texas & N. O. R. Co. v. Tillman (Civ. App.) 197 S. W. 1128; MacDonald v. Avers (Civ. App.) 207 S. W. 686.

In action for injuries to husband, wife, and minor child in collision between automobile and railway car, finding that railroad was guilty of no negligence which was the proximate cause of the accident will not be disturbed, where it found the husband and wife were contributorily negligent, in spite of further finding that the child was not so negligent. Robinson v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 203 S. W. 395.

Where there is no contradiction in testimony in boundary dispute, and the verdict is simply deduction from facts proven, consisting of field notes and maps, the appellate court will not defer to the verdict of the jury. Kerr v. State (Civ. App.) 205 S. W. 474.

The jury is the judge of the weight of the evidence and the credibility of witnesses, where contested issues of fact are involved. Baker v. Grace (Civ. App.) 213 S. W. 299.

In a fact case where the issues were submitted to a jury and substantial justice has been obtained, the judgment will not be disturbed. Ramsey v. Evans (Civ. App.) 228 S. W. 356.

While, in a suit to cancel an oil and gas lease on the ground of abandonment, abandonment is a question for the jury, yet in its determination a verdict and judgment is subject to review by the appellate court, and the judgment may be reversed for insufficiency of evidence. Hall v. McClesky (Civ. App.) 223 S. W. 1004.

14. — Sufficiency of evidence in support of verdicts.—A verdict supported by evidence will not be disturbed on appeal. St. Louis, S. F. & T. Ry. Co. v. Reichert (Civ. App.) 227 S. W. 550; Beadle v. McCrabb (Civ. App.) 199 S. W. 355; American Nat. Ins. Co. v. Frankel (Civ. App.) 199 S. W. 1132; Hudson v. Salley (Civ. App.) 201 S. W. 665; Zeiger v. Woodson (Civ. App.) 202 S. W. 164; West Lumber Co. v. Tomme (Civ. App.) 203 S. W. 784; Estes v. Ferguson (Civ. App.) 203 S. W. 941; Clardy v. American Trust & Savings Bank (Civ. App.) 208 S. W. 990; Producers' Oil Co. v. State (Civ. App.) 213 S. W. 349; St. Louis Southwestern Ry. Co. v. W. L. Richards & Co. (Civ. App.) 217 S. W. 1116; City of San Antonio v. Newnam (Civ. App.) 218 S. W. 128; Bradshaw v. Brown (Civ. App.) 218 S. W. 1071; Panhandle & S. F. Ry. Co. v. Arnett (Civ. App.) 219 S. W. 232; Hagar v. Adams (Civ. App.) 220 S. W. 592; Huston v. Scarborough (Civ. App.) 221 S. W. 703; Pfluger v. Schoen (Civ. App.) 221 S. W. 1090; Pawloskey v. Kusch (Civ. App.) 223 S. W. 496; Arminger v. City Nat. Bank of Paris (Civ. App.) 226 S. W. 707; United Sav. Bank v. Castro (Civ. App.) 230 S. W. 223; Kollaer v. Puckett (Civ. App.) 232 S. W. 914.

A mere suspicion or scintilla of evidence is not sufficient to authorize an appellate court to uphold a verdict based on such evidence. Advance-Rumely Thresher Co. v. Moss (Civ. App.) 213 S. W. 690; Blumenthal v. Nussbaum (Civ. App.) 195 S. W. 275.

Jury's finding on sufficient evidence that plaintiff was defendant's employé and

working for it when injured held binding, though there was testimony that he was in the service of an independent contractor. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Evidence making peculiarly an issue for jury, their finding, in trespass to try title, that improvements by defendants were not made in good faith as to location of boundary, will be sustained on appeal. *Antone v. Cowan* (Civ. App.) 202 S. W. 814.

Appellate courts can only reverse a judgment when there is no evidence to support the verdict or when it is so manifestly against the preponderance of the evidence as to be clearly wrong and to justify conclusion that it resulted from passion, prejudice, etc. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

In a proceeding for the probate of a will where evidence, if competent, is ample to sustain a special finding by the jury that testator was of sound mind at the time he signed the will, the verdict will not be disturbed on appeal. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

Where there was abundant testimony to sustain verdict locating boundary line, verdict will not be disturbed on appeal. *Stark v. Staffen* (Civ. App.) 208 S. W. 695.

To sustain the verdict on appeal, the evidence must amount to something more than inferences, and must be legally of a probative force, mere detached statements of witnesses which may positively furnish an argumentative basis not being controlling, and a jury is not authorized to arbitrarily reject testimony that is unimpeachable and without suspicion. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

If the verdict can be sustained by legal evidence as to any act of negligence on the part of defendant carrier, it is the duty of the Court of Civil Appeals to do so. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

Evidence will be held sufficient to justify jury finding if the record presents a state of facts from which reasonable minds might reach different conclusions. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

If, discarding all adverse evidence and giving credit to all evidence favorable to plaintiff, and indulging every legitimate conclusion favorable to him which might have been drawn from the facts proved, a jury might have found in his favor, there is evidence to support the verdict when challenged on appeal. *Pendell v. Apodaca* (Civ. App.) 221 S. W. 682.

The appellate court must uphold the verdict, unless the direct testimony supporting it cannot be correct because of physical facts or other evidence admitted to be correct. *Neill v. Pryor* (Civ. App.) 222 S. W. 296.

Unless the appellate court can say, from all the undisputed facts and circumstances of the case, that no reasonable mind can draw any conclusion except that plaintiff was negligent in crossing a railroad track without listening or looking, the jury's finding that such act was not negligent will not be disturbed. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

While it is the duty of the appellate courts to sustain the findings of the jury founded on sufficient credible testimony, they are not required to sustain a finding based upon testimony that is incredible, or which is entirely out of harmony with observation, reason, and experience, and if the circumstances and conditions are such that the testimony cannot be true upon any reasonable hypothesis, a finding of the court or jury, based thereon, should be disregarded and set aside. *Texas & N. O. Ry. Co. v. Wagner* (Civ. App.) 224 S. W. 377.

In a suit on a verified open account to recover a balance alleged to be due on merchandise sold and delivered to defendant, defendant pleading payment, the issue of alteration of a check given by defendant in payment having been resolved against plaintiff by the jury, and there being evidence to support the finding, it must be sustained. *Seiz, Schwab & Co. v. Shipman* (Civ. App.) 230 S. W. 842.

It is the duty of the Court of Civil Appeals to set aside a verdict, and the judgment rendered thereon, where in its opinion the evidence is insufficient to sustain the verdict. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344.

15. — **Opposed to opinion of appellate court.**—It is the province of the jury to pass upon the credibility of the witnesses and the weight to be given conflicting testimony, and the court on appeal is not, although it might not have reached the same conclusion had question been submitted to it, authorized to substitute its judgment for that of the jury. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457; *Weil v. Miller* (Civ. App.) 215 S. W. 142; *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

In action for conversion, finding that plaintiffs could have realized substantially its face value will not be disturbed, though evidence of value of equity for which it could have been exchanged might not have had much weight with appellate court. *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424.

The determination of the amount of damages in personal injury cases, is committed to the jury in a very large measure, and its decision will not be reversed, though damages are greater than appellate court would have given. *Burnett v. Anderson* (Civ. App.) 207 S. W. 540.

Where there is abundant evidence to sustain the verdict, the court on appeal will not pass on question of whether it is excessive, even though the opinion of the appellate court is contrary to the verdict. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

16. — **Verdicts on conflicting evidence.**—A verdict on conflicting evidence cannot be disturbed on appeal. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873; *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546; *Crafts v. McAllen* (Civ. App.) 196 S. W. 729; *Rosborough v. Cerveni* (Civ. App.) 197 S. W. 319; *Texas &*

P. Ry. Co. v. Thorp (Civ. App.) 198 S. W. 335; *Smith v. Thompson* (Civ. App.) 201 S. W. 220; *Askew v. Bruner* (Civ. App.) 205 S. W. 152; *Rouser v. Wright* (Civ. App.) 205 S. W. 849; *Falfurrias Mercantile Co. v. Citizens' State Bank* (Civ. App.) 207 S. W. 568; *Lancaster & Wight v. Allen* (Civ. App.) 207 S. W. 984; *Smith v. Smith* (Civ. App.) 213 S. W. 273; *Texas Electric Ry. v. Williams* (Civ. App.) 213 S. W. 730; *Prince v. Yarbrough* (Civ. App.) 217 S. W. 1113; *Du Bois v. Tyler* (Civ. App.) 219 S. W. 211; *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796; *Sutherland v. Citizens' State Bank* (Civ. App.) 220 S. W. 115; *Cobb & Gregory v. Lanier* (Civ. App.) 221 S. W. 990; *Wells v. Scales* (Civ. App.) 222 S. W. 303; *Hines v. Bost* (Civ. App.) 224 S. W. 698; *Fath v. Dawley* (Civ. App.) 226 S. W. 484; *Steger v. Greer* (Civ. App.) 228 S. W. 304; *Sovereign Camp, W. O. W., v. Hay* (Civ. App.) 227 S. W. 1111; *Wright v. Schaff* (Civ. App.) 228 S. W. 333; *Gray v. Stolley* (Civ. App.) 230 S. W. 866; *Forbess v. Elliott* (Civ. App.) 230 S. W. 888.

Where the evidence would have justified either of two contrary conclusions, the appellate court cannot set aside the jury's adoption of either. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 204 S. W. 1026; *Miller v. Bandera Independent Telephone Co.* (Civ. App.) 216 S. W. 900.

In suit to cancel deed as mortgage on homestead, where plaintiff and his wife testified that deed was mortgage, which was denied by defendant, judgment for plaintiffs would be affirmed, since there was issue for jury. *Garner v. Brown* (Civ. App.) 200 S. W. 1161.

In considering the evidence appellate court is limited to a determination of the legal sufficiency of the evidence to support the verdict and findings and has no concern with contrary evidence rejected by the jury. *Houston Electric Co. v. Schmidt* (Civ. App.) 203 S. W. 617.

The findings of the jury are conclusive in a case of conflicting evidence, where there is more than a scintilla of evidence to support them. *McDonald v. Stafford* (Civ. App.) 213 S. W. 732.

Where plaintiff's testimony, though sharply contradicted by several witnesses, raised an issue of fact which it was the province of the jury to pass on, it was not the province of the Court of Civil Appeals to set aside their finding. *Muir v. Stevens* (Civ. App.) 221 S. W. 1119.

On an issue of common-law marriage, where defendant's testimony was contradicted by his time books and payrolls as to plaintiff's being merely a cook, and not his wife, there was such conflict in the evidence that it required the weighing of testimony so that the court must accept part and reject part, the truth not being so manifest that it can be declared what it is in the face of a jury's finding, it being their problem to identify it from a mass of conflicts and contradictions. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

A jury finding of the execution and delivery of a lost deed, when supported by positive and unequivocal testimony and other evidence tending to show such execution and delivery, cannot be disturbed, though there are many circumstances strongly controverting such testimony. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

18. — **Verdicts against weight of evidence.**—A finding of fact by a jury will be set aside only where the verdict is so overwhelmingly against the preponderance of the evidence as to clearly show that such verdict was wrong, or was the result of some passion, prejudice, bias, or other improper motive or consideration. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736; *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 197 S. W. 235; *Angelina County Lumber Co. v. Mast* (Civ. App.) 208 S. W. 360; *Nations v. Miller* (Civ. App.) 212 S. W. 742; *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757; *Selz, Schwab & Co. v. Shipman* (Civ. App.) 230 S. W. 842; *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 230 S. W. 1051.

Courts of Civil Appeals are not authorized to disturb jury's verdict or finding on issue of fact which has reasonable support in evidence, though apparently against preponderance of evidence. *Toole v. Moore* (Civ. App.) 203 S. W. 429; *Anderson v. McCain* (Civ. App.) 195 S. W. 921; *Green v. Hall* (Civ. App.) 203 S. W. 1175; *Sovereign Camp, Woodmen of the World, v. Martin* (Civ. App.) 211 S. W. 270.

Where evidence relating to jury's verdict on question of fact so clearly and overwhelmingly preponderates against verdict as to make it clear to appellate court that such verdict was wrong, it should be disregarded and set aside. *Toole v. Moore* (Civ. App.) 203 S. W. 429; *American Nat. Ins. Co. v. Frankel* (Civ. App.) 199 S. W. 1132; *Grelle v. Grelle* (Civ. App.) 206 S. W. 114.

The jury is the judge of the weight of the evidence. *Roberts v. Wichita Southern Life Ins. Co.* (Com. App.) 221 S. W. 268, reversing judgment (Civ. App.) *Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411; *Baker v. Grace* (Civ. App.) 213 S. W. 299.

Where the verdict of the jury is so against the weight and preponderance of the evidence as to show that it is clearly wrong, it is the duty of the appellate court to reverse. *Texas & N. O. Ry. Co. v. Wagner* (Civ. App.) 224 S. W. 377; *Hines v. Roan* (Civ. App.) 230 S. W. 1070.

Where there was evidence to sustain a verdict that the owner of a theater knew, or should have known, when accepting their services, in leasing theater, that brokers were his and not tenant's agents, the verdict will not be set aside, although the preponderance of the evidence appears otherwise. *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170.

Court on appeal will not except in extreme cases, in which great preponderance of evidence shows conclusively that result reached by verdict is wrongful, disturb jury findings. *Jones v. Schnauffer* (Civ. App.) 202 S. W. 367.

Though the facts contrary to the verdict on their face unquestionably are of greater probative force than those in favor of the verdict, it does not follow that the latter facts will not support the verdict. *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

In action on insurance certificate involving the question of whether insured's statement in application that he had never suffered from syphilis was misrepresentation, verdict for plaintiff held so manifestly contrary to the evidence as to justify reversal. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

19. — **Amount of verdict.**—There is no fixed rule for measuring damages to be allowed for mental suffering, and, jury being exclusive judges of facts, it must clearly appear that amount awarded is excessive before an appellate court will be authorized to disturb a verdict. *Western Union Telegraph Co. v. Parham* (Civ. App.) 210 S. W. 740; *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

A verdict will not be disturbed unless manifestly excessive. *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644.

Where there was substantial evidence to support amount of verdict, it is not subject to attack on appeal as excessive. *Temple Trust Co. v. Pirtle* (Civ. App.) 198 S. W. 627.

Where carrier's liability for wrongful ejection of a passenger is established, the amount of damages found by the jury will not be disturbed unless excessive or indicative of passion or prejudice. *Houston E. & W. T. Ry. Co. v. Snow* (Civ. App.) 201 S. W. 224.

Rendition of verdict so large that it shows on its face that it is result of prejudice or passion constitutes error requiring reversal, unless suitable remittitur is entered. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

The court on appeal, though believing that verdict is excessive, will not reduce it, unless there were such grave circumstances connected with it as to justify conclusion that duty requires the court on appeal to reduce it. *Baker v. Bell* (Civ. App.) 219 S. W. 245.

Where the jury found against contributory negligence, though the evidence almost conclusively established such negligence as a matter of law, and also rendered a verdict for \$30,000 damages, which the trial court reduced to \$12,000, the excessive verdict manifests such bias as indicates that the finding on contributory negligence may have also been due to bias, and the verdict should be set aside. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

In an action for personal injuries, a verdict cannot be set aside by the appellate court as excessive where the jury had before it facts which would support such a finding. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113.

When it is not shown that the jury were in any respect improperly influenced to render their verdict in the sum awarded, the Court of Civil Appeals would not be justified in disturbing the verdict on the ground that the allowance for diminished earning capacity from a personal injury was excessive. *Flores v. Garcia* (Civ. App.) 226 S. W. 743.

20. — **Approval of verdict by trial court.**—Where evidence upon plea of privilege to be sued in another county was contradictory, its determination was for the jury; and where trial judge refused to set verdict aside, the judgment will be affirmed. *Obenhau v. Allen* (Civ. App.) 199 S. W. 366.

Refusal of defendant's submitted instruction to direct a verdict was not error, where there was evidence satisfactory to the trial court to support a verdict for plaintiff. *Liberty Hardwood Lumber Co. v. Stevens* (Civ. App.) 199 S. W. 869.

Appellate courts, having nothing to do with questions of the preponderance of the evidence, are authorized to set aside the verdict of a jury approved by the trial court only where the evidence so overwhelmingly preponderates against it as to show the jury was actuated by passion, prejudice, or other improper motive, and that the verdict is clearly wrong. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

Verdict approved by trial court will not be disturbed on appeal, on the ground that the testimony offered by appellant should be accepted as true, and that of appellees rejected as unworthy of belief; the credibility of witnesses and the weight to be given their testimony being a matter for the jury. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

21. — **Successive verdicts.**—Where two verdicts had been found in favor of plaintiff and both trial judges upheld the verdict, on second appeal the court will not hold that the evidence is so clearly against the verdict as to authorize its reversal. *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 197 S. W. 235.

22. — **Conclusiveness of findings of court in general.**—Where a question of fact is submitted to the court without a jury, a finding by the court is as conclusive as a verdict by the jury, and, if supported by evidence, is conclusive on appeal. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359; *Hart v. Hulsey* (Civ. App.) 196 S. W. 302; *Hudmon v. Foster* (Civ. App.) 210 S. W. 262; *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

It is the duty of the trial court to determine the effect of the testimony, not of the Court of Appeals. *Texas Employers' Ins. Ass'n v. Mummey* (Civ. App.) 200 S. W. 251; *Dittman v. Cornelius* (Civ. App.) 218 S. W. 109.

Trial court's finding on uncontradicted testimony of witness is conclusive on Court of Civil Appeals. *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656.

In an election contest, a declaration in a judgment that parties referred to were qualified voters, except for certain reasons, would not constitute a finding of fact, but would be a conclusion of law; hence appellants would not be entitled to have it given controlling effect in disposing of the appeal. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

In trespass to try title, in which defendants disclaimed as to all of section sued for, except a specific 160 acres claimed under 10-year statute of limitation, held, that court's

finding with reference to true location thereof will not be disturbed. *Miller Link Lumber Co. v. Thompson* (Civ. App.) 208 S. W. 546.

Where statutes of a foreign country have been introduced in evidence, and lawyers of long practice in such country have testified as to meaning of section shown, question of existence of, and abstract meaning of, laws becomes a question of fact to be determined by trial court. *El Paso Electric Ry. Co. v. Carruth* (Civ. App.) 208 S. W. 984.

In the absence of conclusions of fact, the appellate court will impute to the trial court full verity to its findings, and, if there is any issue of fact sufficient to sustain the judgment, it will be done. *Pittman & Harrison Co. v. Knowlan Machine & Supply Co.* (Civ. App.) 216 S. W. 678.

The Court of Civil Appeals must conclude that the trial court who heard the evidence exercised, so far as he might legally do so, his right to pass on the credibility of the witnesses and to discredit such as he thought unworthy of belief. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

On appeal from judgment rendered after trial before court without a jury, the facts will be viewed most strongly in favor of court's verdict and judgment. *Houston E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526.

Whether the operation of a train at a speed of 25 miles an hour over the principal crossing in a city or town of 1,200 to 1,400 inhabitants, which was near the depot and station and was obstructed by a long freight train, cut in the middle of the street and leaving a passage of only 16 feet for the use of the public, was negligence, was a question of fact for the trial court sitting without a jury. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

24. — **Sufficiency of evidence in support of court's findings.**—Finding of trial court upon substantial evidence will not be disturbed by the Court of Civil Appeals. *Smith v. McAdams* (Civ. App.) 206 S. W. 955; *Hart v. Hulsey* (Civ. App.) 196 S. W. 302; *Garvey v. Cain* (Civ. App.) 197 S. W. 765; *Whitley v. Alexander* (Civ. App.) 198 S. W. 173; *Jackson v. Sere* (Civ. App.) 198 S. W. 604; *National Fire Ins. Co. of Hartford, Conn., v. Carter* (Civ. App.) 199 S. W. 507; *Wells v. Cloud* (Civ. App.) 202 S. W. 331; *Wade v. Madison* (Civ. App.) 206 S. W. 118; *Williams v. Ogerly* (Civ. App.) 207 S. W. 572; *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811; *Williams v. Davenport* (Civ. App.) 212 S. W. 675; *McFaddin v. White* (Civ. App.) 214 S. W. 704; *Francklow v. Ullmann, Stern & Krausse* (Civ. App.) 214 S. W. 797; *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537; *Conn v. Southwestern-Settlement & Development Co.* (Civ. App.) 222 S. W. 612; *Dodgen v. McCreca* (Civ. App.) 225 S. W. 71; *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

In reviewing an assignment that the evidence was not sufficient to sustain a finding of fact, strongest probative effect must be given to the evidence tending to establish such fact. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367; *Richardson v. Harless* (Civ. App.) 207 S. W. 139.

Finding that covenant by railway company to maintain depot on land conveyed to it meant a passenger depot, there then being a passenger depot on the land, held not to be disturbed. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621.

A finding that removal of railway depot was not more to the interests of a majority of the citizens of a town held not to be disturbed, though it appeared the largest portion of the town was nearer the new site. *Id.*

Unless trial court's finding is against great weight of evidence, it should be upheld by appellate court. *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656.

The Court of Appeals is bound by the district court's finding of fact, having evidence to sustain it, that it is not for the best interest of the people in a certain school district to be divided into two districts. *Schulz v. Davis* (Civ. App.) 196 S. W. 727.

Where decree establishing trust in note given to a defendant, as representing commissions earned by plaintiff and the other defendants, and taken by such defendant, with knowledge of facts, and pursuant to conspiracy to cheat plaintiff, was authorized by findings supported by evidence, judgment will be affirmed. *McAfee v. Swepston* (Civ. App.) 198 S. W. 812.

In suit to foreclose judgment lien, whether property was community property, whether part of it was part of homestead, and whether former homestead was abandoned, held questions of fact, finding on which would not be disturbed when sustained by evidence. *Jones v. Lanning* (Civ. App.) 201 S. W. 443.

There being no error in the judgment if a corner of survey owned by defendant was at point shown by plat in the record sent to court on appeal, and there being evidence authorizing a finding that the corner was at such point, judgment will be affirmed. *Erwin v. Morgan* (Civ. App.) 207 S. W. 556.

Where the great preponderance of testimony sustains the findings of the trial court under assignment that "court erred in rendering judgment for defendants for the 160 acres of land, claimed by them under their limitation plea, because the evidence shows their occupancy thereof to have been under full recognition of the title of another," assignment will be overruled. *Miller Link Lumber Co. v. Thompson* (Civ. App.) 208 S. W. 546.

Where the trial court's finding that a grantor was of unsound mind when deeds were executed is supported by the briefs and statement of facts, it will not be disturbed. *Sherwood v. Sherwood* (Civ. App.) 225 S. W. 555.

Whether a broker suing for commissions was the efficient procuring cause of a sale was a question for determination by the trial court; and, where its findings are supported by evidence, they cannot be disturbed, though the Court of Civil Appeals might reach a different conclusion. *Pioneer Land & Loan Co. of Martin County v. Ebersol* (Civ. App.) 226 S. W. 423.

The trial court's finding on a pure question of fact, as the area left in a school district which was divided, will not be disturbed. *Baker v. Davis* (Civ. App.) 227 S. W. 534.

In a suit to set aside a deed executed by husband and wife, a finding on ample testimony that the husband was insane when the deed was executed is conclusive on the Court of Civil Appeals. *Lawson v. Armstrong* (Civ. App.) 227 S. W. 687.

The appellate court cannot disturb the implied findings of the lower court clearly put in issue by the evidence. *Nesbit v. Richardson* (Civ. App.) 229 S. W. 595.

25. — Court's findings on conflicting evidence.—Finding of trial court on conflicting evidence is binding on Court of Civil Appeals. *Brittain v. Monsur* (Civ. App.) 195 S. W. 911; *International Order of Twelve Knights and Daughters of Tabor v. Reynolds* (Civ. App.) 195 S. W. 330; *Smith v. Smith* (Civ. App.) 200 S. W. 1129; *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005; *Zemurray v. Houston Fruit & Produce Co.* (Civ. App.) 202 S. W. 209; *Landrum v. Burris* (Civ. App.) 202 S. W. 359; *Oneida Knitting Co. v. Popular Dry Goods Co.* (Civ. App.) 202 S. W. 811; *Williams v. Baldwin* (Civ. App.) 202 S. W. 975; *Dickerson v. Dickerson* (Civ. App.) 207 S. W. 941; *Rousseau v. Everett* (Civ. App.) 209 S. W. 460; *Jones v. Fink* (Civ. App.) 209 S. W. 777; *Stovall v. Martin* (Civ. App.) 210 S. W. 321; *Brader v. Zbranek* (Civ. App.) 213 S. W. 331; *Steingruber v. City of San Antonio* (Com. App.) 220 S. W. 77; *Blair v. Paggi* (Civ. App.) 219 S. W. 287; *Smith v. Coburn* (Civ. App.) 222 S. W. 344; *Signor Tie Co. v. Texas Iron Ass'n* (Civ. App.) 222 S. W. 644; *Jobe v. Patton* (Civ. App.) 222 S. W. 987; *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052; *Gordon v. Gordon* (Civ. App.) 224 S. W. 716; *Minnick v. Dreyer Motor Co.* (Civ. App.) 227 S. W. 365; *City Nat. Bank of Eastland v. Conley* (Civ. App.) 228 S. W. 972; *Paul v. Prince* (Civ. App.) 228 S. W. 1102; *Mitchell v. Smith* (Civ. App.) 231 S. W. 1114.

Judgment of trial court as to weight to be given testimony will not be disturbed on appeal. *Gilbreath v. Cage & Crow* (Civ. App.) 198 S. W. 972.

It is the province of the trial court, when a conflict in testimony appears, to weigh the testimony. *McCardell v. Lea* (Civ. App.) 200 S. W. 562.

Trial court having found for defendant, court on appeal will resolve all conflicts in the findings in defendant's favor. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

Trial court's determination against plaintiff, on conflicting evidence, of the facts essential to the injunction sought against members of master plumbers' association, on the ground of their complicity in the action of journeymen plumbers in leaving plaintiff's employ, is not reviewable. *Sheehan v. Levy* (Civ. App.) 215 S. W. 229.

In a case tried to the court, the trial judge is the sole judge of the credibility of the witnesses, and his findings based on conflicting evidence are entitled, on appeal, to the same effect as the verdict of a jury. *Campbell v. Turley* (Civ. App.) 224 S. W. 528.

Where the trial court was compelled to determine an issue of fact upon diametrically opposed evidence and pass upon the veracity of the witnesses, it is the duty of the Court of Civil Appeals to uphold his finding. *Hull v. Guaranty State Bank of Carthage* (Civ. App.) 231 S. W. 810.

26. — Findings of court against weight of evidence.—A finding of trial court will be conclusive even if appellate court should be of opinion that trial court did not find in accordance with preponderance of evidence adduced. *Hardin v. Continental Casualty Co.* (Civ. App.) 195 S. W. 653; *Tucker v. McCullough* (Civ. App.) 209 S. W. 236.

Finding manifestly against the great weight and preponderance of evidence requires reversal on appeal. *Galveston, H. & S. A. Ry. Co. v. John Muennink & Son* (Civ. App.) 195 S. W. 613.

The findings of a trial judge when supported by evidence are binding unless clearly wrong, or so opposed to the great preponderance of the evidence as to suggest that truth and justice have not been attained. *Dugan v. Smith* (Civ. App.) 199 S. W. 654.

In broker's action for commissions for services in securing exchange of properties between defendant and another, judgment for defendant held clearly against the great preponderance of the evidence, necessitating reversal. *McCreless v. Howell* (Civ. App.) 210 S. W. 972.

Court of Civil Appeals has nothing to do with question of preponderance of evidence, except in cases where preponderance against trial court's finding on question of fact is so clear as to suggest bias or prejudice. *Beaumont Traction Co. v. Cooper* (Civ. App.) 211 S. W. 278.

Findings by the trial judge on material issues as to which there was a conflict in the testimony involved passing on the credibility of the witnesses and the weight to be given their testimony, and such findings will not be disturbed on appeal, though against the testimony of the more numerous witnesses, unless contrary to overwhelming weight of the testimony. *Deaton v. Hamilton County* (Civ. App.) 220 S. W. 577.

27. — Amount of recovery in court's findings.—On trial without jury, where the testimony variously indicated plaintiff's damages to be more or less than \$600, the award of such a sum will not be reversed merely because no witness estimated the damages at exactly \$600. *Houston Tie & Lumber Co. v. Hankins* (Civ. App.) 200 S. W. 237.

29. — Questions of fact on motions or other interlocutory or special proceedings.—There being sufficient facts to justify the findings, determination of the jury against a defendant on an issue of fact on plea of privilege is conclusive against him on appeal. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

Whether alleged newly discovered evidence could have been discovered before the trial, held a question of fact for the trial court. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 333.

On appeal from an interlocutory order appointing a receiver, the appellate court will not review the evidence. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

Where the evidence as to misconduct of jury was such as to make it a question of fact for the trial court as to whether jury was guilty of such misconduct, the Court of Civil Appeals will not review the court's action. *W. T. Carter & Bro. v. Brown* (Civ. App.) 230 S. W. 889.

Finding of court on plea of privilege based on art. 1830, § 24, providing that suits against a corporation may be maintained in any county where the cause of action or part thereof arose, that contract was made in county of suit, will not be disturbed on appeal where sustained by evidence. *Lakeside Irr. Co. v. W. C. Hedrick Const. Co.* (Civ. App.) 230 S. W. 1057.

30. Written opinions.—It is not proper for the Court of Civil Appeals to express an opinion on the weight or sufficiency of evidence on any issue to be subsequently tried by a jury. *Lumsden v. Jones* (Civ. App.) 227 S. W. 358.

Art. 1640. Supreme Court shall return record for supplemental conclusions, when.

Matters considered on return.—Where, on reversal of a judgment of the Court of Civil Appeals, the Supreme Court remanded the case for determination of the sufficiency of the evidence not passed on by the Court of Civil Appeals, the case will not be re-opened and re-examination of the whole controversy permitted in the Court of Civil Appeals. *Hutchison v. Massie* (Civ. App.) 226 S. W. 695.

CHAPTER ELEVEN

REHEARING

Article 1641. [1030] Motion for rehearing; requisites and notice of.

See *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

Rehearing in general.—The appellate court is without jurisdiction to hear and determine, on motion for leave to file supplemental motion for rehearing, the issue of fraud in the rendition of the judgment by the trial court. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

A certified copy of the answer attached to the motion for rehearing cannot be considered, where it is not part of the record before the Court of Civil Appeals. *Wischkaemper v. Allen* (Civ. App.) 221 S. W. 1037.

Grounds for rehearing and requisites of motion.—A telephone lineman having recovered damages against electric company for injuries resulting from high-tension wires could not complain on rehearing of judgment of indemnity against employer. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

Motion for rehearing couched in disrespectful and discourteous language will be stricken from the record and files and dismissed. *Walls v. Cruse* (Civ. App.) 217 S. W. 240.

Where the Court of Civil Appeals dismissed for want of jurisdiction because petition for writ of error had been filed more than 12 months after date of judgment, and appellant moved for rehearing on the ground that judgment had in fact been rendered later than was suggested of record, but did not request that the court hear any evidence on the point, and did not tender any evidence by affidavit, sworn plea, or sworn testimony, the motion for rehearing will be overruled, otherwise where affidavits of counsel, the county clerk, and trial judge make showing of the later rendition of judgment. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

A statement in the original opinion that there was no evidence that the defendant wife had ever met men in the dark is not contrary to evidence of her meeting men in the evening, where the witness testified he was mowing a lawn and saw the defendant at a distance of 200 or 300 yards, so that the statement need not be corrected on a motion for rehearing as misleading. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Objections not previously urged.—Contention that landlord's lien was waived held not available on motion for rehearing, where guarantor pleaded that plaintiff had such a lien, and did not present the question of waiver by an assignment of error. *Meacham v. O'Keefe* (Civ. App.) 198 S. W. 1000.

Where, in all proceedings, up to filing of motion for rehearing, money in banks was treated as collections from operation of railway, not as proceeds of sale of property, Court of Civil Appeals will decline to consider it in any other light. *West v. Carlisle* (Civ. App.) 199 S. W. 515.

Where a case was fully briefed by both parties, and orally argued on original submission and no objection to an assignment for lack of bill of exceptions thereon was urged, the Court of Appeals was justified in considering the assignment on the appellant's uncontested statement, and it is too late on motion for rehearing to consider the objection, in view of rules 40 and 41 of Courts of Civil Appeals (142 S. W. xiv). *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Where plaintiff in error, in answer to motion to dismiss writ for failure to comply with art. 2115, by filing briefs in the lower court, made no effort to show that defendants in error will have ample time within which to brief their case, after judgment on the motion, and without excuse for not making timely answer, plaintiff in error cannot

be heard on petition for rehearing or favored on his contention that his violation of the statute and Rules for the Courts of Civil Appeals, No. 39 (142 S. W. xiii), is without prejudice to defendants in error. *Reilly v. Hanagan* (Civ. App.) 225 S. W. 797.

A question raised for the first time in argument on the motion for rehearing in the Court of Civil Appeals comes too late. *Payne v. Harris* (Civ. App.) 228 S. W. 350.

Time for filing and excuse for delay.—A motion for rehearing in the court of civil appeals, made after the 15 days, will not be considered where the only excuse is that counsel were too busy to make it in time. *Kneeland v. Miles* (Civ. App.) 25 S. W. 486.

In absence of showing that failure to file motion for rehearing in Court of Civil Appeals resulted from accident or some cause beyond control of plaintiffs in error in the Supreme Court, Supreme Court is not warranted in concluding Court of Civil Appeals, cognizant of all of the facts, erred in refusing permission to file motion for rehearing nunc pro tunc as of time when it should have been filed. *Knodel v. Equitable Life Ins. Co.* (Com. App.) 221 S. W. 941, dismissing writ of error (Civ. App.) 193 S. W. 1138.

Court of Appeals was without authority to act on supplemental motion of appellant for rehearing of motion to vacate judgment of affirmance, in substance a "motion for rehearing," not filed within time for motions for rehearing, and not acted on at term at which original judgment was rendered; Supreme Court having denied writ of error. *Gammel Statesman Pub. Co. v. Ben C. Jones & Co.* (Com. App.) 206 S. W. 931.

Appellant will not be permitted to file motion for rehearing after expiration of time provided for filing of motion, on the ground that delay in preparation of motion was caused by sickness in family of one of appellant's attorneys, where such sickness was not shown to have kept the attorney from his business, and where there was no showing why other attorneys for appellant, who had been given notice of court's opinion, could not have prepared and filed the motion. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

CHAPTER TWELVE

EXECUTION OF JUDGMENT

Art.	Art.
1646. Judgment enforced, how, when.	1648. Appellant on reversal to recover costs of appeal.

Article 1646. [1035] Judgment enforced, how, when.

Judgment.—The district court has no jurisdiction over a motion to correct its judgment, which does not seek to correct any clerical error, but which is in fact a motion for a new trial, after the judgment has been affirmed by the Court of Civil Appeals and a motion for rehearing has been denied. *Hardin v. Central Texas Exch. Nat. Bank of Waco* (Civ. App.) 230 S. W. 730.

Art. 1648. [1029] Appellant on reversal to recover costs of appeal.

Items taxable.—This article warrants the clerk of the appellate court, in taxing against appellee the costs of the transcript of the record of the county court, contained in the bill of costs sent up with the transcript. *Baker v. Guinn* (Civ. App.) 25 S. W. 141.

CHAPTER THIRTEEN

REPORTER TO THE COURTS OF CIVIL APPEALS

Article 1651. [Repealed by Acts 1919, 36th Leg., ch. 36, § 4.]

TITLE 33

COURT OF CRIMINAL APPEALS

[See arts. 64-87, Code Cr. Proc., and notes.]

CHAPTER THREE

JURISDICTION OF THE COURT OF CRIMINAL APPEALS

Art.	Art.
1659. Jurisdiction of the court.	1660. Writs of habeas corpus, etc., power to issue.

Article 1659. [1052] Jurisdiction of the court.

Conclusiveness of decisions of civil courts.—Decisions of Supreme Court are binding on this court. *Davis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 196 S. W. 603.

Art. 1660. [1053] Writs of habeas corpus, etc., power to issue.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

TITLE 34

COURTS—DISTRICT

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| <p>Chap.
 1. The Judge of the District Court.
 2. The Clerk of the District Court.
 3. The powers and jurisdiction of the district court and of the judge thereof.</p> | <p>Chap.
 4. The terms of the District Court.
 5. Miscellaneous provisions relating to the District Court.</p> |
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CHAPTER ONE

THE JUDGE OF THE DISTRICT COURT

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|---|--|
| <p>Art.
 1671. Election, qualifications and residence.
 1675. Disqualification, causes of.
 1676. Disqualification; exchange of district judges; or special judge</p> | <p>Art.
 agreed upon, when; appointment by governor.
 1677. Record of election or appointment of.
 1678. Special judge elected.
 1682. Record of election.</p> |
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Article 1671. [1064] [1086] District judge, election of; qualification; residence.

Acceptance of incompatible office.—When one accepts an incompatible office with the one he holds, he may elect which to abandon, but when a judge accepts an office in the military service of the United States, his tenure as judge ceases by direct provision of Const. art. 16, § 12. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Art. 1675. [1068] [1090] Disqualification, causes of.

See *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.
 Cited, *Grigsby v. May*, 34 Tex. 240, 19 S. W. 343.

Interest in subject matter—In general.—Where a district judge acquired land before suit involving its title was filed, and disposed of it before case was tried, he had no such immediate and direct interest as disqualified him from trying case, even if he conveyed his interest by general warranty deed. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646.

Execution purchaser of land subsequently sold under prior deed of trust, who thereafter was elected district judge, held not disqualified in an action involving such land. *Lee v. British & American Mortgage Co.* (Civ. App.) 200 S. W. 430.

Judge held not shown disqualified to try action on life policy because holding policy in the company, it not being shown payment of policy sued on would have any direct effect on any fund in which he might participate. *Kansas City Life Ins. Co. v. Jinkens* (Civ. App.) 202 S. W. 772.

Judge should not try a case in which there is the least ground for his disqualification, and if error is ever made as to disqualification it should be in favor of disqualification rather than against it. *Cotulla State Bank v. Herron* (Civ. App.) 202 S. W. 797.

Conditions given by Const. art. 5, § 11, for disqualification of judge, are exclusive, and prejudice of judge is not ground for disqualification. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

A judge is not disqualified from proceeding with the trial of an action because he has already expressed an opinion therein. *Montfort v. Daviss* (Civ. App.) 218 S. W. 806.

— **Interest as taxpayer.**—A judge is not disqualified, because a citizen and taxpayer, to sit in a suit to enjoin the city from expending money to construct a lighting plant. *Williamson v. Cavo* (Civ. App.) 211 S. W. 795.

Art. 1676. [1069] Disqualification; exchange of district judges; special judge agreed upon, when; appointment by governor.

Construction and operation in general.—Conceding the authority of the Legislature to pass laws facilitating the exercise of the right of the parties under Const. art. 5, § 11, to select a person to try the case in lieu of a disqualified judge, such laws cannot be inconsistent with the terms or restrictive of the right given by the Constitution. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

A special district judge elected by the bar to try a particular criminal case on the disqualification of the regular district judge under Const. art. 5, § 11, held not to have power to sit as judge, he not having been selected by the attorneys in the case under arts. 1676, 1677; art. 1678, providing for election by the bar only when the regular judge is absent or unable to preside, not applying. *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

Selection by parties.—Where the parties by agreement appointed an attorney to try the case pursuant to Const. art. 5, § 11, the fact that the Governor thereupon appointed him did not detract from the force of his selection by the parties. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Under Const. art. 5, § 11, providing that when a district judge is disqualified the parties may appoint a proper person to try the case, this article, is invalid so far as it makes such right conditional on the impossibility of securing a judge by exchange of districts, and the parties may select a person to try the case without complying with this article. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Art. 1677. [1070] Record to be made where special judge is agreed on or appointed.

See *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

Art. 1678. [1071] [1094] Special judge, when and how elected.

See *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Smith v. State*, 24 Tex. App. 290, 6 S. W. 40.

Cited, *Texas & Pacific Coal Co. v. Ready* (Civ. App.) 198 S. W. 1034.

In general.—This article should be strictly construed to preserve the right of litigants to a trial before the regular judge. *Texas & Pacific Coal Co. v. Ready* (Civ. App.) 198 S. W. 1034.

This article, authorizing election of a special judge by the lawyers attending court when the regular judge is unwilling to serve, is valid, though Const. art. 5, § 7, merely authorizes the Legislature to provide for the holding of a court when the judge thereof is absent, disabled, or disqualified. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

A special district judge elected by the bar to try a particular criminal case on the disqualification of the regular district judge under Const. art. 5, § 11, held not to have power to sit as judge, he not having been selected by the attorneys in the case under arts. 1676, 1677; and this article not applying. *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

Absence, inability or unwillingness of regular judge.—Where the regular judge declined to try the case, but remained at his office and attended to other matters pending, he was not "unwilling to hold court," and the election of a special judge in such case was void. *Texas & Pacific Coal Co. v. Ready* (Civ. App.) 198 S. W. 1034.

Where the regular judge had agreed to go to another place and aid in war work, expecting to be absent for some time, and had notified the clerk to have the attorneys elect a special judge, he was "absent."—*Dean v. Dean* (Civ. App.) 214 S. W. 505.

Validity of acts of special judge.—A judgment rendered by a special judge elected without due warrant is a nullity. *Texas & Pacific Coal Co. v. Ready* (Civ. App.) 198 S. W. 1034.

The acts of a judge elected in the absence of the regular judge by the bar of a county are valid on the principle that he was a de facto officer, since he had possession of a legally constituted office under color of authority. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Termination of authority of special judge.—Where the regular judge became an officer of the National Guard, and the bar elected a special judge, and the regular judge thereafter went into the federal service, the special judge had power to continue the term already begun, in spite of Const. art. 5, § 28, art. 16, § 17, as to filling vacancies and tenure of office, since art. 16, § 12, prohibits one holding office under the United States from holding office under the state. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Where regular judge formed National Guard company, and the bar elected a special judge, and the regular judge, inducted into federal service, resigned as judge, the special judge had power to finish the work of the then unfinished term. *Watson v. State*, 83 Cr. R. 131, 201 S. W. 988.

The fact that the regular judge, after the election of a special judge, merely passed through the courtroom without intention of resuming his official duties, did not terminate his absence so as to invalidate the acts of the special judge. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

After plaintiff had announced ready for trial, and the special judge was waiting announcement by defendant, the trial had begun, so that the special judge might proceed therewith, though the regular judge returned at that time. *Id.*

Art. 1682. [1075] [1098] Record of the election, etc.

Record.—The only record as to the appointment of a special judge was that he was selected by the state and the defendant, and was sworn to try the case of the state against the defendant. The clerk certified this to be found in his minutes, but it was entirely detached from any other proceedings in the case. Held, that the entry was too uncertain to show even a substantial compliance with the law. *Smith v. State*, 24 Tex. App. 290, 6 S. W. 40.

CHAPTER TWO

THE CLERK OF THE DISTRICT COURT

Art.	Art.
1690. May appoint deputies.	1694. Shall keep a record of proceedings of court, judgments, etc.
1691. Oath and powers of deputies.	1701. Indexes to all judgments.
1693. May administer oaths, take depositions, etc.	

Article 1690. [1083] [1103] May appoint deputies.

See Kirby Lumber Co. v. Long (Civ. App.) 224 S. W. 906.
Cited, Thompson v. Johnson, 84 Tex. 548, 19 S. W. 784.

Art. 1691. [1084] [1104] Oath and powers of deputies.

Powers.—A deputy district clerk can take depositions only in the clerk's name by himself as deputy. Kirby Lumber Co. v. Long (Civ. App.) 224 S. W. 906.

Art. 1693. [1086] [1106] May administer oaths and take depositions.

Depositions.—A deputy district clerk can take depositions only in the clerk's name by himself as deputy. Kirby Lumber Co. v. Long (Civ. App.) 224 S. W. 906.

Art. 1694. [1087] [1107] Shall keep a record of proceedings, judgments and executions.

Record of judgments.—In order to perpetuate a ruling of the trial court on an exception to a plea of former conviction, where such exception is sustained, the judgment of the court thereon must be entered in the record, so that it may appear in the transcript. Rust v. State, 31 Cr. R. 75, 19 S. W. 763.

This article has reference to the amplified decree which goes upon the minutes, and not to the judge's docket entry. Chandler v. Riley (Civ. App.) 210 S. W. 716.

Where judge's name does not appear in the blank constituting part of the form required by district court rule 48 (142 S. W. xxi) following the judgment copied in the transcript, it will be presumed, for the purpose of giving court on appeal jurisdiction of the appeal, in the absence of such attack on the verity of the record as is permitted by law, that the clerk performed his duty in making out and certifying transcript as required by arts. 2108, 2114, and that judgment was entered under direction of judge under this article, since such direction may be oral. Id.

Art. 1701. [1094] [1113] Indexes to all judgments.

Index.—A judgment duly filed and recorded, but not indexed, creates no lien on lands of the judgment debtor. Nye v. Gribble, 70 Tex. 458, 8 S. W. 608.

CHAPTER THREE

THE POWERS AND JURISDICTION OF THE DISTRICT COURT
AND OF THE JUDGE THEREOF

Art.	Art.
1705. Original jurisdiction.	1713. To grant all remedial writs.
1706. Jurisdiction in probate matters.	1714. Judge may exercise all powers, etc., in vacation, by consent of parties, except, etc.
1708. To punish contempts.	1715. Judges may alternate, etc.
1712. To hear and determine all cases of legal and equitable cognizance	

Article 1705. [1098] [1117] Original jurisdiction of the district court.

See Seay v. Diller (Sup.) 16 S. W. 642; Fryckberg v. Scott (Civ. App.) 218 S. W. 21. Cited, Sutton v. English, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664; Mann v. Brown (Civ. App.) 201 S. W. 438.

1. Jurisdiction in general.—A court without jurisdiction over subject-matter can only dismiss cause. Burcum v. Gaston (Civ. App.) 196 S. W. 257.

Where the amount in controversy was below the jurisdiction of the district court, its judgment thereon is void, and the question may be raised for the first time on appeal. Hull v. First Guaranty State Bank of Overton (Civ. App.) 199 S. W. 1148.

Ordinarily, court's jurisdiction over subject-matter and parties, once fully attached

in a cause, continues until all issues both of fact and of law have been finally determined. *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

Under Const. art. 5, § 8, giving the district courts jurisdiction over suits involving \$500 or more, and Workmen's Compensation Act, § 5, the requirement that a suit to set aside an award be brought where the injury occurred is not jurisdictional, but relates only to the venue, and a suit brought in another county should not be dismissed, but, upon defendant's application, should be transferred to the county where the injury occurred. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

3. Title to land.—Title and recovery of land and the barring of equity of redemption alone being involved, the district court has jurisdiction, though an administrator and guardian be defendants. *Johnson v. First Nat. Bank* (Civ. App.) 198 S. W. 990.

Where title to a house on land conveyed by warranty deed is reserved by parol, a court having jurisdiction will reform deed to include reservation, but such jurisdiction is in the district court, and not in the county court. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

Petition alleging that defendant was interfering with plaintiffs' right of possession of land sufficiently showed jurisdiction in the district court, under Const. art. 5, § 8, this article and arts. 1712 and 1713, since "title" to lands is the means whereby the owner has possession, and "possession" means the actual control of the property and is prima facie evidence of and one of the elements of title, but is not title within such sections (citing Words and Phrases, Second Series, Title; see also, Words and Phrases, First and Second Series, Possession). *Stewart v. Patterson* (Civ. App.) 204 S. W. 763.

Where a judgment of the district court is rendered in an action of trespass to try title against an infant, her mother and her stepfather, held that the judgment divesting the infant of title in land which had been part of the community estate of her mother and her father, and which the mother had conveyed after her remarriage, was within the exclusive jurisdiction of the district court, not the county court. *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

4. Liens on land—In general.—In suit on note for \$300, 6 per cent. interest, and attorney's fees, and to foreclose vendor's lien in which defendant filed a cross-action, seeking to recover \$1,300, held that district court had jurisdiction, though plaintiff dismissed part of petition seeking to establish and foreclose vendor's lien. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

Under art. 268, a justice court, in a suit within its jurisdiction, has authority to decree a foreclosure of attachment lien on real estate, and direct an order of sale of the land; Const. art. 5, § 8, not conferring exclusive jurisdiction on district courts. *Baker v. Pitiuk & Meyer*, 109 Tex. 237, 205 S.W. 982.

7. Value in controversy—In general.—Where plaintiff surety had lost his interest in note sued on by its payment, and amount of interest alleged to have been paid by him to secure its extension was less than \$500, district court had no jurisdiction to render judgment for him. *Kynerd v. Security Nat. Bank* (Civ. App.) 207 S. W. 133.

The district court was without jurisdiction to entertain a suit claiming damages in the amount of \$80. *Beverly v. Roberts* (Civ. App.) 215 S. W. 975.

8. — Particular actions.—In suit to enforce award, under Workmen's Compensation Act, of Industrial Accident Board, district court has jurisdiction if sufficient weekly installments are due at time of suit to amount to court's jurisdictional amount. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 323.

A purchaser's action to cancel and recover some \$300 paid on contracts to purchase land on which over \$1,700 were due involves over \$500, and is within district court's jurisdiction. *Burcum v. Gaston* (Civ. App.) 196 S. W. 257.

District court held without jurisdiction of widow's suit against Employers' Insurance Association to enforce award of Industrial Accident Board under Employers' Liability Act and for mandamus, weekly payments which had accrued being for total amount, not exceeding \$500, exclusively within jurisdiction of county court. *Texas Employers' Ins. Ass'n v. Bryan* (Civ. App.) 198 S. W. 342.

Rule that election contest is not civil suit, and that district court has no jurisdiction, under constitutional provision giving jurisdiction of suits where amount in controversy is \$500, does not apply to quo warranto in name of state against one charged with unlawfully withholding office. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

The district court is without jurisdiction of an action for conversion, based on seizure of property under an invalid execution, for exemplary damages in sum of \$50, and for an injunction restraining sale, as the amount involved is within the exclusive jurisdiction of the county court. *Ramsel v. Miller* (Civ. App.) 202 S. W. 1050.

9. — Actions involving chattels.—Under Const. art. 5, § 16, giving district court jurisdiction when amount exceeds \$500, the district court is without jurisdiction of a suit on notes amounting to \$330 brought against the maker, who had purchased an automobile from plaintiff, and against one to whom the maker had transferred the automobile, even though the automobile was alleged to be of the value of \$500, for in any event plaintiff could only recover \$300. *Kolb v. Gerson* (Civ. App.) 215 S. W. 987.

Where the district court was without jurisdiction of an action on notes, wherein it was sought to foreclose a lien on an automobile, the amount involved being less than \$500, held, that sequestration proceedings under which plaintiff obtained possession of the automobile were also beyond the jurisdiction of the district court and should be dismissed. *Half v. Gerson* (Civ. App.) 215 S. W. 988.

12. — Allegation of amount.—Petition must determine whether amount in controversy is within court's jurisdiction. *Burcum v. Gaston* (Civ. App.) 196 S. W. 257.

In suit to rescind contract for purchase of land and to recover amount paid as part of price, though undisputed evidence showed such part was only \$400, petition alleging it was \$500, sum sued for was within jurisdiction of district court. *Rascoe v. Myre* (Civ. App.) 202 S. W. 780.

The amount in controversy in any case is determined by the pleadings upon which the parties go to trial and is the largest amount for which judgment could be rendered upon such pleadings. *King & King v. Porter* (Civ. App.) 229 S. W. 646.

13. — **Pleadings reducing amount.**—Where the amount recoverable is reduced by exceptions to the different items of damage alleged to an amount below the jurisdiction of the court, and plaintiff fails to amend the proper judgment is one dismissing the cause for want of jurisdiction and not one which would bar a recovery in a court of competent jurisdiction. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

14. — **Recovery of less than jurisdictional amount.**—In an action by a property owner against a city for damages for the destruction as a nuisance of stables, allegations that the improvements destroyed were worth \$500, and that the rental value of the premises was \$15 a month, and praying \$500 vindictive damages, did not show that the amount of damages sought was below the jurisdiction of the district court, notwithstanding that the jury found the value of the premises to be \$175, and the reasonable rental value \$10 per month. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

16. — **Joining claims.**—Where plaintiff sued in his individual capacity for loss sustained by injuries to his child and as next friend of his child for such injuries, and the suit in his individual capacity, which was a separate and distinct cause of action, was for a sum less than the jurisdictional amount of the court, the suit in such capacity must be dismissed. *Pettus v. Weyel* (Civ. App.) 225 S. W. 191.

17. — **Inclusion of interest.**—In a suit to recover earnest money paid on an optional purchase of realty with interest, interest is part of damages, and must be considered as a part of amount in controversy in determining jurisdiction of district court. *Moser v. Tucker* (Civ. App.) 195 S. W. 259.

Under art. 4977, interest, although prayed for, was not recoverable in suit for damages under contract providing for \$500 liquidated damages for breach, and district court had no jurisdiction, amount in controversy being exactly \$500. *Escue v. Hartley* (Civ. App.) 202 S. W. 159.

20. — **Incidental relief.**—The recovery of damages already sustained through defendants' diversion of waters and discharging them on plaintiff's lands being incidental and the main purpose of plaintiff's suit being for an injunction, the amount of the damages alleged by plaintiff, \$500, should not control the question of jurisdiction, and the district court has jurisdiction to try the case; such case not being within the exclusive jurisdiction of the county court on account of the amount alleged. *Smith v. Kidd* (Civ. App.) 228 S. W. 348.

22. **Contested elections.**—Const. art. 5, § 8, as amended, in 1891, to give district court jurisdiction of contested elections, and arts. 3046-3078, prescribing rules by which contest may be tried, enlarged jurisdiction of district court, and did not limit its original power to try suit for office. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Jurisdiction of district court of contested election can be invoked only by compliance with Rev. St. 1911, arts. 3046-3078, executing Const. art. 5, § 8, conferring on district court jurisdiction of contested elections. *Id.*

Suits by duly elected treasurer of county against two persons, one of whom usurped office and illegally held it for year, when he resigned to make place for other, under appointment from county judge, held suits for an office, of which district court had jurisdiction, though Rev. St. 1911, arts. 3046-3078, was not complied with. *Id.*

Art. 1706. [1099] [1118] Jurisdiction in matters of probate.

Cited, *Mann v. Brown* (Civ. App.) 201 S. W. 438.

Settlement of estates.—The district court has jurisdiction in matters relating to estates of deceased persons, when legal or equitable rights must be adjudicated, and the powers of the county court are inadequate to adjudicate them and administer complete relief. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21; *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

District court has no jurisdiction to partition estate where administration proceedings are pending upon appeal to district court from county court, and questions raised in partition suit could have been raised in administration proceedings. *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969.

Where a suit for partition of property was begun after the death of one owner and before a temporary administrator was appointed for her estate and before application for probate of her will, the district court did not acquire equity jurisdiction to the exclusion of the court of probate, and could not by appointment of a receiver deprive the administrator of control of the property. *Van Grinderbeck v. Lewis* (Civ. App.) 204 S. W. 1042.

Action to determine plaintiffs' interest in property left by testator's grandfather and in the estate of plaintiffs' grandmother in the process of administration, involving title to such property and the question of whether the grandmother's administrator had converted the portion of the estate, and whether grandmother had title to certain property at time of her death, was within jurisdiction of district court, involving equitable rights not determinable by probate court under Const. art. 5, § 16. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

Under arts. 1705, 1706, 1712, and arts. 3206, 3207, prescribing the jurisdiction of the county and district courts in probate matters, it has always been the policy to avoid multiplicity of suits, and when possible to settle in one suit such issues as could not have been settled in the probate court. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Where the administratrix refused to obey an order of the county court to sell real estate to pay an allowed claim because others claimed prior rights in the property, the district court could hear a suit against the administratrix and the adverse claimants, to determine the rights of the parties and to order a sale of the property to be carried out under the direction of the county court, since there was no procedure by which the adverse claimants could be brought before the county court and their claims determined. *Id.*

The jurisdiction of the district court over a suit to cancel a conveyance of land, brought by some of the heirs against those to whom deed was made by the ancestor, is not dependent on proof that there were no debts against the estate. *Kibby v. Kessler* (Civ. App.) 225 S. W. 277.

Wills.—A suit by the heirs of a husband and wife to have a joint will treated as ineffective to dispose of the community property, to set aside a judgment establishing the title of trustees under such will, to annul a separate will of the wife, so far as it bequeathed her residuary estate, and for a partition of the property, was not within the jurisdiction of a federal court, since, assuming that the other relief could be obtained by an independent suit in equity in the state district court, the suit, so far as it sought to annul the will of the wife, was merely supplemental to the proceedings for the probate of the will, and cognizable only by the probate court under the Texas decisions. *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

Appellate Jurisdiction.—District court has appellate jurisdiction only over administration of estates of deceased persons. *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969.

The rule of practice in cases appealed from the county court in matters of probate to the district court is that the latter court has only appellate jurisdiction to revise, declare void, and set aside orders and decrees of the county court; the district court must try the case *de novo*, and no enlargement of the issues as made by the pleadings in the county court will be permitted. *Carr v. Froelich* (Civ. App.) 220 S. W. 137.

An issue must first be made and determined in the court of original jurisdiction before the jurisdiction of the appellate court can attach, and then only by appeal or certiorari. *Minor v. Hall* (Civ. App.) 225 S. W. 784.

Control over minors.—The district court has jurisdiction under Const. art. 5, §§ 8, 16, of a proceeding in habeas corpus to determine question of the custody of a minor, notwithstanding the county court, under arts. 4091 and 4122, had appointed a guardian, who had taken the custody of the minor; for the district court, as a court of equity, had jurisdiction to determine whether the guardian was fulfilling his duty and exercising his authority in a manner conformably to the best interests of the minor. *Anderson v. Cossey* (Civ. App.) 214 S. W. 624.

Arts. 2184–2190, defining the jurisdiction of juvenile courts and prescribing the procedure as to dependent or neglected children, are not in violation of Const. art. 5, § 8, conferring on the district court original jurisdiction over guardians and minors and general jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or Constitution, when considered in connection with section 16, giving the county court a power to appoint guardians of minors. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Control over commissioners' court.—The power given the district court by Const. art. 5, § 8, and this article, to supervise the proceedings of the commissioners' court on opening roads, permitted a full inquiry, on application for injunction to restrain opening a road by an interested landowner, as to the validity of the proceedings; the application for an injunction having the character of a direct attack. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

Under art. 1509, prohibiting payment by county treasurer, except on certificate or warrant from some officer authorized by law to issue it, and art. 2241, subd. 8, empowering and making it the duty of the county commissioners' court to audit and settle all accounts against the county and direct their payment, commissioners' court having refused to allow such an account, the district court, though under Const. art. 5, § 8, having jurisdiction and general supervisory control over the commissioners' court, cannot, by original and direct mandamus proceeding against such treasurer, compel him to pay the claim. *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

Despite Const. art. 5, § 8, under Laws 1918 (4th Called Sess.) c. 44, §§ 21–23, arts. 5584½h et seq., plaintiffs, attacking an order of the commissioners' court of a county creating a levee improvement district, held not entitled on the allegations of their petition to maintain their suit, in so far as it was to annul the report of the commissioners of appraisal assessing damages and benefits. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

Art. 1708. [1101] [1120] To punish contempts.

Cited, *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111.

Acts constituting contempt.—Though relator approached a brother-in-law of a juror summoned on jury for week and sought to have juror corrupted, yet where corruptive matters were never communicated to the juror, who was discharged from service, the district court had no jurisdiction to punish relator for contempt. *Ex parte Kemper*, 86 Cr. R. 251, 216 S. W. 172.

Proceedings to punish.—To hold one adjudged in contempt in custody, valid and entered order or judgment, and commitment issued thereon, are necessary, and, in absence of commitment, any restraint is illegal. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

Contempt proceeding for compensation to plaintiff by assessment against defendant and award to plaintiff of the damages sustained by him through defendant's removal of a fence on plaintiff's land after time limited by judgment for plaintiff in his action to recover the land, was a proceeding of a civil nature; but in so far as the proceeding was to punish defendant by fine and imprisonment, in addition to forcing payment of damages, it was punitive and criminal. *Beverly v. Roberts* (Civ. App.) 215 S. W. 975.

Punishment.—A prosecution of defendant for contempt of court by removing a fence on plaintiff's land after the time limited in the judgment in plaintiff's action for the land did not warrant a civil judgment against defendant in redress of injuries to plaintiff resulting from the removal of the fence, a remedy which could be obtained only in a civil suit. *Beverly v. Roberts* (Civ. App.) 215 S. W. 975.

Art. 1712. [1106] [1122] To hear and determine all cases of legal or equitable cognizance.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664; *Kountze v. Cargill* (Civ. App.) 22 S. W. 227; *Stewart v. Patterson* (Civ. App.) 204 S. W. 768.

In general.—Contractor's bankruptcy does not deprive state district court of jurisdiction to distribute funds in owner's hands among mechanic's lien claimants and subcontractors. *Gordon-Jones Const. Co. v. Welder* (Civ. App.) 201 S. W. 681.

A state court was not precluded from jurisdiction for the judicial sale of property, where its judgment was undisturbed by any appropriate action of the bankruptcy court, in which an involuntary petition was filed by judgment debtor's creditors, by taking actual possession of bankrupt's estate, or enjoining execution or sale, or even a suggestion or motion to stay, made in the state court. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

The remedy of specific performance is purely an equitable proceeding entirely different from any kind of relief known to and granted by the law, and belongs exclusively to the jurisdiction of courts of equity. *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

Where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

When a court of competent jurisdiction has obtained jurisdiction of a cause, such jurisdiction cannot be ousted by a proceeding as to the same cause subsequently instituted in a court of concurrent jurisdiction. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

In cases of transfers of property by a bankrupt within 4 months before the filing of the petition in bankruptcy, any state court, which would have jurisdiction, if bankruptcy had not intervened, can set aside the transfer. *Koger v. Clark* (Civ. App.) 216 S. W. 434.

The exercise by district court of equity jurisdiction to protect the rights of parties in other courts is not an encroachment upon the jurisdiction of the other courts, even when it prevents such courts from proceeding with the trial of cases within their jurisdiction. *Houston Heights Water & Light Ass'n v. Gerlach* (Civ. App.) 216 S. W. 634.

Under arts. 1705, 1706, 1712, prescribing the jurisdiction of the district court, and arts. 3206, 3207, prescribing the jurisdiction of the county and district courts in probate matters, it has always been the policy to avoid multiplicity of suits, and when possible to settle in one suit such issues as could not have been settled in the probate court. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

When a court of equity has obtained jurisdiction of a bill for rescission, and a decree in accordance with the prayer is warranted, it will retain jurisdiction for the purpose of all the rights and claims of the parties growing out of the transaction complained of so as to do complete equity and leave nothing for future litigation which it can dispose of in the exercise of its equitable powers upon the parties before it. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

Where plaintiff and defendant had the exclusive right to use a patented process, and by contract divided their territory between themselves, a suit by plaintiff to enjoin defendant from using an unpatented improvement on such process in the territory allotted to plaintiff did not arise under the patent laws, but involved only a breach of contract and was within the jurisdiction of a state court. *Southland Sweet Potato Curing & Storage Ass'n v. Beck* (Civ. App.) 221 S. W. 656.

Equity having the parties, the subject-matter, and the facts before it, will adjudge, in consonance with the rules of equity, the rights of the parties arising on the pleadings and the facts. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

Courts of concurrent jurisdiction.—Where parties to state proceedings against a railway company were different from parties in a federal suit involving same subject-matter, doctrine of comity between courts was inapplicable. *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

Federal court which appointed receiver held not to have exclusive jurisdiction over suit to enjoin railroad company from removing division headquarters from a town at which they were established pursuant to contract made by receiver. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Reservation of jurisdiction in decree of federal court, wherein validity and priority of claims on principles of equity were determined, held not to preclude state court from passing on claim under art. 6625, against property sold by receiver. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Federal court whose receiver has taken possession of railroad company's property held to have exclusive jurisdiction, and to be entitled to retain jurisdiction over property after it has been sold and delivered by receiver. *Id.*

District court of one county has no jurisdiction of suit and to compel receiver of irrigation company to supply water upon terms other than those imposed by order of district court of another county appointing receiver, and to have such terms declared unreasonable, and to enjoin enforcement thereof, since an order granting such relief would constitute an interference with the possession, control, and management of the receivers appointed by another court. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Non-resident parties.—District court has no jurisdiction to enjoin sale of non-resident's property pursuant to valid justice court judgment upon ground that property was exempt from execution. *Mann v. Brown* (Civ. App.) 201 S. W. 438.

Causes of action arising outside of state.—It is only by virtue of the principle of comity that the plaintiff can ask the courts of Texas to enforce a transitory action which occurred in Arkansas. *Western Union Telegraph Co. v. Epley* (Civ. App.) 218 S. W. 528.

A passenger's action for money stolen from his suit case while riding in a Pullman car is transitory, and maintainable wherever a court may be found having jurisdiction of the parties and the subject-matter. *Pullman Co. v. Uribe* (Civ. App.) 225 S. W. 189.

Where the necessary parties are before a court of equity, it is immaterial that the subject of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal, since it can compel the defendant to do according to the *lex loci rei sitæ* all he could do voluntarily to give full effect to the decree against him. *Roberts v. Stewart Farm Mortgage Co.* (Civ. App.) 226 S. W. 1108.

— **Actions concerning chattels.**—A suit to recover minerals unlawfully severed and converted in another state or the value of such minerals, where the petition is an independent cause of action for conversion distinct from that for trespass to the land, will lie in this state, and this right is not abridged or destroyed because it may be necessary to allege and prove right of possession. *Copper State Mining Co. v. Kelvin Lumber & Supply Co.* (Sup.) 227 S. W. 938; reversing *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68. See, also, *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

— **Actions affecting lands outside of state.**—The courts have no power to cancel a deed for land in another state or a foreign country. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

Instrument purporting to convey right of entry upon lands in Republic of Mexico for purpose of severing guayule from soil, etc., purported to give an interest in land in Mexico, and courts of Texas would have no jurisdiction to decree cancellation, either under laws of Texas or under Statutes of the State of Coahuila, Republic of Mexico, arts. 6844, 1327 (book 3). *Id.*

— **Effect of foreign laws.**—Penal statutes authorizing recovery of penalty imposed at suit of private individual have no extraterritorial effect, and cannot be made the basis of a suit in another state. *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 201 S. W. 1072.

In servant's action for injuries, due to violation of federal Safety Appliance Act of March 2, 1893, the master's liability was enforceable in the courts of Texas, without reference to the laws of Louisiana, in which state the tort occurred. *Texas & P. Ry. Co. v. Sprole* (Civ. App.) 202 S. W. 985.

The statutes of a state have no effect beyond its own limits. *Western Union Telegraph Co. v. Epley* (Civ. App.) 218 S. W. 528.

Laws of the state are not subordinate to the laws of another state touching property lawfully within its jurisdiction, and the enforcement of its laws against the deposit of a foreign corporation, and refusal to give up the deposit to the authorities of another state, would not violate the full faith and credit clause of the federal Constitution. *Phillips v. Perue* (Sup.) 229 S. W. 849.

Interstate commerce—Interstate shipments.—The district court has jurisdiction of a suit to recover excessive freight charges and demurrage paid under protest, though the initial jurisdiction is with the Interstate Commerce Commission to fix and establish rules and rates; the suit being to recover charges demanded and paid in violation of the Interstate Commerce Commission's rule fixing demurrage charges and freight rates, and not to assail the rule as unreasonable. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

Waiver or consent.—Jurisdiction over subject-matter cannot be conferred by agreement or estoppel. *Burcum v. Gaston* (Civ. App.) 196 S. W. 257.

Art. 1713. [1107] [1123] To grant all remedial writs.

See *Stewart v. Patterson* (Civ. App.) 204 S. W. 768; *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1714. Judge may exercise all powers, etc., in vacation, by consent of parties, except, etc.

See *Miller v. Brown* (Civ. App.) 216 S. W. 452.

Cited, *Cain v. Lumsden* (Civ. App.) 204 S. W. 115. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Exercise of power in vacation.—Where a judge in vacation set down habeas corpus proceedings for hearing the respondents, who filed a plea of privilege to be sued in their own county, could not, by mandamus, compel the judge to hear and pass upon their plea when he preferred to continue the cause until term time. *Lucid v. McDowell* (Civ. App.) 206 S. W. 203.

In a suit for a permanent mandatory injunction to abate a nuisance, an order entered in vacation, denying a temporary injunction, is not *res judicata* on final hearing; this article being inapplicable, as actions of this kind are controlled by the injunction statutes. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

This article, excepting divorce cases from those triable in vacation, does not prevent divorce cases from being tried at special term under art. 1720. *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Right of appeal.—Where the district court, in term time, entered an order postponing the hearing on a motion to substitute receivers to a day certain beyond the term in another county, a provision in the order that the hearing should be had and considered as in term time did not operate to make the decision of the motion a judgment of the court from which an appeal would lie; arts. 1714, 1726, not being applicable. *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

Art. 1715. [1108] [1124] May alternate, etc.

Presiding in other districts.—This article gives a district judge authority to hear a habeas corpus case for, and at the request of, the judge of another district, who has absented himself from the district after issuing the writ. *Ex parte Angus*, 28 Tex. App. 293, 12 S. W. 1099.

CHAPTER FOUR

THE TERMS OF THE DISTRICT COURT

Art.	Art.
1718. Terms of court.	1725. Adjournment of term, when and how made.
1720. Special terms may be held, when; time; jury commissioners; grand and petit juries, etc.	1726. Extension of term of court, when, etc., effect as to term in another county.
1723. No new civil cases to be brought to special term.	

Article 1718. [1111] [1127] Terms of court.

Unauthorized terms.—All proceedings of a district court at a time when the holding of such court is unauthorized by law are null and void. *Trabue v. Ash* (Civ. App.) 200 S. W. 415.

Art. 1720. Special terms may be held when; time; jury commissioners; grand and petit juries, etc.

Authority of judge to call special term.—The length of a special term of court may be longer than that authorized for a regular term, in the discretion of the judge. *Trabue v. Ash* (Civ. App.) 200 S. W. 415.

Mandamus will not lie to compel the district judge to hold a special term of court under this article, since the statute clearly leaves the matter of calling such sessions to the discretion of the district judge. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Matters which may be considered.—Indictment for murder, found at special term of court called by judge without giving 30 days' notice prior to time court was held, was valid. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

Art. 1714, excepting divorce cases from those which may be tried in vacation, does not prevent divorce cases from being tried at special term under this article. *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Art. 1723. [1117] No new civil cases to be brought to special term.

Cited, *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Art. 1725. [1119] [1128] Adjournment of term, when and how made.

Failure of judge to appear.—Where the district judge appeared at 11:30 a. m. on the fourth day, he was authorized to proceed to hold court. *Texas Mex. Ry. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77.

Art. 1726. Extension of term of court when, etc., effect as to term in another county.

Validity and construction in general.—An indictment found during the extension of the term was not void because not found during or returned in a court in session. Ex parte McKay, 82 Cr. R. 221, 199 S. W. 637.

While an order entered on minutes may not have been necessary to extend a regular term of district court under Acts 34th Leg. c. 139, such order did not destroy power existing under such statute or bring extension within Rev. St. 1911, art. 1726, authorizing extension on different grounds and requiring an order. Alexander v. State, 84 Cr. R. 75, 204 S. W. 644.

This article authorizes, not the calling of a new, distinct or independent term, but merely the continuance of same term, so that during period of extension court necessarily possesses the same power as during original term. Gulf, C. & S. F. Ry. Co. v. Muse, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

Where court extended term "until the conclusion of said pending trial," an order made before entry of final judgment vacating order granting a new trial was rendered during such extended term; the granting of such motion before entry of final judgment being part of the trial. Id.

Where the district court, in term time, entered an order postponing the hearing on a motion to substitute receivers to a day certain beyond the term in another county, a provision in the order that the hearing should be had and considered as in term time did not operate to make the decision of the motion a judgment of the court from which an appeal would lie; arts. 1714, 1726, not being applicable. American Nat. Ins. Co. v. Valley Reservoir & Canal Co. (Civ. App.) 209 S. W. 438.

CHAPTER FIVE

MISCELLANEOUS PROVISIONS RELATING TO THE DISTRICT COURT

Art. 1727. Minutes to be read and signed.	Art. 1729. Seal of the court.
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Article 1727. [1120] [1129] Minutes to be read and signed.

Cited, Rust v. State, 31 Cr. R. 75, 19 S. W. 763.

Art. 1729. [1122] [1131] Seal of the court.

Cited, Guerra v. Guerra (Civ. App.) 213 S. W. 360.

TITLE 35

COURTS—COUNTY

- Chap.
 1. The county judge.
 2. The clerk of the county court.
 3. The powers and jurisdiction of the county court and of the judge thereof.

- Chap.
 4. The terms of the county court for civil and probate business.

CHAPTER ONE

THE COUNTY JUDGE

- Art.
 1736. Disqualification, causes of.

- Art.
 1737. Special county judge appointed by parties.

Article 1736. [1129] [1138] Disqualification; causes of.

Relationship to party.—A judge who is the brother-in-law of a stockholder and president of a corporation is not disqualified to try an action to which such corporation is a party. *Lewis v. Hillsboro Roller-Mill Co.* (Civ. App.) 23 S. W. 338.

Relationship to surety.—A surety on an appeal bond is a "party" to an action, but in an action for damages for wrongful sequestration, judgment in original proceeding will not be held void on ground of disqualification of county judge because of relationship with surety on appeal bond. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

Art. 1737. [1130] Special county judge may be appointed by parties.

Right to appoint.—The amended judiciary article of the constitution, providing that "when the judge of the county court is disqualified in any case pending in the county court the parties interested may by consent appoint a proper person to try said case, or upon their failing to do so, a competent person may be appointed * * * in such manner as may be prescribed by law," does not require legislation to put in force that part which authorizes appointment by consent, and such appointment may be made, instead of transferring the case to the district court. *Parker County v. Jackson*, 5 Civ. App. 36, 23 S. W. 924.

CHAPTER TWO

THE CLERK OF THE COUNTY COURT

- Art.
 1745. Clerk pro tem. appointed when.
 1748. May appoint deputies.

- Art.
 1749. Oath and powers of deputies.
 1752. Issue marriage licenses and take oaths, depositions, etc.

Article 1745. [1135] County clerk pro tem. appointed, when.

Construction and operation.—Where the clerk of the county court is one of the defendants, and files the petition and issues the citation, the latter should be set aside on motion of his co-defendant, though the clerk has entered into a stipulation that no advantage will be taken of the failure to appoint a clerk pro tem. *Lewis v. Hutchison* (App.) 16 S. W. 654.

Art. 1748. [1138] [1145] May appoint deputies.

See *Jones v. MacCorquodale* (Civ. App.) 218 S. W. 59, 62; *Same v. Maes* (Civ. App.) 218 S. W. 62.

Art. 1749. [1139] [1146] Oath and power of deputies.

Powers of deputies.—A sheriff's return in the matter of a school district bond election, bearing the jurat of the county clerk by his deputy, was authorized by this article. *Mayhew v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 943. As, the county clerk's deputies "shall act in the name of their principal and may

do and perform all such official acts as" the clerk may perform, where, in proceedings to lay out a public highway, the notices issued, the appointment of the jury of view, and oaths of such jury were signed, sworn, and certified in the form, "B., Co. Clerk, by V., Deputy," they were in proper legal form. *Culp v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 944.

Under arts. 1748, 1749, the division of the clerk's office into departments, with a deputy over each in charge of particular business, does not limit the authority of any deputy, or prevent him from performing all such official acts as the clerk might perform. *Jones v. MacCorquodale* (Civ. App.) 218 S. W. 59, 62; *Same v. Maes* (Civ. App.) 218 S. W. 62.

Art. 1752. [1142] [1149] Issue marriage licenses, and take oaths, depositions, etc.

Cited, *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880.

CHAPTER THREE

THE POWERS AND JURISDICTION OF THE COUNTY COURT AND OF THE JUDGE THEREOF

Art.	Art.
1763. Exclusive original jurisdiction.	1767. Appellate jurisdiction.
1764. Concurrent original jurisdiction.	1771. Both law and equity powers.
1766. Jurisdiction denied in certain cases.	1772. To grant remedial writs.

Article 1763. [1154] [1161] Exclusive original jurisdiction.

See *Sutton v. English*, 246 U. S. 193, 38 Sup. Ct. 254, 62 L. Ed. 664.

Cited, *Mann v. Brown* (Civ. App.) 201 S. W. 438.

Nature and Incidents of jurisdiction in general.—County court has power to foreclose an attachment lien. *Bracht v. Adamson* (Civ. App.) 211 S. W. 624.

Requisite amount or value in controversy.—Action in the county court will be dismissed for want of jurisdiction; the petition, though to recover \$500, on its face disclosing that no more than \$70 can be recovered. *Youngblood v. Independent Order of Puritans* (Civ. App.) 197 S. W. 1116.

The district court is without jurisdiction of an action for conversion, based on seizure of property under an invalid execution, for exemplary damages in sum of \$50, and for an injunction restraining sale, as the amount involved is within the exclusive jurisdiction of the county court. *Ramsel v. Miller* (Civ. App.) 202 S. W. 1050.

— **Set off or counterclaim.**—In an action in the county court for water rent, a cross-action for damages for flooding of corn, placing the value of the corn destroyed at \$400, was not a fraud on the court, where it was filed and the value fixed in good faith by defendant's counsel, although the real value of the crop was \$1,128.75. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

— **Injunction.**—Since art. 4643, subd. 2, gives county court jurisdiction to enjoin party to pending suit from doing some act as to the subject-matter which would render the judgment ineffectual, defendant, enjoined by county judge from threatened sale of \$200 automobile replevied, could not urge lack of jurisdiction because of the amount. *Sweeney v. Alderete* (Civ. App.) 196 S. W. 367.

Under Const. art. 5, § 16, county court has jurisdiction to enjoin injury threatened to property alleged to be \$400. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

— **Pleading.**—The value of the property in action to foreclose chattel mortgage being alleged in good faith, as found by the court, at an amount giving the county court jurisdiction, it is immaterial that the evidence on the trial showed it to be less. *Hunter v. Marlin Nat. Bank* (Civ. App.) 195 S. W. 882.

In absence of any proof of fraud as to jurisdiction, averments in petition as to amount involved will establish jurisdiction of court. *Jackson v. Sere* (Civ. App.) 193 S. W. 604.

Where jury found that plaintiff had falsely stated his damages for killing of dogs at such sum as to give jurisdiction to county court, court was without jurisdiction, and proper judgment entry was one of dismissal, and not for defendants on merits. *Stone v. Bare* (Civ. App.) 193 S. W. 1102.

Where allegations of petition show an amount in controversy sufficient to give court jurisdiction, and the allegations are not attacked as fraudulent, the court has jurisdiction to give judgment or change venue. *San Antonio Drug Co. v. Red Cross Pharmacy* (Civ. App.) 199 S. W. 324.

Where it appears from face of petition for injunction in county court that such court had no jurisdiction over subject-matter of suit, Court of Civil Appeals has no jurisdiction over appeal from judgment of county court. *Luhning v. Scott* (Civ. App.) 201 S. W. 663.

Petition in suit on notes and for foreclosure of chattel mortgage disclosing sum sued for is less than \$200, and containing no allegation of value of mortgaged property.

does not affirmatively allege facts showing county court has jurisdiction. *Watts v. Stewart* (Civ. App.) 201 S. W. 1061.

Where, in one count of petition, plaintiff sued for \$150 as the value of a house, and in another count alleged house to be worth \$250, and sued for that amount in conversion, the petition, on its face, did not show that less than \$200 was involved, and was sufficient to give jurisdiction to county court. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

In a petition in the county court for foreclosure of a mortgage on an automobile, an allegation that both parties agreed to a sale of the car for \$450 and that plaintiff was damaged in the sum of \$300 is insufficient to show the value of the automobile, on which the jurisdiction of the county court depended. *Hodgkinson v. Hartwell* (Civ. App.) 226 S. W. 457.

— **Amount claimed or value of property.**—The jurisdiction of the county court over a suit to foreclose a chattel mortgage is determined by the value of the mortgaged property, and not by the amount of the debt secured thereby. *Hodgkinson v. Hartwell* (Civ. App.) 226 S. W. 457; *Hunter v. Marlin Nat. Bank* (Civ. App.) 195 S. W. 582; *Jackson v. Sere* (Civ. App.) 198 S. W. 664; *Houston Harbor Sales Co. v. Levand* (Civ. App.) 206 S. W. 379.

Where petition seeking foreclosure of chattel mortgage alleged that a third person set up some claim to the property, the value of the property, and not the debt due from mortgagor to mortgagee, was the amount in controversy, and if such value was not alleged, the petition did not affirmatively show jurisdiction as to the third person. *People's Ice Co. v. Phariss* (Civ. App.) 203 S. W. 66.

The amount of plaintiff's demand at the time of filing suit fixes the jurisdiction of the court, in the absence of fraudulent intent in making the allegation. *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

In proceeding in district court of Robertson county under Acts 35th Leg. c. 96, § 14, where the return did not show the value of property levied on, which plaintiff was claiming, but the sheriff made an indorsement upon the replevy bond given by plaintiff, stating that he assessed the value of the property at \$222.50, and it was agreed that such was its value, court properly overruled a motion to dismiss, on the ground that the value of the property in controversy was less than \$200. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

Under Const. art. 5, §§ 16, 22, and art. 6882, the county court had jurisdiction over an appeal of landowner, whose land was taken for road purposes, from the award of the commissioners' court of \$150 damages, though the appellant claimed \$2,830 as the value of the land taken. *Leathers v. Leon County* (Civ. App.) 228 S. W. 658.

— **Principal, interest and attorney's fees.**—Where petition is doubtful as to recovery of \$185 principal and interest thereon, together with 10 per cent. attorney's fees, which sufficed to make the amount in controversy in excess of \$200, the amount is within the jurisdiction of the county court. *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192.

Action for \$500 due on stock subscription contract and for 6 per cent. interest thereon due under art. 4977, no specified rate having been agreed on, held not within jurisdiction of district court, being within exclusive jurisdiction of county court under Const. art. 5, § 16, giving a county court exclusive original jurisdiction in civil cases when amount in controversy exceeds \$200 and does not exceed \$500 "exclusive of interest"; the 6 per cent. interest sued for being "interest" within such constitutional provision and not damages. *Nueces Hotel Co. v. Ring* (Civ. App.) 217 S. W. 255.

Objections to jurisdiction.—To establish plea in abatement that plaintiff laid his damages excessively so as to confer jurisdiction, evidence must show not only that property was of value less than jurisdictional amount, but that value laid was for fraudulent purpose of conferring jurisdiction. *Stone v. Bare* (Civ. App.) 198 S. W. 1102.

Art. 1764. [1155] [1162] Concurrent original jurisdiction.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

Amount or value in controversy.—County court has no jurisdiction to issue writ of injunction, except where amount in controversy exceeds \$200, and does not exceed \$1,000, in value, exclusive of interest. *Luhning v. Scott* (Civ. App.) 201 S. W. 663.

If petition of deceased's son claiming personal property mortgaged by deceased be treated as a suit against administrator for recovery of property, county court had no jurisdiction, alleged value of property being in excess of \$1,000. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

A cause of action for \$32.35 as actual damages and \$1,000 as exemplary damages was not within the jurisdiction of the county court. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

— **Principal, interest and attorney's fees.**—Where petition is doubtful as to when interest sought is to begin, it will be construed to begin when the judgment was rendered, where, if it began before such time, the court would not have had jurisdiction on account of amount involved. *Magnolia Cotton Oil Co. v. Martin* (Civ. App.) 201 S. W. 190.

Language of Const. art. 5, § 16, providing that county court shall have concurrent jurisdiction with district court when matter in controversy shall not exceed \$1,000, "exclusive of interest," applies only where interest is expressly given by statute, and county court had no jurisdiction of suit by subscribers to corporate stock on defendant's agreement to take stock off their hands after year if not satisfied; interest in

addition to \$1,000 prayed for by plaintiffs being merely damages, and contract not coming within art. 4979. *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

In action in county court for breach of implied warranty of seeds, a complaint alleging that if the seed had been as represented plaintiff would have produced five tons of broomcorn on his land, worth \$200 a ton over and above all expenses of raising and harvesting, was not bad as in excess of jurisdiction of the county court; plaintiff not asking for judgment in excess of \$1,000 and not asking for interest in any form. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

— **Pleading.**—In the absence of allegation of fraudulent attempt to confer jurisdiction on the county court, finding that cotton destroyed was of value of \$1,500 did not deprive the court of authority to render judgment for the amount claimed in the petition, which was within its jurisdiction. *New Fenfield Townsite Co. v. King* (Civ. App.) 204 S. W. 788.

To render a complaint bad as asking recovery in excess of the court's jurisdiction, it must affirmatively appear that plaintiff sues for an amount in excess of the jurisdiction, and a prayer for general relief will be confined to that which the court has jurisdiction to grant. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

The county court being a court of limited jurisdiction, it must affirmatively appear that the amount sued for is within the jurisdiction of the court, and defendant's general demurrer should have been sustained in an action by a piano company asking for judgment on promissory notes aggregating \$300 and to foreclose a chattel mortgage lien on a piano given to secure the payment of the note, where the value of the piano was not stated by plaintiff in his petition. *Tant v. Baldwin Piano Co.* (Civ. App.) 217 S. W. 239.

The question whether the county court has jurisdiction of a civil action must be determined by the pleadings, and where defendant in action to foreclose a mortgage on an automobile desired to challenge jurisdiction of the county court on ground that automobile was of a value exceeding \$1,000, he must do so by plea in abatement, charging that the value of the mortgaged property had been falsely and fraudulently represented to be less than it really was, in order to confer jurisdiction on the county court; and where no such plea was offered, the case cannot be dismissed on evidence that the automobile was of a value exceeding \$1,000. *Moon Automobile Co. v. Avery* (Civ. App.) 219 S. W. 511.

Under Const. art. 5, § 16, the county court has no jurisdiction of causes where the matter in controversy exceeds \$1,000, exclusive of interest, the matter in controversy not being the amount prayed for or the amount stated generally in the petition, where the items going to make up the total value of damages are specifically stated, and the aggregate sum differs from the amount prayed for or stated generally, the total of the items specifically set out comprising the "matter in controversy" in case of such conflict. *Gulf, C. & S. F. Ry. Co. v. Hamrick* (Civ. App.) 231 S. W. 166.

Art. 1766. [1157] [1164] Jurisdiction denied in certain cases.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

Involving title to land.—Where title to a house on land conveyed by warranty deed is reserved by parol, a court having jurisdiction will reform deed to include reservation, but such jurisdiction is in the district court, and not in the county court. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

The county court has no jurisdiction of an action to recover or partition real property. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

Where land had been fraudulently conveyed away from a decedent's estate, only the district court could grant adequate relief. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

The county court had jurisdiction of suit by the vendee of a lot to recover from the vendor money paid by her on account of the vendor's breach in failing to deliver a certain gold bond as agreed when 24 monthly payments had been made; nothing in the vendee's pleadings involving title to the lot, and in protection of the vendor's right the court not being required to enter any order involving title. *Harris County Inv. Co. v. Davis* (Civ. App.) 230 S. W. 761.

Art. 1767. [1158] [1165] Appellate jurisdiction.

Appellate jurisdiction—Amount in controversy.—On the recovery of claims against railroad companies, the attorney's fee is part of the matter in controversy, and not costs, within Const. art. 5, § 16; giving the county court appellate jurisdiction of cases from justice courts when the judgment appealed from or the amount in controversy exceeds \$20, exclusive of costs. *Gulf, C. & S. F. Ry. Co. v. Werchan*, 3 Civ. App. 478, 23 S. W. 30.

Art. 1771. [1162] [1169] Both law and equity powers.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

Art. 1772. [1163] [1170] To grant remedial writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER FOUR

THE TERMS OF THE COUNTY COURT FOR CIVIL AND PROBATE BUSINESS

Art.

1776. Terms of the county court.
1777. Commissioners' court may fix.

Art.

1778. Adjournment of term when the county judge fails to appear.

Article 1776. [1167] Terms of the county court.

Terms for civil and criminal business.—Loc. & Sp. Acts 32d Leg. c. 104, creating the county court of Galveston county at law, and section 4, providing that the terms shall be held "as now established for the terms of the county court of Galveston county until the same terms may be changed by the commissioners' court," expressly adopts the provision made by the commissioners' court prior thereto fixing the terms and duration of terms of county court of Galveston county so as to permit each term of the newly created court to remain in session until the time for the succeeding term to begin, and the different terms of court do not expire by operation of law within three weeks by reason of this article. *Ex parte Miller*, 85 Cr. R. 263, 211 S. W. 451.

Art. 1777. [1168] Commissioners' court may fix.

End of term for civil and probate business.—The order of the commissioners' court of Galveston county made August 7, 1911, to the effect that the terms of the county court of Galveston county at law "are hereby changed, and that hereafter the terms of said court be and are fixed as follows: The terms of said court shall begin on the first Monday, etc., until otherwise ordered by this court," purports to change only the part of the previous order fixing the term of the county court which refers to the number of terms and the dates on which they begin, and does not annul the part permitting a term to continue until the disposition of all of its business. *Ex parte Miller*, 85 Cr. R. 263, 211 S. W. 451.

Art. 1778. [1169] Adjournment of term when county judge fails to appear.

Absence of judge.—Where the county judge was not present the first three days of a term of court, but appeared on the morning of the fourth day, opened his court, and proceeded to do business, this article was sufficiently complied with. *Moore v. State*, 87 Cr. R. 24, 218 S. W. 1059.

TITLE 36

COURTS—COUNTY, AT LAW, ETC.

Chap.

1. County Court of Dallas-County, at Law.
2. County Court of Tarrant County for Civil Cases.
4. County Court of Bexar County for Civil Cases.
5. County Court of Castro County.
6. County Court of Deaf Smith, Farmer, Randall (Castro), and Lubbock Counties, and the Unorganized Counties of Bailey and Lamb.
7. County Court at Law of Harris County, Texas.
8. County Court of Harrison County.

Chap.

9. County Court of Jasper County.
11. County Court of Oldham County.
13. County Court of Wheeler County.
14. County Court of Zapata County.
15. County Court of Jefferson County at Law.
16. El Paso County Court at Law.
17. County Court of Eastland County at Law.
18. County Court of Tarrant County at Law.
19. County Court of Wichita County at Law.

CHAPTER ONE

COUNTY COURT OF DALLAS COUNTY, AT LAW

Art.

1787. Jurisdiction of said court.
1788. Jurisdiction retained by county court of Dallas County.

Art.

1793. May issue writs.
1798b. Jurisdiction.

Article 1787. Jurisdiction of said court.

Cited, *Ex parte Fowler*, 85 Cr. R. 436, 213 S. W. 271. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1788. Jurisdiction retained by county court of Dallas county.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1793. May issue writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1798b. Jurisdiction.

Jurisdiction.—The county court of Dallas county at law, No. 2, has jurisdiction to render judgment as a juvenile court. *Ex parte Fowler*, 85 Cr. R. 436, 213 S. W. 271.

CHAPTER TWO

COUNTY COURT OF TARRANT COUNTY FOR CIVIL CASES

Art.

1799. Creation of county court of Tarrant county for civil cases.
1800. Jurisdiction of said court.

Art.

1802. Both courts may issue writs.
1804. Judge to be elected, when, etc.
1810. Removal of judge.

Article 1799. Creation of county court of Tarrant county for civil cases.

Construction of act in general.—Office of judge of county court of Tarrant county for civil cases is a county, and not a state or district, office, whose confirmation by senate was not necessary to validity of his appointment. *State v. Valentine* (Civ. App.) 193 S. W. 1006.

Art. 1800. Jurisdiction of said court.

Citing in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1802. Both courts may issue writs.

Citing in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1804. Judge to be elected, when, etc.

Validity.—The provision of this article that all vacancies in the office of judge of county court for civil cases in Tarrant county shall be filled by Governor, etc., conflicts with Const. art. 4, § 12, relating to filling of vacancies in state or district offices, and art. 5, § 28, relating to filling of vacancies in the office of county judges. *State v. Valentine* (Civ. App.) 198 S. W. 1006.

Art. 1810. Removal of judge.

Cited, *State v. Valentine* (Civ. App.) 198 S. W. 1006.

CHAPTER FOUR
COUNTY COURT OF BEXAR COUNTY FOR CIVIL CASES**Article 1811—9. Both courts may issue writs.**

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER FIVE
COUNTY COURT OF CASTRO COUNTY

Art.
1811—19. Jurisdiction of court.

Art.
1811—21. May issue writs.

Article 1811—19. Jurisdiction of court.

Validity.—This act violates Const. art. 3, § 35, requiring the subject of an act to be stated in the title, in that it is entitled an act to establish a county court, whereas in effect it creates a municipal court, in view of Supp. 1918, arts. 1788-1811. *De Silvia v. State* (Cr. App.) 229 S. W. 542.

Art. 1811—21. May issue writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER SIX
**COUNTY COURT OF DEAF SMITH, PARMER, RANDALL,
(CASTRO) AND LUBBOCK COUNTIES AND THE UN-
ORGANIZED COUNTIES OF BAILEY AND LAMB****Article 1811—30. Jurisdiction of court.**

See *San Antonio Drug Co. v. Red Cross Pharmacy* (Civ. App.) 199 S. W. 324.

CHAPTER SEVEN
COUNTY COURT AT LAW OF HARRIS COUNTY, TEXAS

Art.
1811—38. Jurisdiction of said court.
1811—40. Jurisdiction retained by county
court of Harris county.

Art.
1811—50. Salary of county judge of Harris
county.

Article 1811—38. Jurisdiction of said court.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1811—40. Jurisdiction retained by county court of Harris county.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 1811—50. Salary of county judge of Harris county.

Validity.—This article held local special law, regulating the affairs of the county, and invalid under Const. art. 3, § 56, as to a matter which could be regulated by a general law. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Repeal.—Art. 3893, enacted after the act to create the county court at law of Harris county, and declaring that the commissioners' court is debarred from allowing compensation to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for, repealed the provision of the act creating the county court, which allowed the commissioners to fix ex officio compensation for the county judge. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

CHAPTER EIGHT

COUNTY COURT OF HARRISON COUNTY

Art. 1811—54. Jurisdiction of county court of Harrison county.	Art. 1811—55. Jurisdiction in civil cases. 1811—59. May grant writs.
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Article 1811—54. Jurisdiction of county court of Harrison county.

Transfer of jurisdiction.—In view of art. 268, as to enforcing attachment, in action involving \$490, commenced, with levy of attachment, in district court of Harrison county, after this article conferred such jurisdiction, judgment entered in that court after Acts 33d Leg. c. 53, retransferring jurisdiction to county court, was void. *Jackson v. Lancaster* (Civ. App.) 199 S. W. 1179.

Art. 1811—55. Jurisdiction in civil cases.

Transfer of jurisdiction.—In view of art. 268, as to enforcing attachment, in action involving \$490, commenced, with levy of attachment, in district court of Harrison county, after Acts 32d Leg. c. 54, conferred such jurisdiction, judgment entered in that court after this act, retransferring jurisdiction to county court, was void. *Jackson v. Lancaster* (Civ. App.) 199 S. W. 1179.

Art. 1811—59. May grant writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER NINE

COUNTY COURT OF JASPER COUNTY

Article 1811—67. May grant writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER ELEVEN

COUNTY COURT OF OLDHAM COUNTY

Article 1811—83. May grant writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER THIRTEEN

COUNTY COURT OF WHEELER COUNTY

Article 1811—99. May grant writs.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER FOURTEEN

COUNTY COURT OF ZAPATA COUNTY

Article 1811—110. Power to grant writs, etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER FIFTEEN

COUNTY COURT OF JEFFERSON COUNTY AT LAW

Art.

- 1811—119. Court created.
 1811—120. Jurisdiction.
 1811—121. Jurisdiction of other courts.
 1811—122. Terms of court.
 1811—123. Election of judge; tenure; qualifications.
 1811—124. Continuance of judge.
 1811—125. Disqualification of judge.
 1811—126. Issuance of writs.
 1811—127. Clerk, seal, and sheriff.

Art.

- 1811—128. Selection of jurors.
 1811—129. Vacancy in office of judge.
 1811—130. Salary of judge; fees collected and accounted for.
 1811—131. Appeals from lower courts.
 1811—132. Fees of county judge.
 1811—132a. Special judge; election; compensation.
 1811—132b. Act not repealed.

Article 1811—119. Court created.

See *Victor v. State*, 86 Cr. R. 462, 217 S. W. 698.

Art. 1811—120. Jurisdiction.—The County Court of Jefferson County at Law shall have jurisdiction in all matters and cases, civil and criminal, original and appellate, over which by the general laws of the State the County Court of said County would have jurisdiction, except as hereinafter provided in Section 3 of this Act [Art. 1811—121], and all cases pending in the County Court of said County other than probate matters such as are provided in Section 3 of this Act shall be and the same are hereby transferred to the County Court of Jefferson County at Law, and all writs and process, civil and criminal, heretofore issued by or out of said County Court, other than those pertaining to matters which are hereby exempt by this Act that are to remain in the County Court of Jefferson County, shall be and the same are thereby made returnable to the County Court of Jefferson County at Law. The jurisdiction of the County Court of Jefferson County at Law, and to the Judge thereof, shall extend to all matters of eminent domain of which jurisdiction as heretofore vested in the County Court or in the County Judge; but this provision shall not affect the jurisdiction of the Commissioners Court or the County Judge of Jefferson County as the presiding officer of said Commissioners Court as to roads, bridges and public highways, or matters of eminent domain which are now in the jurisdiction of the Commissioners Court or the Judge thereof. [Acts 1915, 34th Leg., ch. 29, § 2; Acts 1919, 36th Leg., ch. 27, § 2.]

Took effect Feb. 20, 1919.

Art. 1811—121. Jurisdiction of other courts.—The County Court of Jefferson County shall retain, as heretofore, the general jurisdiction of the Probate Court and all jurisdiction conferred by law now over probate matters; and the Court herein created shall have no other jurisdiction than that named in this Act, and the County Court of Jefferson County as now and heretofore existing shall have all jurisdiction which it now has, save and except that which is given the County Court of Jefferson County, at Law, in this Act, but the County Court as now existing shall have no other jurisdiction, civil or criminal. The County Judge of Jefferson County shall be the Judge of the County Court of said county, and all ex-officio duties of the County Judge shall be exercised by said Judge of the County Court of Jefferson County, except in so far as the same shall by this Act be committed to the County Court of Jefferson County at Law. [Acts 1915, 34th Leg., ch. 29, § 3; Acts 1919, 36th Leg., ch. 27, § 3.]

Art. 1811—122. Terms of court.—There shall be twelve terms of the County Court of Jefferson County at law held annually and the practices therein and the appeals and the writs of error thereto and therefor shall be as prescribed by the laws relating to County Courts. The said terms of the County Court of Jefferson County at law, shall be held as follows: Beginning on the first Monday of the first month after this Act shall become effective and shall continue in session until the last Saturday in said month when it shall adjourn, and open again on the first Monday in the next month and shall continue in session until the last Saturday in said month, and so on during the entire year, and the terms thereof shall be held at the Courthouse of Jefferson County, Texas. [Acts 1915, 34th Leg., ch. 29, § 4; Acts 1919, 36th Leg., ch. 27, § 4.]

Art. 1811—123. Election of judge; tenure; qualifications.—There shall be elected in Jefferson County by the qualified voters thereof at each general election a Judge of the County Court of Jefferson County at Law, who shall be well informed in the laws of the State, and who shall hold his office for two years and until his successor shall have been duly elected and qualified. No person shall be elected judge of said Court who has not been a resident citizen of Jefferson County, Texas, for at least two years prior to his election, and shall possess all of the qualifications for the office that are now required by the general laws of the State for County Judges. [Acts 1915, 34th Leg., ch. 29, § 5; Acts 1919, 36th Leg., ch. 27, § 5.]

Sec. 6 relates to criminal business. See Code Cr. Proc. art. 40a.

Art. 1811—124. Continuance of judge.—When this Act shall become effective the present Judge of the County Court of Jefferson County at Law, shall continue to be the Judge of said Court and shall hold his office until the next general election of county officers or until his successor is elected and qualified. [Acts 1915, 34th Leg., ch. 29, § 7; Acts 1919, 36th Leg., ch. 27, § 7.]

Art. 1811—125. Disqualification of judge.—When the Judge of the County Court of Jefferson County at Law, is disqualified to try any case pending in the County Court of Jefferson County at Law, the parties or their attorneys in such a case may agree on the selection of a Special Judge to try such case, but if the parties or their attorneys fail to agree upon the selection of a Special Judge to try such case, it shall be the duty of the Judge of the County Court of Jefferson County at Law, to certify to the Governor that he is disqualified to try such case and the failure

of the parties or their attorneys to agree upon the selection of a Special Judge to try such a case. Whereupon, the Governor shall proceed to appoint a Special Judge, learned in the law, to try such case. [Acts 1915, 34th Leg., ch. 29, § 8; Acts 1919, 36th Leg., ch. 27, § 8.]

Art. 1811—126. Issuance of writs.—The County Court of Jefferson County at Law, or the Judge thereof, shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas and all writs necessary to the enforcement of jurisdiction of said Court, and to issue writs of habeas corpus in such cases where the offense charged is within the jurisdiction of said Court, or of any other Court in said county of inferior jurisdiction to said County Court at Law. [Acts 1915, 34th Leg., ch. 29, § 9; Acts 1919, 36th Leg., ch. 27, § 9.]

Art. 1811—127. Clerk, seal, and sheriff.—The County Clerk of Jefferson County, Texas, shall be the Clerk of the County Court of Jefferson County at Law, and the seal of said Court shall be the same as provided by law for County Courts, except the seal shall contain the words "County Court of Jefferson County at Law," and the Sheriff of Jefferson County shall in person or by Deputy attend said Court when required by the Judge thereof, and the County Clerk of Jefferson County, Texas, is hereby authorized, if it becomes necessary, in his judgment, to appoint a Deputy to specially attend to the matters pertaining to the County Court of Jefferson County at Law, and said Deputy shall receive a salary of one hundred and fifty (\$150.00) dollars per month, to be paid out of county treasury of Jefferson County on the order of the Commissioners Court of said county. [Acts 1915, 34th Leg., ch. 29, § 10; Acts 1919, 36th Leg., ch. 27, § 10.]

Art. 1811—128. Selection of jurors.—The Jurisdiction or authority now vested by law in the District Courts of this State for the drawing, selection and service of jurors shall be exercised by the County Court of Jefferson County at Law, provided a panel of not exceeding twenty-four jurors shall be drawn for any one week of said Court, and juries selected in the trial of any case shall not exceed six. [Acts 1915, 34th Leg., ch. 29, § 11; Acts 1919, 36th Leg., ch. 27, § 11.]

Art. 1811—129. Vacancy in office of judge.—Any vacancy in the office of the Judge of the County Court of Jefferson County at Law, may be filled by the County Commissioners Court, and when so filled the Judge shall hold office until the next general election and until his successor is elected and qualified. [Acts 1915, 34th Leg., ch. 29, § 12; Acts 1919, 36th Leg., ch. 27, § 12.]

Art. 1811—130. Salary of judge; fees collected and accounted for.—The Judge of the County Court of Jefferson County at Law, shall receive a salary of thirty-six hundred (\$3,600.00) dollars per annum, to be paid out of the county treasury of Jefferson County, Texas, on the order of the Commissioners Court of said county, and said salary shall be paid monthly in equal installments. The Judge of the County Court of Jefferson County at Law, shall assess the same fees as are now prescribed by law relating to County Judge's fees, all of which shall be collected by the Clerk of the Court and shall be paid into the county treasury on collection. No part of which shall be paid to the said Judge, but he shall draw a salary as above specified in this section. [Acts 1915, 34th Leg., ch. 29, § 13; Acts 1919, 36th Leg., ch. 27, § 13.]

Art. 1811—131. Appeals from lower courts.—All cases appealed from the Justices Courts and Recorders Courts in Jefferson County, Texas, shall be made direct to the County Court of Jefferson County at Law under the provisions heretofore governing such appeals. [Acts 1915, 34th Leg., ch. 29, § 14; Acts 1919, 36th Leg., ch. 27, § 14.]

Art. 1811—132. Fees of County Judge.—The County Judge of Jefferson County, at the time this Act goes into effect, shall receive the same compensation in ex-officio salary and fees as he would have received had this Act, creating the County Court of Jefferson County at Law, not been enacted, said Compensation to be computed and allowed and ordered paid by the Commissioners Court of said County out of the general fund of said county. [Acts 1915, 34th Leg., ch. 29, § 15; Acts 1919, 36th Leg., ch. 27, § 15.]

Art. 1811—132a. Special judge; election; compensation.—In the event of the failure from any cause of the Judge of this Court to open the same at the time prescribed by law, then a majority of the practicing attorneys present in said Court shall proceed to elect a Special Judge in the same manner as prescribed by law for the election of Special Judges of the District Courts, who shall preside over said Court until such regular Judge shall be able to hold the same, and said Special Judge shall be entitled to receive a fee of three (\$3.00) dollars for each case tried and finally disposed of by him, the same to be paid by the County Treasurer upon the order of the Commissioners Court of Jefferson County, Texas. [Acts 1919, 36th Leg., ch. 27, § 16.]

Art. 1811—132b. Act not repealed.—Nothing in this Act shall be construed in any manner to affect or repeal the Court at Law, created for the city of Port Arthur in Jefferson County, Texas, passed by the Fourth Called Session of the Thirty-fifth Legislature and known as House Bill No. 112. [Id., § 16a.]

Validity of act.—Acts 35th Leg. (1918) 4th Call. Sess. c. 61, providing for organization of county court of Jefferson county at law No. 2, held void, in that under section 3 the Legislature delegated to the governing body of the city of Port Arthur the right to name qualifications, tenure of office, and method of election of judge in violation of Const. art. 5, § 1, 15. *De Silvia v. State* (Cr. App.) 229 S. W. 542.

COUNTY COURT OF JEFFERSON COUNTY AT LAW, NO. 2.

The County Court of Jefferson County at Law No. 2, created by Acts 1913, 35th Leg. 4th C. S., ch. 61, p. 138, §§ 1-19, abolished, and the act creating said court and all acts and parts of acts in conflict were repealed by Acts 1919, 36th Leg. 2d C. S., ch. 14, § 11, post. Code Cr. Proc. art. 97½o. Said Acts 1919, 36th Leg. 2d C. S., ch. 14, creates the Criminal Court of Port Arthur, in lieu of said County Court No. 2 (Code Cr. Proc. arts. 97½j-97½nn).

CHAPTER SIXTEEN

EL PASO COUNTY COURT AT LAW

Art.

1811—134. Jurisdiction.

1811—135. Jurisdiction.

1811—141a. Official shorthand reporter; appointment; term of office; oath; duties.

Art.

1811—143. Compensation of judge.

1811—145a. Repeal; partial invalidity of act.

Article 1811—134. Jurisdiction.—The El Paso County Court at Law shall have jurisdiction of all civil matters and causes, original and appellate over which by the general laws of the State of Texas the county court of said county would have jurisdiction, except as provided in Sec-

tion 3, of this Act [Art. 1811—135]; and the El Paso County Court at Law and the County Court of said County shall have concurrent jurisdiction in all criminal matters and causes, original and appellate over which by the general laws of this State the County Court at Law now has jurisdiction, except as provided in Section 3, of this Act; and all civil and criminal writs and processes heretofore issued by and out of said County Court at Law be and the same are hereby, made returnable to the El Paso County Court at Law or the County Court of El Paso County, Texas, whichever may have jurisdiction, or in which said court, the writs or processes may be pending; the jurisdiction of El Paso County Court at Law and the judge thereof shall extend to all matters of eminent domain of which jurisdiction has heretofore rested in the County Court of El Paso County, Texas, or the judge thereof, but this provision shall not effect the jurisdiction of the commissioners court of the county judge of El Paso County as presiding judge of said court as to roads, bridges and public highways and matters of eminent domain which are now within the jurisdiction of the commissioners court or of the Judge of the County Court of El Paso County, Texas. [Acts 1917, 35th Leg., ch. 93, § 2; Acts 1918, 35th Leg. 4th C. S., ch. 14, § 1.]

Took effect March 18, 1918.

Art. 1811—135. Jurisdiction.—The County Court of El Paso County, Texas, shall retain, as heretofore, its jurisdiction as a juvenile court, its jurisdiction in matters pertaining to liquor licenses, forfeitures and bonds and the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots and lunatics, persons non compos mentis and drunkards, grant letters testamentary and of administration, settle accounts with administrators, executors and guardians, transact all business pertaining to deceased persons, and to apprentice minors as provided by law, and to have concurrent jurisdiction with the County Court at law in all criminal matters in causes, original and appellate, over which by the general laws of the State of Texas the County Court of said county would have jurisdiction if no County Court at Law had been created. The County Judge of El Paso County, Texas, shall be the Judge of the County Court of El Paso County, Texas, and all ex-officio duties of the County Judge shall be exercised by said Judge of the said County Court of El Paso County, except insofar as the same shall by this Act be committed to the Judge of the El Paso County Court at Law. The Judge of the County Court and the Judge of the County Court at Law shall have authority to transfer any criminal causes from one court to another by order duly made and entered upon the minutes of the Court. [Acts 1917, 35th Leg., ch. 93, § 3; Acts 1918, 35th Leg. 4th C. S., ch. 14, § 2.]

Art. 1811—141a. Official shorthand reporter; appointment; term of office; oath; duties.—For the purpose of preserving a record in all cases for the information of the court, jury and parties, the Judge of the County Court at Law of El Paso, county, Texas shall appoint an official shorthand reporter for such court, who shall be well skilled in his profession. shall be a sworn officer of the court and shall hold his office at the pleasure of the court; and the provisions of Chapter Eleven of Title 37 of the Revised Civil Statutes of Texas of 1911 relating to the appointment of Stenographers for the district courts shall, and it is hereby made to, apply in all its provisions, insofar as they are applicable, to the official shorthand reporter herein authorized to be appointed by the Judge of the County Court at Law of El Paso County, Texas and he shall be en-

titled to the same fees and shall perform the same duties and shall take the same oath as are in said Chapter Eleven of Title 37 provided for the stenographers of district courts of this State, and also be governed by any other Laws covering the stenographers of district courts of this State. [Acts 1918, 35th Leg. 4th C. S., ch. 14, § 3.]

Art. 1811—143. Compensation of judge.—The Judge of the County Court at Law of El Paso County, Texas, shall be entitled to the following compensation for his services as Judge of the County Court at Law; there shall be taxed and collected by the El Paso County Court at Law the same fees provided by the law for county Judges in similar cases, all of which shall be paid by the clerk monthly into the county treasury, and the judge of said court shall receive a salary of Three Thousand Dollars annually to be paid monthly out of the county treasury upon order of the commissioners court. [Acts 1917, 35th Leg., ch. 93, § 11; Acts 1918, 35th Leg. 4th C. S., ch. 14, § 4.]

Art. 1811—145a. Repeal; partial invalidity of act.—All laws and parts of laws in conflict herewith be, and the same are hereby repealed, and it is further enacted that if any of the provisions of this Act shall be held void or in conflict with any provisions of the Constitution of this State the fact that such provisions may be held void shall in no wise affect any other provisions of this Act. [Acts 1918, 35th Leg. 4th C. S., ch. 14, § 5.]

CHAPTER SEVENTEEN

COUNTY COURT OF EASTLAND COUNTY AT LAW

Art.	Art.
1811—146. Court created.	1811—151. Bond and oath of judge.
1811—147. Jurisdiction.	1811—152. Issuance of writs.
1811—148. Jurisdiction of county judge of Eastland county retained.	1811—153. Clerk; seal; sheriff.
1811—149. Terms of court; practice; appeals and writs of error.	1811—154. Juries.
1811—150. Judge; election; term of office.	1811—155. Vacancy in office of judge.
	1811—156. Fees and salary of judge.

Article 1811—146. Court created.—There is hereby created a Court to be held in Eastland County, Texas, to be called "The County Court at Law for Eastland County." [Acts 1919, 36th Leg. 2d C. S., ch. 16, § 1.]
Took effect July 22, 1919.

Art. 1811—147. Jurisdiction.—The County Court at Law for Eastland County, shall have jurisdiction in all matters and causes, civil and criminal, original and appellate, including the general jurisdiction of the Probate Court, over which the general laws of the State of Texas, the County Court would have jurisdiction; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons no[n] compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to deceased persons, minors, idiots, lunatics, and drunkards, including the settlement, partition and distribution of estates of deceased persons; and the apprentice of miners as provided by law, except as is provided in Section 3 of this bill [Art. 1811—148]. The said Court or the judge thereof, shall have power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court; and also to punish contempts under such provisions as are or may be provided by general law governing County

Courts throughout the State. The jurisdiction of the County Court at Law for Eastland County and the Judge thereof, shall extend to all matters of eminent domain, of which the jurisdiction has heretofore invested in the County Court or the County Judge; but this provision shall not [a]ffect the jurisdiction of the commissioners court or the county judge of Eastland County, Texas, as the presiding officer of such commissioners' Court, as to roads, bridges and public highways in matter of eminent domain which are now within the jurisdiction of the Commissioners' Court or the Judge thereof. The County Judge of Eastland County shall be the judge of the County Court at Law for Eastland County, Texas. All ex-officio duties of the county judge shall be exercised by the county judge of Eastland County, except in so far as same shall, by this Act be committed to the judge of the County Court at Law for Eastland County, Texas. [Id., § 2.]

Art. 1811—148. Jurisdiction of County Judge of Eastland County retained.—The County Judge of Eastland County, Texas shall retain as heretofore, all jurisdiction given under the general laws governing county judge in all the administration of the affairs of said county and as the presiding officer of said commissioners' court and nothing in this act shall be construed so as to confer upon the county court at Law for Eastland County, Texas or the judge thereof, any jurisdiction of the financial or fiscal affairs or taxation matters of said Court, the control or management of the roads, bridges, etc., or as the presiding officer of the commissioners' court. [Id., § 3.]

Art. 1811—149. Terms of court; practice; appeals and writs of error.—The terms of the County Court at Law for Eastland County, Texas, and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by law relating to county courts. The terms of County Courts at Law for Eastland County, Texas, shall be held as now established by the terms of the County Court of Eastland County, until the same shall be changed in accordance with the law. [Id., § 4.]

Art. 1811—150. Judge; election; term of office.—There shall be elected in said county by the qualified voters, thereof, at said election, judge of the County Court at Law for Eastland County, Texas, who shall be well informed in law of the State who shall hold his office two years and until his successor shall have duly qualified. [Id., § 5.]

Art. 1811—151. Bond and oath of judge.—The judge of the County Court at Law for Eastland County, shall execute a bond and take the oath of office as required by law for county judges, and may be appointed or elected as provided by law relating to county court and judges thereof. [Id., § 6.]

Art. 1811—152. Issuance of writs.—The County Court at Law for Eastland County or the judge thereof, shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari and supersedeas, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus, in cases where the offense charged is within the jurisdiction of said court, or of any other court or tribunal inferior to said court. [Id., § 7.]

Art. 1811—153. Clerk; seal; sheriff.—The County Clerk of Eastland County shall be the Clerk of the County Court at Law for Eastland County. The seal of the said court shall be the same as that provided by

law for county courts, except that the seal shall contain the words "County Court at Law for Eastland County, Texas"; the sheriff of Eastland County shall, in person or by deputy, attend the said court, when required by the judge thereof. [Id., § 8.]

Art. 1811—154. Juries.—The jurisdiction and authority now vested by law in the County Court for the appointment of jury commissioners and the selection and service of jurors shall be exercised by the County Court at Law for Eastland County, Texas. [Id., § 9.]

Art. 1811—155. Vacancy in office of judge.—Any vacancy in the office of the judge of the county court at Law for Eastland County, may be filled by the Commissioners' Court of Eastland County until the next general election. [Id., § 10.]

Art. 1811—156. Fees and salary of Judge.—The Judge of the County Court at Law for Eastland County, shall collect the same fees as are now established by law, relating to county judges and such ex-officio compensations for holding county court as the Commissioners' Court of said county shall prescribe and authorize. The County Judge of Eastland County, Texas, shall hereafter receive all such fees as are allowed him under the general laws and such salary for the ex-officio duties of his office as may be allowed him by the commissioners' court of said county. [Id., § 11.]

CHAPTER EIGHTEEN

COUNTY COURT OF TARRANT COUNTY AT LAW

<p>Art. 1811—157. Court created. 1811—158. Jurisdiction. 1811—159. Same; juvenile and probate matters. 1811—160. Issuance of writs. 1811—161. Terms of court; practice. 1811—162. Judge.</p>	<p>Art. 1811—163. Same; bond and oath. 1811—164. Special judge. 1811—165. Clerk; seal; sheriff. 1811—166. Fees; salary. 1811—167. Removal of judge. 1811—168. Shorthand reporter. 1811—169. Transfer of causes.</p>
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Article 1811—157. Court created.—That there shall be created a court to be held in Tarrant County, Texas, to be known and designated as the "County Court at Law" of Tarrant County, Texas. [Acts 1921, 37th Leg., ch. 28, § 1.]

Took effect March 12, 1911.

Art. 1811—158. Jurisdiction.—The County Court at Law of Tarrant County, Texas, shall have exclusive jurisdiction within said county of all criminal matters and causes, original and appellate, that is now vested in the County Courts having jurisdiction in civil and criminal cases under the Constitution and laws of Texas, except as provided in Section 3 of this Act [Art. 1811—159]; and said County Court at Law shall have and exercise, in civil matters and causes, concurrent and equal jurisdiction with the County Court of Tarrant County for civil cases. said concurrent jurisdiction to extend to all causes and matters of which jurisdiction has heretofore vested in the County Court of Tarrant County for civil cases, or the judge thereof. [Id., § 2.]

Art. 1811—159. Same; juvenile and probate matters.—The County Court of Tarrant County shall retain exclusively as heretofore its jurisdiction as a juvenile court, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons

non compos mentis, and common drunkards, and grant letters testamentary and of administration, settle accounts of administrators, executors and guardians; transact all business pertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of the estates of deceased persons; and of apprenticed minors as provided by law. The County Judge of Tarrant County shall be the judge of the County Court of Tarrant County, Texas, and all ex-officio duties of the County Judge shall be exercised by the said judge of the said County Court, except insofar as the same shall, by this Act, be committed to the judge of the County Court at Law of Tarrant County, Texas, and except such as have heretofore been conferred upon the judge of the County Court of Tarrant County for civil cases. [Id., § 3.]

Art. 1811—160. Issuance of writs.—The County Court at Law of Tarrant County, Texas, or the judge thereof, shall have the power to issue writs of injunction, sequestration, attachment, garnishment, certiorari, supersedeas, and all other writs necessary to the enforcement of the jurisdiction of said court; and also power to punish for contempt under such provisions as are or may be provided by the General Laws governing County Courts throughout the State, and issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said court or of any court or tribunal inferior to said court. [Id., § 4.]

Art. 1811—161. Terms of court; practice.—The terms of the County Court at Law of Tarrant County, Texas, and the practice therein and appeals and writs of error therefrom shall be as prescribed by law relating to the County Courts. The terms of said County Court at Law shall be held not less than four times each year and the Commissioners' Court of Tarrant County, Texas, shall fix the time at which said court shall hold its terms, until the same may be changed according to law. [Id., § 5.]

Art. 1811—162. Judge.—As soon as may be after the passage of this Act, there shall be appointed by the Governor, in accordance with law, and subject to the confirmation of the Senate, a judge of the County Court at Law hereby created, who shall be well informed in the laws of the State and who shall hold his office until the next succeeding general election and until his successor shall have duly qualified. The judge of said court elected at any general election shall hold office for two years and until his successor shall have duly qualified; provided, that no person shall be eligible for judge of said court unless he shall be a citizen of the United States and of this State, who shall have been a practicing lawyer of this State or a judge of a court in this State for four years next preceding his appointment or election, and who shall have resided in the county of Tarrant for two years next preceding his appointment or election. [Id., § 6.]

Art. 1811—163. Same; bond and oath.—The judge of the County Court at Law of Tarrant County, Texas, shall execute a bond and take the oath of office as required by the law relating to County Judges. [Id., § 7.]

Art. 1811—164. Special judge.—A special judge of the County Court at Law of Tarrant County, Texas, may be appointed or elected as provided by the laws relating to County Courts and to the judges thereof. [Id., § 8.]

Art. 1811—165. Clerk; seal; sheriff.—The County Clerk of Tarrant County, Texas, shall be the clerk of the County Court at Law of Tarrant County, Texas. The seal of said Court shall be the same as provided for County Courts except that the seal shall contain the words "County Court at Law, Tarrant County, Texas." The sheriff of Tarrant County shall, in person or by deputy, attend said court when required by the judge thereof. [Id., § 9.]

Art. 1811—166. Fees; salary.—The judge of the County Court at Law of Tarrant County, Texas, and the judge of the County Court of Tarrant County for civil cases, shall collect the same fees provided by law for County Judges in similar cases, all of which shall be paid by them monthly into the County Treasury and the judge of each said courts, shall receive a salary of \$4,000 annually, to be paid monthly out of the County Treasury by the Commissioners' Court. [Id., § 10.]

Art. 1811—167. Removal of judge.—The judge of the County Court at Law of Tarrant County, Texas, may be removed from office in the same manner and for the same causes as any other County Judge may be removed under the laws of this State. [Id., § 11.]

Art. 1811—168. Shorthand reporter.—For the purpose of preserving a record in all cases for the information of the court, jury and parties, the judge of the County Court at Law of Tarrant County, Texas, shall appoint an official shorthand reporter, who shall be well skilled in his profession, shall be a sworn officer of the court and shall hold his office at the pleasure of the court; and the provisions of Chapter eleven of Title 37 of the Revised Civil Statutes of Texas of 1911 relating to the appointment of stenographers for the District Courts shall, and it is hereby made to apply in all its provisions, insofar as they are applicable to the official shorthand reporter herein authorized to be appointed, and said reporter shall be entitled to the same fees and salaries and shall perform the same duties and shall take the same oath as are in said Chapter eleven of Title 37 provided for the stenographers of District Courts of this State, and also be governed by any other laws covering the stenographers of the District Courts of this State; provided, that the official shorthand reporter of said court shall not be required to take the testimony in cases where neither party litigant nor the judge demands it; but where the testimony is taken by said reporter a fee of three dollars shall be taxed by the clerk as costs in the case. Said reporter shall also as far as practicable, act as the official shorthand reporter of the County Court of Tarrant County for civil cases. [Id., § 12.]

Art. 1811—169. Transfer of causes.—As soon as may be after this Act takes effect, the Clerk of the County Court of Tarrant County, Texas, shall transfer to the docket of the County Court at Law of Tarrant County, Texas, all of the criminal cases then pending in the County Court of Tarrant County. The clerk shall note such transfers when made on the minutes of the County Court of Tarrant County, Texas. Thereafter, all new criminal cases filed in said county and coming within the jurisdiction of the County Court shall be placed on the docket of said County Court at Law. Until such time as the Commissioners' Court shall direct, no civil cases shall be filed in or transferred to said County Court at Law; but when directed to do so by said Commissioners' Court, the clerk of said county shall transfer from the docket of the County Court of Tarrant County for civil cases to the docket of said County Court at

Law a sufficient number of civil cases to equalize the dockets of said two courts, and shall thereafter place new civil cases, as they are filed, on the docket of said County Court at Law in a ratio to be prescribed by said Commissioners' Court, which ratio may be changed or modified from time to time by order of said Commissioners' Court. [Id., § 13.]

CHAPTER NINETEEN

COUNTY COURT OF WICHITA COUNTY AT LAW

Art.	Art.
1811—170. Court created.	1811—178. Clerk; seal; sheriff.
1811—171. Jurisdiction.	1811—179. Juries.
1811—172. Probate and other jurisdiction.	1811—180. Vacancy in office of judge; appointment of judge until next election.
1811—173. Terms of court; practice.	1811—181. Fees and salary of judge of county court at law.
1811—174. Election of judge; qualifications; tenure.	1811—182. Fees and salary of county judge.
1811—175. Bond and oath of judge.	1811—183. Stenographers.
1811—176. Special judge.	
1811—177. Issuance of writs.	

Article 1811—170. Court created.—That there is hereby created a court to be held in Wichita County, to be called the County Court of Wichita County at Law. [Acts 1920, 36th Leg. 3d C. S., ch. 5, § 1.]

Took effect June 8, 1920.

Designation of court.—Although the court created by this act was denominated "the county court of Wichita county at law," it was by the use of the words "at law" in its designation that such court was differentiated in name from the county court already in existence, so that an information stating its presentment in "the county court of Wichita county at law" was not defective as not conforming to the requirement of Code Cr. Proc. 1916, art. 478, subd. 2, that from the information it must appear to have been presented in a court of competent jurisdiction, where the distinguishing words "at law" were preserved throughout all the pleadings. *Pelz v. State* (Cr. App.) 230 S. W. 154.

Information for unlawfully carrying a pistol presented in the "county court at law of Wichita county" was not subject to quashal on the ground the court was designated by act of the Legislature as the "court of Wichita county at law." *Dodaro v. State* (Cr. App.) 231 S. W. 394.

Art. 1811—171. Jurisdiction.—The County Court of Wichita County at Law shall have jurisdiction in all matters and causes, civil and criminal, original and appellate, over which by the general laws of the State, the county court of said county would have jurisdiction, except as provided in Section 3 of this Act [Art. 1811—172]; and all cases other than probate matters and such as are provided in Section 3 of this Act, be and the same are hereby transferred to the County Court of Wichita County at Law and all writs and process, civil and criminal, heretofore issued by or out of said county court, other than pertaining to matters over which by Section 3 of this Act, jurisdiction remains in the county court of Wichita County, be and the same are hereby made returnable to the County Court of Wichita County at Law. The jurisdiction of the County Court of Wichita County at Law and the judge thereof shall extend to all matters of eminent domain, of which jurisdiction has been heretofore vested in the county court or in the county judge, but this provision shall not effect [affect] the jurisdiction of the commissioners court, or of the county judge of Wichita County as the presiding officer of such commissioners court as to roads, bridges, and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners court or the judge thereof. [Id., § 2.]

Art. 1811—172. Probate and other jurisdiction.—The county court of Wichita County shall retain as heretofore, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and to apprentice minors as provided by law; and the said court, or the judge thereof, shall have the power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court, and also to punish contempts under such provisions as are or may be provided by general law governing county courts throughout the State; but said county court of Wichita County, shall have no other jurisdiction, civil or criminal. The county judge of Wichita County shall be the judge of the county court of Wichita County. All ex-officio duties of the county judge shall be exercised by the said judge of the county court of Wichita County, except in so far as the same shall by this Act be committed to the judge of the County Court of Wichita County at Law. [Id., § 3.]

Art. 1811—173. Terms of court; practice.—The terms of the County Court of Wichita County at Law and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by laws relating to county courts. The terms of the County Court of Wichita County at Law shall be held as now established for the terms of the county court of Wichita County until the same may be changed in accordance with the law. [Id., § 4.]

Art. 1811—174. Election of judge; qualifications; tenure.—There shall be elected in said county by the qualified voters thereof, at each general election, a judge of the County Court of Wichita County at Law, who shall be well informed in the laws of the State, who shall hold his office for two years, and until his successor shall have duly qualified. [Id., § 5.]

Art. 1811—175. Bond and oath of judge.—The judge of the County Court of Wichita County at Law, shall execute a bond and take the oath of office as required by the law relating to county judges. [Id., § 6.]

Art. 1811—176. Special judge.—A special judge of the County Court of Wichita County at Law, may be appointed or elected as provided by law relating to county courts and to the judges thereof. [Id., § 7.]

Art. 1811—177. Issuance of writs.—The County Court of Wichita County at Law, or the judges thereof shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, and supersedeas, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said court or of any other court or tribunal inferior to said court. [Id., § 8.]

Art. 1811—178. Clerk; seal; sheriff.—The county clerk of Wichita County shall be the clerk of the County Court of Wichita County at Law; the seal of the said court shall be the same as that provided by law for county courts, except that the seal shall contain the words "Clerk of the County Court of Wichita County at Law." The sheriff of Wichita County shall in person or by deputy, attend the said court when required by the judge thereof. [Id., § 9.]

Art. 1811—179. Juries.—The jurisdiction and authority now vested in the county court for the appointment of jury commissioners and the selection and service of jurors, shall be exercised by the County Court of Wichita County at Law. [Id., § 10.]

Art. 1811—180. Vacancy in office of judge; appointment of judge until next election.—Any vacancy in the office of the judge of the court created by this Act, may be filled by the commissioners court of Wichita County until the next general election. The commissioners court shall as soon as may be, after this Act shall take effect, appoint a judge of the County Court of Wichita County at Law, who shall serve until the next general election and until his successors shall be duly elected and qualified. [Id., § 11.]

Art. 1811—181. Fees and salary of judge of County Court at Law.—The judge of the County Court of Wichita County at Law, shall collect the same fees as are now established by law relating to county judges, all of which shall be by him paid monthly into the county treasury, and he shall receive an annual salary of three thousand dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners court. [Id., § 12.]

Art. 1811—182. Fees and salary of county judge.—The county judge of Wichita County, Texas, shall collect the same fees as are now established by law relative to county judges, all of which shall be by him paid monthly into the county treasury, and he shall receive an annual salary of thirty-six hundred dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners court. [Id., § 13.]

Art. 1811—183. Stenographer.—For the purpose of preserving a record in all cases for the information of the court, jury and parties, the judge of the County Court, Wichita County, at Law, shall appoint an official shorthand reporter for such court, who shall be well skilled in his profession, shall be a sworn officer of the court, and shall hold office at the pleasure of the court; and the provisions of Chapter 11 of Title 37 of the Revised Civil Statutes of Texas, relating to stenographic reporters for the District Courts, shall, and it is hereby made to apply in all its provisions, in so far as they are applicable and not in conflict herewith, to the official shorthand reporter herein authorized to be appointed by the judge of the County Court, Wichita County, at Law; and he shall perform the same duties and shall take the same oath as are in said Chapter 11 of Title 37 provided for the stenographers of District Courts of this State, and also be governed by any other laws covering the stenographers of District Courts of this State; and the stenographer herein authorized to be appointed shall receive a salary of Fifteen Hundred (\$1,500.00) per annum, in addition to the transcript fees as provided for by the law for the stenographers of the District Courts of Texas; said salary to be paid monthly by the Commissioners' Court of Wichita County, Texas, out of the general funds of the county. [Acts 1921, 37th Leg., ch. 34, § 1 (§ 15).]

Took effect 90 days after March 12, 1921, date of adjournment.

TITLE 37

COURTS—DISTRICT AND COUNTY—PRACTICE IN

Chap.		Chap.	
1.	Institution of Suits.	14.	The Verdict.
2.	Pleading in General.	15.	Judgments.
3.	Pleadings of the Plaintiff.	16.	Remitter and Amendment of Judgment.
3a.	Verification of Pleadings.	17.	New Trials and Arrest of Judgment.
4.	Venue of Suits.	18.	Costs and Security Therefor.
5.	Parties to Suits.	19.	Bills of Exceptions and Statements of Facts.
6.	Process and Returns.	20.	Appeal and Writ of Error.
7.	Abatement and Discontinuance of Suit.	21.	Certain Interlocutory Proceedings, etc.
8.	Pleadings of the Defendant.	22.	Suit by Next Friend.
9.	Change of Venue.	23.	Suits Against Non-Residents.
10.	Continuance.	24.	Attorney's Fees, Recovery of.
11.	Stenographic Reporters.	25.	Miscellaneous Provisions.
12.	Trial of Causes.		
13.	Charges and Instructions to the Jury.		

CHAPTER ONE

INSTITUTION OF SUITS

Art.		Art.	
1812.	Suits commenced by petition filed with clerk.	1815.	Clerk's file docket.
1813.	Duty of the clerks on receiving petition.	1816.	Civil suits not to be instituted on Sunday, etc., except.

Article 1812. [1177] [1181] Suits commenced by petition filed with clerk.

See *Ferguson v. Estes & Alexander* (Civ. App.) 214 S. W. 465; *State Nat. Bank of San Antonio v. Lancaster* (Civ. App.) 229 S. W. 883.

Institution of suit.—Under this article, the statute of limitations ceases to run at the time of filing of petition, though more than two years elapse before any citation is issued; it not being shown that the delay was caused by plaintiff. *Tribby v. Wokee*, 74 Tex. 142, 11 S. W. 1089.

Under this article, persons are made parties to a suit by another filing a petition which states a cause of action with a bona fide intention that citation shall issue and be served. Hence contention that parties to two suits are not the same because two parties had not been served in one of suits is without merit. *Camp v. First Nat. Bank* (Civ. App.) 195 S. W. 217.

Under this article, where petition was filed within period of limitations, whether plaintiff was guilty of laches because of delay in issuing and serving citation held a question for the jury. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Delay in issuance and service of citation held to raise no presumption of laches making limitations applicable. *Id.*

Jurisdiction, within the rule that jurisdiction when attached cannot be taken away by subsequent proceedings in another court, cannot attach when no pleadings setting up the cause of action against any one is alleged. *State Nat. Bank of San Antonio v. Lancaster* (Civ. App.) 229 S. W. 883.

Premature commencement.—An action on notes will not be defeated because brought before their maturity, where an amendment after maturity was made, declaring on the notes. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

Specific performance of a contract for sale and exchange of lands whereby defendant was to assume a contract with a water user's association under a government irrigation project, held not dependent on termination of litigation as to water rights. *Sorenson v. Broadus* (Civ. App.) 202 S. W. 1008.

Matters arising after commencement of suit.—While the plaintiffs in trespass to try title must have title at the commencement of the suit, and one without title cannot sue for the use of another in such action, a conveyance pendente lite by plaintiff does not affect the progress or determination of the suit, and grantee is bound by the judgment rendered, and a judgment for plaintiff inures to grantee's benefit, and such conveyance does not constitute an outstanding title. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

In an action for wrongful discharge, plaintiff employee cannot recover for damages beyond the time of trial. *Golden Rod Mills v. Green* (Civ. App.) 230 S. W. 1039.

A deed, which was executed after the suit was brought for conversion of ores removed from a mining claim, but which showed on its face that it was executed in lieu of a prior deed, which had been lost, was admissible in that suit in support of the evidence that plaintiff had purchased the claim from which the ore in controversy was re-

moved before its attempted relocation by defendants. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

Order of trial.—See *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408; note to art. 1943.

Art. 1813. [1178] [1182] Duty of the clerk on receiving petition.

See *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408; note to art. 1943.

Art. 1815. [1179] [1183] Clerk's file docket.

See *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408; note to art. 1943.

Art. 1816. [1180] [1184] Civil suits not to be instituted on Sunday, etc., except.—No civil suit shall be commenced nor shall any process be issued or served on Sunday except in cases of injunction, attachment, garnishment, sequestration, or distress proceeding. [Act 1846, p. 363, § 2; Acts 1897, p. 84; P. D. 1424; Acts 1919, 36th Leg., ch. 99, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Criminal proceedings.—That the criminal complaint was filed on Sunday is not ground for quashing it. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

The issuance of a copy of the sheriff's return on a special venire on July 4th could not vitiate the return. *Clark v. State*, 87 Cr. R. 107, 220 S. W. 100.

Service of notice to dip cattle, made on Sunday, was not illegal, despite this article, there being no such provision in the Code of Criminal Procedure. *Williams v. State* (Cr. App.) 229 S. W. 545.

DECISIONS IN GENERAL.

Right of action.—A "cause of action" cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused (citing Words and Phrases, Second Series, Cause of Action). *Beaumont Cotton Oil Mill Co. v. Hester* (Civ. App.) 210 S. W. 702.

Where there is no legal right interrupted, there is no cause of action. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Torts.—The mere filing of a civil action and the issuance of citation to defendant, even though maliciously and without probable cause, is not a tort which gives a right of action for damages; nor does the repeated filing of such actions in different jurisdictions for the same cause of action, and their dismissal when defendant appeared to defend, give such right of action. *Pye v. Cardwell* (Civ. App.) 224 S. W. 542, conforming to answers to certified questions, 110 Tex. 572, 222 S. W. 153.

Demand as condition precedent to suit.—In order for vendor to recover on a breach of a contract to purchase land, he must show that he performed, or offered to perform, the obligations imposed by the contract upon him, provided such obligations were not independent, or some other valid reason for the failure of the plaintiff to perform, or offer to perform. *Echols v. Miller* (Civ. App.) 218 S. W. 48.

When an obligation to pay is complete, a cause of action at once arises, and no formal demand is necessary. *Green v. Scales* (Civ. App.) 219 S. W. 274.

Election of remedies.—The mere bringing of an action which has been dismissed before judgment, in which no advantage has been gained or legal detriment occasioned, is not an election. *Lewis v. Powell* (Civ. App.) 205 S. W. 737.

Where remedies were alternative and concurrent and not inconsistent, the pursuit of one will not exclude the other until a satisfaction is had. *Palmer v. Bizzell* (Civ. App.) 229 S. W. 971.

Where after judgment for title and possession of an automobile plaintiff discovered that it had been transferred to third persons, and his judgment was unavailing, a new legal situation having arisen, an action for conversion cannot be defeated on the theory of the election of remedies. *Id.*

The doctrine of election does not apply unless the party has two valid and available remedies when he makes his election. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

A party does not have two remedies between which he must elect, where there is a valid defense to one of them, as where the remedy first sought is defeated by laches or limitations. *Hartford Life Ins. Co. v. Patterson* (Civ. App.) 231 S. W. 814.

The mere institution of a proceeding is not such a conclusive election as will prevent the plaintiff from abandoning it and pursuing an inconsistent remedy. *Id.*

Change of remedy by Legislature.—No one can have a vested right, one that cannot be disturbed without the consent of the parties, in a remedy. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

The Legislature has the right to modify and change the judicial procedure by means of which contract rights are enforced, so long as the modification does not incidentally enlarge the burden of the debtor or diminish the vested rights of the parties in contracts then existing. *Id.*

Parties suable.—That a railroad is in the hands of the government is no defense against an action, under U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j,

and a suit for unlawful conversion of property may be brought directly against the Director General of Railroads; such suit being in no sense a suit against the federal government. *Chambers, Watson & Wilson v. Hines* (Civ. App.) 225 S. W. 200.

CHAPTER TWO

PLEADING IN GENERAL

<p>Art. 1819. "Pleadings" defined. 1820. Pleadings of an intervenor. 1822. Pleading charters and acts of incorporation.</p>	<p>Art. 1823. Pleading special acts of the legislature. 1824. Pleadings may be amended. 1825. Time of filing amendment.</p>
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Article 1819. [1183] [1187] Pleadings defined.

Necessity and sufficiency in general.—Allegation of mutual mistake becomes immaterial where unilateral mistake of one party, known to other party, is sufficiently alleged. *International Life Ins. Co. v. Stuart* (Civ. App.) 201 S. W. 1088.

It is necessary to plead law of other state. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

To make estoppel of principal from setting up his agent's lack of authority available to the other party, it must be pleaded by such other party in his action against the principal. *Farmers' Union Co-op. Clearance House of Rusk v. Guinn* (Civ. App.) 208 S. W. 362.

Subrogation, to be available, must be pleaded. *Newton v. Houston Hot Well Improvement Co.* (Civ. App.) 211 S. W. 960.

Fraud, to be available against an award, must be pleaded. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

In the absence of plea of either waiver or estoppel, no such issues were in the case. *Holland v. De Walt* (Civ. App.) 225 S. W. 216.

Innocent purchase, for proof thereof to be available, must be pleaded. *Kurz v. Soliz* (Civ. App.) 231 S. W. 424.

Purpose and intent of pleader.—Intention of pleader could not alter legal effect of facts alleged. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Matters judicially noticed.—Neither a statute, nor the charter of a city, which is made by one of its provisions an act of which all courts must take notice, need be pleaded. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Matters of implication.—An allegation of facts which amounts to fraud is a sufficient allegation of fraud, though fraud is not alleged by name nor set out by the pleader as a legal conclusion from the facts. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Conclusions of fact or law.—It is sufficient to plead the facts relied on to show estoppel. *South Texas Lumber Co. v. Wolvin Line* (Civ. App.) 199 S. W. 1129.

A pleading setting up fraud must contain specific allegations of acts and conduct relied upon, and must be definite and certain. *J. M. Radford Grocery Co. v. Flynn* (Civ. App.) 202 S. W. 332.

Whether or not a suit to cancel a mineral lease is one coming within art. 1830, subd. 14, providing for venue of suits concerning land, is a legal question, and defendant's allegation in his plea of privilege, that it was not such a suit is a mere conclusion of law. *Thomason v. Ham* (Civ. App.) 210 S. W. 561.

A judgment cannot be based on a pleaded conclusion of law not warranted by the facts pleaded. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Fraud is not pleaded by a mere allegation that an execution was fraudulent, but the facts which would constitute the fraud must be pleaded. *Branscum v. Reese* (Civ. App.) 219 S. W. 871.

General allegations that a contract was executed through accident, mutual mistake, and fraud with respect to a certain feature thereof were ineffective as conclusions, where specific allegations of fact concerning such matter failed to show any accident, mutual mistake, or fraud. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881.

An allegation that a factory constitutes a nuisance, is the mere pleading of a conclusion. *Haynes v. Hedrick* (Civ. App.) 223 S. W. 550.

Certainty and consistency.—The particular facts relied upon as constituting estoppel should be pleaded with reasonable certainty. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

It is duty of pleader to state facts on which he relies with such certainty and accuracy as will identify transaction on which reliance for recovery is based, so as to afford other party a reasonable opportunity for investigation with a view to meeting the issue. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

There is no qualification or abridgment of the rights to plead matters that are inconsistent, if they be pleaded at the same time and in due order of pleading. *Illinois Bankers' Light Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

Disjunctive allegations.—When two causes of action or defense are pleaded in the disjunctive, one of which is good and the other is not, it amounts to no more than pleading the latter, because a pleading will be construed most strongly against the pleader. *Baker v. Galbreath* (Civ. App.) 211 S. W. 626.

Construction of pleadings.—Specific allegations control those of a general nature. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881; *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

Particular averments of doubtful meaning, at least in pleadings at law, must be construed against the pleader. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

Issues, proof, and variance.—A party must first plead facts which proof offered tends to establish, before such proof will be admissible, or, if admitted without objection, will avail him anything. *Nimmo v. O'Keefe* (Civ. App.) 204 S. W. 883.

Evidence which finds no support in pleadings cannot be considered. *Grand Lodge, A. O. U. W., v. Schwartz* (Civ. App.) 205 S. W. 156.

Under pleading charging that sale was in fraud of creditors, party was properly allowed to show that sale was constructively fraudulent to extent of difference between consideration paid and reasonable value of property, in that purchaser knew vendor was insolvent. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

The allegata and probata must correspond. *Allen v. Vineyard* (Civ. App.) 212 S. W. 266.

In divorce actions the courts will not quibble as to whether evidence showing plaintiff not entitled to divorce is supported by the pleadings. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

In broker's action on commission notes secured by lien reserved in deed, pleadings held to present issue of nondelivery of notes to broker. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

Art. 1820. [1184] [1188] Pleadings of an intervenor.

See *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

Sufficiency of pleading.—Where landowners intervened in receivership proceedings against irrigation company after sale of plant under order of court, and alleged water rights under contract with former owner, the court will not pass upon such question as against purchaser, where interveners did not plead an application to board of water engineers to fix water rates. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

Art. 1822. [1186] [1190] Pleading charters and acts of incorporation.

Cited, *Pate v. Whitley* (Civ. App.) 196 S. W. 581.

Pleading corporate existence.—In action against an insurance company, allegation that defendant was "a mutual chartered company doing business in the state" was, as against a general demurrer, a sufficient allegation of defendant's corporate status, the words "mutual chartered company" ordinarily meaning an incorporated company. *United Mut. Fire Ins. Co. v. Talley* (Civ. App.) 211 S. W. 653.

Denial of incorporation.—See *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823; note to art. 1906.

Art. 1823. [1187] [1191] Pleading special act of the legislature.

Pleading city charter.—Neither a statute, nor the charter of a city which is made by one of its provisions an act of which all courts must take notice, need be pleaded. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Art. 1824. [1188] [1192] Pleadings may be amended.

See *Bomar v. Parker*, 68 Tex. 435, 4 S. W. 599.

Cited, *McDaniel v. Cage & Crow* (Civ. App.) 201 S. W. 1078.

1. **Necessity of amendment.**—Where court considered amount insufficient to confer jurisdiction, plaintiff need not request permission to amend petition by making allegations of fraud more specific, since such request would have been useless. *Purcum v. Gaston* (Civ. App.) 196 S. W. 257.

Where buyer reconvened for damages for misrepresentations and there was evidence that the goods were of some value, court will affirm judgment for seller on a directed verdict, notwithstanding that evidence showed that the difference in value of goods actually delivered and that contracted for was considerable, where buyer refused to amend pleading so as to ask judgment for the difference of the value of goods delivered and that contracted for. *Alba-Malakoff Lignite Co. v. Hercules Powder Co.* (Civ. App.) 219 S. W. 554.

2. **Right to amend and subject-matter of amendment.**—Where court dismissed suit, plaintiff having been lacking in diligence to procure service of nonresidents, it properly refused to permit filing of amended petition showing why plaintiff should have been permitted to cite unserved defendants by publication, and why case should have been continued. *Cain v. Wharton* (Civ. App.) 196 S. W. 952.

In suit on joint and several note, with attachment and levy on defendants' joint property, an amendment alleging a subsequent cause of action against one of such defendants was not objectionable as being a misjoinder of causes of action. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

If art. 4649, requiring that petitions for injunction be verified, applies to a divorce proceeding, wherein district court, by art. 4639, has special authority to make temporary orders respecting property of parties, irregular verification of petition for divorce is subject to amendment, and does not defeat jurisdiction of district court to enter order prohibiting disposition of property of community estate. *Ex parte Gregory*, 85 Cr. 115, 210 S. W. 204.

An amendment may supply an allegation necessary to give the court jurisdiction, or correct statement of damages or change the capacity in which the plaintiff sues. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Where plaintiff petitioned for an injunction to restrain defendants from disconnecting a pipe system, and, after dissolution of a temporary injunction, the system was disconnected, it was not error for the court to allow plaintiff to amend and set up a claim for damages. *Id.*

Where plaintiff sued a liquor company for the price of a saloon business and it interpleaded W. and wife on a note given for the price of such business and disclaimed any interest in the note or amount due, plaintiff was properly permitted, after citing W. and wife, to amend and assert a cause of action against them on the note. *Wahl v. Ramsey* (Civ. App.) 218 S. W. 559.

In suit to enforce claim that devise was conditional, where the petition inferentially alleged that it was not the purpose to attack the will as probated, the trial court properly refused to permit plaintiffs to file an amended petition, in substance a suit to set aside probate of the will and to contest its probate in the district court over which that court had no jurisdiction. *Minor v. Hall* (Civ. App.) 225 S. W. 784.

In suit to cancel an oil lease, the trial court did not err in permitting defendant lessee to amend its answer so as to show the true date when it complied with a provision of the lease by furnishing a copy of the reports of the expert who made a geological survey. *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

3. Matters arising or discovered after original pleading.—An amendment may, under restrictions, introduce a new cause of action, or, in addition to the original cause, add one accruing after the suit was brought, and before the amendment was filed. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Where in suit to foreclose vendor's lien it was first shown by answers and cross-action that widow of purchaser agreed with vendor and mortgagee to deed the land one-half to each on a payment to be made by mortgagee to vendors, to which plaintiff pleaded by trial amendment that mortgagee waived agreement, the failure of plaintiff to sooner plead abandonment could not operate as an estoppel as to such plea. *Daugherty v. Roasberry* (Civ. App.) 229 S. W. 924.

4. New cause of action or defense.—In action on note where no fraud is alleged, an amendment to petition showing fraud presents new cause of action. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

There was no fundamental repugnance nor irremedial inconsistency between original petition, praying, in the alternative, for foreclosure of vendor's lien and for judgment on the notes, and amended petition seeking foreclosure of lien and a judgment for the debt. *Jones v. Fink* (Civ. App.) 209 S. W. 777.

Where original petition was amended only to the extent of changes due to a different stage having been reached in the progress of negotiations for exchange of properties, held, that different causes were not stated, and court did not err in overruling defendants' plea asking a transfer of cause to the county to which they had moved between the time of filing of original and amended petitions. *Sykes v. Fischl* (Civ. App.) 212 S. W. 217.

Oral contract declared on in third amended petition held not to so materially differ from that declared on in second amended petition as to change the cause of action, so that the bar of the statute, having been pleaded to the second amended petition, did not have to be further pleaded to the third. *El Paso Times Co. v. Fuller* (Civ. App.) 215 S. W. 113.

The right to amend pleadings includes the right to set up new matter as new grounds of recovery or defense. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

A new cause of action is one materially different from, or in addition to, that stated in the original pleading, or such as permits a more onerous judgment against defendant than could have been rendered against him on the original pleading. *Young v. City Nat. Bank* (Civ. App.) 223 S. W. 340.

Where the original petition stated a cause of action for simple debt against defendant, an amendment alleging that the debt arose by reason of larcenous conversion of funds by defendant states a new cause of action. *Id.*

Petition alleging that surety purchased notes from payee and delivered them to the payee to secure a loan that payee made to him, held not inconsistent with trial amendment that note was not intended to satisfy and discharge the note, but that it was understood and agreed between surety and payee, at the time of the transaction, that the note sued on was to be kept alive for the benefit and protection of the payee. *Security Nat. Bank of Dallas v. Kynerd* (Com. App.) 228 S. W. 123.

Where insurance company sued by agent for commissions sought to show that cause of action alleged was for damages for the accepted termination of the contract and set up limitation, plaintiff could amend so as to plead a cause of action upon theory that contract was a continuing one and had not terminated, notwithstanding amendment asserted an inconsistent remedy. *Hartford Life Ins. Co. v. Patterson* (Civ. App.) 231 S. W. 814.

7. **Amendment or further pleading after sustaining of demurrer or exception.**—Where in a personal injury action complaint was dismissed on exceptions upon plaintiff's refusal to amend, the refusal to amend did not abate the suit, where plaintiff subsequently before the following term of court, did amend, and thereafter prosecuted the suit by permission of the court. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

10. **Condition of cause and time for amendment.**—This article does not prevent the court from allowing a defendant to file an amended original answer after sustaining objections to the answer, where the plaintiff is not injured thereby. *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Court did not abuse its discretion by allowing plaintiff to file amended petition at subsequent term, especially in absence of showing of prejudice to defendant thereby. *Hunt v. Hunt* (Civ. App.) 196 S. W. 967.

Striking defendant railroad's amended answer filed immediately before trial, which asserted that petition alleged wrong measure of damages for mules killed, held erroneous, since plaintiff could not have been surprised or trial delayed. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 199 S. W. 868.

Although defendant's amended answer and cross-bill in suit for divorce was unnecessarily long, where there was nothing difficult of understanding in any of its allegations, the court did not err in refusing motion to strike on the ground that it was filed only three days before trial, in view of arts. 1824, 1825. *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

Record evidence held to warrant finding that defendants in suit on a note and to foreclose deed of trust, were negligent in delaying presentation of their case, etc., and in not seeking to amend their pleadings and introduce their evidence until the last day of court, so that it was no abuse of discretion in declining to permit them to amend and introduce evidence. *Richards v. Howard* (Civ. App.) 218 S. W. 95.

11. — **Effect of announcement of ready for trial.**—Permitting filing of amended pleadings on the day the case is called for trial, or even after announcement of ready, is in the discretion of the trial court, and such action will not be disturbed on appeal in the absence of a clear abuse of such discretion. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699.

12. — **Trial amendments in general.**—Privilege to file trial amendment is within discretion of trial court, and its denial is not error in absence of showing of abuse of such discretion. *Boyd v. Hurd* (Civ. App.) 207 S. W. 339; *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466; *Holden v. Evans* (Civ. App.) 231 S. W. 146.

The court cannot allow an amendment of the pleadings during the trial, under this article. *Petty v. Lang*, 81 Tex. 238, 16 S. W. 999.

Under this article, it was within discretion of the court to permit defendants in trespass to try title to amend their pleadings after case had proceeded for 10 days, so as to allege equitable instead of legal title. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

In view of District and County Court Rule 12 (142 S. W. xviii) and this article, held that practice in allowing trial amendments after announcement of ready within discretion of court is well established. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

Under district and county court rule 27 (142 S. W. xix) trial amendment, filed after cause had been dismissed, without knowledge or consent of court, would not aid sufficiency of original petition. *Russell v. Koennecke* (Civ. App.) 197 S. W. 1111.

In trespass to try title for two tracts of land out of a survey, the allowance of plaintiff's trial amendment, attempting to vary and limit the terms of a deed, was erroneous. *Read v. Blaine* (Civ. App.) 201 S. W. 415.

In action to recover lands, where defendant claimed a specific tract by adverse possession, it was not error to permit a trial amendment to the answer praying in the alternative that an undescribed 160-acre tract be set off to her, and that such tract include her improvements. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

Although first paragraph of plaintiff's trial amendment did not set up a new cause of action, where no abuse of discretion is shown in striking out amendment, it will not be held that there was error. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

It was not abuse of discretion to allow defendant to file trial amendment, plaintiff not claiming surprise, nor asking for continuance, nor showing injury. *Kanner v. Startz* (Civ. App.) 203 S. W. 603.

In servant's action for injuries, there was no error in allowing trial amendment alleging that plaintiff stepped on a piece of carbon, instead of carbide, as originally alleged by plaintiff, and admitting testimony relating to carbon; there being no claim of surprise and no request for a continuance or postponement. *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

In action on contract the court did not abuse its discretion in refusing to allow defendant to file amended answers alleging that defendants were agents of a third party, who alone was liable to plaintiff, where amendment was not offered until case was called for trial. *Harlan v. Falfurrias Mercantile Co.* (Civ. App.) 214 S. W. 649.

Postponement of a trial is in the sound discretion of the trial court, and it was not an abuse of discretion to refuse to permit an amendment to be filed after evidence was in, setting up facts which were within the pleader's knowledge before the trial. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

District Court Rule 27 (142 S. W. xix), regulating the filing of trial amendments, does not make the right to file the same dependent upon the contingency that ex-

ceptions to a pleading have been sustained; the matter being within the discretion of the court. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

Whether the facts relied on to show an ordinance unreasonable are apparent in the face of the petition or not, a demurrer admits them as true, and the reasonableness or unreasonableness becomes a question of law for the court. *Zucht v. King* (Civ. App.) 225 S. W. 267.

A trial amendment after the jury had answered the special issues held within the trial court's discretion. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

13. — **Amendment to conform to proof.**—Where evidence as to modifications of a contract was objected to upon the ground that the pleadings did not support such evidence, the defect in the pleading could be cured by a trial amendment. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

15. **Notice or citation.**—Defendant, who has been cited, but has not been answered, must be notified of every amendment which sets up new cause of action or requires more onerous judgment. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

Where defendant has pleaded, only notice of amendment, which sets up new cause of action or requires more onerous judgment against him, to which he is entitled, is order of court granting leave to file amendment. *Id.*

Plaintiff's second amended petition, although containing specific prayer for foreclosure of lien, held not to state new cause of action or require more proof of defendant entitling him to notice of filing thereof. *Id.*

In case where original petition prayed \$10,000 damages, held, that amended petition asking \$3,000 became effective against defendants' right to removal under petition filed thereafter, but before service of notice of amendment; notice of amendment being given within five days required by this article. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Under this article, defendant cannot complain that petition alleging his assumption of purchase-price notes was amended during vacation without service upon him by alleging that he had conveyed land for which notes were given to other defendants, since such amendment did not affect him. *De Berry v. Chambers* (Civ. App.) 200 S. W. 1141.

Where, in an action for injuries to plaintiff's wife, defendant moved for a peremptory instruction on the ground that such damages were not recoverable by the husband, whereupon he filed an amended petition making the wife a party plaintiff, it was not necessary to again serve defendant with citation. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

A defendant properly served with citation and original petition and in default is entitled to service of process upon an amendment which states a new cause of action against him. *Young v. City Nat. Bank* (Civ. App.) 223 S. W. 340.

16. **Amendment regarded as made.**—If a petition shows that it is amendable so as to meet every objection, it is sufficient to sustain a judgment. *Sovereign Camp Woodmen of the World v. Piper* (Civ. App.) 222 S. W. 649.

18. **Form and sufficiency of amended pleading.**—Amendment, entitled "First Amendment of Plaintiff," being intended as a trial amendment for the purpose of supplementing original petition, misnomer and failure to refer to original pleading will not destroy its real character and purpose. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

19. **Operation and effect of amendment.**—Where plaintiff filed amended petition reducing claim to \$3,000, nonresident defendants' application for removal to federal court held properly denied, although property attached under original petition was appraised at \$10,000.—*Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Allegations of trial amendment contradictory of and repugnant to distinctly alleged fact in amended petition of which trial amendment was a part is ineffectual. *Kynerd v. Security Nat. Bank* (Civ. App.) 207 S. W. 133.

Exception because of original answer not giving the Christian names of individuals was properly overruled; the omission having been corrected by amended answer. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

A trial amendment to petition is to be construed in connection with the petition. *Security Nat. Bank of Dallas v. Kynerd* (Com. App.) 228 S. W. 123.

The fact that amended original petition did not specify that the action was against executor as such will not be treated as a dismissal of the action as to him in his representative capacity, where the relief sought necessitated his presence in his representative capacity, and he continued to treat the action as involving his representative capacity. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

20. — **Superseding prior pleading.**—A first amended abandoned petition is no part of a second amended petition. *Corpus Christi Street & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 201 S. W. 1032.

Under Rules 12 and 14 (142 S. W. xviii), an amended petition completely supersedes an original petition, and the averments of the original petition cannot be looked to in determining the admissibility of evidence. *Cox v. Cox* (Civ. App.) 214 S. W. 627.

27. **Supplemental petition.**—Trespass to try title against a defendant holding notes secured by vendor's lien on land and a deed as purchaser at a sale under a deed of trust held not changed to a suit in equity to cancel trustee's deed by supplemental petition. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

Supplemental petition pleading waiver of one of provisions of contract is not demurrable upon ground that it seeks to ingraft upon contract conditions not embodied therein. *Couch v. Biggers* (Civ. App.) 198 S. W. 1101.

Where defendant denied that plaintiff was in defendant's employ, and alleged that he was working for F., an independent construction contractor, an allegation of supplemental petition that F. was defendant's president held relevant. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

A supplemental petition in reply to defendants' answer in a suit on notes and chattel mortgage on machinery, given by the purchaser thereof, held sufficient when tested by general demurrer. *Board v. Emerson-Brantingham Implement Co.* (Civ. App.) 203 S. W. 421.

In a suit on a note wherein defendants pleaded a compromise agreement, a paragraph of plaintiff's supplemental petition held to state no defense thereto and open to general demurrer. *Richardson v. Nesbit* (Civ. App.) 204 S. W. 689.

An abandoned supplemental petition, filed by plaintiff, is admissible in evidence against him, notwithstanding it contained legal conclusions, for the averments in the petition were admissions of the plaintiff. *Stowers v. H. L. Stevens & Co.* (Civ. App.) 208 S. W. 365.

An exception to supplemental petition to recover for services that it did not specifically allege that the defendant knowingly permitted anything to be done with the intention of inducing plaintiff to conclude that its general local manager had authority to contract for plans and specifications on its behalf, and because not alleging that plaintiff was induced to form such an erroneous opinion by any of the alleged circumstances, held not well taken. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In suit to set aside deed, new matter alleged in supplemental petition attempting to claim damages, but not constituting a reply to any allegations in defendant's answer, under district and county court rule 5 (142 S. W. xvii), was not sufficient, since such matter, under rule 15, should have been pleaded by amendment. *Kiehn v. Willmann* (Civ. App.) 218 S. W. 15.

The office of a supplemental petition is not to set up a cause of action, but simply to reply to the pleadings of the adversary. *Sanger Bros. v. Barrett* (Civ. App.) 221 S. W. 1087.

Where a petition for specific performance alleged that one was acting as agent of the vendor, and her answer denied the agent's authority, it was the office of the plaintiff's supplemental petition to reply to this denial, and it was proper to allege ratification which, if true, was a sufficient answer. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

A supplemental petition was not the proper pleading for disclosing the fact that one, suing in his individual name on a note payable under a trade-name, was doing business under such trade-name, and thereby curing a defect in the petition, as such defect should have been cured by amendment. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701.

In an action for breach of contract to convey land, plaintiff cannot complain that he was not permitted to offer evidence as to certain expenses incurred by him in moving his family and household goods, where such items of damages, pleaded by plaintiff in his supplemental petition, were not in response to pleading by defendant. *Henderson v. Jones* (Civ. App.) 227 S. W. 736.

In a suit to recover earnest money and liquidated damages for breach of a contract, where the answer claimed that the abstract furnished did not show good title, a supplemental petition, alleging that defendant agreed to accept the title if plaintiff procured quitclaim deeds, but that he refused to accept it after the deeds were procured, though it does not state grounds for recovery by plaintiff, states a defense to the affirmative relief asked by defendant, so that it was error to sustain exceptions thereto. *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

28. Supplemental answer.—In action by an employé of a third person for injuries wherein defendant answered by general denial, etc., supplemental answer, that plaintiff had accepted compensation under Workmen's Compensation Act, could not nullify the general denial, in view of the statute permitting defendant to plead as many matters of law or fact as he may choose. *Lancaster v. Hunter* (Civ. App.) 217 S. W. 765.

29. Repleader.—In proceeding by stockholders of corporation for receivership and settlement of its affairs, plaintiffs' repleader held to add nothing to the original complaint, which failed to show a cause for the appointment of a receiver. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

Art. 1825. [1189] [1193] Time of filing amendment.

See *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

DECISIONS IN GENERAL

2. Demurrer or exception—Grounds for demurrer or exception in general.—If plaintiff's pleading was defective for want of particularity, defendant should have excepted on such ground, following up the general rule that an exception touching the legal sufficiency, formally or substantially, of a pleading, should be made before a trial on the issues of fact. *Cooper v. Hinman* (Civ. App.) 212 S. W. 972.

In action on a life policy, which did not provide that the certificate of the attending physician and the findings of the coroner should be admitted in evidence to establish the cause of death, so that they were not admissible over objection, the trial court should have sustained plaintiff's exceptions to the answer, which contained matters of evidence. *Green v. Missouri State Life Ins. Co.* (Civ. App.) 219 S. W. 552.

3. — **Matters not appearing on face of pleading.**—Petition, not indicating on its face that suit was brought sooner than 60 days after proof of loss, contrary to provisions of fire policy, was good against special exception on ground that it appeared that suit was prematurely brought. *Royal Ins. of Liverpool, England, v. Humphrey* (Civ. App.) 201 S. W. 426.

A petition held sufficient against demurrer to state a cause of action on a note, though as a matter of fact plaintiffs had previously recovered a judgment on such note, etc., where petition did not mention such fact. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

5. — **Statute of frauds and of limitations.**—The defense of limitation may, where the facts appear upon the face of the pleadings, be taken advantage of by special exceptions. *Garcia v. Yzaguirre* (Com. App.) 213 S. W. 236.

7. — **Demurrer to part of pleading or to pleading good in part.**—Where exception to plaintiffs' petition embodying account was general, some items of account being correctly pleaded, it was error to dismiss entire account, and to refuse to hear testimony. *Willet Bros. v. Western Naval Stores Co.* (Civ. App.) 198 S. W. 352.

Where a petition for damages for loss of trunk by innkeeper set out each item lost with its value, each item constituted a cause of action, and a special demurrer to the petition as a whole was insufficient. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

A general exception to petition seeking to recover for failure to seasonably deliver shipments to connecting carrier should be overruled, where allegations as to some shipments were sufficient. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

In suit by an infant, whose land was condemned by a city, to set aside the judgment of condemnation on the ground that she was not notified of the proceedings, etc., exception to the owner's petition on the ground that certain facts alleged were immaterial, some of the matters being proper, and none of them immaterial or irrelevant, held properly overruled. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Where a petition stated a good cause of action to recover for supplies furnished to a contractor, but stated no cause of action against the surety, the judgment sustaining a general demurrer to the petition will be reversed in so far as it relates to the contractor. *Acme Brick Co. v. Taylor* (Civ. App.) 223 S. W. 248.

8. — **General demurrer or exception.**—Every reasonable intendment or presumption will be indulged in favor of the sufficiency of a petition or other pleading as against a general demurrer. *Ayo v. Robertson* (Civ. App.) 207 S. W. 979; *Turner v. Turner* (Civ. App.) 195 S. W. 326; *Russell v. Koennecke* (Civ. App.) 197 S. W. 1111; *Lang v. Bohlen* (Civ. App.) 200 S. W. 429; *Ætna Life Ins. Co. v. Otis Elevator Co.* (Civ. App.) 204 S. W. 376; *City of Seguin v. Berman* (Civ. App.) 205 S. W. 990; *Harris v. Mann* (Civ. App.) 207 S. W. 156; *Tittle v. Bartholomae* (Civ. App.) 207 S. W. 176; *Pelipchuk v. Borden* (Civ. App.) 207 S. W. 177; *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372; *Strait Bros. v. Chaney* (Civ. App.) 209 S. W. 219; *Acme Brick Co. v. West* (Civ. App.) 215 S. W. 476; *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225; *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101; *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611; *Colley v. Alamo Lumber Co.* (Civ. App.) 227 S. W. 559; *Paine v. Hart-Parr Co.* (Com. App.) 228 S. W. 121; *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

Objection on appeal that petition did not entitle plaintiff to relief because of facts appearing on its face held to partake of the nature of a general demurrer, and facts alleged to be considered as true. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

If petition to rescind sale of real estate, cancel deeds, and recover compensation for personal services was defective, in other respects, but stated cause of action for personal services, general demurrer should have been overruled. *Posey v. Hanson* (Civ. App.) 196 S. W. 731.

Exception that pleading was effort to vary terms of written agreement by contemporaneous parol agreement, and that it failed to show a matter specified, held in the nature of a general demurrer rather than a special exception. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

Where general demurrer, as well as special exceptions, were sustained to plaintiff's petition sufficient as against general demurrer, judgment will be reversed on plaintiff's appeal, though he failed to complain of sustaining of exceptions. *Reasoner v. Gulf, C. & S. F. Ry. Co.*, 109 Tex. 204, 203 S. W. 592.

A general demurrer did not raise the objection that the temporary writ of injunction expired by operation of law at the return term of the court, and that, as the suit was for injunction only, a cross-action would not lie, and without a special exception such objection was waived. *Anderson v. Wilson* (Civ. App.) 204 S. W. 784.

A complaint for recovery of an occupation tax paid under duress set out, and held sufficient as against a general demurrer, though it may have been subject to special exception. *City of Seguin v. Berman* (Civ. App.) 205 S. W. 990.

Pleadings not objected to below, except by interposition of general demurrer, on appeal will be given most liberal construction consistent with their terms, every reasonable intendment being indulged in their favor, a rule particularly applicable to a bill in equity. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

While special exceptions were properly sustained to part of petition seeking a recovery for breach of contract, if a cause was stated against defendant city for a conversion and willful acts or negligence, a general demurrer should not have been sustained. *Templeton v. City of Wellington* (Civ. App.) 207 S. W. 186.

A general demurrer, being merely intended to challenge the sufficiency of a petition or answer, cannot operate as a claim of the benefits of art. 1830, subd. 17, relating to venue. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Pleading of right to have land on foreclosure sale sold in small lots under art. 3754, without alleging that the plat and field notes were certified by county surveyor, held sufficient on general demurrer, since such omission could only be reached by a special exception. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

In an action against an employer amenable to the Employers' Liability Act (arts. 5246h-5246zzzz), but who has not qualified, allegation that "the defendant, its agents and servants, negligently," etc., "turned the switch," is sufficient upon general demurrer under art. 5246h, subd. 4, although a special exception pointing out that no particular servant was named, and that there was no allegation that the person or employé was acting within the scope of his employment would be sustained. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

Plaintiff's authority to sue for the use and benefit of another cannot be raised by general demurrer. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

Petition is subject to general demurrer, a fact necessary to be proved to sustain a recovery, neither being alleged therein, nor fairly inferable from facts alleged. *Midland & N. W. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 216 S. W. 627.

Where after reading every reasonable intendment into a petition it still states no cause of action, a general demurrer thereto should be sustained. *Galveston, H. & S. A. Ry. Co. v. Seligman* (Civ. App.) 219 S. W. 303.

A petition as against general demurrer should be liberally construed, all reasonable intendments from facts stated being indulged in favor of statement of a cause of action, though facts, and not mere conclusions, must be alleged. *Shepherd State Bank v. San Jacinto County* (Civ. App.) 221 S. W. 324.

A general demurrer admits the facts pleaded to be true, but denies that they constitute a cause of action or ground of defense, and, if enough is stated to enable the court to see that a good cause of action exists, however defectively, the insufficiency or defectiveness of the averment cannot be taken advantage of by a general demurrer. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

Plaintiff's pleading termed an amended petition, and answer to defendant's cross-action stating that he demurred generally to defendant's allegations for damages as insufficient in law upon which to base a cause of action was not a general exception to the entire pleading, but at most a general exception to only one part of the answer. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

9. — **Special demurrer or exception.**—If plaintiff in action for damage to machinery claimed improper measure of damages, defendant must call attention to the defect in the petition by special exception. *Houston Tie & Lumber Co. v. Hankins* (Civ. App.) 200 S. W. 237.

If plaintiff desires to know more specifically what representations were which defendant alleged induced the note in suit, he may acquire such information by special exception, in which case every presumption is indulged against the sufficiency of the allegations. *Lang v. Bohlen* (Civ. App.) 200 S. W. 429.

While the suggestion that a pleading is not good as against a general demurrer raises a question of fundamental error, the rule does not apply to objections raised by special exception. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

On special exception, ambiguity will be construed against pleader. *Reuter v. Nixon State Bank* (Civ. App.) 206 S. W. 715.

There being no averment that cashier had authority to bind board of directors of defendant bank, or that board approved all sketches prepared by plaintiff architect, and authorized cashier to so inform plaintiff, it will not be inferred in the face of a special exception that the board of directors were bound. *Id.*

Objection that complaint in broker's action against his associates for share of commission failed to allege fraud in securing release given by him is available only on an action of the court on special exception to the pleading, in the absence of which no question is presented on appeal. *Security Realty Co. v. Critchett* (Civ. App.) 206 S. W. 852.

If the petition shows a good cause, but defectively stated, or if there is an omission of a formal averment, the defect must be pointed out by special exception. *Templeton v. City of Wellington* (Civ. App.) 207 S. W. 186.

Where plaintiffs alleged that defendant lived in a county other than where the suit was instituted, no plea of privilege under art. 1903, was necessary, since privilege could be invoked by special exception to plaintiffs' petition. *Thomason v. Ham* (Civ. App.) 210 S. W. 561.

Defect in the form or manner of stating a fact should be pointed out by special exception, since a good cause of action, defectively stated, or the omission of a formal, but necessary, averment, is good against a general demurrer. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Misjoinder of defendants and causes of action is a matter properly raised by special exception to the pleadings, and not reviewable in the absence of a statement of facts or findings of fact. *Spitzer v. Smith* (Civ. App.) 213 S. W. 599.

The rule that all parts of a pleading will be considered to give effect to intention of pleader is not applicable against a special exception. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

The "subject-matter" with reference to the court's jurisdiction concerns its power to hear and determine cases of the general class to which the proceedings belong, so that a special exception that the petition shows that the court has no jurisdiction of the subject-matter does not present the objection of nonjoinder of a necessary plaintiff. *Western Union Telegraph Co. v. Brooks* (Civ. App.) 221 S. W. 1024.

On special exception that plaintiff's petition was insufficient because it failed to allege the performance or tender of performance of contract, the petition must be consid-

ered in its entirety, and the exception was properly overruled where the petition, so considered, was not subject to that objection. *Hodgkinson v. Hartwell* (Civ. App.) 226 S. W. 457.

A pleading which alleged facts from which it might be inferred that an insurance company had waived a requirement of the policy so that it would be valid against a general exception is nevertheless subject to a special exception. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Certain exceptions objected to as being no more than general demurrers, while general in their phraseology, held to meet substantially the requirement of the rule that they should point out the particular pleading excepted to. *Browning Engineering Co. v. Willett* (Com. App.) 228 S. W. 151.

Even in an action for the conversion of ores, a mere general allegation that plaintiff was the owner of the claim from which the ores were taken would be insufficient against a special exception. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

10. — Speaking demurrer.—A statement styled an exception held not an exception, but a "speaking demurrer," which was bad because it required consideration of pleadings other than that demurred to. *Pyle v. Park* (Civ. App.) 196 S. W. 243.

A demurrer to a petition alleging facts not found in the petition is a "speaking demurrer," and should be overruled. *Cudahy Packing Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 206 S. W. 854.

11. — Abandonment or waiver of demurrer or exception.—Failure to invoke action of the trial judge upon a general demurrer and special exceptions was a waiver of the exceptions, and the case will be viewed on appeal as though they were never filed. *Texas Auto Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 211 S. W. 629.

Plaintiff could not avail himself of defense of limitation without having pleaded limitation in his reply, though he had raised such defense by special exception, where court had not acted upon the exception, and judgment of the court thereon had not been invoked by plaintiff; the exception having been waived. *Garcia v. Yzaguirre* (Com. App.) 213 S. W. 236.

Where, although defendants pleaded the general demurrer as part of their answer, it was never presented to or acted upon by the trial court, it was waived. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

The sufficiency of petition to state a cause of action will not be reviewed in absence of ruling on demurrer interposed thereto. *Id.*

12. — Admissions by demurrer or exception.—On general demurrer to petition, the averments must be considered as true. *Davidson v. Guarantee Life Ins. Co.* (Civ. App.) 220 S. W. 582; *Houston Heights Water & Light Ass'n v. Gerlach* (Civ. App.) 216 S. W. 634; *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535; *Colley v. Alamo Lumber Co.* (Civ. App.) 227 S. W. 559; *Brokaw v. Collett* (Civ. App.) 230 S. W. 790; *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

A demurrer admits truth of statements in pleading against which it is directed. *Cherbonnier v. Citizens' Nat. Bank of Lubbock* (Civ. App.) 199 S. W. 307; *Texas Co. v. Keeter* (Civ. App.) 219 S. W. 521.

Demurrer to the petition admits the facts alleged to test their sufficiency. *Ander-son v. Grand Lodge, United Brothers of Friendship of the State of Texas* (Civ. App.) 223 S. W. 237; *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 196 S. W. 346.

A general demurrer to a petition admits the truth of all facts alleged and all inferences reasonably deducible therefrom. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

Demurrer to the petition admits the facts alleged, and the Court of Civil Appeals must assume they are true. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

Where, in cross-action, allegations of petition of plaintiff are adopted, the allegations must be taken as true on general demurrer. *James v. Stratton* (Civ. App.) 203 S. W. 386.

Admission by demurrer is only for purpose of passing upon sufficiency vel non of pleading, and is not an admission of truth of facts upon the merits. *Ray v. W. W. Kimball Co.* (Civ. App.) 207 S. W. 351.

In considering ruling sustaining demurrer to answer, Court of Civil Appeals must assume truth of every fact alleged. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

Upon exceptions to petition for certiorari, averment of petition must be taken as true. *Lee v. Benzes* (Civ. App.) 209 S. W. 768.

Allegations of the petition not reached by special exceptions are taken as true on general demurrer. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

Whether the facts relied on to show an ordinance unreasonable are apparent in the face of the petition or not, a demurrer admits them as true. *Zucht v. King* (Civ. App.) 225 S. W. 267.

Allegations of fact in petition must be treated as true on demurrer. *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

13. — Scope of inquiry.—As a general rule, the only pleading which can be considered in passing on a demurrer is the pleading demurred to. *Pyle v. Park* (Civ. App.) 196 S. W. 243.

On exception to the petition, the court may take judicial notice of the citation and return thereon, as bearing on the question whether the action was effectively commenced within the period of limitations. *Ben C. Jones & Co. v. West Pub. Co.* (C. C. A.) 270 Fed. 563.

In passing upon general demurrer to a pleading, the court must look to and consider only such matters of fact as are alleged in such pleading. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

In suit to foreclose mortgage covering crops whether the parties contemplated that a crop would be grown in 1917 was in a measure a question of fact, which could not be determined by exception to plaintiff's petition. *Perkins v. Alexander* (Civ. App.) 209 S. W. 739.

Where the truth of matters contained in a plea in abatement did not appear from the face of the record so as to enable the court to decide the questions raised as a matter of law, it was error to sustain exceptions to the plea. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

14. — **Hearing and determination.**—Where petition in replevin action did not allege that defendant wrongfully deprived plaintiff of possession, or wrongfully withheld possession and answer contained a general demurrer, it was duty of court of its own motion, if demurrer was not called to its attention, to hold that petition did not state cause of action. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

15. — **Effect of overruling.**—After a general demurrer has been overruled, the pleader, to prevail, must establish by competent evidence the facts pleaded on a trial of the issues made. *Ray v. W. W. Kimball Co.* (Civ. App.) 207 S. W. 351.

16. — **Effect of sustaining.**—Where general demurrer to answer was sustained, defendant was left without answer, and plaintiff relieved of the burden of making proof of any matter pleaded. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

The trial court having sustained general demurrer to petition special exceptions thereto should not have been considered. *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

Where a demurrer to plaintiff's petition was erroneously sustained and he was dismissed from the suit, a judgment against him, after an *ex parte* hearing, upon the claims of certain defendants to a fund paid into court, cannot be sustained. *Hand v. Sovereign Camp, Woodmen of the World* (Civ. App.) 214 S. W. 718.

The judgment rendered on sustained exceptions to the petition which plaintiff declined to amend, should not be that plaintiff go hence without day, but should be a dismissal of the case. *Strickland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

In a suit by stockholders against officers and directors for injunction and a receivership, where a general demurrer was sustained to that portion of the petition seeking to have a receiver appointed, plaintiffs, by refusing to further prosecute their suit, abandoned their entire cause of action. *Bordages v. Burnett* (Civ. App.) 221 S. W. 326.

17. — **Demurrer to amended pleading.**—Where plaintiff's recovery was wholly by virtue of allegations in the petition as they existed at the time of filing of trial amendment, it was not necessary that defendant should have renewed exceptions to the petition when the trial amendment was filed in order to complain of too great generality in its allegations. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

19. **Defects and objections and waiver thereof.**—Assuming that suicide clause in life policy required beneficiary to plead a negative, failure to plead such negative was only a defect of pleading which could not be raised upon the introduction of evidence. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

20. — **Cure by subsequent pleading.**—In an action by a mortgagee against a mortgagor and a subsequent mortgagee, the subsequent mortgagee, not pleading fraud in execution of plaintiff's mortgage, cannot profit by such an allegation by the mortgagor. *John E. Morrison Co. v. Riley* (Civ. App.) 198 S. W. 1031.

The objection, made on appeal, that a fact was not sufficiently pleaded, should be overruled, if all the pleadings, including one defendant's pleadings and plaintiff's reply to plea of privilege of another defendant, taken together, present such an issue. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

21. — **Cure by pleadings of adverse party.**—In suit on guardianship bond, averment in answer sufficiently showing that sureties signed as such would cure want of an allegation in petition that sureties executed the bond. *Davis v. White* (Civ. App.) 207 S. W. 679; *Wyatt & Wingo v. White* (Com. App.) 223 S. W. 154.

To a general demurrer to petition, it is sufficient answer that by plea of confession and avoidance defendant had admitted the cause of action, except as to specific matters therein set up. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

In landlord's action, failure to allege agreement, whereby statute limiting amount of rent was rendered inapplicable, held cured where such agreement was alleged in the answer. *Doby v. Sanders* (Civ. App.) 198 S. W. 806.

Where averments in an answer cover the want of jurisdictional averments in a petition, the pleadings of both parties may be looked to to ascertain the issues. *Hranicky v. Sell* (Civ. App.) 199 S. W. 315.

An insufficiency of description, in broker's complaint for commissions, of the lands plaintiff was authorized to sell, is cured by the answer identifying them. *Vrablec v. Kocurek* (Civ. App.) 199 S. W. 876.

Though a petition to compel the acting comptroller to reinstate a retail liquor license failed to allege the license had been rescinded and vacated, the defect is cured, where that fact was set out by the answer. *Tittle v. Bartholomae* (Civ. App.) 207 S. W. 176.

In mandamus against city officer, the officer could not complain of an order overruling a plea in abatement on the ground that plaintiff did not specially plead ordinances,

where the answer specially pleaded such ordinances. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Failure of petition, in action for death of husband, to allege that husband was engaged in interstate commerce, was cured by affirmative allegations in motion to dismiss petition that both husband and company were so engaged. *Pope v. Kansas City, M. & O. Ry. Co. of Texas*, 109 Tex. 311, 207 S. W. 514.

Allegations of answer may be taken in aid of the petition in testing it as against a general demurrer. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

Misrepresentations pleaded by plaintiff in an action against seller of unsound cattle, taken in connection with defendant's pleading that he was only an agent of plaintiff, held, under plaintiff's prayer for general relief, to entitle him to recovery upon the theory of fraudulent misrepresentations by defendant as plaintiff's agent. *Graves v. Haynes* (Civ. App.) 214 S. W. 665.

Any defect in a complaint on a fraternal benefit policy due to failure to allege that beneficiary had an insurable interest in deceased's life was supplied by answer which alleged the beneficiary was deceased's nephew. *Hand v. Sovereign Camp, Woodmen of the World* (Civ. App.) 214 S. W. 718.

A petition, in an action to enjoin the state comptroller from issuing warrants, on the ground that a law providing therefor was void, which referred to a certified copy of the alleged void law, but did not have such copy attached, was cured by the answer, to which was attached a certified copy of such law. *King v. Terrell* (Civ. App.) 218 S. W. 42.

In an action for injuries in collision between defendant's street car and an automobile, evidence of failure to sound gong was admissible, though such failure was not alleged, where answer alleged that the motorman sounded the gong. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

In a suit on a fraternal benefit certificate, plaintiff's pleadings, as aided by defendant's answer held good on general demurrer; every intendment of the pleader being read into the petition. *Sovereign Camp, W. O. W., v. Hubbard* (Civ. App.) 231 S. W. 828.

22. — Waiver in general.—Though it is the better practice to present exceptions to pleadings setting up supposed immaterial issues, failure so to do does not necessarily constitute a waiver or an estoppel, and prevent objection to supporting proof when offered. *Cooper v. Hinman* (Civ. App.) 212 S. W. 972.

The rule that failure to except to pleadings setting up supposed immaterial issues constitutes a waiver or an estoppel is applicable only when the issue pleaded could be saved by amending. *Id.*

Where a corporation was sued by wrong name, and judgment by default taken in that name, neither the petition nor the citation leaving in doubt the identity of the party intended to be sued, the judgment was binding, since, if, knowing that suit had been brought against it, it elected not to interpose timely objection, it will be considered as having waived such mistake. *Abilene Independent Telephone & Telegraph Co. v. Williams* (Sup.) 229 S. W. 847.

23. — Waiver of objections to petition or complaint in general.—Objections to sufficiency of petition to support judgment or justify recovery held reviewable, though not assigned in the trial court, as they presented questions of fundamental error. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

In action for commission by a firm of realty brokers, pleading that defendant owners voluntarily consummated sale with purchaser produced by plaintiff firm, on terms dissimilar to those specified by owners, though general, was sufficient to permit introduction of testimony, in absence of demurrer raising issue. *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347.

Defendant, having failed to except to statement in justice court of plaintiffs' cause of action, either in that court or on appeal to county court, cannot ask reversal of judgment against him because of the imperfect statement. *Kelly v. Collins* (Civ. App.) 198 S. W. 396.

In suit to foreclose chattel mortgage, failure to allege the value of the property mortgaged is fundamental error apparent of record, requiring reversal, whether or not there was an exception, plea, or other objection to the petition on that ground in the court below. *People's Ice Co. v. Phariss* (Civ. App.) 203 S. W. 66.

Pleading a conclusion that petitioners for injunction were owners of the fee in a street in the absence of special exception thereto or general denial held to warrant introduction of evidence of ownership of fee. *City of Orange v. Rector* (Civ. App.) 205 S. W. 503.

Averment of divorced wife's complaint attacking decree dividing community property on ground that it was procured by fraud on her and the court, in absence of special exception, held sufficient to admit evidence as to the exact time when and the conditions under which her husband's fraud was discovered. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

Although averment that purpose of sending telegram to son announcing serious illness of his sister "was to notify her brother of her condition so that he might come to her immediately" was ambiguous, where it was not excepted to, it was permissible to construe averment to mean that plaintiff's purpose was to have son come immediately. *Western Union Telegraph Co. v. Barrett* (Civ. App.) 207 S. W. 976.

An insufficient petition will not be held sufficient on the ground that plaintiff's counsel understood from conversation with defendant's counsel that it would not be nec-

essary to amend the pleadings, as no question concerning the same would be raised. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

An objection to the petition, not raised by any plea, exception, or other pleading in the trial court, cannot be raised for the first time on appeal. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

The requirement of art. 6097, that the name and residence of joint owners in partition shall be alleged, is not cured by a failure to take action upon it at the trial. *Farras v. Delgado* (Civ. App.) 210 S. W. 610.

Assuming that suicide clause in life policy required beneficiary to plead a negative, failure to plead such negative could not be raised upon the introduction of evidence or after verdict, where no exception was taken to such omission. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

An omission of the offer to do equity or to make restitution of what the complainant has received does not go to the sufficiency of the bill to state a cause of action, but must be taken advantage of by answer or demurrer, and is waived if the defendant goes to trial without objection. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

In action on policy issued by a mutual benefit society based on presumption of his death after seven years' absence, allegations of petition, though general, held sufficient to state cause of action in the absence of exception, the allegations, with the society's admissions, being sufficient to meet requirements that conditions precedent to recovery should be pleaded. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

A petition for damages for breach of contract to ship a specified number of bales of high density Webb compressed cotton, which disclosed that the theory of recovery was that the specified cotton should have a higher density than that furnished for shipment, is sufficient, in the absence of a special exception, to support recovery on the finding that the cotton was not compressed in a workmanlike manner, as impliedly required by the contract. *Elder, Dempster & Co. v. Weld-Neville Cotton Co.* (Com. App.) 231 S. W. 102.

24. — **Misjoinder of causes of action and duplicity.**—Where two railway companies filed a joint answer, not complaining of misjoinder of causes of action, and subsequently filed separate answers, pleading misjoinder in abatement, the objection was waived. *Missouri, K. & T. Ry. Co. of Texas v. Baker Bros.* (Civ. App.) 210 S. W. 244.

In an action for conversion against second mortgagee, where a petition fully set out plaintiff's rights as a mortgagee, and also as a purchaser of the mortgaged chattels, and there was a prayer for both general and special relief, and the petition was not excepted to because it asserted plaintiff's rights in both respects in same count, plaintiff was entitled to recover either as purchaser or mortgagee. *Citizens' Guaranty State Bank v. Johnson* (Civ. App.) 211 S. W. 271.

The objection that the cross-action by one defendant against another was foreign to plaintiff's suit so that there was a misjoinder of causes of action was waived, by failure to raise it by plea in abatement or by special exception, and it was error for the court on its own motion to strike out the cross-action. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

25. — **Failure to state cause of action.**—Insufficiency of petition to state cause of action can be urged on appeal, though defendant did not present a general demurrer in lower court. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

The sufficiency of the petition to show a cause of action cannot be raised on appeal where not excepted to until motion for new trial. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

25½. — **Want of jurisdiction.**—Since jurisdiction over subject-matter cannot be conferred even by express consent, objection may be raised by plaintiff at any stage of the proceeding. *Stewart v. Patterson* (Civ. App.) 204 S. W. 768.

26. — **Waiver of objections to plea or answer.**—Where the plaintiff, who had gone upon the carrier's platform to meet a passenger set up an ordinance regulating the moving and handling of express trucks on railroad platforms, and defendants filed no exceptions to the plea, objection made to the introduction of the ordinance came too late. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

Where, though record showed order sustaining exceptions to answer, case was tried on the answer, without objection or exception to evidence or to the submission of the issue raised thereby, and motion for new trial did not raise the question, held, that the order sustaining exceptions was waived. *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641.

Though, in a suit on a note assigned, a verified plea of non est factum was hardly in compliance with art. 1906, subd. 8, in absence of objection below, it may be considered as regular in form. *Iowa City Bank v. Milford* (Civ. App.) 200 S. W. 883.

Where no objection was made in an action for personal injury that a plea that plaintiff assumed the risk had not been denied, until after verdict for plaintiff, the defendant must be held to have waived any right to have the plea taken as confessed, under the Verified Pleading Act of 1913 (Acts 33d Leg. c. 127). *Denison Cotton Mill Co. v. McAmis* (Com. App.) 215 S. W. 442.

If plaintiffs were entitled to have a plea of limitations set forth more specifically the facts giving rise to its effectiveness, they cannot complain of its generalization in the absence of special exceptions. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

29. — **Objections to amendments and supplemental pleadings and rulings relating thereto.**—Agreement, after amendment had been permitted, that the court should render final judgment on the pleadings and evidence before the court waived an objection relating to the time of filing the amended pleading. *Aultz v. Zucht* (Civ. App.) 209 S. W. 475.

Discrepancies between original and amended petitions will not be considered as fundamental error on appeal, where attention of trial court was not called thereto by defendants in their second amended original answer. *Jones v. Fink* (Civ. App.) 209 S. W. 777.

30. — **Want or insufficiency of indorsement or verification.**—In action on employers' liability policy, where answer set up failure of insured to give insurer notice of the accident defendant's failure to verify answer under art. 5714, was waived by plaintiff by failure to object to evidence as to such want of notice. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

In absence of exception in the trial court to failure to verify plaintiff's plea by supplemental petition, want of verification can avail defendant appellant nothing. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

Defendant's failure to except on the ground that the original petition was not verified is a waiver of the objection. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

32. — **Objection to introduction of evidence under pleading.**—Objection to admissibility of evidence under the pleadings cannot be raised for first time in Court of Civil Appeals. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

In an action by two members of a firm against a third for an accounting as to salaries paid under duress, evidence as to a threat made not in the exact words alleged in the pleading held admissible in absence of exception or objection, and a judgment entered thereon was not fundamental error. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

33. — **Objections to evidence on ground of variance.**—In action to cancel lease, although petition alleged that defendant made false representation, where testimony was admitted without objection that representation was made by another in defendant's presence and with his acquiescence, defendant waived objection as to variance. *Nimmo v. O'Keefe* (Civ. App.) 204 S. W. 883.

In an action on a treasurer's bond, that the petition alleged the warrants drawn by the clerk were paid by the treasurer, while the proof showed the treasurer issued checks on the county depository therefor, is immaterial, where no objection to such evidence was made upon trial. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

In lessee's action for conversion alleged to have been committed by the lessor, evidence that the conversion was committed by the lessor's agent did not constitute such a variance that it could not be waived by defendant's failure to object. *Henderson v. Beggs* (Civ. App.) 207 S. W. 565.

There was no fatal variance in an action for personal injuries on sidewalk, in that the petition alleged that elevation on the sidewalk from which plaintiff stepped to the sidewalk, whereas, according to testimony, she stumbled over the elevation; there being no objection on the ground of variance nor any claim of surprise or that the city was misled, and the essential element of plaintiff's petition being that the sidewalk was rough and uneven and unsafe for travel. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

Where the variance between pleading and proof of a contract amounted merely to a misdescription, the failure to object to evidence will preclude objection on the ground of variance to the charge or to the judgment. *McConnell v. Payne & Winfrey* (Civ. App.) 229 S. W. 355.

34. **Aider by verdict or judgment.**—Defective petition in suit on improvement certificate held not cured by verdict for plaintiff. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 196 S. W. 601.

Where no action was taken on general demurrer to petition, the verdict may aid petition, and it will be sustained if, by fair implication, it alleges facts necessary to sustain recovery. *Bustillos v. Southwestern Portland Cement Co.* (Com. App.) 211 S. W. 929.

Where the petition sought cancellation of an oil lease for fraud and failure of consideration with respect to the agreement to drill a well the omission of an express allegation that defendants failed to begin drilling within the time agreed is not fundamental error, and is cured by findings of the court to that effect. *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

In an action by a surety who paid a balance due on notes, the complaint, which set out the facts of payment and the assignment of the notes to the surety, is sufficient to state a cause of action where not attacked by exception or otherwise, even though it proceeded on the erroneous theory that the sureties' rights were based on the notes, and in such case a judgment in favor of the surety cannot be questioned for insufficiency of the complaint. *Dodgen v. McCrea* (Civ. App.) 225 S. W. 71.

CHAPTER THREE

PLEADINGS OF THE PLAINTIFF

Art.

1827. Requisites of the petition.

1828. Defensive matters by plaintiff.

Art.

1829. Denial of special defenses presumed.

Article 1827. [1191] [1195] Requisites of the petition.See *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.Cited, *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

1. **Matters of presumption or implication.**—In a negligence case, the essential facts constituting the cause of action and fixing the liability of the defendant must be directly and distinctly alleged, and not left to be supplied by inference. *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611.

2. **Matters of fact or conclusions.**—In an action against an indemnity company wherein the employer was insured, allegations that the employer did not fall within the exemptions from the operation of the act, and that plaintiff was an employé within the act and was entitled to compensation are conclusions of the pleader, and insufficient as against general demurrer. *American Indemnity Co. v. Hubbard* (Civ. App.) 196 S. W. 1011.

The following allegations have been held conclusions: In action for conversion of notes, allegations that plaintiff never parted with title, and that defendant knew plaintiff's purpose in transferring the notes to a third person, and that defendant in collecting the notes knowingly perpetrated a fraud upon plaintiff. *Wilkirson v. Bradford* (Civ. App.) 200 S. W. 1094. Allegation that corporation's charter and right to do business were forfeited for nonpayment of franchise tax. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320. In suit to enjoin execution, allegation that petitioner had been prevented by fraud from "presenting his valid and meritorious defense which he had prior to and at the time of said suit." *Boykin v. Patterson* (Civ. App.) 214 S. W. 611. In action against telegraph company for breach of contract to furnish telegraphic reports of a prize fight, allegations that plaintiffs were damaged in consequence of the failure and refusal of defendant to carry out its contract, without stating facts upon which such claim of damage was based. *Western Union Telegraph Co. v. Jeffries* (Civ. App.) 214 S. W. 781. Averments that, on failure of a third person to obtain a contract, title to the property involved became and was vested in defendant, which held deeds thereto. *J. C. Engelman Land Co. v. La Blanco Agr. Co.* (Civ. App.) 220 S. W. 653. Allegation in petition of plaintiff seeking injunction, that at the time of the organization of defendant association and conveyance to its trustees of a certain survey, he owned an undivided fourth interest in the land. *Townsend v. Durfee Mineral Co.* (Civ. App.) 223 S. W. 876. Allegation, in depositor's petition against bank for delay in collection of check on other bank, "that if said check had been sent direct" to other bank "the same would have been paid." *Bingham v. Emanuel* (Civ. App.) 223 S. W. 1015. Averments in will contest that execution was procured by undue influence exerted by testator's wife, who possessed great influence over the testator, and that by her insistence and by her pleading she procured him to execute the will and to cut off contestants. *Ater v. Moore* (Civ. App.) 231 S. W. 457.

But these are not conclusions: Allegations that by reason of his injury plaintiff's entire physical nervous and mental being suffered a severe shock. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614. In suit on note and for foreclosure of chattel mortgage, averment that mortgaged chattel was of value of \$350. *Jackson v. Sere* (Civ. App.) 198 S. W. 604. In suit wherein the petition asked appointment of receiver of a trust fund allegation that the fund was in danger of being lost, diverted, misapplied, and put beyond the reach of plaintiff and the court, being a reasonable inference from facts alleged. *Temple State Bank v. Mansfield* (Civ. App.) 215 S. W. 154.

Allegations stating the conclusion of fraud, but failing to state any facts constituting the fraud, was insufficient. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

Petition for divorce, merely alleging that defendant husband cursed and abused plaintiff unmercifully, a conclusion, held insufficient, under art. 4631, subd. 1, as to divorce for cruelty. *Claunch v. Claunch* (Civ. App.) 203 S. W. 930.

In suit on warrants issued by defendant city, allegation in petition that warrants were given in lieu and substitution of other valid warrants was a mere conclusion, insufficient to show that warrants were valid. *American Roads Machinery Co. v. City of Ballinger* (Civ. App.) 210 S. W. 265.

In a servant's action against the insurer for compensation, general conclusions as to the result of the injuries, would be sufficient, if followed by specific description of the injuries; but, where the attempted specification is about as general and indefinite as the conclusion, the petition is insufficient. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Allegation of petition of fence owners for injunction against defendant's interfering with their possession by tearing the fence down, etc., that defendant's entry on the land was unlawful and wrongful, held a mere conclusion of the pleader, and not entitled

to force in construing the legal effect of the averments. *Graham v. Knight* (Civ. App.) 222 S. W. 326.

Allegations of gross abuse of discretion by road commissioners of fraud, etc., in petition of taxpayers to enjoin construction of road along route, which commissioners prior to election agreed to adopt, held not mere conclusions of the pleader, in view of the allegations of facts involved; for only ultimate facts need be stated in a pleading, and details and minute circumstances should be omitted. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

In an action by a city to restrain the maintaining and operating of a filling station, allegations that the construction and maintenance of a filling station would necessarily constitute a public nuisance held but conclusions of the pleader and equivalent to an allegation that the threatened acts would constitute a nuisance per se. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

Statement in a petition for an injunction that commissioners' court violated the law in selecting bank as depository was but a statement of a legal conclusion, and was short of the statement of any fact showing that there was an abuse of discretion in selecting such bank. *Hurley v. Citizens' Nat. Bank of Sour Lake* (Civ. App.) 229 S. W. 663.

Good pleading requires that, in stating the grounds of a will contest, facts should be averred and not conclusions, and when grounds of contest embrace fraud, duress, or undue influence, a subsequent will, revocation, or the like, such matters, not being ultimate facts but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts relied on must be stated. *Ater v. Moore* (Civ. App.) 231 S. W. 457.

3. Conclusions of law from facts alleged.—Plaintiff having pleaded facts fully, it was unnecessary to state legal effect thereof. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

In suit for reasonable value of services petition which alleged facts upon which law raises implied promise to pay was sufficient; it being unnecessary, in view of art. 1819, to allege a promise to pay. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

4. Matters of evidence.—A petition need not and should not state the evidence relied on as constituting the cause of action, but should only state the facts themselves. *Hicks v. Emerson-Brantingham Implement Co.* (Civ. App.) 229 S. W. 348; *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

Where the written evidence on which it was alleged that defendant had guaranteed payment of a note was fully set out in the petition, the petition alone could be looked to to fix defendant's liability. *Hopkins v. Schallert* (Civ. App.) 195 S. W. 219.

An injured servant need not in his complaint set out evidence, but where he states the injuries and the cause thereof, it is sufficient. *Palermo Bros. v. Capps* (Civ. App.) 196 S. W. 275.

In action for loss of stock in shipment, it was not necessary that letter from defendant's claim agent, stating that stock died while in defendant's possession, be pleaded to make it admissible. *Galveston, H. & S. A. Ry. Co. v. Booth* (Civ. App.) 209 S. W. 198.

In action for money paid to insurance company, upon verbal promise to make a loan and issue a policy, the basis of the recovery was the company's breach of agreement, and plaintiff was not required to set out the application for insurance, which was a matter of evidence. *Trammell v. San Antonio Life Ins. Co.* (Civ. App.) 209 S. W. 786.

In suit for destruction of crops by cattle through negligence in not having sufficient fences, plaintiff was not required to plead his evidence as to the condition of the fence. *Corn v. McNutt* (Civ. App.) 230 S. W. 1052.

7. Certainty, definiteness, and particularity.—In action for breach of contract for farm lease, paragraph of complaint, alleging as damages what plaintiff would have saved in living expenses by occupying the farm, held not sufficiently specific to enable defendant to be prepared to meet such allegations, and subject to special exceptions. *Prince v. Blisard* (Civ. App.) 210 S. W. 301.

Petition for negligence of railroad company as to gate in right of way fence, through which stock escaped onto the track, held subject to special exception as too general, vague, and indefinite. *Texas Electric Ry. Co. v. Simmons* (Civ. App.) 214 S. W. 563.

In action by foreman of ranch, to recover salary, advancements, etc., allegations in support of plaintiff's claim for moneys advanced and for commission on sales from the ranch, held subject to special exception on account of their generality, in the absence of allegation that plaintiff was unable to furnish details or further information as to the advancements, and in presence of mere allegation he was unable to make a detailed statement of sales from ranch. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

9. Disjunctive and alternative allegations.—See *Eureka Paving Co. v. Barnett* (Civ. App.) 216 S. W. 903.

An allegation that, although those in charge of train saw, or should have discovered, that team was frightened, they continued to cause the whistle to blow, etc., does not raise the issue of discovered peril, and is demurrable, since to allege that one or the other of two things is true is not to affirm the truth of either. *Baker v. Galbreath* (Civ. App.) 211 S. W. 626.

10. Consistency or repugnancy.—Petition, claiming damages for injuries alleged to wholly disable plaintiff, and seeking damages for breach of contract for continued

employment did not present inconsistencies and repugnancies fatal to right of recovery for injuries. *Reasoner v. Gulf, C. & S. F. Ry. Co.*, 109 Tex. 204, 203 S. W. 592.

Allegation that board of directors of defendant bank approved all portions of preliminary sketches, prepared by plaintiff architect, being inconsistent with remainder of count to effect that plaintiff was directed to complete plans and specifications, in accordance with that portion only of preliminary schedule theretofore approved, trial court properly sustained special exception. *Reuter v. Nixon State Bank (Civ. App.)* 206 S. W. 715.

12. Scandalous matter and false allegations.—If plaintiff, knowing facts which would in law defeat venue, makes allegations which would confer venue, such allegations are in law fraudulent. *Payne v. Coleman (Civ. App.)* 232 S. W. 537.

14. Pleading written instruments.—Copying guardianship bond in petition, and alleging that sureties were indebted and liable to plaintiffs, would not show execution of the bond by the sureties. *Davis v. White (Civ. App.)* 207 S. W. 679.

The petition on which a judgment was based which described the vendor's lien notes sued on as the last four of the series of six notes giving the amount and due date of each sufficiently described the notes to sustain the judgment against petition to vacate. *Strickland v. Higginbotham Bros. & Co. (Civ. App.)* 220 S. W. 433.

In contractor's action against an irrigation district for balance due on construction work, an objection that the written contract declared upon was not set out verbatim in his pleadings is without merit. *Peyton Creek Irr. Dist. v. White (Civ. App.)* 230 S. W. 1060.

16. — Parol evidence to vary, add to, or explain writing.—Allegations that a contract "does not clearly state the minds of the parties" and "does not speak the truth of the agreement, and the minds of the parties did not meet in said writing, but did meet and agree to the effect," etc., held sufficient to allege a mutual mistake so as to warrant admission of parol testimony as to the actual agreement. *Eldora Oil Co. v. Thompson (Civ. App.)* 230 S. W. 738.

17. Construction of petition.—See *White v. Texas Motor Car & Supply Co. (Com. App.)* 228 S. W. 138.

When a petition is not attacked by special exception, every reasonable intendment will be read into its allegations to sustain it. *Sovereign Camp, Woodmen of the World, v. Piper (Civ. App.)* 222 S. W. 649; *Jackson v. Greenville Compress Co. (Civ. App.)* 202 S. W. 324; *Aynesworth v. Peacock Military College (Civ. App.)* 225 S. W. 866.

Where a petition alleged that a debt was created prior to conveyance, but the actual dates showed that it was not, the special allegations controlled the general. *Moore v. Belt (Civ. App.)* 206 S. W. 225.

A suit, under art. 3915, to recover four times the amount of excessive fees charged by a county surveyor, is one for a penalty, and the petition is subject to strict construction. *Redus v. Blucher (Civ. App.)* 207 S. W. 613.

Where a petition is the first time attacked in the appellate court on grounds which could have been raised by general demurrer, every reasonable presumption will be indulged in favor of the sufficiency of the petition. *Williams v. Atkinson (Civ. App.)* 214 S. W. 504.

In action against telegraph company for failure to deliver telegraphic reports of prize fight, petition held to plead cause of action to recover expenses in preparation for exhibition at which reports were to have been read, and for special damages, and not to recover for loss of profits by reason of the breach of contract. *Western Union Telegraph Co. v. Jeffries (Civ. App.)* 214 S. W. 781.

In an action for refusal to transfer and deliver notes and accounts purchased at a public sale, a petition, alleging that defendant's agent agreed to let plaintiff have the notes and accounts for a specified sum if he would not bid, and that he did not bid by reason of such agreement, but permitted defendants to purchase the property relying upon such agreement, was susceptible of no other construction than that plaintiff would have continued to bid but for such promise. *Taylor v. Lafavers (Com. App.)* 221 S. W. 957, reversing judgment (Civ. App.) 198 S. W. 651.

18. Conclusiveness of allegations.—See *Masterson v. Turnley (Civ. App.)* 220 S. W. 428; notes under art. 3687, rule 37, notes 15-22.

Plaintiff who alleges in his petition that the land in controversy is in El Paso county, Tex., is not in a position to question the jurisdiction of the district court of such county over the subject-matter. *Schoonmaker v. Clardy (Civ. App.)* 218 S. W. 1112.

20. Designation of court and term.—A petition entitled in district court of Dallas county, Tex., giving the name of the parties and addressed "To the Honorable the District Court of Dallas County, Texas, ——— Judicial District of Texas," was not insufficient as failing to show the court, where it was filed in the fourteenth judicial district, and no effort was made to try it in any other court, and it did not appear that defendants were deceived or misled as to where the cause was to be tried, and default judgment based upon such petition is valid. *Miller v. Trice (Civ. App.)* 219 S. W. 229.

21. Names, description, and capacity of parties, and venue.—Although style of case did not designate parties as plaintiff and defendant, held that it may on general demurrer be presumed from style that party first named is plaintiff, and other, defendant. *Russell v. Koennecke (Civ. App.)* 197 S. W. 1111.

Petition as a whole held to show that it was against a county within the statute of limitations although the name of the county was omitted in the introductory paragraph. *Bexar County v. Linden (Civ. App.)* 205 S. W. 478.

Under art. 3051, requiring election contestants to give contestees notice in writ-

ing of intention to contest, and to deliver to them a written statement of the grounds, which does not refer to this article prescribing the requisites of a petition, a service of a copy of the petition filed in a contest case is not required, and the fact that the copy served does not name the contestees does not invalidate the proceedings; it affirmatively appearing that the contestees were not misled. *Kennison v. Du Plantis* (Civ. App.) 220 S. W. 118.

Upon pleas of privilege, it devolves upon plaintiff only to plead a cause of action arising in whole or in part in the county of suit, or an offense or trespass committed therein, and that the acts relied on, or a part of them, occurred there, and it is not necessary to prove all the elements finally fixing liability upon the defendant. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

Fraudulent allegations as to venue, see *Payne v. Coleman* (Civ. App.) 232 S. W. 537; note 12.

22. Statement of cause of action in general.—The allegations of a plaintiff's petition must be sufficient to constitute a legal basis on which to predicate judgment in his favor. *Medley v. Lamb* (Civ. App.) 223 S. W. 1048.

A complaint charging violation of an ordinance must state facts which, if true, amount to a violation of the law. *Ex parte Jonischkies* (Civ. App.) 227 S. W. 952.

The purpose of a petition is satisfied if it apprises the court and the opposite party of the facts on which plaintiff intends to rely as constituting his cause of action. *Hicks v. Emerson-Brantingham Implement Co.* (Civ. App.) 229 S. W. 348.

23. Theory and form of action.—In action by tenant to recover share in amount paid landlord for pasturage, petition held not objectionable as setting up two separate causes of action, contract and tort, but to state cause of action for money had and received. *Cooke v. Ellis* (Civ. App.) 196 S. W. 642.

Petition alleging contract to sell land and a lease of other lands, false representations as to the time for which the lease could be renewed, the making of a deed, and a purported assignment of the lease, and that a certain part of the recited consideration of the deed was for the assignment, and seeking damages, held for fraud, and not to recover on a contract. *Harris v. Mann* (Civ. App.) 207 S. W. 156.

Petition by seller of jewelry against buyer and latter's surety on replevy bond given when property was replevied from seizure under writ of sequestration held not to seek to enforce surety's statutory liability on bond, but rather to seek recovery, either on the bond as a common-law obligation, or for conversion. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

A petition in an action against a corporation by a purchaser of stock held one for damages for fraud and deceit, and not one for rescission of a contract. *Texas Co-op. Inv. Co. v. Clark* (Civ. App.) 212 S. W. 245.

Petition held to state cause of action for injunction to restrain removal of oil-drilling equipment and casing delivered to plaintiff under an executed contract, and not an action for specific performance of an executory contract to drill well. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

At common law the breaking of the close of another would give an action in trespass, while for creating a nuisance the action would be case. *Trinity Portland Cement Co. v. Horton* (Civ. App.) 214 S. W. 510.

A servant injured may sue on contract or for tort. *State v. Elliott* (Civ. App.) 212 S. W. 695.

An original and amended petition, which alleged plaintiff's ownership of the land and its detention from him by defendants, and prayed for title and possession of lands and also for an injunction to restrain rounding up and driving off cattle from the land and damaging windmills thereon, states a cause of action to recover land in which the injunction is merely ancillary to the main relief. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

Vendor's petition, alleging that vendor's notes on other land received for the land sold were valueless, held to state a cause of action in equity for rescission and recovery of the property transferred, and not a suit for damages. *Kiehn v. Willmann* (Civ. App.) 218 S. W. 15.

A petition alleging that plaintiff performed services at request of defendant and the reasonable value of such services states a cause of action on implied contract, though it also pleaded as a conclusion that thereby defendant became indebted to plaintiff on an express contract. *Kuhn v. Shaw* (Civ. App.) 223 S. W. 343.

Suit held one for deceit in making fraudulent representations on sale of tractor, especially where the supplemental petition expressly so alleged. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

A petition alleging a written contract by which plaintiff was to drill an oil well and that defendant breached the contract to plaintiff's damage in the sum of \$3,000 held for breach of contract, and not on quantum meruit, despite an amendment. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

24. Separate causes of action—Separate statement.—The system of pleading by counts is not in vogue in Texas. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

26. Joinder of causes of action.—In action on contract for sale of assets of a bank which provided for redemption of real estate, causes of action held properly joined. *Langford v. Power* (Civ. App.) 196 S. W. 662.

Doctrine of misjoinder of causes of action rests on consideration that such procedure would consume too much time, confuse jury, and hinder proper administration of law. *Buckholts State Bank v. Thallmann* (Civ. App.) 196 S. W. 687.

When petition indicates on face that joinder is not calculated to consume too much time and confuse jury, alternative cause of action being sustainable by same testimony, and when case may be submitted on special issues, rule should not be enforced. *Id.*

Where separate causes arising under different state of facts are alleged in the alternative in separate counts, there is no joinder of causes. *Missouri, K. & T. Ry. Co. of Texas v. Grimes* (Civ. App.) 196 S. W. 691.

The question of misjoinder of causes of action is a matter largely within the discretion of the trial judge. *Spitzer v. Smith* (Civ. App.) 218 S. W. 599.

Suits for damages arising from two distinct torts between the same parties may be joined. *Headington Auto Co. v. Hood* (Civ. App.) 219 S. W. 511.

Joinder of all causes of action arising between the same parties in the same right and growing out of the same transaction is favored. *Pease v. State* (Civ. App.) 228 S. W. 269.

Quo warranto to oust defendant from office to which plaintiff was elected was properly joined with cause of action to recover salary paid defendant. *Id.*

27. — **Injuries to person, property, or reputation.**—An action held not objectionable as misjoining an action for slander with a count for wrongful conduct inducing defendant's brother to commit a breach of promise to marry plaintiff, but merely to state an action for slander alleging breach of marriage promise as one of its results. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

28. — **Causes of action arising out of contract.**—The vendor in an executory contract for the sale of land can, on purchaser's default, either sue for the land or for the purchase money, and the better practice is to unite his causes of action, pleading and praying in the alternative. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

Vendor may sue for specific performance and to foreclose vendor's lien in same action. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

One wrongfully prevented from fully performing contract after he has entered upon performance may elect either to sue on the quantum meruit or for breach, but he cannot do both. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

Seller's causes of action for breach of two sales contracts were properly joined to avoid a multiplicity of suits, regardless of whether venue as one contract was properly laid in the county in which the action for breach of other was properly brought. *Landa v. F. S. Ainsa Co.* (Civ. App.) 231 S. W. 175.

Causes of action against a railroad for excessive freight charges, demurrage charges wrongfully exacted, and damages for shortage of coal delivered, were properly joined, since all grew out of contracts of shipment and were ex contractu, and between the same parties. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

30. — **Contract and tort.**—Causes of action for fraudulent representation that land was subject to irrigation and for failure to furnish water for irrigation held repugnant and contradictory, and properly alleged only in the alternative. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

A cause of action upon a written contract for price of potatoes could properly be joined with a cause of action for damages against any one or more defendant railway companies for negligence, if any, in a shipment of the potatoes. *Trevathan v. G. M. Hall & Son* (Civ. App.) 209 S. W. 447.

A landlord's causes of action against the tenant for rent and for wrongful removal of a fence are properly joined as matters growing out of the same transaction and subject-matter. *Marshall v. Magness* (Civ. App.) 211 S. W. 541.

The general rule is that two causes of action, one based on contract and the other on tort, cannot be joined. *Id.*

But where the two causes of action arose out of the same transaction they may be joined. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

A servant's petition which sets up two causes of action, one in tort against the master for injuries from negligence, and the other against an insurer on a contract indemnifying the master from liability on account of bodily injuries, is bad for misjoinder of parties and causes of action. *Owens v. Jackson-Hinton Gin Co.* (Civ. App.) 217 S. W. 762.

One injured in a collision with a motorcar may in the same action join the owner of the vehicle and an insurer, even though the insurer was liable only after judgment had been awarded against the owner, and the cause of action against the owner sounded in tort and that against the insurer was based on contract. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

In an action upon insurance policy and upon a contract of renewal by the insurer's agency, the plea in abatement by the members of such agency, asking a dismissal because of the improper joinder of causes of action, was properly sustained, and the cause of action alleged in the plea against the agency severed from the cause of action against defendant, as it was improper to join two actions, one for debt and the other sounding in tort. *American Cent. Ins. Co. v. Robinson* (Civ. App.) 219 S. W. 277.

A mortgagee has no right to a judgment foreclosing his lien against mortgaged property in the hands of a purchaser from the mortgagor, and in the same suit recover for conversion of that property, the right to suit for conversion being based on the assumption that his security has been destroyed or impaired, and if he pursues both remedies in the same suit it should be by an alternative pleading. *Smith v. Wall* (Civ. App.) 230 S. W. 759.

31. — **Parties and interests involved in general.**—There is no misjoinder of causes of action, nor of parties, where, in proceedings to contest an election of two school trustees, two defeated candidates are contestants against the two successful

ones; all parties interested adversely to the contestees being proper parties plaintiff. *Kennison v. Du Plantis* (Civ. App.) 220 S. W. 118.

32. — **Claims or liabilities in different capacities.**—The commissioners' court of Henderson county having wholly supplanted the officials of the several road districts, one having claims against two road districts might properly join the same in an action against the commissioners' court. *McDonald v. Axtell* (Civ. App.) 218 S. W. 563.

. Actions against executors and their sureties, one for waste and misapplication of funds, and another to set aside a conveyance of lands of the estate, fraudulently procured, to one of the sureties, with the collusion of the executors, held properly consolidated as against the objection of misjoinder of parties. *Bain v. Coats* (Civ. App.) 223 S. W. 571.

33. — **Joint or common interest of plaintiffs.**—Where all plaintiffs in suit to recover land asked for cancellation of former judgment against them and for repossession of their respective separate tracts, and one plaintiff also asked damages, there is a misjoinder of parties plaintiff, since they have separate demands and stand in different relations to defendants. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646; *Clegg v. Temple Lumber Co.* (Com. App.) 222 S. W. 971, affirming judgment (Civ. App.) 195 S. W. 646.

Parties claiming separately segregated parts of a survey cannot join in action to recover such land. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646.

Where the brother of two sisters as their agent sent a telegram announcing their father's fatal illness, held, that it was not improper for the two sisters to join in a suit for delay in delivery which precluded their attendance at the funeral. *Western Union Telegraph Co. v. Morrow* (Civ. App.) 208 S. W. 689.

The several owners of separate parcels of land composing a large tract cannot maintain a joint suit for the entire large tract, but each must sue for his respective part. *Allen v. Vineyard* (Civ. App.) 212 S. W. 266.

Where members of association contracted in its name for onion crates, without specifying how many crates each member was to receive, the members who suffered damages because of defendant's failure to furnish a sufficient number of crates could properly join their several causes of action, and also join in a joint cause of action in the name of the association. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

There was no misjoinder of causes of action and of parties in suit against defendants who had sold stock in a corporation to be formed, agreeing to drill for oil on certain land and to deliver the well as drilled to a specified depth, to the company; the claim of each separate purchaser having been assigned to plaintiffs, who owned jointly all the claims arising out of the sales of stock to each of the purchasers named, including plaintiffs themselves. *Frye v. Wayland* (Civ. App.) 228 S. W. 975.

34. — **Joint or common liability of defendants in general.**—Where plaintiffs show they are entitled to estate as minors which has been administered by two guardians, and that one or both guardians are liable, and that there will be controversy between guardians as to which caused loss to plaintiffs, plaintiffs are not required to bring separate suits. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

35. — **Liabilities of codefendants on contracts.**—In suit on joint and several note, with attachment and levy on defendants' joint property, an amendment alleging a subsequent cause of action against one of such defendants was not objectionable as being a misjoinder of causes of action. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

Amended petition asking judgment on note against one of such defendants, purchased after commencement of suit, was not objectionable as misjoinder of parties. *Id.*

In broker's action for commission for effecting an exchange of properties while acting for both parties to the exchange, held, that there was no misjoinder of causes of action. *Hull v. Eidt-Summerfield Co.* (Civ. App.) 204 S. W. 480.

In suit upon oral contract for commissions against a father and son who acted jointly in combining their different tracts, entered into a written contract of exchange and were to receive a joint deed, there was no misjoinder of parties defendant. *Id.*

37. — **Corporation or partnership and members, officers, and other interested persons.**—There was no misjoinder of parties plaintiff and causes of action because a corporation, which borrowed at usurious interest, and its stockholder, the indorser of its notes, sued together to recover separate penalties from the payee, especially after the payee filed his cross-action and sought to recover against both the corporation and its indorser. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

38. — **Codefendants in actions for equitable relief.**—Where petition to recover land sought cancellation of a judgment, recovery of several distinct tracts, and damages against one defendant, there is a misjoinder of parties defendant, since cancellation of judgment is separate from damage relief sought. *Clegg v. Temple Lumber Co.* (Civ. App.) 195 S. W. 646.

42. **Splitting cause of action.**—Under contract to pay \$240 rental for year at \$20 a month, each month's rent was separate and distinct demand; and landlord could elect to sue therefor separately. *Neal Commission Co. v. Radford* (Civ. App.) 197 S. W. 1052.

A wife injured by contact with an electric wire on going to the aid of her husband, who had come in contact therewith and who died from his injury, can maintain a suit for her own injuries, and a separate suit for his death. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

43. **Reference from one part of petition to another or to other instruments.**—In a suit to enjoin obstructions in certain streets, a petition, alleging that plaintiff was the owner of certain blocks forming part of a large body of land which had been dedicated to the public, and that all conveyances of lots had recognized the plan of dedication, and naming the streets alleged to be constructed, held sufficiently to identify the premises, since the map might be referred to, although not made a part of the petition. *Zoeller v. Offer* (Civ. App.) 216 S. W. 1113.

44. **Right of plaintiff.**—The facts alleged in the petition must not only show some wrong or dereliction by defendant, but also some consequent injury to the personal or property rights of plaintiff; otherwise courts would be continually called upon to decide moot questions. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

Petition whereby the purchaser of an automobile sought to recover from an indemnity insurer held subject to general demurrer, plaintiff purchaser not having been a party to the policy, but a stranger, and it never having been transferred or assigned to him, so far as the petition showed. *Indemnity Co. of America v. Mahaffey* (Civ. App.) 231 S. W. 861.

45. — **Ownership, title, or possession.**—One doing business under a trade-name could sue in his individual name on a note payable under the trade-name, without alleging or proving a transfer. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701.

48. **Matter of inducement and performance of conditions.**—In stockholders' suit, facts alleged showing defendants constitute majority of directors, or that directors or majority are under control of wrongdoing defendant, so that refusal of directors to sue in name of corporation on request may be inferred, held sufficient without alleging any demand. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In suit against Texas Employers' Insurance Association under Employers' Liability Act of 1913, arts. 5246h-5246zzzz allegation in petition that notice of injury had been given employer and insurance association "in due time" was equivalent to allegation it was given "as soon as practicable," as required. *Texas Employers' Ins. Ass'n v. Mumme* (Civ. App.) 200 S. W. 251.

In suit for professional services rendered by plaintiff architect, allegations of petition held not to show that plaintiff had fully performed his part of the contract. *Reuter v. Nixon State Bank* (Civ. App.) 206 S. W. 715.

Petition in action on insurance certificate, not alleging that the conditions precedent to entitle beneficiary to the sum named in the policy have been complied with, was insufficient, where such failure was not cured by answer. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

In action against city for personal injuries and for damages to property, the giving of notice of claim of damages required by Dallas Charter, art. 14, § 11, must be affirmatively alleged, being a condition precedent to the right of action. *City of Dallas v. Shows* (Com. App.) 212 S. W. 633.

A contract, whereby citizens of a town agreed to make certain payments to and do certain things for railroad upon completion and operation of railroad, being an entire contract, a railroad contractor suing on the citizens' notes could not recover without alleging performance of the contract. *Wellington Railroad Committee v. Crawford* (Com. App.) 216 S. W. 151.

In an action on notes conditional upon completion of railroad contractor suing notwithstanding failure to complete road within required time could not avoid such condition upon ground of breach of contract making such completion impossible without pleading such breach. *Id.*

Where plaintiff seeking cancellation of his deed alleged that his predecessors had conveyed the property for valuable consideration to him and his associates, and that plaintiff became the owner of $1/120$, it was not necessary for him to allege that he and his associates had made the deferred payments called for in his deed. *Holland v. De Walt* (Civ. App.) 225 S. W. 216.

Where plaintiff agreed to convey his interest in certain land incumbered by two judgments, a petition seeking to recover the specified consideration, is not defective for failing to allege tender of a conveyance, where defendants had acquired plaintiff's interest by purchase from one of the judgment creditors. *Fleming v. Stringer* (Civ. App.) 225 S. W. 801.

A petition to recover purchase price of land incumbered by two judgments held not insufficient because not alleging tender of performance before the specified date by plaintiff owner and by a judgment creditor who had an interest in the land. *Id.*

50. **Act, omission or liability of defendant—Co-defendants.**—Where petition alleged the making of a contract by defendants without specifying which of the defendants made the contract or when and where contract was entered into, and where the transactions under such contract extended over a period of months, defendants were entitled to have plaintiffs plead specifically both when and where the representations and agreements alleged were made, and to allege which of the defendants made the promises and agreements relied on. *Hartwell v. Fridner* (Civ. App.) 217 S. W. 231.

51. **Statutory actions.**—A petition, in an action in which penalties are sought to be recovered, should state all the statutory requirements with the same degree of certainty as is required in an indictment in a criminal case. *Redus v. Blucher* (Civ. App.) 207 S. W. 613.

Petition for statutory penalty for collecting and receiving usurious interest held not subject to general demurrer. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

52. Duplicity and multifariousness.—Whether or not a petition is multifarious is largely for the discretion of the court. *Hudmon v. Foster* (Civ. App.) 210 S. W. 262.

The rule against multifariousness, the improper joining in one suit of distinct and independent matters, is to be construed with, and so as not to restrict, the policy of avoiding a multiplicity of suits; so that the matters relied on for recovery in the petition growing out of the same transactions, exceptions on the ground of multifariousness, should not be sustained, and plaintiff put to necessity of separate actions. *Hudmon v. Foster* (Com. App.) 231 S. W. 346.

53. Anticipating defenses.—In an action for purchase price, the contract appearing complete on its face as set out in petition, and providing seller would protect buyer should the order run less than the amount specified, the condition was for buyer's benefit, and petition need not allege that any particular quantity was ordered, such being strictly defensive matter. *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192.

A complaint on fraternal benefit policy need not allege that beneficiary had an insurable interest in the insured's life, since the lack of such interest is a matter of defense. *Hand v. Sovereign Camp, Woodmen of the World* (Civ. App.) 214 S. W. 718.

Allegations that a car left with defendants for repairs was sold after notice, under art. 5667, and that certain accessories had been converted, etc., held to state a good cause of action, although not alleging that plaintiff was entitled to possession of the car or had tendered the charges due, since the petition did not admit that charges were due or that sale was legal, and in any event the allegations alleging the conversion of accessories rendered the petition good at least in part. *J. C. Killgore & Co. v. Whitaker* (Civ. App.) 217 S. W. 445.

54. — Negating contributory negligence or other fault.—In a petition for injuries to a man thrown from a fire wagon by a defect in the street, an allegation that plaintiff was lawfully entitled to be on the wagon, or to attempt to get there, at the time of the accident, is sufficient, as against a general demurrer, as an allegation that plaintiff had a right to ride on the fire wagon. *City of Austin v. Schlegel* (Civ. App.) 228 S. W. 291.

57. — Statute of frauds and limitations.—Petition of assignors for benefit of creditors against the assignees based on right to surplus and fraudulent disposition of assets by the assignees, filed 15 years after the fraud, held to show probable knowledge of the facts, so that, it showing no excuse or justification for delay, it was subject to special pleas of limitations. *McCord v. Bass* (Com. App.) 223 S. W. 192, reversing judgment (Civ. App.) *Bass v. McCord*, 178 S. W. 998.

A petition to recover for the deficiency in land conveyed to plaintiff which alleged that he discovered the mistake as to the quantity just before he began the action, held sufficient to raise a question for the jury whether plaintiff was excused from having an earlier survey of the land made, so that it was error to dismiss the petition because recovery was barred by limitations. *Hohertz v. Durham* (Civ. App.) 224 S. W. 549.

58. Admissions.—In action by purchaser's assignee to recover money deposited on contract, allegation in petition held not to admit that vendor furnished an abstract within time allowed by contract, but to allege merely that purchaser made timely objections to defects in title. *J. M. Frost & Sons v. Cramer* (Civ. App.) 199 S. W. 838.

Though the assignee of a purchaser's interest, suing to recover a deposit, admitted the purchaser's timely receipt of abstract, contrary to undisputed evidence, it would be unjust to hold the purchaser bound to accept title shown by abstract or forfeit deposit. *Id.*

59. Prayer for process and relief.—See *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

If petition contained prayer for cancellation of instruments unaccompanied by prayer for general relief, such special prayer determines the nature and object of the suit. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

The cause of action depends upon the facts stated, rather than upon the specific relief prayed for, where there is a general prayer for relief. *Id.*

A prayer for "general relief" is just as comprehensive in its scope as the prayer for "such other and further relief, judgments and decrees, legal and equitable, such as he may be entitled to under the facts in this case," etc. *Texas Co-op. Inv. Co. v. Clark* (Civ. App.) 212 S. W. 245.

Misrepresentations pleaded by plaintiff in an action against seller of unsound cattle, taken in connection with defendant's pleading that he was only an agent of plaintiff, held, under plaintiff's prayer for general relief, to entitle him to recovery upon the theory of fraudulent misrepresentations by defendant as plaintiff's agent. *Graves v. Haynes* (Civ. App.) 214 S. W. 665.

In an action by an injured servant against the insurer of his master, the servant is not entitled to recover compensation at a greater rate per week than that prayed for in the petition. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

Under this article, where there were allegations of ownership and delivery to defendant of automobiles and demand for their possession, accompanied by tender of storage charges and of special daily damages until return of the property, a demand for the properties was involved, although no specific demand therefor was made, and the writ of sequestration was warranted by the prayer for general relief, if the special prayer be totally rejected. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

61. — Interest and costs.—Where broker sued associates for share in commission fraudulently concealed from him, and asked general relief, interest, being allowable

as part of his damages, was properly included in the judgment, which did not exceed the amount sued for. *Security Realty Co. v. Critchett* (Civ. App.) 206 S. W. 852.

In action for purchase price, plaintiffs may recover interest without a special prayer therefor, especially where there is a plea for general relief. *Trevathan v. G. M. Hall & Son* (Civ. App.) 209 S. W. 447.

Where, under facts found, as matter of law plaintiff is entitled to interest as part of his damages, court should grant it to him on prayer for general relief. *Wiess v. Gordon* (Civ. App.) 209 S. W. 486.

In suit against city for overflow of sewer, and injury to automobile by street sprinkler, petition held to affirmatively disclose that interest was not included in the amounts sued for, so that interest could not be deemed to be included in the prayer for general relief; and there being no specific prayer for interest, the petition could not be deemed to claim interest. *City of San Antonio v. Pfeiffer* (Civ. App.) 216 S. W. 207.

64. Exhibits—Variance between pleading and exhibit.—Where a written instrument is made part of a petition, court will, on demurrer, give to instrument the legal effect to which it is entitled, and legal effect will control when allegations of petition and recitals of instrument as to legal effect are found in conflict. *Rowles v. Hadden* (Civ. App.) 210 S. W. 251.

65. Copy of account.—A petition was not insufficient in that itemized bill of certain expenses attached thereto did not on its face state purpose for which the several amounts were expended, nor the date of each such expenditure, where the general purpose of expenditures was alleged, and it was stated that each and all of them were made at the special instance and request of defendant. *Ferguson v. Mansfield* (Civ. App.) 215 S. W. 234.

69. Pleading damages in general.—In action by lessee for wrongful dispossession, allegation that plaintiff was wrongfully deprived of use and benefit of land with its improvements, and prevented from raising a crop thereon, and thereby greatly damaged, was sufficient as alleging a proper measure of damages. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

In an action for damages in that plaintiff was discharged from his employment by reason of a notice sent by defendant to his employer falsely claiming he was indebted to defendant, allegations as to difficulty of securing other employment, etc., and that he suffered much chagrin, humiliation, distress of mind, mental pain, and agony, held a sufficient basis for the recovery of damages. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In an action for fraud in exchange of property, plaintiff must set forth the necessary facts to be considered in measuring damages. *Medley v. Lamb* (Civ. App.) 223 S. W. 1048.

In such action proof of values of the property is not available in the absence of allegations of such values. *Id.*

In an action for a seller's fraudulent representations, though the petition shows that notes were given for the purchase price, the failure to allege their payment and present status does not preclude plaintiffs from maintaining a suit if recoverable damages are otherwise alleged. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

In a buyers' action for false representations in the sale of a tractor, allegations that a plow purchased for use with the tractor was worthless to them, because the tractor could not be operated successfully and they had no other means of using it, but not alleging that it had no market or intrinsic value, or that plaintiffs had offered to return it, did not warrant a recovery of the price of the plow. *Id.*

70. Pleading general or special damages.—In the law of libel, general damages are those which naturally, proximately, and necessarily result from publishing the libel, and are recoverable under a general averment. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

A purchaser who contracts to purchase land from one who has no title can, in the absence of fraud, recover only the amount paid on the contract, if any, and such special damages not including the loss of his bargain as he may allege and prove. *Garcia v. Yzaguirre* (Com. App.) 213 S. W. 236.

Petition of store employé against the company operating the store alleging a slander by having charged her with theft held to state a cause of action, the utterance of statement complained of being slander per se, so that the petition did not need to allege special damages. *Foley Bros. Dry Goods Co. v. McClain* (Civ. App.) 231 S. W. 459.

71. Personal injuries and physical suffering.—In an action for injuries resulting in death, allegations in the complaint as to poverty stricken condition of plaintiffs and as to details of decedent's injury should, upon exception, have been stricken. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

72. — Issues, proof, and variance in general.—Proof in personal injury actions should correspond with allegations of the complaint, and material injuries not alleged should not be proven. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

Allegations and evidence held to support a charge as to reasonable value of time lost and diminished earning power. *Texas Electric Ry. v. Jones* (Civ. App.) 231 S. W. 823.

75. — Extent of direct and consequential injuries to brain, nervous system or senses.—In action for damages sustained while attempting to board street car, statement in describing how injuries affected injured person that she "had bells in her head" was not inadmissible, although injury to the head had not been pleaded. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

In an action for personal injury, where the petition alleged, among other injuries, that plaintiff was suffering from "neurasthenia," medical testimony as to ocular symptoms, such as that plaintiff, after reading a short time, became tired and unable

to further read, is admissible, though no affection of the eye was pleaded; for by those symptoms the disease, which was one of the nerves, could be shown. *C. L. Smith Oil Co. v. Riggs* (Sup.) 230 S. W. 133.

78. Loss of earnings or services.—Passenger's pleading held sufficient, in the absence of special exception on the specific ground, as an allegation of loss of time, to support recovery therefor, where the evidence disclosed the loss of time. *Texas & P. Ry. Co. v. Mercer* (Civ. App.) 195 S. W. 263.

Petition by consignee who was contractor to recover for railroad company's refusal to seasonably deliver shipments to connecting carrier held not sufficient to warrant contractor's recovery for his own loss of time. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

80. Impairment of earning capacity.—In personal injury action, petition, describing injuries and alleging that, "By reason thereof the plaintiff has been rendered unable to follow his said business, and permanently injured," to his damages, etc., held to justify recovery of damages for diminished earning capacity. *Gulf, C. & S. F. Ry. Co. v. Scripture* (Civ. App.) 210 S. W. 269.

82. Loss of or damage to property.—Petition, in action for loss of guest's baggage, was not subject to special exception for failure to show whether the figures set opposite the various articles represented the price, the market value, a reasonable value, or the extrinsic value, since it is enough to allege the damages. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 163.

In action for delay in shipment of live stock, an allegation that the market had declined below that at time cattle should have arrived, and that cattle had lost in weight and marketable appearance, was sufficiently specific allegation of damage sustained. *Chicago, R. I. & G. Ry. Co. v. Manby* (Civ. App.) 207 S. W. 151.

In an action for damages from street improvement, it is permissible to set out in the petition the definite injuries, the property taken and destroyed, its intrinsic character and peculiar value and adaptability for specific purposes, though it is neither necessary nor proper to set out in minute detail all the surrounding circumstances. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

In an action for damages by overflows, refusal to sustain special exceptions to parts of the petition and trial amendment, especially with relation to the failure to advise defendants of the character of the crops it was claimed plaintiff was prevented from raising by virtue of the overflows, held erroneous. *Payne v. Cummins* (Civ. App.) 232 S. W. 1118.

83. — Issues and proof.—In an action against a railroad for injuries to plaintiff's land through overflows, where the claim was for permanent injury to the entire land, the averments were sufficient to admit proof of partial injury as against exceptions that the pleadings did not apprise defendants of the area or quantity permanently injured. *Payne v. Cummins* (Civ. App.) 232 S. W. 1118.

84. Damages from breach of contract in general.—Allegations that defendant telegraph company erroneously duplicated message to plaintiff's brokers for purchase of cotton, causing them to close his account, and that plaintiff when notified of such action could not countermand it because of deranged wire service, etc., do not affirmatively show that plaintiff failed to minimize his losses. *Pearlstone v. Western Union Telegraph Co.* (Civ. App.) 199 S. W. 860.

Averment of general notice to railroad company of damages that would result from refusal to seasonably deliver cars to connecting carrier held sufficient averment as to notice to sustain recovery by consignee who was contractor for loss of his own time. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

Where count seeking recovery on allegation of mutual mistake of parties to a sale of land in supposing the tract sold to contain 128 instead of 114 acres did not allege the value of the 14 acres of shortage, testimony with respect to its value was not available to plaintiff. *Gillispie v. Gray* (Civ. App.) 214 S. W. 730.

Allegation of general damages is sufficient to entitle purchaser to recover the difference between value of land as it would have been if vendors had performed contract to make extensive and permanent improvements and its value in consequence of vendors' failure to perform. *Zimmerman v. Keith* (Civ. App.) 224 S. W. 288.

A petition to recover for the deficiency of land received by plaintiff in exchange for his land, which alleged the value per acre of both tracts and the total consideration given by plaintiff as well as the acreage represented and actually received, sufficiently alleges that the land received was of less value than that given so as to furnish a basis for recovery of damages. *Hohertz v. Durham* (Civ. App.) 224 S. W. 549.

86. Loss of profits.—In an action by the purchasers of a thrasher for misrepresentations inducing the purchase, testimony as to loss of profits held admissible in view of the allegations of the petition, against which general demurrer alone was filed. *Hart-Farr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

In action against telegraph company for breach of contract to furnish telegraphic reports of prize fight, allegation that plaintiffs would have received a large sum of money on sale of tickets held insufficient to show that plaintiffs were damaged in a legal sense and entitled to special damages. *Western Union Telegraph Co. v. Jeffries* (Civ. App.) 214 S. W. 781.

87. Expenses incurred.—An employé suing for wrongful discharge as breach of contract, who failed to plead expenses incurred in effort to secure other employment, could not recover such expenses, though testimony showed the amount thereof. *Consumers' Lignite Co. v. James* (Civ. App.) 204 S. W. 719.

In an action against a carrier for refusing to transport a passenger, a petition alleging actual damages in a specified sum, including item for medicine and doctors, but not alleging that she paid the sum claimed, or assumed to pay it, or that it was a reasonable charge, did not support a recovery for such item. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

A petition held sufficiently to allege that defendant had notice that plaintiff would suffer mental anguish in case message advising stepson of illness of plaintiff's husband was not properly transmitted. *Western Union Tel. Co. v. Johnson* (Civ. App.) 218 S. W. 781.

In an action by the buyers for fraudulent representations, where the petition showed that notes were given for the purchase price, and did not allege their payment or present status, allegations that they purchased new parts on the representation that they would get credit for them does not authorize a recovery of the amounts paid, where it is not alleged that they were not given credit on the notes. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

An averment that plaintiff was "obliged" to pay and become liable for medicines and medical treatment in the sum of \$200 was sufficient, in absence of special exception, as an averment of the reasonableness of the expenditure; the word "obliged" being synonymous with the word "compelled," which implies reasonableness. *Texas Electric Ry. v. Jones* (Civ. App.) 231 S. W. 823.

In a personal injury action, the plaintiff was entitled to recover only the reasonable cost of her medical bill, etc., and the pleadings should be so framed as to show that the items thus involved are reasonable, and the charge of the court should so limit the recovery. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

88. — Proof and variance.—In purchasers' action for misrepresentations, testimony as to the value of items of expense alleged to have been paid held inadmissible in the absence of allegation that the amount paid was the reasonable value. *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

89. Mental suffering.—See *Stein v. Greenbaum* (Civ. App.) 203 S. W. 809.

In an action for conversion of personal property, where no injury to person is alleged, plaintiff can recover no damages for mental anguish. *Dunn v. Wilkerson* (Civ. App.) 203 S. W. 59.

92. Exemplary damages.—In an action for damages occasioned by defendant falsely sending written notice to plaintiff's employer that defendant had an assignment of plaintiff's wages, allegations concerning nature of defendant's business, held proper and material as tending to show the degree and deliberateness of the act; the petition containing a prayer for exemplary damages. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In order to recover exemplary damages, the act which constituted the cause of action must be actuated by or accompanied with some evil intent, or be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent; and, when the bad intent is not a necessary inference from the act charged, it must be alleged. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

In action against defendants who had obtained possession of premises by means of sequestration proceedings to which plaintiff had not been made a party, allegations showing a conscious disregard of plaintiff's rights by defendants held to authorize exemplary damages. *Id.*

In action for wrongfully obtaining possession of premises by sequestration proceedings, where the allegations of the petition may have sufficiently charged a willful or evil intent and gross disregard of plaintiff's right, but the petition alleged plaintiff "has suffered mental distress on account of his being deprived of the use of the said building for his said mother and father," and that he had been damaged in a sum equal to the rental value, etc., the petition would not support a recovery of exemplary damages, in which form only could damages for mental distress be recovered. *Id.*

93. Allegations as to amount of damages.—Judgment on item sued for could not be for more than claimed in petition. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Petition of plaintiff which, having extended credit to corporation on faith of false statements made to commercial agencies, sought to recover against corporate directors, properly alleged that dividends in bankruptcy amounted only to 19 per cent. of plaintiff's claim. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

97. — As to value.—In an action for conversion of a note, an allegation of its face value is a sufficient allegation of its value. *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424.

In an action for fraud in exchange of lands, plaintiff must allege the value of any moneys and other personal property received in the transaction; such allegation being as necessary as an allegation as to the value of the realty. *Medley v. Lamb* (Civ. App.) 223 S. W. 1048.

98. — Interest on amount of recovery.—In suit on draft, petition and prayer held to afford basis for verdict for plaintiff for interest from due date until date of judgment in addition to principal sum. *Stacy v. Raywood Canal & Milling Co.* (Civ. App.) 196 S. W. 568.

Plaintiffs' petition, alleging their damages to be value of hay burned by defendant railroad, to wit, \$5,312.50, "together with interest from said 22d day of December, 1915, at 6 per cent. per annum," authorized recovery of value of hay as alleged and interest as computed. *Texas & Pac. Ry. Co. v. Eldridge Carter & Son* (Civ. App.) 204 S. W. 478.

Where interest is not claimed by the pleadings, none can be recovered. *City of San Antonio v. Pfeiffer* (Civ. App.) 216 S. W. 207.

In an action for value of steers killed by defendant's trains, in the amount of \$195, brought in justice court, interest thereon is not recoverable *eo nomine*, but only as an item of damages, and must be pleaded, or otherwise it is not a matter in controversy, to be added to the amount sued on in determining jurisdiction. *Hufstutler v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 216 S. W. 495.

In an action for injuries to a shipment of goods, where interest was not claimed on the damages from date of delivery of the damaged goods, the awarding of such interest was erroneous. *Baker v. Lyons* (Civ. App.) 218 S. W. 1090.

When interest as damages is sought, it need not be specially pleaded, but the damages claimed in the pleadings must be laid in a sufficient amount to cover the loss at the time of the accrual of the cause of action, with interest from that date to the time of the trial. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Com. App.) 227 S. W. 945.

100. Pleading particular facts or issues—Assumption of obligation.—A petition, alleging that plaintiff sold to A. certain merchandise, "which account is still wholly due and unpaid," and that the property of A. was transferred to J. and was transferred by J. to defendant, and that "the consideration of said bill of sale and transfer in bulk was the assumption of the payment * * * of the accounts against J. and A., including the account of plaintiff which is sued on herein," stated a cause of action. *Texas Auto Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 211 S. W. 629.

101. — Consideration or want thereof.—Petition, in action on insurance certificate, was not defective for failure to allege consideration. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

In suit to cancel a mineral lease, where defendant set up a written option to lease, and, while denying she had executed such instrument, plaintiff, in avoidance by supplemental petition, pleaded that the option contract on which it was based had no consideration, etc., want of consideration for the option was duly presented by the pleadings. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 800.

A petition, assailing an option agreement on the ground that the consideration is inadequate, should specifically allege that the consideration was inadequate, and the facts showing its value, together with the excuse for giving the option upon the consideration agreed upon. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

One suing on contract must plead, as well as prove, a valid consideration for the undertaking; none being presumed. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

A complaint alleging that defendant agreed that, if plaintiff would advertise certain stock in newspapers, defendant would reimburse plaintiff for all sums so expended, and plaintiff, relying upon such agreement, so advertised the stock and expended a certain sum, was not subject to the criticism that it failed to show a consideration for the alleged promise of defendant, or that the contract alleged, being unliquidated and uncertain as to its duration, was void for uncertainty. *Elmendorf v. Mulliken* (Civ. App.) 231 S. W. 164.

102. — Conspiracy.—In an action against fire insurance companies for conspiring to prevent plaintiff from obtaining insurance by slanderous communications made to the companies by their agents, the petition should be sufficiently specific to put defendants on notice as to what they would have to be prepared to meet on the trial. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

103. — Customs and usages.—In action by tenant under a lease for one year to recover from his landlord's grantee money received for pasturage, evidence that it was custom for tenant to get Johnson grass after cutting crop held not admissible, in absence of pleading to that effect. *Cooke v. Ellis* (Civ. App.) 196 S. W. 642.

105. — Discovered peril.—Petition, in an action against a railroad company for the death of one run down by a train, held, as against general demurrer, to sufficiently aver discovery of peril. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

To invoke the doctrine of discovered peril, it must be pleaded. *Baker v. Shafter* (Com. App.) 231 S. W. 349.

In action for injuries in a crossing accident, pleadings which failed to assert the actual discovery by defendant's agents of plaintiff's perilous situation in time to have averted the accident by the use of means at their command commensurate with their own safety are lacking in one of the essential elements of discovered peril. *Id.*

107. — Estoppel.—In suit on promissory note given for price of land by unmarried woman, who had subsequently married and gave renewal note, petition held not to show estoppel on defendant's part to deny that she had permanently separated from her husband when she gave note. *Sewell v. Walton* (Civ. App.) 204 S. W. 371.

109. — Fraud and mistake.—Where plaintiff, having extended credit to corporation in reliance on false financial statements made by corporation to commercial agencies, sued directors on theory that they were guilty of fraud or negligence in permitting false statements, it was unnecessary for petition to allege that either corporation or directors were subscribers to mercantile agencies, or that it was deceived. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

In action by servant for injuries, averments held sufficient to avoid release on ground of false representations, as against general demurrer. *Reasoner v. Gulf, C. & S. F. Ry. Co.*, 109 Tex. 204, 203 S. W. 592.

Fraud is never presumed, but must always be proven, and the facts and circumstances relied on must be set out, so that in construing a petition it may be determined whether the facts and circumstances alleged amount to fraud. *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767.

In action to recover money paid for stock in oil company, general allegations with reference to fraudulent representations as to existence of oil under the land held not to sustain judgment in plaintiff's favor. *Id.*

Allegations that a lease of oil lands which lessors sought to cancel was granted defendant in trust for a corporation to be returned to lessors if the corporation was not formed, and that after the corporation project was abandoned defendant assigned an interest to his codefendants, charges a breach of duty by trustee which constitutes legal or presumptive fraud. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Allegations as to fraudulent representations by defendant, inducing exchange of properties, and that but for such false representations the trade would not have been consummated, should be clear. *Thrasher v. Walsh* (Civ. App.) 228 S. W. 961.

Allegation by plaintiff, suing for recovery of an amount paid under false representations for cancellation of his oil and gas lease, that defendant misrepresented that he was a soldier in the army, held not a misrepresentation of law, but one of fact. *Ware v. Campbell* (Civ. App.) 229 S. W. 593.

Petition for recovery of an amount paid under false representations for cancellation of an oil and gas lease held good as against general demurrer. *Id.*

Petition in a suit to cancel an oil and gas lease made to defendant as trustee on the ground of misrepresentation by defendant's agent in procuring the lease that a lease was desired by a going oil company for immediate drilling on the land held insufficient to state a cause of action on the ground of fraud. *Cooper v. Casselberry* (Civ. App.) 230 S. W. 231.

Vendor's complaint, in an action against purchaser, alleging that purchaser misrepresented that maker of notes received in part payment was solvent, that deed of trust had been executed on certain land to secure such notes, and that such land was of certain value, held to state a cause of action for deceit. *Rea v. Luse* (Com. App.) 231 S. W. 310.

112. — **Homestead exemption.**—One seeking to enforce a trust deed upon property alleged to be the homestead need not specially plead abandonment of the maker of the trust deed by his wife, in order to avail himself of such abandonment. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

112½. — **Invitation or license.**—Petition, alleging that a boy carrying lunch to one of defendant's employes was killed by falling into an unguarded pit near footpath used by pedestrians with defendant's knowledge, held to show an implied invitation to use the premises, and not a mere license. *Bustillos v. Southwestern Portland Cement Co.* (Com. App.) 211 S. W. 929.

114. — **Jurisdictional facts.**—Allegations of jurisdictional facts relating to subject-matter of suit, contained in petition, of themselves, confer jurisdiction which will be retained until defendant alleges and proves that allegations were made for fraudulent purpose of conferring jurisdiction. *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

In suit to obtain divorce and recover separate property and community interest, objection that allegations failed to show that plaintiff wife had resided in county, and had been actual bona fide inhabitant of the state for 12 months, might be good as far as suit for divorce is concerned, but would have no pertinency so far as suit for her property is concerned. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

In suit for cancellation of instruments with reference to cutting of guayule from land in Mexico, petition held to disclose that court had jurisdiction of persons of defendants, and that a fraud had been committed against plaintiff for which a remedy could be afforded by requiring defendants to reconvey to plaintiff. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

Proof as to inhumanity of state and residence of county, required by art. 4632, is as essential as any other fact in a divorce case, and though the question is not raised by plea in abatement, it is not waived, but the plaintiff must allege and prove residence as part of his case. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

In wife's divorce action, petition alleging husband and wife to be bona fide inhabitants and resident citizens of the state, that wife was a resident inhabitant of county in which suit was brought, that husband was a resident of a specified county in the state, and that each had been so for more than 12 months next immediately preceding the institution of the suit, held sufficient. *Landers v. Landers* (Civ. App.) 220 S. W. 359.

A petition in any suit must affirmatively allege the facts showing that the court has jurisdiction. *Hodgkinson v. Hartwell* (Civ. App.) 226 S. W. 457.

114½. — **Marriage.**—In the absence of allegation that plaintiffs, claiming homestead, were married, the fact of marriage cannot be presumed from the fact that plaintiffs settled on the land claimed as homestead, resided there, and raised crops thereon. *Arispe v. Clark* (Civ. App.) 204 S. W. 373.

116. — **Notice or knowledge.**—In action for damages due to failure to promptly deliver to her son telegram with reference to serious condition of plaintiff's daughter, the fact that the company had notice that the telegram was sent for benefit of plaintiff sender held to sufficiently appear from petition. *Western Union Telegraph Co. v. Barrett* (Civ. App.) 207 S. W. 976.

Plaintiff's allegation held sufficient allegation of notice to defendant that plaintiff was claiming bale of cotton, or its value or proceeds, to satisfy his landlord's lien, as against general demurrer. *Green v. Scales* (Civ. App.) 219 S. W. 274.

An allegation in a petition to cancel an oil lease that the officer who took the acknowledgment was the agent of lessees and interested in the lease was sufficient to show that lessees were charged with notice of his disqualification, and sufficient predi-

cate for a finding of the court against the lease. *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

116½. — **Nuisance.**—Pleading that oil and gasoline are high explosives, and that they were placed upon defendant's property, which is situated upon a public street in a thickly settled portion of a city, held to charge a public nuisance. *McGuffey v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 211 S. W. 335.

117. **Ordinances.**—Petition charging railroad with negligence "in violating the ordinance of the city * * * in running at a much greater rate of speed than is permitted and allowed by said ordinance, duly enacted and in force at the time of the accident," is sufficient to notify defendant that the ordinance will be offered in evidence, and a good pleading thereof, at least in the absence of special exception. *San Antonio & A. P. Ry. Co. v. Boyed* (Civ. App.) 201 S. W. 219.

120. — **Proximate cause.**—In a suit against the seller of gasoline labeled "Coal Oil," by one injured by an explosion after purchasing it from a retailer who had bought it from defendant, a general demurrer to the petition on the ground that it affirmatively appeared that the defendant's act was not the proximate cause of the injury, held without merit. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

Allegations of petition against electric power company for injuries to horseman, who became entangled in unguarded guy wire in or near a roadway, held not to have made plaintiff's own acts in riding out of the roadway and on the guy wire the proximate cause of his injury. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

In an action against a city for injuries caused by a defect in the streets to one riding on a fire wagon, a petition held not demurrable as alleging negligence by the driver of the fire wagon as the sole or concurrent cause of plaintiff's injury. *City of Austin v. Schlegel* (Civ. App.) 228 S. W. 291.

In action for injuries to jitney bus passenger in collision with truck, petition held sufficient, as against general demurrer to show that the negligence was the proximate cause. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

122. — **Tender and offer of equity.**—When transaction out of which a conveyance results involves payment of a valuable consideration by grantee, the grantor, if he elects to rescind and reclaim land, must restore or offer to restore what he has received, and should by his pleading inform the court as to such facts. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

In action by lessors to cancel oil lease, if petition specifically alleged payment of consideration, plaintiffs should have alleged an offer or tender to return payment made before suit or alleged an excuse for not making tender. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

In an action for specific performance, an amended petition, alleging in substance that plaintiff had been at all times since making the contract, ready, willing, and able to perform his part and to accept conveyance, and to pay for the same and to assume vendor's payment of mortgage, held sufficient as against objection of failure to allege tender. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

In a suit to rescind an oil and gas lease for alleged fraud, plaintiff lessor must plead an offer and tender of the rentals which were paid by the defendant lessee. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

In a suit to cancel a deed on the ground that it was procured through misrepresentations, a statement in plaintiffs' petition that, if they were required to pay money received as a condition precedent to recovery they were ready to do so, held not a tender. *Fisher v. Gulf Production Co.* (Civ. App.) 231 S. W. 450.

In an action for a rescission of a settlement, plaintiff is not obliged to tender back the money received in settlement where, in any event, he would be entitled to retain that amount either by virtue of the settlement or of the original liability. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 232 S. W. 290.

122½. — **Title and possession.**—In action to determine plaintiff's interest in property left by grandfather and grandmother, involving question of whether certain property was community property, petition referring to grandfather's will and probate thereof and inventory of property thereunder, together with partition suit in which such property was alleged to be community property and judgment therein, held to sufficiently allege that property was community property. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

In an action for conversion of ores removed from a mining claim, the general allegation that plaintiff was the owner of the claim is sufficient as against general demurrer. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

123. — **Waiver and ratification.**—Where plaintiff agreed to begin work at once and complete repair of bridge within 100 days, time was of the essence, and there could be no recovery in the absence of pleading or proof that plaintiff had been released. *Palo Pinto County v. Beene* (Civ. App.) 199 S. W. 866.

124. **Pleading in particular actions.**—In suit by corporate stockholders, pleading held to allege that company had made chattel mortgage for benefit of creditors, allegation being almost tantamount to statement that company had effected composition. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In guest's action for loss of baggage, complaint held good as against a general exception. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

In suit by commissioner of insurance and banking to enforce liability of present and former stockholder of an insolvent state bank, held, that pleadings filed were sufficient to authorize judgment against the former stockholder for full amount sued for. *Austin*

v. Campbell (Civ. App.) 210 S. W. 277; Same v. Kelly (Civ. App.) 210 S. W. 282; Same v. Yates (Civ. App.) 210 S. W. 282; Same v. Huffman (Civ. App.) 210 S. W. 283.

In an action against one who had caused the discharge of plaintiff by falsely and maliciously giving notice to the employer that she had an assignment of plaintiff's wages, allegations that defendant was engaged in conducting a usury business in the name of the M. Co., which defendant, in order to avoid the law and its penalties, falsely claimed was owned by a nonresident, were proper and material where defendant was sought to be held liable for acts done by the loan company as her agent. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In an action by attorneys to recover one-third of amount paid by defendant to client, who had assigned interest in a cause of action in order to secure services, it was not necessary to plead and prove all the facts which would have been necessary in the original action to entitle their client to recover. *Wichita Falls Electric Co. v. Chancellor & Bryan* (Civ. App.) 229 S. W. 649.

The probate court has the exclusive jurisdiction for the settlement of estate of deceased parties, and a creditor who seeks payment of his debt outside of an administration through the courts of probate, must state in his petition such facts as bring him within some of the exceptions to the ordinary rules of proceeding. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

125. — **Account.**—Petition by the buyer of merchandise to recover from the seller the difference between what the seller had agreed to account for, on account of sales made by him after the transaction, but before possession changed, and the amount which he had actually accounted for, was not defective, because it did not state whether the contract between the seller and buyer was oral or in writing. *Adams v. Sims* (Civ. App.) 214 S. W. 838.

127. — **Against bailee.**—In suit against defendant compress company for damages to cotton, held plaintiff's petition sufficiently alleged relation of ballor and bailee for hire in absence of special exception. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

128. — **Against carriers of goods and live stock.**—Where shipper of cattle suing for damages in transit alleged carrier received cattle for shipment, received reward in payment for services, and caused damage by its negligence, there was sufficient allegation of common-law liability of carrier. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 203 S. W. 410.

Pleadings held to raise the issue of whether railroad furnished car for shipment of live poultry within a reasonable time after shipper's application therefor, in compliance with its duty under Interstate Commerce Act (U. S. Comp. St. § 8563, subd. 2). *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

It is not necessary for the plaintiff, in an action for damages to an interstate shipment resulting from defective refrigerator cars, to either allege or prove negligence of the carrier. *Nabors v. Colorado & S. Ry. Co.* (Civ. App.) 210 S. W. 276.

In shipper's action for damage to cattle, allegations that the railroad was negligent by reason of delays on sidings and switches, rough handling, and sudden stop of train because of collision, or near collision, with motorcar or section hand car, resulting in damage to cattle, held sufficient, as against objection that allegations were too general and did not specify in what the alleged negligence consisted. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

129. — **Against connecting carriers.**—Petition to recover for defendant's failure to seasonably deliver shipment to connecting carrier held not open to exception on ground of vagueness of allegations as to shipments, in view of former trial. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

To recover from a terminal carrier the damages to shipment caused by preceding carriers, plaintiff must plead that the shipment was on a contract for through carriage, recognized, acquiesced in, or acted upon by the carriers so as to bring the case within arts. 731, 732. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

131. — **Against cities and other municipal corporations.**—In suit on city warrants petition held insufficient to show a compliance with Const. art. 11, § 5, 7, as to making provision for interest and sinking fund when debt is created, or that debt was to be satisfied out of current revenues for the year, or some fund within the immediate control of the city. *American Roads Machinery Co. v. City of Ballinger* (Civ. App.) 210 S. W. 265.

Petition in an action on a warrant given in 1913, and payable in 1916, as consideration for a traction engine, held not to sufficiently aver that at the time of creating the debt provision had been made for levying and collecting a sufficient tax to pay the same. *J. I. Case Threshing Mach. Co. v. Camp County* (Civ. App.) 218 S. W. 1.

In a contractor's action against an irrigation district to recover for the price of work done, a petition, charging the organization, existence, and functioning of the defendant district under the statute, the making and delivery of written contract through its board of directors under attestation by its secretary, and the attachment of its corporate seal, the construction and completion of the work, and its acceptance held sufficient, as against a general demurrer objecting that the petition did not specifically allege performance of the detailed procedure described by arts. 5107—21, 5107—85 to 5107—87, 5107—89, 5107—92. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

133. — **Against sureties.**—In an action against the surety on a constable's bond by one falsely imprisoned by the constable, the petition, which alleged that the constable as such arrested plaintiff for disturbance of the peace committed in the presence of the constable, and also alleged that the latter took plaintiff in custody on the plea that he

was guilty of such offense, as against general demurrer sufficiently showed that the constable was acting in his official capacity. *National Surety Co. v. Masters* (Civ. App.) 200 S. W. 1123.

The petition, which disclosed that the arrest was made at a dance for disturbance of the peace or disorderly conduct in a public place, deemed by the constable to constitute a misdemeanor authorizing plaintiff's arrest without warrant, sufficiently charged as against general demurrer that the constable arrested plaintiff for what he construed to be an offense classified as a breach of the peace. *Id.*

In suit upon guardianship bond, petition as against sureties was defective, where there was no allegation that they executed the bond, or that they refused to comply with the terms thereof. *Davis v. White* (Civ. App.) 207 S. W. 679.

Allegation that sureties on guardianship bond became liable and indebted to plaintiffs on the bond does not imply a failure on the part of the sureties to discharge their liability and indebtedness. *Id.*

Complaint, aided by every reasonable intendment, held to present a suit on an absolute guaranty, and so to support a judgment on that theory. *Smith v. Cummer Mfg. Co. of Texas* (Civ. App.) 223 S. W. 338.

134. — **Against telegraph and telephone companies.**—In action for failure to deliver message of fatal illness, where complaint failed to allege possibility of delivery on any other than the day when sent, or that any subsequent delivery would have enabled plaintiff to have attended the funeral, or to have seen his sister alive, and the judge found no negligence on that day, judgment for the plaintiff could not stand. *Western Union Telegraph Co. v. Tartar* (Civ. App.) 200 S. W. 559.

In an action against a telegraph company for failure to deliver a death message, petition held to state a cause of action as against a general demurrer. *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080.

Petition against telegraph company, for failure to deliver message, held demurrable as not alleging sufficient facts to show contract by telegraph company to transmit and deliver message, and as not sufficiently alleging facts to show existence of company's duty to transmit and deliver. *Western Union Telegraph Co. v. Fletcher* (Civ. App.) 208 S. W. 748.

In action for failure to promptly deliver telegram informing plaintiff that sender would sell his interest in a partnership, failure to deliver promptly resulting in the other partner withdrawing his consent, so that plaintiff could not purchase, complaint held to state a cause of action. *Western Union Telegraph Co. v. Dorough* (Civ. App.) 213 S. W. 282.

Allegations, in a petition for damages for mental anguish caused by failure to promptly deliver a death message to plaintiff's son, held to sufficiently state what facilities the son could avail himself of in reaching a certain point, and the son was properly permitted to testify to the route he took, which, if the telegram had been promptly delivered, would have carried him there in time. *Western Union Tel. Co. v. Johnson* (Civ. App.) 218 S. W. 781.

In an action by the addressee for failure to seasonably deliver a message announcing the fatal illness of his mother, allegations that in the usual and customary routes of travel the addressee, had the message been promptly delivered, could have reached his mother in time to have found her rational, are sufficient. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

To entitle sendee to recover damages for failure to promptly deliver a telegram announcing the death of a relative, it devolved upon him to allege and prove that, if the telegram had been promptly delivered, he could and would have attended the funeral. *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611.

Allegations that "plaintiff would have been enabled to attend the funeral of his mother," and he suffered much pain and anguish "because of the impossibility of reaching the burial place of his mother before she was buried, because of the delay in the delivery of said telegram," did not sufficiently show that the sendee would have attended the funeral, had the telegram been promptly delivered. *Id.*

137. — **Bills and notes.**—A complaint, alleging that defendant executed and delivered certain checks to plaintiff drawn upon a named bank, payable to plaintiff's order and in amounts and on dates specified, was not subject to general demurrer. *Merriman v. Swift & Co.* (Civ. App.) 204 S. W. 775.

A complaint, alleging that defendant executed certain checks for a valuable consideration and delivered them to plaintiff, and that "defendant is indebted to the plaintiff thereon and by reason thereof," is not insufficient as failing to allege a promise to pay: (quoting Words and Phrases, Second Series, Indebted—Indebtedness). *Id.*

Petition, in action on vendor's lien note, alleging the appointment of vendor's foreign administrator, who transferred all notes to one S., and that note in suit was put in escrow by administrator and another did not allege title under S. or any ownership by S., and the word "transferred" meant the written indorsement thereon, and not a legal assignment and delivery, or that the transfer to S. postdated the escrow agreement. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Under art. 582, providing assignee may sue in his own name, in an action on an assigned note, it was not necessary that the pleader state in detail the circumstances of the transfer of the note, though it was not indorsed. (Per Boyce, J.) *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

Where plaintiff in suit on note is payee, that the note is indorsed by him in blank does not make it necessary that plaintiff allege and prove ownership of note; such indorsement not raising a presumption against title of holder. *Holland v. Wood* (Civ. App.) 209 S. W. 774.

In a suit on a note given in consideration of the establishment and maintenance of a permanent shipyard and the construction of four wooden ocean going ships under the direction of the government, performance of the consideration held sufficiently alleged. *Bell v. First Nat. Bank* (Civ. App.) 225 S. W. 1107.

In an action on a guardian's bond conditioned for the faithful performance of the guardian's duties, where the petition alleged failure of the guardian to account for certain funds, it was sufficient as against the objection that it contained no allegation as to performance on the part of the sureties, as no duty of performance was imposed on them. *Wyatt & Wingo v. White* (Com. App.) 228 S. W. 154.

Under arts. 4097-4112, requiring a guardian to take oath, give bond to be fixed by the county judge, present the oath and bond to the judge for his action, and file the oath and bond when approved by the county judge, an averment in an action on the bond that it had been filed was sufficient to include the intermediate steps, including the fixing of the amount by the judge and the approval of the bond by him. *Id.*

In an action on a guardian's bond, an allegation that the guardian invested the trust fund without orders of the court and appropriated it to his own use sufficiently charged a failure to faithfully discharge his duties and rendered unnecessary any averment of nonpayment of the penalty of the bond. *Id.*

139. — Breach of contracts in general.—To recover money on a contract, petition must show breach thereof, and, failing to do so, is subject to general demurrer. *Hart-Parr Co. v. Paine* (Civ. App.) 199 S. W. 822.

Allegations of petition in action for breach of contract held sufficient as against general demurrer. *Matthews v. Deason* (Civ. App.) 200 S. W. 855.

Complaint alleging breach of agreement as to conditions for entry of judgment in "suit No. 18163a in Fourteenth District Court of Dallas County" for purpose of foreclosing plaintiff's right of redemption, sufficiently identified action in which the agreed judgment was entered. *Id.*

Where plaintiff alleged contract by which he permitted judgment to be entered in foreclosure suit against him, on condition that defendants would reconvey, and that they refused to reconvey and dispossessed him, it was unnecessary to allege that by judgment they acquired title to land. *Id.*

Petition which alleged ordinary transaction of purchase by plaintiff from defendant of 15 bales of cotton, and plaintiff's making a contract for resale calling for delivery on same date, held not to show on face that transaction was a gambling one. *Dixon v. Winters* (Civ. App.) 201 S. W. 1103.

In suit for professional services rendered by architect, petition held not to allege fully, clearly, and consistently what plaintiff had contracted to do, so that it was insufficient when tested by special exceptions. *Reuter v. Nixon State Bank* (Civ. App.) 206 S. W. 715.

Employé suing to recover hospital expenses from employer who had deducted "hospital fee" from monthly wages of employé had burden of alleging and proving that fees were collected as a present hospital fund, to be used in case of sickness, and that employer had on hand a sufficient amount of the funds to pay the expenses. *Courchesne v. Brown* (Civ. App.) 216 S. W. 674.

In action against shipping agent for delay in furnishing ship petition pleading duty to furnish ship by last of February, and claiming damages for delay from March 1, held not to sustain claim that shipping agent breached contract in January. *Langhen v. Crespi & Co.* (Civ. App.) 218 S. W. 144.

A petition asking for specific performance of an oil lease, or, in the alternative for damages, held to state a cause of action for damages for failure to reassign the leases as provided in contract, as against a general demurrer. *Bois D'Arc Creek Oil & Gas Co. v. Southwestern Oil Corporation* (Civ. App.) 219 S. W. 1115.

Petition by the foreman of ranch to recover salary, moneys advanced, etc., held not subject to general exception, but rather to state a cause of action. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

In a suit for compensation for publishing the delinquent tax list under a contract providing for payment as the taxes were paid, a petition, alleging that a reasonable time for payment of the debt had expired, sufficiently alleged, as against general demurrer, the failure of the county to perform its duty to proceed expeditiously to the enforcement of the obligation of the taxpayers. *Potter County v. Boesen* (Com. App.) 221 S. W. 948, affirming judgment (Civ. App.) 191 S. W. 787.

Petition in action on contract must state the time at which defendant should have performed, and if the contract specified no time for performance, it should be averred that it was to be performed on request or in a reasonable time, and that such request was made or that a reasonable time has elapsed. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

Petition in action on contract must aver every material part of it, or so much as is essential to the cause of action, as the material facts of a contract cannot be presumed. *Id.*

The contract for breach of which damages are sought must be pleaded with such particularity that the damages resulting must flow as a natural sequence of its breach. *Id.*

Petition of selling agents alleging a contract not specifying the date commissions were to be paid, but alleging that, though often requested, defendant company wholly failed and refused to pay commissions earned, sufficiently charged noncompliance with the implied stipulation to pay commissions within a reasonable time, and stated a cause of action. *Paine v. Hart-Parr Co.* (Com. App.) 228 S. W. 121.

Petition in action to recover a money judgment, in the alternative to recover a

leasehold interest in described realty, held not to show on its face, to render it demurrable, that plaintiff, in his alleged contract with defendants to file suit for cancellation of a former lease was willfully guilty of any act or combination of acts denounced as barratry by Pen. Code 1911, art. 421. *Tunstill v. Grisham* (Civ. App.) 228 S. W. 272.

In contractor's action against an irrigation district for balance due on construction work, an objection that the written contract declared upon by plaintiff was not set out verbatim in his pleadings, and that it was not averred that the law regulating such contracts had been complied with, is without merit. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

An objection that the contract showed authority of agent was limited to estimating the work and labor performed and the materials furnished, and did not confer on him the right to accept the work which was a nondelegable duty imposed by statute upon the directors, is not well taken, where the pleading asserts that the work was accepted by the district's board of directors. *Id.*

140. — **Breach of contract of sale.**—Where land is conveyed in gross, the purchaser takes the risk as to the acreage and cannot recover a shortage without allegation and proof of fraud or mutual mistake. *Read v. Blaine* (Civ. App.) 201 S. W. 415.

In an action for purchase price, the contract as set forth in the petition held to contain the necessary elements to constitute a valid written contract under the averments of a petition when tested by demurrer. *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192.

In an action for purchase price, a petition alleging that buyer executed the contract set out in the petition held sufficient as against a general demurrer, since the word "executed," in a legal sense, includes delivery and implies a completed contract. *Id.*

Petition of the purchaser of land, suing for a shortage in acreage, held to show that the sale was by the acre and not in bulk. *Gillisple v. Gray* (Civ. App.) 214 S. W. 730.

Petition held not to show on its face that the purchaser was guilty of negligence as a matter of law in failing to discover the shortage before the day when possession was delivered to him. *Id.*

Allegation of petition that defendant agreed and bound itself to extend to plaintiff a line of credit for goods, wares, and merchandise is not a sufficient statement of a contract. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

A petition to recover consideration for plaintiff's interest in land incumbered by two judgments held sufficient. *Fleming v. Stringer* (Civ. App.) 225 S. W. 801.

Allegations that the land was part of a specified league in a certain county, and was the land conveyed to a named judgment creditor by sheriff's deed, etc., held a sufficient description as against a general demurrer. *Id.*

In vendor's action for breach of contract of purchase of land, petition disclosing the sale of the land, vendor's compliance with all the terms thereof, and the purchaser's refusal to perform, held sufficient as against general demurrer. *Colley v. Alamo Lumber Co.* (Civ. App.) 227 S. W. 559.

A petition for the recovery of earnest money paid on a contract for the purchase of land, which alleged that the securing of a federal loan was a condition precedent and that such loan was not procured because the vendor, in violation of his agreement, required the proceeds to be applied on purchase-money notes, was sufficient to support a judgment on directed verdict. *Faulkner v. Otto* (Civ. App.) 230 S. W. 447.

142. — **By broker for commissions.**—Petition, in suit to recover broker's commissions, held good as against a general demurrer. *Britton v. Eagan* (Civ. App.) 196 S. W. 972.

In a broker's action for a commission for effecting an exchange of properties, value not entering into the exchange, petition is not bad for failure to allege the value of the lands. *Hull v. Eidt-Summerfield Co.* (Civ. App.) 204 S. W. 480.

Realty broker, suing for commission earned in selling land, was required to allege, and prove affirmatively, to establish his case, that he was procuring cause of sale. *Buck v. Woodson* (Civ. App.) 209 S. W. 244.

Petition alleging exclusive right by broker to sell property until certain date, and sale by owner, subsequent to such date, to purchaser procured by broker, but failing to allege that purchaser was procured by broker within the period during which he had exclusive right to sell, failed to state cause of action. *Aukerman v. Bremer* (Civ. App.) 209 S. W. 261.

A petition brought by a partnership, was not demurrable, as alleging a contract made by an individual plaintiff, where petition in fact alleged a contract with a partnership, notwithstanding an immaterial allegation that defendant had listed his land with one of partners. *Baker v. Slaughter & Moorehead* (Civ. App.) 210 S. W. 557.

No actual sale having been consummated, the broker must allege and prove that he procured a purchaser ready, able, and willing to purchase at the price and upon the terms provided in the contract between himself and the owner. *Webb v. Harding* (Com. App.) 211 S. W. 927.

Where it is alleged that the seller actually sold the premises to a purchaser with whom the broker was negotiating upon specified terms, it is not necessary to allege that the proposed purchaser was ready, able, and willing to buy. *Williams v. Atkinson* (Civ. App.) 214 S. W. 504.

Petition, alleging that the broker procured a purchaser who agreed to purchase and entered into a written contract, etc., and took possession of the premises, and that the broker was the efficient procuring cause, held sufficient to support a judgment in the broker's favor. *Id.*

Petition held good against demurrer, sufficiently alleging that the purchaser could pay cash, notwithstanding statements as to the contract whereby the broker was to procure a loan for the purchaser, so that the defense that the purchaser could not pay cash must be raised by answer. *Covington Realty Co. v. Reedy* (Civ. App.) 229 S. W. 604.

143. — **By or against corporations or associations in general.**—Stockholders' complaint held to state a good cause of action for dissolution of the corporation. *Crow v. Cattleman's Trust Co.* (Civ. App.) 198 S. W. 1047.

Allegations that a national bank guaranteed a seller's compliance with a contract, that it had been the bank's custom to extend credit to the seller, that the bank received exchange fees from moneys paid the seller and applied proceeds of sale on seller's indebtedness to it, etc., held not to show that bank had such a sufficiently direct interest in the transaction as would avoid the defense that its guaranty was ultra vires. *First Nat. Bank v. Crespi & Co.* (Civ. App.) 217 S. W. 705.

In the absence of pleading and proof to the contrary, the court must assume that a corporation, if it was authorized to make notes and create a lien to secure them, had the authority to agree on an extension of due dates, and one suing on the note and to foreclose the lien need not allege that the corporation had the power to agree to such extension. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

Where an association adopted and ratified the act of plaintiff broker in effecting a sale of its property, it was permissible to plead that the contract of sale was made by the association. *Waurika Oil Ass'n No. 1 v. Ellis* (Civ. App.) 232 S. W. 364.

145. — **By, or against insurance company or order.**—In an action against an insurer for loss by fire of 405 bales of cotton, it was not error to overrule a special exception to the complaint for the reason that the identity of said bales by tag number or otherwise was not disclosed, where the complaint set out the date and place of the fire, and the policy covered cotton situate anywhere in the state belonging to plaintiffs. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

Allegations that plaintiff made a "John Doe" application and was instructed to make formal application and he would be accepted, that plaintiff submitted to examination and was passed, and was refused solely on account of facts disclosed by the "John Doe" application, sufficiently show that examination conformed to the "John Doe" application. *Capitol Life Ins. Co. of Denver, Colo., v. Driscoll* (Civ. App.) 199 S. W. 872.

A petition alleging that the dwelling in which property was located was totally destroyed by fire, and that proof of loss of such property was thereafter furnished insurer, was sufficient, as against general demurrer, to show destruction by fire of the goods insured. *United Mut. Fire Ins. Co. v. Talley* (Civ. App.) 211 S. W. 653.

Where plaintiff's right to recover on a life insurance policy did not depend upon whether defendant was an ordinary life insurance company or fraternal benefit association, it was unnecessary for the petition to allege what kind of life insurance the defendant was authorized to issue. *Hand v. Sovereign Camp, Woodmen of the World* (Civ. App.) 214 S. W. 718.

In suit on a fraternal benefit policy, a petition alleging that policy was in defendant's possession, and stating its substance and effect, held sufficient. *Id.*

In an action on burglary and theft policy, an allegation that property was feloniously abstracted from the interior of plaintiff's residence was sufficient, especially when not challenged by demurrer, to cover a loss by theft, as distinguished from burglary. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 461.

In an action by a beneficiary under a supplemental life policy, providing for double liability in case of accidental death, burden was on plaintiff to allege and prove that the deceased came to his death by accident within the policy. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

A clause, not in the same part of a life policy in which an insurer promises to pay, to the effect that insurer will not be liable in event of suicide, is in the nature of a condition subsequent, or a proviso which, if relied on to defeat a recovery must be sufficiently pleaded and proved by the insurer. *Id.*

A petition on fraternal life policy, alleging that insured had paid specified premiums, the death of insured, etc., held sufficient, especially as insurer's answer admitted issuing policy and recognized insured as one of its members. *Sovereign Camp, W. O. W., v. Little* (Civ. App.) 225 S. W. 574.

146. — **By or against husband or wife or both.**—As against general demurrer, the petition held sufficient to allege that decedent and plaintiff were husband and wife, and that the property involved was acquired during the existence of the marital relation and was community property. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

Petition against husband and wife on note executed by wife in purchase of piano states no cause of action against her, though it alleges purchase was for benefit of her separate estate, but discloses facts showing conclusion is erroneous. *Bledsoe v. Barber* (Civ. App.) 220 S. W. 369.

In a husband's action for injuries to his wife under art. 1839, the petition need not allege that the suit is brought by the husband as agent of the wife or for her benefit. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

148. — **By or against officers.**—A petition to compel the acting comptroller of Texas to reinstate a retail liquor license held, as against general demurrer, to sufficiently allege the license was rescinded and vacated. *Tittle v. Bartholomae* (Civ. App.) 207 S. W. 176.

149. — **Cancellation or rescission.**—A purchaser's petition, in action to cancel contract that vendor stated the land would not overflow, that such statements were false and known to be false, etc., held sufficient. *Burcum v. Gaston* (Civ. App.) 196 S. W. 257.

In absence of exception, plaintiff's averment that he placed on record instrument

purporting to be rescission would be sufficient allegation of rescission. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Allegations in petition setting up the title of plaintiff specially, and asking for cancellation of deed and possession of land assigned, held sufficient. *Hensley v. Pena* (Civ. App.) 200 S. W. 427.

In suit to rescind contract for sale of land, vendor's petition alleging that superior title was in him, that defendants unlawfully entered premises and ejected plaintiff and were withholding from him the land, stated a cause of action. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

In suit praying for cancellation of instruments with reference to cutting of guayule from land in Mexico, petition held to disclose that a fraud had been committed against plaintiff for which a remedy could be afforded by requiring defendants to re-convey. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

Petition seeking cancellation of deeds executed to defendant to secure dealings in cotton futures was not subject to general demurrer because of allegation of plaintiff's knowledge that money was to be used for illegal purpose, where it did not appear from petition that plaintiff was in *pari delicto* with defendant, as the cancellation of the deeds would not be in furtherance of the illegal transaction. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

In buyer's action to recover the value of a mule sold, the petition, being in the alternative praying for damages in event that it should be held that plaintiff could not rescind did not justify submitting the issue of breach of warranty of soundness. *Fulwiler Electric Co. v. Jinks McGee & Co.* (Civ. App.) 211 S. W. 480.

Petition, by owner of $\frac{1}{120}$ interest in the oil, gas, and other minerals on and under certain lands, to cancel his deed thereof to defendants, held to state a cause of action in its allegations of misrepresentations by defendants. *Holland v. De Walt* (Civ. App.) 225 S. W. 216.

Petition by a sister to set aside deeds given by her to her brother, on ground of her mental weakness and general overreaching by the brother, held sufficient as against special exceptions which were practically general demurrers. *Duckels v. Dougherty* (Civ. App.) 226 S. W. 720.

In a suit to cancel oil and gas leases and to recover 25 cents an acre deposited to guarantee performance by the lessee, the petition stated no cause of action for the recovery of the deposit, where it merely alleged that defendants deposited 25 cents an acre "on the above-described lands and on the lands of the plaintiffs, which amount aggregated \$2,500." *Huber v. Smith* (Civ. App.) 228 S. W. 339.

152. — Conversion.—Petition held to state cause of action as against sheriff and another for conversion of property which sheriff sold on execution to plaintiff and turned over to other defendant. *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Allegations in mining company's petition for conversion of ore, held sufficient on general demurrer to be basis of cause of action. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 63.

Allegations that plaintiff was owner of named claim in Arizona, and that defendants entered upon "the" claim and extracted ores therefrom, was meager as to ownership of plaintiff, and, if specially excepted to, plaintiff should have been required to amend. *Id.*

153. — Covenant or warranty.—In a suit on a breach of warranty by one who had exchanged lands, plaintiff must allege eviction or that the title is such that eviction will certainly follow. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

In action on warranty of heating system, allegations in general terms that the reasonable cost of work and material necessary in reconstructing the heating systems, so as to remedy the defect, was a certain sum, were not sufficient on special exceptions. *Nunn v. Brillhart* (Civ. App.) 230 S. W. 862.

155½. — Divorce.—Accurate pleading should be demanded before the marriage relation is dissolved. *Rowden v. Rowden* (Civ. App.) 212 S. W. 302.

In an action for divorce and division of community property, it was only necessary for plaintiff, wife, to allege that such property was acquired by joint labor during their marriage under art. 4623, and husband's general denial and plea of limitations was insufficient to permit a defense that they lived part of the time in a state where the wife had no shares in such property, and he should have pleaded such facts and pleaded and proved the laws of such state to warrant such issue. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In a wife's suit for divorce, a petition alleging habitual indifference, neglect, and failure to support, continual and habitual abuse, refusal to support wife and their minor children, or to buy them clothes, and acts humiliating to the wife, held sufficient in connection with a trial amendment stating times and details of the matters alleged. *Erwin v. Erwin* (Civ. App.) 231 S. W. 834.

156. — Establishment and enforcement of trusts.—An amended petition, alleging that an attorney, who had purchased property sold for taxes, had done so as to retain it for his client, defendant, but which fails to allege defendant's ownership and right of possession, or any consideration for the agreement, does not show an enforceable trust. *Ivey v. Teichman* (Civ. App.) 201 S. W. 695.

A petition alleging that plaintiff deposited her money with defendants as trustees to invest and reinvest it for her, and seeking damages for a misapplication of a part of the funds, need not allege that any specified amount was deposited. *Murphy-Bolanaz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

158. — False Imprisonment or malicious prosecution.—A petition, alleging institution against plaintiff of seven successive chattel mortgage foreclosure suits in fur-

therance of a conspiracy to unlawfully extort money from plaintiff, held not to state cause of action in absence of allegation of facts showing that plaintiff suffered by such suits interfering with her person or property. *Pye v. Cardwell*, 110 Tex. 572, 222 S. W. 153, answers to certified questions conformed to (Civ. App.) 224 S. W. 542.

159. — **Foreclosure of liens.**—Petition by vendor of ginning plants, seeking foreclosure of deed of trust on machinery subsequently installed therein by buyers, held sufficiently to describe such machinery. *Murray Co. v. Jacksboro Oil & Milling Co.* (Civ. App.) 205 S. W. 517.

162. — **Inducing breach of contract or discharge of employé.**—Complaint alleging that defendant is wholly responsible for and was acting with defendant contractors "in the wrongful rejection of said bricks" held sufficient on general demurrer, though there was no allegation of express malice or bad faith on the part of defendant in causing contractors to breach their contract. *Acme Brick Co. v. West* (Civ. App.) 215 S. W. 476.

163. — **Injunction.**—In a suit for injunction based on an alleged unlawful execution sale by a constable, who had been subsequently appointed town marshal, a complaint failing to show that such constable had qualified as town marshal, and acted as such, held not to state a cause of action; it affirmatively appearing that such constable was acting under the provisions of art. 809a. *Torno v. Hochstetler* (Civ. App.) 221 S. W. 623.

In suit to enjoin construction of bed spring and mattress factory, petition alleging merely that the operation of such a factory would "constitute a nuisance and would work great hurt, inconvenience, discomfort and damage" to the plaintiffs and their neighbors, without alleging wherein it would constitute a nuisance or cause inconvenience or injure plaintiffs or their property, held insufficient. *Haynes v. Hedrick* (Civ. App.) 223 S. W. 550.

A petition by a city to restrain the construction and maintenance of a filling station must allege facts which differentiate the filling station in question from a business of that kind as ordinarily conducted, and the facts relied on must show with reasonable certainty that a nuisance will result. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

Petition for injunction against a live stock barn charging erection and use would constitute a nuisance by creating filth, offal, excrement, etc., on the lots, held to state a cause of action for injunction. *Jacobs & Wright v. Brigham* (Civ. App.) 227 S. W. 249.

165. — **Injuries from obstruction or diversion of water.**—In action against road and receiver for damage by overflow of obstructed rainfall, where petition alleged obstruction was due to negligent construction of road originally, as well as to negligence of receiver, cause of action was stated against railway. *Ft. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

In an action against a railroad company for damages due to overflow caused by the construction of a railroad across a natural drain, complaint held sufficiently to allege that the backwater filled a bayou, and combined with the water naturally flowing down such bayou as to flood plaintiff's farm. *Johnson v. San Antonio & A. P. Ry. Co.* (Civ. App.) 220 S. W. 388.

166. — **Injuries in construction and operation of railroads.**—A petition that plaintiff passenger was forced and compelled by defendant carrier's conductor of whom he was in fear to leave a moving train, etc., held not to present conductor's action in inspiring fear in plaintiff as an independent ground of negligence. *Brown v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 198 S. W. 986.

Where petition alleged that view at crossing in village was obstructed by cars and temporary depot, it was not error to overrule special exception to the petition charging negligence in failing to have a flagman or watchman at the crossing. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

Where plaintiff had to rely upon circumstantial evidence to establish killing of horse, and it was impossible to allege specific act done or omitted constituting negligence, he could rely upon general allegation of negligence. *St. Louis Southwestern Ry. Co. of Texas v. Claybon* (Civ. App.) 199 S. W. 488.

Petition alleging ownership of lot abutting city street and defendant's construction of railroad viaduct in part of street, without owner's consent and without compensation, to her damage, held to state a cause of action. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

In an action against a railroad for loss of animals killed by trains operated by receivers, facts necessary to fix liability upon railroad, receivers having been discharged, must be pleaded and proved. *Ft. Worth & R. G. Ry. Co. v. Wilhite* (Civ. App.) 210 S. W. 765.

167. — **Injuries in operation of street railroads.**—Petition, averring that plaintiff stepped partly on track to signal interurban car, and, upon receiving what she understood was the usual response that it would stop, was struck and injured by the car passing by at a great speed, does not show on its face that plaintiff was guilty of contributory negligence. *Texas Electric Ry. v. Hooks* (Civ. App.) 211 S. W. 654.

168. — **Injuries to servant.**—Complaint alleging injuries from defective machinery held not demurrable. *Palermo Bros. v. Capps* (Civ. App.) 196 S. W. 275.

Petition for death of railroad employé due to negligence of fellow servant held to state cause of action under art. 4694. *Ft. Worth & R. G. Ry. Co. v. Bird* (Civ. App.) 196 S. W. 597.

Petition held not to show that deceased was employed in interstate commerce. *Id.*

In action for death of a railroad engine inspector, allegation that defendant was a part of the F. System did not sufficiently point out fact that deceased was employed in interstate commerce. *Id.*

In action for injuries when sledge hammer flew off handle, petition, though not expressly charging defendant employer knew of condition of hammer, or that it could have known by exercise of ordinary care, held not subject to general demurrer. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

A petition alleging generally that a motor-driven sheet metal shears was defective, and that such defects were peculiarly within defendant's knowledge, was sufficient. *Wichita Falls Motor Co. v. Meade* (Civ. App.) 203 S. W. 71.

A petition alleging that plaintiff, a minor, 17 years old, was employed by defendant, that he was required to perform services in a cotton gin, that the machinery was negligently left exposed, that plaintiff was ignorant of the danger, that he was not warned, and that as a result he sustained injuries, held, as against general demurrer, sufficient to state a cause of action. *Pelipchyk v. Borden* (Civ. App.) 207 S. W. 177.

General allegations as to a manhole being an unsafe place to work and as to master's failure to warn a servant as to the possibility of an explosion when an iron bucket used by him struck a hard substance, should be construed with reference to an explosion of gas and as to the cause thereof, specifically alleged to have been the striking of the bucket against the wall of the manhole. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

An allegation "that it was the duty of defendant to properly light said mine, and that it failed to perform said duty, that, if it had been properly lighted, plaintiff might have discovered that the switch was turned wrong, and might have avoided injury," was not subject to general demurrer. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

An allegation that railroad employes, including plaintiff, protested to the foreman and the company against handling timbers with an insufficient force, but the foreman refused to furnish more men and directed the work to be done under his eye, thereby assuring the men that they could perform the work with safety, is not subject to an exception as stating no ground of negligence nor excuse for proceeding to move the timber with knowledge of insufficient number of men. *Panhandle & S. F. Ry. Co. v. Brooks* (Com. App.) 222 S. W. 186, affirming judgment (Civ. App.) 199 S. W. 665.

In an action for a railroad employe's death by derailment from a cause not known to plaintiff, a general allegation that it was through the negligence of defendants was sufficient, without alleging the negligence of the engineer and manner of construction. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

169. — **Interpleader.**—Pleadings as a whole, under principle that lessee may not deny landlord's title, held to disclose such interest in those brought in by interpleader by one sued by lessee in oil lease for price of oil as to entitle them to hearing on issue of forfeiture of lease. *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687.

In an action against a fraternal insurer, where parents of a deceased member, sought recovery on the ground that the beneficiary named was not the adopted child, the insurer's answer asserting its willingness to pay, but that the beneficiary had filed a suit in another state, and that it did not know to whom to pay, and therefore prayed that the rights of the parties be determined, was in the nature of a bill of interpleader, and did not plead the pendency of another suit. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

171. — **Judgment, equitable relief against.**—In suit by former insane person to set aside judgment in her receiver's suit denying cancellation of her deed, to cancel deed, etc., allegations of fraud chargeable to a defendant held sufficient to form basis of judgment for relief prayed. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

In suit to set aside judgment for want of service, where judgment and return showed service, facts constituting meritorious defense should have been alleged. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

In wife's suit to set aside divorce decree, in so far as dividing community property, as having been procured by husband's fraud, controlled by art. 4634, it is necessary to comply with fundamental rules of pleading, but the court should likewise construe pleadings so as to give effect to any real equities. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

In a suit to set aside a tax judgment and sale thereunder because no citation had been served on plaintiff, notwithstanding the return recited service, it was not necessary for plaintiff to allege that the falsity of the return was due to any action on the part of defendant. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

The rule that one who seeks to set aside a judgment improperly rendered by default must state that he has a good defense to the cause of action has no application to a suit to set aside a tax judgment and sale thereunder on the ground that no notice or citation was served on the owner. *Id.*

In order to have a final judgment vacated or set aside at a subsequent term, the petition must disclose some legal or equitable ground for the granting of such relief. *Skiner v. Waits* (Civ. App.) 214 S. W. 844.

In an action to set aside part of a judgment on the ground that plaintiff was never served with notice recited in the judgment, or any other process, it was not necessary to specifically allege that the return on the notice was false. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

172. — **Libel or slander.**—Where a communication is qualifiedly privileged, the inference of malice is rebutted prima facie, and it devolves upon the party complaining to allege and prove malice. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

In an action against a credit company for placing plaintiff's name in a list of debtors, it was necessary to set out the words in the list, with such innuendoes as were necessary. *Henderson v. Credit Clearing House* (Civ. App.) 204 S. W. 370.

Where alleged slanderous words are susceptible of an innocent as well as a defamatory meaning, plaintiff should allege use of words in a defamatory sense, and also that words conveyed defamatory meaning to hearers. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

A libel suit being based on language or its equivalent, a complaint should put the court in possession of the libelous matter published. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

Allegation that defendant published and delivered to plaintiff's employer a statement in writing wherein defendant alleged and stated that she "had an assignment of wages and power of attorney on him, the plaintiff, to the extent of \$12, providing for an attorney's fee of \$10 additional," sufficiently disclosed a libel under art. 5595; the rule being satisfied with any allegation that discloses the very language used, whether purporting to be quoted from the writings or not. *Id.*

In an action for libel, an "innuendo" in pleading is an explanation of defendant's meaning in the alleged libelous words by reference to some antecedent matter; its office being to aver the meaning of the language of the publication of which complaint is made, and the colloquium identifying the person to whom it was intended to be applied. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

Alleged libelous words must be capable of the meaning ascribed to them by the innuendo; moreover it cannot introduce new matter, or enlarge the natural meaning of the words, or give them a forced and unreasonable construction. *Id.*

Plaintiff cannot place, by innuendo, a construction on the alleged libelous letter of which it is not fairly susceptible. *Fuson v. Abilene Gas & Electric Co.* (Civ. App.) 219 S. W. 208.

An allegation in petition for slander that defendant, speaking to plaintiff and to the people generally, uttered the words claimed to be scandalous, is subject to exception, as not being definite as to whom outside of plaintiff the words were spoken. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

A petition, charging defendant with falsely accusing plaintiff with the theft of money and inducing defendant's brother to break off his engagement to marry plaintiff, held sufficient as to statement of slanderous words and the effect of the same. *Vogt v. Guldry* (Civ. App.) 229 S. W. 656.

174. — Mandamus.—In mandamus to compel clerk of court to issue writ of possession, petition was demurrable where it showed upon its face a controversy between plaintiff and others over title and none of such persons were made parties. *Fain v. McCain* (Civ. App.) 199 S. W. 889.

In mandamus by district attorney to compel the judge and clerk of a city court to permit plaintiff to prosecute all criminal cases and to require the clerk to tax fees in plaintiff's favor, it was not necessary to specifically plead the statutes giving him such right. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Mandamus should not be granted unless the petition shows every fact necessary to entitle relator to the relief sought. *City of Amarillo v. W. L. Slayton & Co.* (Civ. App.) 208 S. W. 967.

176. — Money received or money paid.—Amended petition, in action to recover interest in advertising contract conveyed by defendant to third person with fraudulent intent, held to entitle plaintiff to recover his interest in the proceeds. *Pyle v. Park* (Civ. App.) 196 S. W. 243.

Petition by county for use of road district against bank to recover judgment on account of amount paid bank to discharge indebtedness of contractor held insufficient to state cause of action to recover amount by which payment to bank exceeded amount county owed contractor. *Shepherd State Bank v. San Jacinto County* (Civ. App.) 221 S. W. 324.

177. — Negligence in general.—In wards' suit against guardian and sureties, as against general demurrer, averments that guardian negligently made deposits without authority from court, and continued deposits negligently when he knew, or could have known, deposits were liable to be lost, held to charge liability. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

Although failure of county treasurer to examine returned checks and discover forged indorsements was not specifically alleged as negligence, it was a circumstance to be considered under the general allegation of negligence in the payment of fraudulent claims, particularly where there were 143 forged checks. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

In suit for death of a son about seven years old due to his falling into an open, unguarded well on defendant's vacant property, allegations of petition held to state a cause of action. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

A petition in an action for personal injuries sustained in an explosion of gasoline purchased from a retailer as coal oil, who had purchased it from defendant, designating the substance sold "as gasoline or some other highly explosive substance similar to gasoline," held sufficient. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

Petition, alleging that electric shock resulting in death was proximately and directly caused by negligence of defendant "in permitting a dangerous, excessive, and deadly current of electricity to traverse the wire running to and into said house of deceased," sufficiently alleged manner in which injury occurred; the doctrine of *res ipsa loquitur* being applicable. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

Allegations of petition of horseman injured by electric power company's guy wire in or near a roadway held sufficient to aver an act of negligence on the part of company. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

In depositor's action against bank for negligence in collection of check on which

payment had been stopped, petition held insufficient, in that it was not alleged that maker of check had money on deposit sufficient to pay the check, and that check would have been paid if payment thereunder had not been stopped. *Bingham v. Emanuel* (Civ. App.) 228 S. W. 1015.

178. — Negligence in use of street.—A complaint charging the owner of an automobile with failing to drive on the right-hand side of the traffic pole on a street was insufficient to charge driving on the wrong or left side of the pole. *Ex parte Jonischkies* (Cr. App.) 227 S. W. 952.

179. — Quieting title.—A petition in a suit to remove a cloud from title held to sufficiently allege that the execution of the sheriff's deed under which plaintiff claimed was made pursuant to an order of sale. *Richards v. Rule* (Com. App.) 207 S. W. 912.

180. — Recovery of land.—Petition specially alleging a continuous chain of acts by conspirators to accomplish the transfer of land for a small valuation held to state cause of action for recovery of the land, whether facts alleged constitute the basis for a constructive trust or whether the right to recover is upon the theory of rescission for fraud. *Scarborough v. Ward* (Civ. App.) 220 S. W. 274.

183. — Replevin.—To entitle one to recover in replevin, he must allege either that defendant wrongfully deprived him of possession of property, or that he wrongfully withholds possession from plaintiff. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

184. — Services on implied contract.—Where an agent is denied recovery for services rendered after his principal's death, he cannot recover for prior services thereunder in the absence of proper pleading of quantum meruit or of part performance, since the contract is not divisible. *Beckham v. Scott* (Civ. App.) 204 S. W. 137.

187. — Specific performance.—In a suit for specific performance of a contract to convey corporate stock, allegations that the shares of stock were limited, that an equal amount of other shares could not be purchased on the same terms, or at all, and that plaintiff was familiar with the affairs of the corporation, and was desirous of obtaining such shares, showed a cause of action for specific performance. *Amsler v. Cavitt* (Civ. App.) 210 S. W. 766.

188. — Taxes and assessments.—Ft. Worth Charter, c. 12, § 15 (Special Acts 31st Leg. c. 31), making improvement certificate prima facie evidence of regularity, held to relate to proof only, and not to relieve certificate owner from proper pleadings to show liability of property owner. *Wooten v. Texas Bitulithic Co.* (Civ. App.) 196 S. W. 601.

A petition in an action on a certificate of assessment which was attached and made a part thereof held to state a cause of action although the ordinances, resolutions, and other matters were not copied in the petition, and each act or step taken was not pleaded in detail, in view of art. 1011. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

189. — Trespass.—In suit for damages based on destruction of crops by cattle, allegation that a general stock law was in effect in the county justified proof that a live stock law had been adopted in that county, prohibiting stock from running at large. *Corn v. McNutt* (Civ. App.) 230 S. W. 1052.

191. — Wrongful discharge from employment.—An allegation that principal refused to pay the plaintiff agent's salary, and notified plaintiff that he would not pay him in the future, held to allege a breach of contract, but not in law a discharge. *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374.

Employer's petition, stating that defendant employer agreed to give 30 days' notice before discharging him or give one month's additional pay, and that plaintiff was discharged without such notice or additional pay, held good against a general demurrer. *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225.

192. — Wrongful levy.—Owner attacking sequestration proceedings to which he was a party as being wrongfully sued out would be required to negative the grounds stated in the affidavit and state his damages occasioned by such wrongful act, and, if he desires punitive damages, to allege that it was willful, malicious, or the like, and without probable cause. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

193. Issues, proof, and variance.—Where appellee pleaded and proved theory upon which he sought to recover, he will not be permitted to recover on theory made by evidence of intervener who conspired with him against principal. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Where it was not alleged that a parent had authority to sue to annul the marriage of a minor child under the laws of another state, such fact cannot be shown. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Where the petition alleged that defendant misrepresented that he was going to drill a well on a block of land of which plaintiffs' property would form part, misrepresentations, established by the evidence, that lessee would assign to another who intended to and thereafter did drill a well, did not conform to the pleadings, and plaintiff is not entitled to judgment thereon. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

194. — Allegations which must be proved in general.—Plaintiff, in action for damages for changing telegram authorizing sale of land, pleading that sendee was his agent, was not, in the absence of any issue raised in that respect, bound to develop by pleading or proof the details of the agency as to authority to insert provision in the sales contract for forfeiture; authority in such respect being collateral. *Western Union Telegraph Co. v. Southwick* (Civ. App.) 214 S. W. 987.

Where a petition, seeking recovery under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), was sufficient to authorize recovery independent of that act, the fact that the allegation of employment in interstate commerce was not sus-

tained does not defeat recovery. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 234 S. W. 472.

196. — **Proof of matters admitted.**—Facts admitted by the pleadings of both parties need never be proved. *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191; *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Plaintiff must prove lease as alleged in petition, notwithstanding special pleas in answer admitting it, they following and being subordinate to a general denial of allegations of petition, coupled with demand for strict proof. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

Where defendant pleaded a general denial, any admissions thereafter pleaded in the answer would not lift the burden from plaintiff of proving his case against the general denial. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 210 S. W. 737.

197. — **Materiality to issue in general.**—In an action to enjoin one who has sold his business and good will to a corporation from soliciting his former customers or dealing with them, the right of the corporation to oust him as president and general manager, and stop his salary, presents questions foreign to the issues involved. *Sheehan v. Sheehan-Hackley & Co.* (Civ. App.) 196 S. W. 665.

199. — **Parties or other persons.**—Where plaintiff alleged that a grantor and her husband settled a divorce case, and such grantor gave a deed to defendant with the understanding that on the death of the husband a one-half interest should be deeded to plaintiff's father, the land granted being the homestead and community property, there was no variance as to parties to the agreement, though the husband was not a party; no claim of that kind being made. *Hall v. Hall* (Civ. App.) 198 S. W. 636.

In action for commission on sale of cattle, that petition alleged that sale was made to R. and H., and proof showed that contract of sale as finally made was to R. and C., brothers, and H. and sons, held not a fatal variance. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

There is no fatal variance between lease executed by husbands alone, and petition of husbands and wives for rent, expressly alleging it was so executed, coupled with allegation that it was executed on behalf of all the plaintiffs. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

Since petition alleged plaintiff's name as Mrs. G. C. B., wife of G. C. B., deceased, contention that judgment should not be entered for her for the reason that the evidence showed her name to be Ole Mae B., will be overruled. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

In an action for damages by one tarred and feathered, where plaintiff alleged that certain of the defendants had placed a placard on him, he should not have been permitted to testify that a certain other defendant had placed the placard on him, in the absence of a trial amendment. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

An action for libel not being against defendants as members of a county council of defense, or against the council, so far as the petition stated, exclusion of testimony as to who were the members of the council was immaterial and not reversible error. *McBroom v. Weir* (Civ. App.) 219 S. W. 855.

In a suit to cancel oil and gas leases and recover a deposit where the deposit was with the First State Bank of T. and it was alleged that the contract so provided and such bank was made a party but the contract provided for deposit in a bank at M., the pleadings and proof did not correspond. *Huber v. Smith* (Civ. App.) 228 S. W. 339.

When plaintiff alleges that two parties to a contract made him a promise, although under the rule at common law that is a joint promise, yet the allegation necessarily means that each of them promised, and, he can recover against one upon proof that he promised, although he fails to prove the promise of the other. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

201. — **Written instruments.**—That petition described note as payable to iron works company and note introduced in evidence was payable to iron works did not constitute a variance where parties concerned used names interchangeably. *Harty v. Keokuk Sav. Bank* (Civ. App.) 201 S. W. 419.

The petition, in action for rent, alleging written lease of second and third floors of building, lease offered in evidence in terms of second floor, is subject to objection of fatal variance. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

An allegation that a surety company's representative agreed to pay a certain commission to its agent on certain business obtained by him would have permitted proof either of an oral or written agreement. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 465.

There was a fatal variance between a note reciting that it was given in payment of a liquor business purchased from a third party and a petition alleging that it was given in consideration of a business sold by plaintiff to defendant, and not showing that the note was negotiable, or that it was secured by a chattel mortgage or payable at a bank. *Wahl v. Ramsey* (Civ. App.) 218 S. W. 559.

Where recovery for the amount of a draft drawn by one to whom cattle were delivered by payee could not be had on allegations either of acceptance of the draft by defendant's bookkeeper, or of receipt and retention of the proceeds of cattle, no recovery could be had on the ground, not alleged although supported by evidence, that defendant gave the draft drawer authority to draw the draft on them. *Schweers-Kern Live Stock Commission Co. v. Kothmann* (Civ. App.) 234 S. W. 593.

204. — **Effect of variance to mislead or surprise.**—In an action on a judgment rendered in another county, the judgment was properly admitted in evidence, although

the petition did not state that an attachment had been issued in the case; failure to so allege not constituting a misdescription of the judgment, nor constituting any surprise, no benefit having ever accrued to the plaintiff in consequence of the attachment. *Willis v. Pegues* (Civ. App.) 218 S. W. 96.

There was no fatal variance between allegation and proof in an action against a city for personal injuries on sidewalk, in that the petition alleged that there was an elevation on the sidewalk from which plaintiff stepped, whereas, according to plaintiff's testimony, she stumbled over the elevation; there being no objection nor any claim of surprise or that the city was misled. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

A variance in pleading and proof is material only when it tends to mislead or surprise the adverse party, and hence pleading that note was executed and delivered to plaintiff, and introducing in evidence a note payable under a trade-name, was not prejudicial, where the execution of the note admitted in evidence was conceded in defendant's pleading, and the material issue was partial failure of consideration, in view of a supplemental petition, alleging that plaintiff was doing business under such trade-name. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701.

Where the variance between pleading and proof of a contract amounted merely to a misdescription, it is fatal only if the misdescription tends to mislead and surprise the adverse party. *McConnell v. Payne & Winfrey* (Civ. App.) 229 S. W. 355.

207. — Ownership or title.—Where plaintiff sued as sole owner of certain cows to recover for their death, and the proof was that he was a joint owner, he could not recover. *Gulf, C. & S. F. Ry. Co. v. Kuehn* (Civ. App.) 199 S. W. 494.

Where plaintiff, suing on notes, alleged that it acquired them by written transfer, and evidence showed that there was no indorsement or writing, there was nevertheless no variance, in view of arts. 582 and 1994; production of the note being presumptive evidence of ownership, especially where the original payee was a party. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

In a boundary dispute, where petition referred to plaintiff's survey as being 1,900 varas square, but also distinctly referred to lines evidenced by iron pipe corners, that a slight excess over 1,900 varas was shown to exist between the corners was not a fatal variance. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

In an action by tenants for forcible and wrongful eviction, the allegation by plaintiff tenants in their supplemental petition that the property detained by defendant landlord was purchased jointly and jointly owned by them was sufficient to warrant proof of the fact. *Evans v. Caldwell* (Civ. App.) 219 S. W. 512.

208. — Nature and form of contract and performance or breach thereof in general.—Pleading and proof in vendee's action after failure of title to a portion of the land, held to present a variance as to consideration. *Farmers' & Merchants' State Bank & Trust Co. v. Cole* (Civ. App.) 195 S. W. 949.

In action for alleged balance due under contract, where plaintiff failed to allege estoppel to rescind by accepting the articles sold, evidence of such acceptance was irrelevant. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

In suit for specific performance of an oral contract of payee, since deceased, to cancel notes in consideration of legal services rendered and to be rendered, held there was a fatal variance between contract alleged and contract proven. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

A petition against a water company to compel it to furnish water under a contract did not raise issue that it was defendant's duty to supply water sufficient to properly irrigate land, where it was not alleged that defendant was a public service corporation, or that the price asked for water required in excess of that contracted to be delivered was unreasonable. *Rowles v. Hadden* (Civ. App.) 210 S. W. 251.

Where case alleged that owner of cattle, was to pay for value of grass leased in his possession, evidence that cattle taken by owner or possessor of land to pasture was so much per head was properly excluded. *Marshall v. Magness* (Civ. App.) 211 S. W. 541.

In suit for breach of warranty of title, allegations that the price paid for all the land was \$8,000, and that the price paid for the land to which the title failed was \$25 an acre, held sufficient to admit evidence of the price paid for all the land, whether in money or property, and of the proportional part of such price represented by the land lost. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

In action on contract against four defendants, allegation that defendants made the contract without specifying by which of defendants it was made, and where and when it was entered into, would have been sufficient to support proof of such contract had no special exception been urged thereto. *Hartwell v. Fridner* (Civ. App.) 217 S. W. 231.

In subcontractor's action for damages sustained because of contractor's refusal to furnish gravel, where petition alleged an express agreement by contractor to furnish gravel, proof of a contract whereby contractor did not either expressly or impliedly agree to furnish gravel was not admissible; such proof being a material variance from contract pleaded. *Id.*

Under the rules of common-law pleading there would be a variance preventing recovery between allegations that a contract of employment was made with an individual and a corporate defendant, and that services were rendered for such parties, and evidence that the contracts were with the corporate defendant alone, and the services rendered for it alone. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

It is elemental that one suing upon a contract must recover upon the contract alleged, and, if he proves a contract essentially different, the variance is fatal. *McConnell v. Payne & Winfrey* (Civ. App.) 229 S. W. 355.

In suit to recover purchase-money payment, if the pleadings were such that defendant vendors were permitted to show that the written contract sued on was never executed as alleged, plaintiffs, under their present pleading, could not recover on some other contract, though similar in some of its terms. *Stokes v. Waller* (Civ. App.) 230 S. W. 1085.

Where an attorney, alleged a verbal agreement on the part of deceased to cancel certain notes in consideration of "legal services theretofore and thereafter to be rendered," and the evidence showed such promise if plaintiff would continue to do decedent's work, as long as decedent lived, there was no material variance. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

209. — **Express and implied contracts.**—The proof in action for transmitting telegrams being that the charges were the usual and customary rates, recovery must be regarded as had on a quantum meruit; and it is immaterial that plaintiff, pleading it was under Interstate Commerce Commission's jurisdiction, and charges based on its order, but at trial waiving this contention, did not prove charges were based on Commission's order and filed in office. *Early-Foster Co. v. Mackay Telegraph Co.* (Civ. App.) 204 S. W. 1172.

Where broker sued for compensation upon an alleged express contract alone, he could not recover on quantum meruit or an implied contract to pay the reasonable value of his services. *Read v. Farquharson* (Civ. App.) 207 S. W. 335.

A cause of action upon a quantum meruit is different from a cause of action on an express contract, and, unless the causes are pleaded in the alternative or in different counts, evidence cannot be introduced on the cause not so pleaded. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

A plaintiff cannot recover on an entire contract by proving part performance without allegations authorizing recovery upon a quantum meruit. *Enterprise Co. v. Neely* (Civ. App.) 217 S. W. 1088.

210. — **Action by broker for commissions.**—There is a variance, where proof and allegations in petition, in broker's action for commissions, differed as to amount one party to proposed trade was to pay to the other. *Britton v. Eagan* (Civ. App.) 196 S. W. 972.

In an action wherein commissions and damages for refusal to receive cattle were sought, where it was pleaded that the cattle were purchased as agent, proof that the sale was consummated through a commission company as shipper, and that the cattle were sold at the cost price, plus \$10 a car commission and expenses, was not a material variance; measure of damages being the same. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

Where broker alleged defendants jointly contracted to pay a commission for the sale of land, and court found on sufficient evidence that defendants had listed the land and agreed to pay a commission as alleged, there was no variance on the ground that the evidence showed a several obligation by each defendant to pay a commission on his part of the land. *Keithley v. Ward* (Civ. App.) 217 S. W. 428.

A complaint, alleging that defendant, the second broker with whom plaintiff listed lands, agreed in event of sale to pay plaintiff one-half of a percentage of the purchase price, is not supported by proof that defendant agreed to split commissions. *Porter v. Cox* (Civ. App.) 225 S. W. 84.

In an action for commissions, the facts established by the evidence must be substantially the same as those pleaded by plaintiffs to justify recovery. *Miller & Biggerstaff v. Burke* (Civ. App.) 228 S. W. 310.

In action for commissions on sale of a farm, proof as to the details of sale introduced by plaintiff brokers held variant from their pleadings, so that verdict was properly directed against them. *Id.*

Evidence that defendant seller should receive \$8,000 or \$10,000 for his land and receive the balance January 1, 1919, when the trade was to be consummated, no notes being executed, held not to prove allegation that land was sold for notes and cash enough to enable defendant owner to cash the notes. *Id.*

Where brokers alleged that they were employed to procure a purchaser for \$6,000, \$2,000 in cash, the balance on time, and the jury found that the property was listed at \$6,000, \$3,000 in cash, and the balance on time, the variance was fatal, for the terms were material. *McConnell v. Payne & Winfrey* (Civ. App.) 228 S. W. 355.

The petition being on an express contract to pay a certain commission for effecting sale on stipulated terms, recovery cannot be had on any basis other than such contract. *Mitchell v. Smith* (Civ. App.) 231 S. W. 1114.

An allegation, in an action for obtaining a purchaser for land, that the land was listed with plaintiff and the purchaser procured by him and his agent, was sustained by proof that the land was listed with a third person, who was an agent of plaintiff unknown to the defendant, and that the agent performed the services. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

211½. — **Action for divorce.**—In a wife's suit for divorce, evidence that the husband cursed the wife on different occasions and cursed a third person in her presence held admissible under the petition, especially where the case was tried by the court, who was capable of separating the material testimony from the immaterial. *Erwin v. Erwin* (Civ. App.) 231 S. W. 834.

213. — **Action for wages.**—In a servant's action for unpaid wages there is no material variance between allegations that the contract of employment was made on or about September 4, 1917, and proof that it was made about June 1, 1918. *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225.

216. — **Actions against insurance companies or orders.**—In an action for death benefit, judgment roll in divorce action held admissible to prove first wife was not divorced, under allegation that she was deceased's lawful wife at time of his death. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

217. — **Action against telegraph company.**—A petition, held to show agreement to deliver in the country, notwithstanding allegation of agreement to deliver message to addressee at the station to which it was transmitted, and hence a showing that he was at the station was unnecessary. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

218. — **Action to rescind or cancel.**—In an action to recover corporate stock transferred to defendant, in view of allegation in trial amendment, held that contention of variance cannot be sustained. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

In action by purchaser to cancel sale of lots, where plaintiff testified in answer to direct question that he relied upon personal promise of defendant's agent to effect resale of lots at profit, he could not recover for fraud upon alleged fraudulent representation as to size of lots. *Milam v. Launder* (Civ. App.) 204 S. W. 1071.

In an action to cancel oil lease executed by husband and wife, on the ground that wife was induced to sign and acknowledge deed by assurances that lessee merely wanted her signature and acknowledgment in order to assist him in obtaining leases on other lands, held that evidence tended to support allegation. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

In an action to set aside the transfer of plaintiff's interest in an oil and gas lease, where the transfer was correctly described in the petition, a fatal variance was not created by evidence showing that the title to the lease was subject to a parol trust. *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598.

Before inadequacy of consideration may be shown, where cancellation of a contract is sought on the ground of fraud, it should be alleged that such fraud induced the agreement for the consideration named. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

223. — **Actions for negligence in general.**—In action for alleged malpractice of a substitute sent by physician, where no pleading was filed by plaintiff, alleging that substitute was held out as defendant's partner, it would be immaterial on the question of defendant's liability whether defendant represented that the substitute was his partner. *Moore v. Lee*, 109 Tex. 391, 211 S. W. 214, 4 A. L. R. 185.

In an action for personal injuries due to an explosion of gasoline sold as coal oil, and alleged to have been used in a lamp, evidence that it was a lantern that exploded, was not error; "lamp" including a lantern. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

A petition in action for loss of barges at wharf which, after charging several negligent omissions in protecting barge, contained clause "or otherwise protect said barges," is broad enough to let in proof of any negligent omission causing loss of barges. *Freeport Town-Site Co. v. S. H. Hudgins & Sons* (Civ. App.) 212 S. W. 287.

A particular act of negligence alleged is put in issue by a general denial, and plaintiff is limited to the act specified. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In an action against an electric light and power company for injuries from a guy wire, allegations of the petition, held sufficient on general demurrer to place the wire either in a street or close upon it, so that proof establishing the company's duty to protect travelers from such injuries, and that plaintiff's injuries were the direct and proximate result of breach of such duty, was admissible. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

224. — **Actions against carriers.**—Where petition did not allege that any cattle shipped died after delivery, evidence was inadmissible to show such facts. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

Where a carrier sent away and had repaired automobile injured in shipment, and consignee then refused it, proof in consignee's action should have been limited to value of machine at time of its return after being repaired; its subsequent liability as warehouseman not being pleaded. *Houston & T. C. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

There is no variance between proof that defendant carrier delayed shipments at junction point with another carrier at certain date, and allegations that goods were delivered to defendant a month previous to such date. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

Petition by consignee seeking to recover for carrier's refusal to seasonably deliver to connecting carrier held, in view of former trial, sufficient to warrant admission of evidence as to shipments delayed. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

Where petition predicates liability on negligence of initial carrier alone, plaintiff cannot recover upon proof of connecting carrier's negligence, notwithstanding arts. 731, 732. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In action against initial carrier for negligent delay, where there was no allegation of negligence by connecting carrier, evidence that connecting carrier's failure to deliver shipment sooner was due to congestion of traffic, and not negligence, was ma-

terial to show delay by initial carrier, if any, was not proximate cause of loss, and to controvert plaintiff's contention of negligent delay by connecting carrier. *Id.*

Where a stock shipper, trampled by frightened animals, on a loading chute alleges particularly in a complaint for injuries that the light causing the fright came from a trainman's lantern, he is limited to the particular act of negligence specified. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In action by passenger for injuries sustained when stepping from step of passenger coach to platform, held there was no fatal variance between plaintiff's pleading regarding the cause of her injury and the proof adduced in support thereof. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

In a passenger's action for injuries due to exposure after derailment, his allegation that defendant was negligent "in the matter of the building, erection, and maintenance of its track, roadbed, and bridges, and the careless and negligent operation of said car," was not a charge of specific acts of negligence compelling him to prove the exact negligence alleged, instead of relying on the presumption of negligence arising from the derailment. *Dowdy v. Southern Traction Co.* (Com. App.) 219 S. W. 1092.

Where the petition alleged and the evidence showed that a passenger was compelled to vacate a warm bed and take a cold berth, it was immaterial how the berth became cold, and, in the absence of contributory negligence with respect to an open window, the carrier was not entitled to have the damages sustained by reason of the open window excluded, though the petition did not allege negligence respecting the open window. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

There can be no recovery against a terminal carrier, under arts. 731, 732, for loss occasioned by prior carriers, where a through contract was not pleaded, even though the evidence established such contract. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

225. — **Action for injuries to servant.**—In a railroad employé's action for injuries, due to a defective guard rail on a vestibule door, he was limited in his proof to the defect alleged, and could not prove the guard rail defective, because not properly latched. *Blackman v. San Antonio & A. P. Ry. Co.* (Civ. App.) 200 S. W. 412.

In an action by a servant for personal injuries, it was error to admit evidence of incompetency of another who caused the injury, in the absence of an allegation that the employer knew of such incompetency. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

A switchman thrown from the roof of a wrecking car, who alleged conjunctively that negligence of the engineer speeding up with a jerk, and negligence of the railroad in failing to couple air brakes with the engine, caused his injuries, could recover on proof of the first allegation of negligence alone; it being shown to be the efficient cause of the injury. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

In action for death of employé under Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), plaintiffs could not recover on ground of negligence not pleaded. *Roberg v. Houston & T. C. R. Co.* (Civ. App.) 220 S. W. 790.

In view of inclusiveness of general allegations of railway receiver's negligence in furnishing defective pick, employé held entitled to have cause determined by jury in accordance with theory presented by his evidence that pick was so defectively tempered that, when struck against a steel rail, it threw off a sliver. *Freeman v. Wilson* (Com. App.) 222 S. W. 551, affirming judgment (Civ. App.) 189 S. W. 1199.

226. — **Actions for injuries in operation of railroads.**—Where plaintiff alleged that horse was killed by negligent operation of defendant's train, he could not recover, in absence of evidence showing manner of death. *St. Louis Southwestern Ry. Co. of Texas v. Claybon* (Civ. App.) 199 S. W. 488.

Where a railroad has its right of way properly fenced, it is necessary, to admit proof that hogs were killed on the track, to allege that the railroad was negligent. *Texas & N. O. R. Co. v. Lovett* (Civ. App.) 199 S. W. 498.

The proper conclusion from allegations of petition, special exception to which of indefiniteness had been overruled, being that plaintiff expected to show that fastening of gate in defendant's right of way fence, was insufficient or had become out of repair, plaintiff's testimony that there was no fastening on the gate when it was installed should not have been received. *Texas Electric Ry. Co. v. Simmons* (Civ. App.) 214 S. W. 563.

Allegations that the conductor caused trespasser to fear for his life so that he jumped from a moving freight train, are not supported by evidence that conductor told him he must get off, without violent gestures, or profanity, where plaintiff testified that he was not afraid of the conductor. *Baker v. Cobb* (Civ. App.) 221 S. W. 314.

In a personal injury action against a street railroad, where plaintiff alleged that defendant had refused to pay, plaintiff's testimony that he had not been paid anything, and had made a demand for settlement, was proper to support the allegation of nonpayment. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

Art. 1828. [1192] [1196] Defensive matters pleaded by plaintiff.

Cited, *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Replication or subsequent pleading.—If contract between gas company and customer avoiding liability for injuries from explosion was obtained by duress, and was without consideration, she was entitled, in her action for injuries, to allege and prove such facts in avoidance. *Southwestern Gas & Electric Co. v. Cobb* (Civ. App.) 200 S. W. 1116.

Employé, suing for injuries and seeking to avoid employer's defense of assumed risk by employer's promise to remedy conditions, must specially plead such promise. *Schaff v. Hendrich* (Civ. App.) 207 S. W. 543.

In action for death at crossing, giving of defendant's requested special charge on contributory negligence as proximate cause of injury, which ignored issue of discovered peril and inability to exercise ordinary care because of terror, was not erroneous, where such issues were not pleaded in answer to plea of contributory negligence. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In suit to cancel a mineral lease, where defendant set up a written option to lease whereby it was granted 25 days in which to accept the lease, dating from receipt of abstracts of title, and, while denying she had executed such instrument, plaintiff, in avoidance by supplemental petition, pleaded that the option contract on which it was based had no consideration, etc., want of consideration for the option was duly presented by the pleadings. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

In suit by heirs of a deceased wife against the sureties on the bond given by the husband as community survivor, allegation of the amended petition, held an insufficient answer to defendant sureties' plea of the statute of limitations. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

Estoppel to be available against the defense of ultra vires must be pleaded. *W. C. Bowman Lumber Co. v. Pierson*, 110 Tex. 543, 221 S. W. 930, 11 A. L. R. 547, answering certified questions (Civ. App.) 139 S. W. 618.

In partition suit, in which defendant claimed title to the entire tract by adverse possession under the 10-year statute, the fact that plaintiff had acquired title of owners who had reached their majority less than 10 years before the filing of the suit, to be available to defeat defendant's title by adverse possession, should have been specially pleaded; such matter being in the nature of an exception to the title by limitations pleaded by the defendant. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

Verification.—In absence of exception in the trial court to failure to verify plaintiff's plea by supplemental petition, want of verification can avail defendant appellant nothing. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

Issues, proof and variance.—In action for price for cattle specified in original contract, later reduced by seller on buyers' refusal to perform where seller did not answer buyers' plea with charge that any modification was induced by mistake or fraud, Court of Civil Appeals cannot consider such theory. *Craig, Thompson & Jeffries v. Barreda* (Civ. App.) 200 S. W. 368.

In an action to recover land and rental defended on the ground of title by agreement or estoppel, plaintiff may offer evidence in rebuttal under a general denial, which is interposed by statute, but when he offers evidence in avoidance, he must plead the facts relied upon to avoid defendant's pleaded title. *Davies v. Rutland* (Civ. App.) 219 S. W. 1114.

Art. 1829. [1193] [1197] Denial of special defenses presumed.

See *Bradley v. Deroche*, 70 Tex. 465, 7 S. W. 779; *Meyer v. Opperman*, 76 Tex. 105, 13 S. W. 174; *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Cited, *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

Implied denial.—Under this article, as originally enacted, where the coverture of a female defendant is pleaded, the fact is in issue without a general denial. *Brooks v. Pegg* (Sup.) 8 S. W. 595.

And evidence to rebut a special plea, setting up failure of consideration of a note sued on, is admissible without a replication. *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. 677.

And where defendant pleads the destruction of cotton without negligence on its part, and proves the destruction, plaintiff is entitled to introduce evidence to show its negligence and to recover if negligence is proved, even though he does not allege it. *Texas Elevator & Compress Co. v. Mitchell*, 78 Tex. 64, 14 S. W. 275.

Under the amendment by Acts 34th Leg. c. 101, where insurer, in action on fire insurance policy, pleaded nonpayment of insured's premium note, insured, assuming the burden of proving payment, had the right to prove it under his implied general denial. *St. Paul Fire & Marine Ins. Co. v. Clark* (Civ. App.) 200 S. W. 229.

The law supplies the merely formal denial of all material averments of defense pleaded in the defendant's answer in avoidance of a cause of action set out in a petition, and imputes to the plaintiff a denial of the purely defensive matters pleaded by defendant. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

Decisions under Act of 1913.—In action against carrier for loss of goods, where answer denied delivery and set out in detail the circumstances under which the bill of lading was issued, the facts so alleged were not to be taken as confessed, in default of reply, under this article; for such provision was intended to apply only to facts not already in issue by allegations of the petition, and alleging affirmatively the converse of what plaintiff has alleged amounts merely to a denial and not "special matter of defense." *Brass v. Texarkana & Ft. Smith Ry. Co.* (Com. App.) 218 S. W. 1040.

Burden of proof.—As the statute interposes a general denial on behalf of plaintiff, a defendant who set up affirmatively defensive matter in the answer has the burden of proving such matter. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

CHAPTER THREE A

VERIFICATION OF PLEADINGS

Articles 1829a, 1829b.

See *Southwestern Portland Cement Co. v. Moreno* (Com. App.) 215 S. W. 444.
Cited, *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Decisions under repealed act.—Where no objection was made in an action for personal injury that a plea that plaintiff assumed the risk had not been denied, until after the jury returned a verdict for plaintiff, the defendant must be held to have waived any right to have the plea taken as confessed, under the Verified Pleading Act of 1913 (Acts 33d Leg. c. 127). *Denison Cotton Mill Co. v. McAmis* (Com. App.) 215 S. W. 442.

In an action against a master for injuries, where plaintiff alleged that defendant was a private corporation and had more than five persons in its employ, and such allegation was not denied, the fact stood admitted under Verified Pleading Act of 1913. *Southwestern Portland Cement Co. v. Moreno* (Com. App.) 215 S. W. 444.

CHAPTER FOUR

VENUE OF SUITS

Art.	Art.
1830. Venue, general rule.	1833. When plea sustained, order changing venue, record transmitted.
1832. If plea sustained, no dismissal, but transfer.	

Article 1830. [1194] [1198] Venue, general rule.

See *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805, 28 Am. St. Rep. 794; *Gottlieb v. Ainsworth* (Civ. App.) 229 S. W. 341.

Cited, *Coryell v. Linthecum* (Sup.) 11 S. W. 1092; *Pfeuffer v. Burns* (Civ. App.) 24 S. W. 36; *E. L. Witt & Sons v. Stith* (Civ. App.) 212 S. W. 673; *Coats v. Williams* (Civ. App.) 229 S. W. 361.

General rule.—The difference in wording in the various exceptions to the general rule indicates that the Legislature had in mind the differing significations of the terms "may," "must," and "shall," and presumably used those terms in relation to the subject of venue advisedly. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

He who claims the benefit of an exception in the statute relating to venue must bring himself clearly within such exception. *Lee v. Gilchrist Cotton Oil Co.* (Civ. App.) 215 S. W. 977.

An action by an attorney to recover fees, brought in the county court, is controlled as to venue by this article, and it was therefore error, in overruling defendant's plea of privilege, to base the decision upon art. 2308, subd. 4, relating to venue in justice courts. *Fears v. Fish* (Civ. App.) 218 S. W. 507.

Should any question arise in justice court with reference to venue not covered by art. 2308, the court must be governed by any provision of this article applicable thereto. *Id.*

This chapter furnishes the rule of venue for district and county courts. *Randall v. Harris* (Civ. App.) 218 S. W. 509.

When a cause of action which would be cognizable in the justice court is combined with other causes of action, and suit thereon is brought in the district or county court, the venue is to be determined by the provisions of the statute providing for suits in the district and county courts. *Id.*

Right to maintain suit away from residence of defendant, who pleads privilege, must depend on existence of facts which constitute exception to statute, and not upon mere allegation of facts. *Bledsoe v. Barber* (Civ. App.) 220 S. W. 369.

— **Cases not within exceptions to general rule.**—That before suit can be brought the matter in controversy must be submitted to some board or referee, or must have some order or certificate or other matter of some department of state, does not give that place venue of a suit afterwards brought; hence in a suit under the Employers' Liability Act, the fact that plaintiff was obliged, under the act, to submit the claim to the accident board in a given county did not give such county venue of a suit on the liability. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 205 S. W. 158.

In action to enjoin actions to construe an agreement to place money in bank to be distributed among purchasers of land if a railroad was not built, where bank had not contracted to pay the money in the county in which the action was brought, and the instrument did not require payment of money in such county and the suit did not involve the title to land in such county, the bank's plea of privilege should have been granted. *State Nat. Bank of San Antonio v. Lancaster* (Civ. App.) 229 S. W. 883.

Allegations and proof by plaintiff college that its contract with its student was made in the county of suit, and that by a telegram sent to it in such county defendant bank agreed to pay the check sued on did not show a case within any of the exceptions to this article. *Sinton State Bank v. Tyler Commercial College* (Civ. App.) 231 S. W. 170.

Joinder of causes.—See *Headington Auto Co. v. Hood* (Civ. App.) 219 S. W. 511.

Jurisdiction of an action against a nonresident defendant, based on the fact that such action was joined with other actions against the same defendant cannot be obtained, where the court did not have jurisdiction over the actions to which it was joined, none of them falling within the exceptions of this article. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

Seller's cause of action for breach of a sale's contract was properly joined with cause of action for breach of a similar contract, in order to avoid a multiplicity of suits, regardless of whether venue as to former contract was properly laid in the county in which the action for breach of latter contract was properly brought. *Landa v. F. S. Ainsa Co.* (Civ. App.) 231 S. W. 175.

Residence.—In action against partners residing in another county where one of defendant partners removed, after plea of privilege, to county in which it was brought, held, that court properly refused to sustain the plea, on plaintiff's filing an amended petition showing such removal. *Avery v. Llano Cotton Seed Oil Mill Ass'n* (Civ. App.) 196 S. W. 351.

In suit for specific performance of contract to convey land, proper venue is county of residence of defendants when they set up plea of privilege. *Ballard v. Ellerd* (Civ. App.) 199 S. W. 305.

In habeas corpus to determine proper custody of children, which was in effect merely a civil action, respondents, upon proper showing, have the right to a change of venue to the county of their residence. *Lucid v. McDowell* (Civ. App.) 206 S. W. 203.

A city cannot maintain a suit for taxes against a nonresident taxpayer, where the case is not within any exception to this article. *Wilson v. City of Belton* (Civ. App.) 206 S. W. 366.

Statutes relating to change of venue to county of defendant's residence should be liberally construed to effect such purpose. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

Suit to oust trustees of a county line school district from exercising or asserting any corporate right, franchise, privilege, or jurisdiction over that portion of the school district taken from a district in G. county, was an attack upon the corporate existence of the district, and the district, through its trustees, had the privilege of being sued in C. county, the situs of the district fixed by arts. 2815a and 2815b. *State v. Waller* (Civ. App.) 211 S. W. 322.

A general rule is that no person who is an inhabitant of the state shall be sued out of the county in which he has his domicile. *Id.*

The general rule prevails in all cases except cases coming clearly within one of the recognized exceptions. *Id.*

One who sues a defendant in a county other than that of his residence must bring his case clearly within the exceptions to the general rule. *Valdespino v. Dorrance & Co.* (Civ. App.) 207 S. W. 649.

The right to maintain a suit in a county away from the residence of domicile of a defendant who pleads his privilege depends upon the existence of facts which constitute the exceptions to the statute, and not upon the mere allegation of facts. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

The privilege to be sued in the county of one's residence is a valuable right, and, in order to maintain a suit against him in some other county facts authorizing it must be clearly shown. *Russell v. Green* (Civ. App.) 214 S. W. 448.

The right is of too much value to be wrested from one, except by suits instituted in good faith under one of the exceptions to the general rule. *Hutchison v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864.

Intention of a party to fix a domicile at a particular place at some future time is not sufficient to give him a domicile at that point, where not evidenced by any acts or even declarations to that effect. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

Where defendant had a single residence located partly in C. and partly in L. county, his residence and domicile for purposes of venue was in both counties, and under this article, he could be sued in either. *Smith v. Farmer* (Civ. App.) 226 S. W. 485.

Where a purchaser of an automobile was sued for the purchase price and counter-claimed for damages against the distributor who had attempted to repair it under a claim of warranty, held, that the cause of action on the counterclaim was distinct from the controversy in the main suit, which was with the selling firm and was in personam, and the distributor was entitled to trial in the county of his residence in view of this article. *Coats v. Williams* (Civ. App.) 229 S. W. 961.

Contract fixing venue.—Insurance contracts, see notes to subd. 29.

Buyer of tractor was not bound by agreement fixing venue in case of action growing out of the purchase of the tractor, where he had not expressly or impliedly authorized such agreement; hence seller's plea of privilege to be sued in such county instead of the county where the representations were made, was properly denied. *Texas Moline Plow Co. v. Grimminger* (Civ. App.) 217 S. W. 747.

The parties to a lawsuit cannot fix the venue of a suit differently from the statute regulating venue, and such agreement will not be enforced by the courts. *Winniford v. Holloman* (Civ. App.) 227 S. W. 1114.

Objections and waiver.—Record held not to show that appellant has not waived its right to insist upon plea of privilege, or that the trial court erred in overruling it. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

Defendants who filed plea of privilege admitted court's jurisdiction by making a settlement with original plaintiff. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 190 S. W. 819.

Where, after plea of privilege was filed, the court entered on his docket, "Rule for costs invoked by defendant," which was not carried into the minutes, but at a later term, at which the plea was sustained, was entered *nunc pro tunc*, such rule was a waiver of such plea. *Torno v. Cochran* (Civ. App.) 201 S. W. 735.

In view of subd. 5, parties to a bond had the right to waive the privilege of being sued in the county of their domicile, and were not precluded therefrom by art. 2008. *Howard v. Barthold & Casey* (Civ. App.) 206 S. W. 378.

To obtain the benefits of subd. 17, the privilege must be claimed seasonably and in due order of pleading, otherwise it will be deemed to have been waived. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Mere entry of rule of costs by trial court, with proviso that it was without prejudice to defendant's rights with reference to his plea of privilege, was not a waiver of plea of privilege under Acts 35th Leg. c. 176, § 1, art. 1903. *Murphy v. Dabney* (Civ. App.) 208 S. W. 981.

The judgment of the court entered on a verdict of the jury in no wise reflected its action at the previous term on the plea of special privilege, and excepting to that judgment did not amount to an exception to its ruling on the plea. *St. Louis, B. & M. Ry. Co. v. Webber*, 109 Tex. 383, 210 S. W. 677.

Pleas of privilege may be waived by failure to present them to the trial court within the time and manner required by law. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

Where plea of privilege was filed but neither the judgment of the court nor any other portion of the record disclosed any action by the trial court thereon, it will be assumed the plea was waived. *Id.*

Where there was no cause of action against wife, her failure to plead privilege could not deprive nonresident husband of right to insist there was no exception to the venue statute authorizing suit against him in such county. *Bledsoe v. Earber* (Civ. App.) 220 S. W. 369.

Under this article, and in view of rule 24, for district and county courts (142 S. W. xix), relating to dilatory pleas, the failure of defendant to call to the attention of the trial court its plea of privilege at the term at which it was filed is a waiver thereof, notwithstanding the amendment of art. 1903, by Acts 35th Leg. (1917) c. 176. *Auds Creek Oil Co. v. Brooks Supply Co.* (Civ. App.) 221 S. W. 319.

As a defendant who pleads privilege must comply with art. 1903, as amended by Acts 35th Leg. (1917) c. 176, the failure of such defendant, when demurrer to the plea is filed, to call the same to the attention of the trial court warrants the court in treating the plea as waived. *Id.*

That land was situated in a county other than that in which the suit to recover possession was brought presents merely a question of venue that can be waived, and in absence of a plea presenting that issue, the court can render judgment for recovery of the land. *Lawright v. Reese* (Civ. App.) 223 S. W. 270.

If an executor, who resides in a county other than that in which the will was probated, can only be sued in the county of probate, under subd. 6 of this article, he waives that right by failure to present a plea of privilege in the court below, and cannot raise the question on appeal. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

Agreement waiving citation, held not to cut off right to file a plea of privilege to be sued in the county of residence; the alleged waiver constituting an appearance only. *Winniford v. Holloman* (Civ. App.) 227 S. W. 1114.

Subd. 17, providing that when suit is brought to enjoin execution it shall be brought in the county where the judgment was rendered, is one of venue only, and not of jurisdiction; so defendant may waive his privilege. *Martin v. Kieschnick* (Com. App.) 231 S. W. 330.

Right is not waived though the general demurrer filed contemporaneously with the plea in abatement precedes it in the arrangement in the answer, though art. 1902 allowing a defendant to plead as many several matters as he shall think necessary for his defense provides that he shall file them all at the same time "and in due order of pleading." *Id.*

— **Participation in cause in general.**—If a defendant pleads over against a codefendant, he thereby waives his plea of privilege. *Carlisle v. Frost-Llewellyn Lumber Co.* (Civ. App.) 196 S. W. 733.

Where appellant prior to renewed plea of privilege filed application for continuance, which was passed on at same term, she waived right to urge privilege. *Hambleton v. Dignowity* (Civ. App.) 196 S. W. 864.

Under this article, where a plea of privilege is overruled and a bill of exceptions taken, the presentation of a counterclaim and an answer is not a waiver of the privilege. *Griffith v. Gohlman, Lester & Co.* (Civ. App.) 200 S. W. 233.

A motion by defendant for a continuance does not constitute an abandonment of a plea of privilege, where the motion shows that defendant was insisting thereon, and the judgment of the court continuing the hearing on the plea shows that it was continued without prejudice. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 205 S. W. 158.

In suit on notes secured by chattel mortgage, wherein appellants prayed that cause be removed to E. county, that prayer would be taken as waiver by the defendants re-

siding in C. county that cause should be removed to that county, as alleged in their plea of privilege. *Ray v. W. W. Kimball Co.* (Civ. App.) 207 S. W. 351.

Where defendant's plea of privilege in justice court was overruled during December term, and the cause taken to county court on February 19th following certiorari returnable to the March term, and where motion to dismiss certiorari which was filed during the March term was not disposed of until June 2d, when motion to strike out plea was made, there was no waiver of plea in county court. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

If defendant's pleading as a whole conclusively shows he does not intend to waive his plea of special privilege for change of venue, no waiver should be held because he did not specifically state that his plea to the merits was subject to such plea of privilege being overruled; but where he alleges a duty, a subsequent breach thereof on plaintiff's part, loss suffered thereby, specifies the nature and amount of damages, and asks affirmative relief, he waives his plea of special privilege. *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

Where defendant, following his allegations of a duty and breach thereof on plaintiff's part, and consequent damage to defendant, prayed for affirmative relief, and the pleading was sufficient to have sustained the judgment on defendant's plea in reconviction, he must be held to have asked affirmative relief in a manner to waive his plea of privilege. *Id.*

Defendant, by answering to merits upon codefendant's cross-petition, submitted himself to court's jurisdiction and waived plea of privilege, notwithstanding dismissal as to plaintiff and misjoinder of plaintiff's cause of action with that of codefendant. *McClure v. Pair* (Civ. App.) 214 S. W. 683.

Where at term to which case had been continued a defendant filed a full answer to the merits of the original defendant's cross-action against him, and there was no allegation or statement in the answer or any part of the record that the answer was filed subject to such defendant's plea of privilege, he waived it. *Griffith v. Sawyer* (Civ. App.) 221 S. W. 687.

Defendant's claim of privilege asserted by plea in abatement, is waived by invoking action on general demurrer, and abiding by court's act in sustaining the demurrer and dismissing the action; whereas, if it had merely sustained the plea of privilege, it would under art. 1833, have transferred the case. *Martin v. Kieschnick* (Com. App.) 231 S. W. 330.

— **Cross-complaint.**—While defendant does not waive his plea of privilege to be sued in the county of his residence by pleading generally to the merits, subject to the plea, his privilege is waived by filing a cross-action demanding affirmative relief. *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

A defendant after he has asked affirmative relief in a suit brought against him in a county other than that of his residence, etc., cannot successfully plead his privilege, but the mere filing of a plea for affirmative relief after the plea of privilege is not a waiver. *Whisnant v. Kurtz* (Civ. App.) 228 S. W. 977.

Where defendant, having pleaded his privilege, filed an answer praying that a railroad company be impleaded as a defendant, and citation was served on such company, defendant's plea to be sued in the county of his residence was waived. *Id.*

Evidence.—See *Reliance Life Ins. Co. v. Robinson* (Civ. App.) 202 S. W. 354; notes to art. 1903.

2. Transient persons.

See *Kennedy & Gafford v. Reppond* (Civ. App.) 226 S. W. 140; notes to subd. 4.

3. Non-residents and persons whose residence is unknown.

See *Claiborne v. Pickens* (App.) 16 S. W. 867.

Non-residents.—See *Kennedy & Gafford v. Reppond* (Civ. App.) 226 S. W. 140; notes to subd. 4.

Under this subdivision, where a defendant resides without the state, suit may be brought in the county in which the plaintiff resides. *Hines v. Avant & Coughran* (Civ. App.) 226 S. W. 821.

4. Several defendants residing in different counties; effect of assignment.

See *Claiborne v. Pickens* (App.) 16 S. W. 867; *Perkins v. Texas Bank & Trust Co.* (Civ. App.) 230 S. W. 736.

Residence of co-defendants.—See *Farmers' & Merchants' Nat. Bank of Comanche v. Lillard Milling Co.* (Civ. App.) 210 S. W. 260; notes to subd. 5.

Under this subdivision, an action on a railway company's bond conditioned to return certain subscriptions in aid of the construction of the road on default of such construction cannot be commenced against the sureties of the bond in S. county, it appearing that the sureties resided in T. county, and that the railroad had no domicile in S. county. *Red River, S. & W. Ry. Co. v. Blount*, 3 Civ. App. 282, 22 S. W. 930.

In a suit to restrain the operation of a cotton gin as a nuisance, nonresident defendants are not privileged to be sued in the county of their residence where their superintendent of construction is a resident of the county and is positively interested in the establishment of the gin. *Moore v. Coleman* (Civ. App.) 195 S. W. 212.

Where suit to restate account because of usury, etc., was brought in county where

two of defendants resided, pleas of privilege of nonresident defendants were properly overruled. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Lumber purchase transaction held such that the liability of defendants was joint so as to permit suit on the account against both of them in the county where either resided. *Carlisle v. Frost-Llewellyn Lumber Co.* (Civ. App.) 196 S. W. 733.

If lessee has cause of action against lessor for breach of lease, lessor being sued with others, is entitled to be sued in county of residence. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

This subdivision applies only where the cause of action as to all parties is same. *Id.*

In mechanic's lien action, defendant contractor's residence gave court jurisdiction as against pleas of privilege filed by other defendants. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

Suit was properly brought against all defendants in county of one defendant's residence, unless there was misjoinder of parties and causes of action. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

A suit for injunction to enforce compliance by a railroad company with a contract to establish and maintain division headquarters at a particular town, in which the company and an individual who was a proper party were joined as defendants, was properly instituted in the county of the individual defendant's domicile instead of that of the company under this article, and art. 4653, as the injunction was an ancillary proceeding. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Where in compliance with his contract, E. procured Q. to convey land to plaintiff, E. receiving the consideration, the contract to convey was satisfied by the joint act of E. and Q., and an action for breach of warranty could be brought against both E. and Q. in the county where Q. resided, in view of this subdivision. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

Where all the defendants residing within the county obtained a favorable judgment on plea of limitation, the court's jurisdiction was not destroyed as to remaining defendants, where the first defendants were not fraudulently impleaded, for plaintiff was not bound to anticipate the interposing of the plea. *Strait Bros. v. Chaney* (Civ. App.) 209 S. W. 219.

In an action against the seller of hay and the receivers of the railroad which carried the shipment, for loss resulting from delivery of an inferior quality of hay, short in weight, the trial court erred in overruling plea of privilege of the seller of the hay; the railroad receivers not residing in the county of suit, to make this subdivision applicable, and the contract not being written to bring the case under subd. 5. *Watson v. Howe Grain & Mercantile Co.* (Civ. App.) 214 S. W. 843.

Where purchaser of automobile from resident defendants surrendered possession to a nonresident and then brought sequestration proceedings against such nonresident and the resident sellers, plaintiff cannot, because subds. 2 and 3, allowed the action as to the nonresident to be brought in the county of his residence, maintain the action as to the resident defendants in such county; for there is no exception destroying the privilege of codefendants in case one of them is not a resident, as in case of residents. *Kennedy & Gafford v. Reppond* (Civ. App.) 226 S. W. 140.

Vendor's action for purchase price placed in escrow against purchaser and bank with which money was deposited was properly brought in the county in which the bank was situated, under this subdivision; the bank being a proper defendant in such case. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

In a suit against L. and M. in which L. filed plea of privilege claiming that M. resided in another state, plea held properly overruled on showing as to M.'s residence. *Latham v. Continental Supply Co.* (Civ. App.) 230 S. W. 230.

County where codefendant suable.—Where rice growers sued a corporation which had sold rice for them for proceeds unpaid because of a lien asserted thereon by an irrigation company, which was also made a defendant, the action was properly brought in a county where the corporation had an agent, in view of subds. 4 and 24. *Trousdale v. Southern Rice Growers' Ass'n* (Civ. App.) 221 S. W. 322.

An individual sued with a private corporation in the same right, and on a joint contract made with plaintiff may be sued where the corporation may be sued. *Danciger v. Smith* (Civ. App.) 229 S. W. 909.

In an action against an association, its trustees and members for breach of its bond not specifying the place of payment, where the association and some of the individuals were nonresidents of the county, suit could not be maintained against the individual nonresident defendants under this subdivision, notwithstanding that the company was suable in such county by virtue of having an agent therein. *Cotton States Petroleum Co. v. Britton* (Civ. App.) 230 S. W. 742.

Improper joinder.—See *McCauley v. McElroy* (Civ. App.) 199 S. W. 317; notes to subd. 9.

Fact that petition for conversion does not show that defendants, other than sheriff and one other, participated in or are liable for conversion, affords no reason for transferring case to county in which defendants reside. *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Defendant corporation, sued for breach of its implied warranty of seeds sold, could not properly join, by cross-action, another from whom it purchased the seed, and thereby defeat such other's privilege to be sued in his own county. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

A defendant cannot be sued out of the county of his residence by the joinder in the suit of unnecessary and improper parties defendant, resident within the county where suit is brought. *Shaw v. Stinson* (Civ. App.) 211 S. W. 505.

Nor by an improper joinder of a cause of action against such nonresident defendant with a separate and distinct cause of action against a resident defendant, and with which the nonresident defendant is in no wise connected. *Id.*

When it is sought to sustain the venue of a suit against a nonresident on the ground that the codefendant resides in the county, the cause of action against the nonresident must be the same, or at least connected, and not separate and distinct. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

In action against bank, which honored a second draft drawn by a borrower from plaintiff, etc., held that though the borrower resided in the county where suit was instituted, defendant's plea of privilege to be sued in the county in which it did business could not be overruled, on the theory that defendant bank and the borrower were joint tortfeasors or converters of the fund. *Id.*

Where cross-action by one defendant against codefendants is severable from plaintiff's cause of action, codefendants are entitled to have venue, as to cross-action, changed to county of their residence, where main action was brought in county in which defendant bringing cross-action resided. *McClure v. Pair* (Civ. App.) 214 S. W. 683.

This subdivision contemplates a real defendant, and one against whom the plaintiff has a cause of action. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

It applies only where there is a joint cause of action against the several defendants; and it is not enough to show a valid cause of action against each, or a liability of one or the other in the alternative, though the causes of action grow out of the same subject-matter. *Danciger v. Smith* (Civ. App.) 229 S. W. 909.

It does not allow persons who are nonresidents of the county in which action is brought, and who would not be even proper parties to the action, to be there sued by the original defendant by bringing them in by cross-bill on a contract of indemnity. *National Union Fire Ins. Co. v. Littlejohn* (Civ. App.) 223 S. W. 595.

Under Negotiable Instruments Act, §§ 132, 135, an alleged oral acceptor of a draft is not a proper party to an action against the drawer, and where the alleged acceptor resided in a county other than that in which the drawer resided and action was begun, the action as to it must be transferred, under art. 1903, as amended April 2, 1917, regardless of plaintiff's allegation that the acceptor was estopped from setting up the statute of frauds. *First Nat. Bank v. Sanford* (Civ. App.) 228 S. W. 650.

Defendant's plea of privilege should have been sustained, though action was brought in the county of the residence of the codefendant under this subdivision, where there was no cause of action stated against codefendant. *Bingham v. Emanuel* (Civ. App.) 228 S. W. 1015.

An action against an unincorporated association and its members, cannot be maintained in the county of the residence of one of them under this subdivision, where he is neither a necessary nor a proper party. *Cotton States Petroleum Co. v. Britton* (Civ. App.) 230 S. W. 742.

Stockholder of association who meddled with the assets or proceeds of the sale of its properties and converted the money to his own use, was, so far as plea of privilege was concerned, properly joined in an action by a creditor against the association, having the right to call him for an accounting, and it was immaterial that stockholders were not personally liable for debts of association. *Smith v. Payne* (Civ. App.) 230 S. W. 756.

Assignment of cause of action.—Under amendment of this subdivision by Acts 33d Leg. c. 177, agreement by the drawees of a draft to accept the same on presentation by an assignee of the draft rendered the drawee jointly liable with the maker to the assignee so that suit could be brought in the county where the maker resided. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

Where one of the defendants assigned to plaintiff his right of action against a nonresident defendant, held that action could not, under this subdivision, be maintained in the county in which the assignor resided, for as the assignment was necessary to give plaintiff a right of action, venue could not, under Act 1913, be obtained in that fashion. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

5. Contract in writing to be performed in a particular county.

See *Hutchison v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864; note to subd. 7; *Clarke v. Taylor* (Civ. App.) 223 S. W. 878; *Union Woolen Mills v. Starke* (Civ. App.) 228 S. W. 357.

Place of performance.—Action for balance due on contract was properly brought in county in which payment was to be made, though defendant did not reside therein. *Allison v. Hamic* (Civ. App.) 226 S. W. 483; *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

Under this provision, a cause of action suable in the county of defendant's domicile only, cannot be joined with a cause suable also in the county where the obligation on which it is based was to have been performed, so as to compel defendant to submit to the jurisdiction of the court of the latter county against his plea of privilege. *Altgelt v. Harris* (Sup.) 11 S. W. 857.

Where an action based on a written contract, which specifies the place of its performance, is commenced in the county specified in the contract, the venue will not, on the application of defendant, be changed to the county of defendant's residence, under this subdivision. *Burleson v. Lindsey* (Civ. App.) 23 S. W. 729.

Where plaintiff accepted draft attached to bills of lading upon telephone agreement that shippers would protect such advance, an action to recover difference between advance and selling price after defendant's default is not on a written contract

to be performed in plaintiff's county within this subdivision. *Sanders v. George M. Hester Cotton Co.* (Civ. App.) 195 S. W. 269.

Where defendant shipped cotton from his county to that of plaintiffs consigned to himself, and forwarded bills of lading to plaintiffs with drafts calling for advances, there was no writing to perform any obligation in plaintiffs' county under this article. *Griffith v. Gohlman, Lester & Co.* (Civ. App.) 200 S. W. 233.

Overruling of defendant's plea of privilege is error, unless he had contracted in writing to make payment of the note sued on in county where sued. *Poindexter v. First State Bank of Richland* (Civ. App.) 202 S. W. 809.

Under the rule that guarantor in writing of the payment of note according to its tenor and legal effect may be sued in county where note is payable, guaranty of payment of a debt evidenced by a note is not within the rule. *Id.*

A letter from a wholesaler in D. county to a retailer in N. county to book a carload of flour was not an offer to perform any agreement in N. county so as to authorize a suit to be brought in N. county. *Denton Milling Co. v. Green* (Civ. App.) 204 S. W. 362.

If a broker negotiates contract for sale of grain by phone, reduces the terms of the contract to writing and mails each party a copy, and neither objects, there is a "contract in writing," within this subdivision. *Kelsey v. Early Grain & Elevator Co.* (Civ. App.) 206 S. W. 849.

Defendant's application for membership in a trade association plaintiff's letter confirming a trade and specifying P. county as the place of performance together with arbitration committee's award in plaintiff's favor, held a "contract in writing" to perform the contract obligation in P. county, within this subdivision. *Id.*

Where there was no written contract to be performed in the county where suit was begun and such county was not that of defendant's residence, held, that under this article, the county court of such county was without jurisdiction. *Browne Grain Co. v. Walker* (Civ. App.) 206 S. W. 859.

An implied promise to perform a contract in a county other than that of defendant's residence will not place the venue of a suit thereon in such county. *Valdespino v. Dorrance & Co.* (Civ. App.) 207 S. W. 649.

Suit on an oral contract to return overpayments, if any, on a sale of cotton upon being scaled and weighed in the county of the purchaser's residence, cannot be brought in such county under this subdivision. *Id.*

Where plaintiff sold hay to defendant f. o. b. at a point in Galveston county, but drafts with bill of lading attached were to be sent to county of defendant's residence, held, that the contract cannot be construed as one to be performed within Galveston county, the expression "f. o. b." cars implying no promise to pay in Galveston county. *Harris v. Moller* (Civ. App.) 207 S. W. 961.

Contract for sale of hay held performable, in Bexar county, at least under amendment, whereby seller agreed to deliver in said county, despite clause that all obligations pertaining were payable at point in Grayson county. *Garrett v. J. A. Hughes Grain Co.* (Civ. App.) 208 S. W. 758.

Contract for sale of stock of goods situated in certain county and providing for deposit as forfeits of certified checks with bank situated in such county was by implication partly to be performed in such county, and buyer under this subdivision, waived privilege of being sued for breach in county of his residence. *Cecil v. Fox* (Civ. App.) 208 S. W. 954.

Order for potatoes to be shipped to N. county held not to constitute contract in writing to pay for potatoes in N. county, so as to prevent buyer from having seller's action for price removed to county of defendant's domicile. *Trevathan v. G. M. Hall & Son* (Civ. App.) 209 S. W. 447.

Where obligee's action against guarantor and principal was brought in the county in which principal agreed to make payment, and where there was no allegation that guarantor had guaranteed that payment would be made in such county, and neither guarantor nor principal were domiciled therein, guarantor, in view of subds. 4, 5, was entitled to have place of trial changed to the county of its domicile. *Farmers' & Merchants' Nat. Bank of Comanche v. Lillard Milling Co.* (Civ. App.) 210 S. W. 260.

Where plaintiff sued architects on the theory that they were negligent in superintending construction, or in drawing plans, and that such negligence resulted in unsafe construction which caused the house to be destroyed by fire, held, under this subdivision, that suit might be maintained in the county where the house was located, though it was other than the county of defendants' residence. *Presnall v. Adams* (Civ. App.) 214 S. W. 357.

In action for commission for procuring a loan held, that defendant did not contract in writing to perform the obligation sued on in D. county, within this subdivision. *Russell v. Green* (Civ. App.) 214 S. W. 448.

If this exception is relied on, the contract must contain an express agreement to perform in the county where the venue is laid, or the court must be able to say that the contract necessarily imports an obligation to perform in the county where suit is instituted. *Id.*

But though contract may not plainly specify that it is to be performed in a certain place, yet if contract by its terms leads to no other conclusion but that it is performable in that place, then jurisdiction will be given to that place. *Cecil v. Fox* (Civ. App.) 208 S. W. 954.

If the terms of a written contract are such that it must necessarily be performed in a certain county, suit can be maintained thereon in such county. *Valdespino v. Dorrance & Co.* (Civ. App.) 207 S. W. 649.

In determining whether one has contracted in writing to perform an obligation in a particular county within this subdivision, the written contract alone can be looked to; parol provisions of the contract being immaterial. *Russell v. Green* (Civ. App.) 214 S. W. 448.

In view of subds. 5 and 12, venue of an action to foreclose a vendor's lien may be laid in the county where the land is situated. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Any right to hold B. and R. responsible on joint note of I. and C., alleged to be a partnership obligation of all, being independent of the promise, they are entitled to the transfer of the cause, as to them, to the county of their residence, though the note is payable in the county where action is brought. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

In suit on note executed by wife, where petition discloses note constituted no obligation of wife, it cannot confer venue in county where payable as to husband, resident in another county under this subdivision. *Bledsoe v. Barber* (Civ. App.) 220 S. W. 369.

In suit on wife's note in the county where it was payable, though plaintiff pleaded agency of wife for husband and asserted it in controverting affidavit to husband's plea of privilege, plaintiff still remained under necessity to prove it to show contract sued on was that of husband, so that action was properly brought in county of execution under this subdivision. *Id.*

An agreement or promise to pay for articles purchased in a county other than the promisor's residence, in order to fix the venue in such county, must be in writing and plainly provide for such performance in the other county, under this subdivision. *Texas Supply Co. v. Clarke* (Civ. App.) 220 S. W. 573.

Where a contract for the sale of farm machinery required the purchaser, in a case of breach to pay liquidated damages at Dallas the courts of that county have jurisdiction under this subdivision; hence defendant was not entitled to have the suit removed to the county of his residence. *Southern Plow Co. v. Dunlap Hardware Co.* (Civ. App.) 221 S. W. 1020.

Where goods were sold in county by written instrument by defendants, who fraudulently represented themselves the owners, and who obtained payment by draft on bank in such county, the venue was properly laid in such county, though defendants did not reside therein, under subds. 5, 7; the contract having been made to be performed, and having in fact been performed in such county. *Harris v. San Antonio & A. P. R. Co.* (Civ. App.) 221 S. W. 1118.

Defendant, knowing from school catalogue that all payments at plaintiff's school were payable in the county of the school, his answer to plaintiff's inquiry as to "enrollment per catalogue" that he would send his boy, followed by his doing so, and making a payment at such place, rendered him liable to suit there for the balance, though he lived in another county. *Peacock Military College v. Scroggins* (Civ. App.) 223 S. W. 232.

In an action brought in Houston county on an injunction bond filed in suit in Travis county, where there was no showing that the bond was payable in Houston county, and it was not shown that it was payable therein as a matter of law, it was error to overrule defendant's plea of privilege to be sued in Travis county. *Eyres v. Crockett State Bank* (Civ. App.) 223 S. W. 268.

Where, under original contract for sale of land, all papers were to be delivered in Wichita Falls, where each seller lived, any suit on such original contract would have to be filed by the buyers in Wichita county, under this article. *Clarke v. Taylor* (Civ. App.) 223 S. W. 878.

Where a contract for the sale of machinery was made and consummated in Dallas and called for delivery, and the property was delivered in Dallas, the cause of action for the price because the machinery was worthless then arose, and the venue was in that county, though its worthlessness became apparent on a practical demonstration in another county. *Avery Co. of Texas v. Walker* (Civ. App.) 227 S. W. 693.

Buyer's action against seller for nondelivery, contract being for sale of cotton seed f. o. b. cars at a point in C. county and for payment of price there, held properly brought in C. county, under this article. *Watson v. Landa Cotton Oil Co.* (Civ. App.) 228 S. W. 243.

Where a portion of the purchase price was deposited in escrow with a bank, the vendor's action to recover such amount was properly brought in the county in which bank was situated under this subdivision, since the contract, in so far as it related to the payment of that portion of the purchase price so deposited, was to be performed in such county. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

Where a written rental contract was executed by defendants and sent to plaintiffs, who returned it for more formal execution, which defendants refused to make, but defendants had gone into possession and both parties had performed their agreements, the contract, whether signed or not, would be effectual to deprive the defendant of his privilege. *Union Woolen Mills v. Starke* (Civ. App.) 228 S. W. 357.

A petition which alleged that the written contract was executed by defendants and sent to plaintiffs, who returned it for proper execution, but that defendants refused to re-execute it, does not show the execution of a written contract which would defeat defendants' plea of privilege. *Id.*

Where the contract for the sale of cattle was oral, and the check given in payment was not payable in A. county, and defendant was a nonresident of A. county, there was no ground for laying the venue of an action on the contract in A. county. *Whisnant v. Kurtz* (Civ. App.) 228 S. W. 977.

Where corn was sold over the telephone by residents of Karnes county, to be shipped in Karnes county, the contract was made there and to be performed there, and the venue of buyer's action was properly changed to such county, though buyer wrote the terms of the contract down and sent a letter of confirmation to sellers stating corn was to be billed to a point in Williamson county and demand drafts with bills of lading attached would be paid on presentation. *Gottlieb v. Ainsworth* (Civ. App.) 229 S. W. 341.

The venue statute does not contemplate that the party bringing the suit on a contract in writing may rely on the terms of the contract as to performance by himself, but the venue depends on whether the adverse party has agreed to perform in the county of suit. *Gottlieb v. Dismukes* (Civ. App.) 230 S. W. 792.

Where defendant telephoned an offer to sell corn to plaintiff, weight statements, bill of lading, and demand draft to be sent to W. county for delivery to and payment by plaintiff and the offer was accepted with agreement to send confirmative contract, which was sent accordingly embodying the terms of the agreement, and was retained by the defendant without objection, the contract was in writing within this subdivision. *Id.*

Where a contract for sale of corn by defendant, of G. county, f. o. b. there to plaintiff in W. county, weight statements, bill of lading, and demand draft on plaintiff to be sent to W. county for delivery to and payment by plaintiff, the contract was performable in its most essential features in W. county within this subdivision. *Id.*

In a contract for the sale of hay, a provision that all claims under the contract were to be paid at a designated place, held not to relate to the claim of the seller against the buyer for the purchase price, so that the contract was not to be performed by the buyer in the county where the claims were payable, and the buyer is entitled to be sued in the county of its residence. *Strawn Merchandise Co. v. Texas Grain & Hay Co.* (Civ. App.) 230 S. W. 1094.

Seller's action for breach of a written contract by which seller had sold goods to be shipped to specified city was properly brought in the county in which such city was situated under this subdivision; the contract being performable in such county. *Landa v. F. S. Ainsa Co.* (Civ. App.) 231 S. W. 175.

Objections and waiver.—See notes at head of article.

6. Executors, administrators, etc.

Representatives included.—A survivor in community is not included within the provision of this subdivision. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Actions included.—A creditors' suit to collect a judgment from income payable under testamentary trust was not to establish "a money demand against the estate" within this subdivision. *Nunn v. Titche-Goettinger Co.* (Civ. App.) 196 S. W. 890.

Objections and waiver.—See notes at head of this article.

7. Cases of fraud, and defalcation.

See *Griffin v. J. W. & J. R. Bryan* (Civ. App.) 211 S. W. 296; *First Nat. Bank v. Gates* (Civ. App.) 213 S. W. 720.

Place of commission of fraud or defalcation.—In an action on a promissory note, where the answer makes a non-resident company co-defendant, on the ground that the note was procured by its agent by a fraud committed in the county of the maker's residence, in which the suit is brought, and asks judgment against the company, the court has jurisdiction of the company, under this subdivision, though it had no office in that county. *First Nat. Bank of Cleburne v. Turner* (App.) 15 S. W. 710.

Under this subdivision, suit may be brought against a vendor for having fraudulently sold land that was conveyed to him by way of mortgage in the county where the sale was made, though he resided in another county. (*Boothe v. Feist* [Sup.] 15 S. W. 799, followed.) *Boothe v. Feist* (Sup.) 19 S. W. 398.

A suit to rescind a contract of sale because of seller's misrepresentations was properly brought in county where misrepresentations had been made in view of this subdivision. *Calloway v. Booe & Collier* (Civ. App.) 195 S. W. 1174.

In an action to recover money paid, wherein defendant set up a plea of privilege based on its residence, and plaintiffs filed a controverting plea, stating payment made to defendant of certain notes procured from them by the fraudulent representation that, unless they gave such notes, plaintiffs' kinsman would be criminally prosecuted, which representations were made in a county other than that of defendant's residence, the plea of privilege was erroneously granted, since venue should have been laid in the latter county, under subs. 7 and 28. *Richardson v. Beckham Nat. Bank* (Civ. App.) 202 S. W. 142.

Habeas corpus to recover possession of grandchild, of which petitioners were wrongfully deprived by fraudulent representations to the grandchild inducing her to leave the state, is not a suit in which the fraud alleged is the gist of the action, within this subdivision. *Slaughter v. Oakes* (Civ. App.) 203 S. W. 405.

Where broom corn seed was purchased to be delivered in the county of plaintiff's residence, in which county alleged fraudulent representations were made, the courts of that county on a plea of privilege by defendant corporation must be held to have jurisdiction of a suit for damages for fraud and deceit regardless of any defenses which defendant, though a nonresident of the county, might make as to the merits. *Texas Seed & Floral Co. v. Hairrill* (Civ. App.) 211 S. W. 539.

Where plaintiff's own agent induced the maker of a note to draw a second draft

which the defendant bank honored and plaintiff paid, held that though the fraud of plaintiff's agent occurred in the county in which the defendant bank did business, a right of action for such fraud was so disconnected with the right of action against defendant bank that its plea of privilege, made under this article, must be sustained. *First Nat. Bank of Coleman v. Gates* (Civ. App.) 213 S. W. 720.

Evidence held insufficient to establish any fraud of defendant in procuring absolute deed as security, failing to show suit was maintainable, under this article, in the county of plaintiff's residence. *Adams v. Wallace* (Civ. App.) 217 S. W. 1079.

Where pledgee lived in H. county, where pledge was made and property held, and plaintiffs repaid the borrowed money, defendant agreeing to deliver the pledged diamonds in F. county, where he delivered inferior diamonds, defendant was guilty of conversion in H. county, and where plaintiffs kept the diamonds delivered and brought action for damages, the venue was in H. county, and not in F. county, under this exception. *Brooks v. Hamilton* (Civ. App.) 218 S. W. 38.

Where goods were sold in county by written instrument by defendants, who fraudulently represented themselves the owners, and who obtained payment by draft on bank in such county, the venue was properly laid in such county, though defendants did not reside therein, under subsds. 5, 7. *Harris v. San Antonio & A. P. R. Co.* (Civ. App.) 221 S. W. 1118.

Suit by the assignee of the cause of action against defendant on implied warranty of title, and for false representations as to title was properly brought in the county where the property was when defendants sold it and where it was delivered and paid for and where the fraud in selling without title was alleged to have been perpetrated, though defendant filed plea of privilege. *Harris v. San Antonio & A. P. Ry. Co.* (Civ. App.) 223 S. W. 258.

In an action for fraud in renting plaintiff pastures which contained grass or shrubs that were injurious to cattle, held, that the court erred in overruling a plea of privilege although notes given under the contract were payable in the county where action was brought, and some of them were paid there, and cancellation of the remaining notes was prayed for. *Hutchison v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864.

This provision does not extend to an action to impose a constructive trust on mineral rights which the parties guilty of fraud acquired in exchange of the lands thus acquired, and then transferred to the wife of one of them, but such suit, not being based on the original fraud, must be venued in the county of the wife's residence. *Reeves v. Shook* (Civ. App.) 225 S. W. 429.

Where lands conveyed by plaintiffs were exchanged for mineral rights, and plaintiffs, asserting they were induced to convey by fraudulent misrepresentations, sought to subject to a constructive trust the mineral rights, venue should be laid in the county of the record owner's residence, where the fraudulent conversion occurred. *Id.*

Plaintiff, to sustain the venue, on the ground the action is for fraud perpetrated in the county in which suit is brought, is not required to prove the fraud, but merely that a transaction which might constitute actionable fraud occurred in such county. *Edmonds v. White* (Civ. App.) 226 S. W. 819.

Stock purchaser's action to recover purchase price on ground of fraudulent representations inducing the purchase, in view of this subdivision, was properly brought in the county in which the fraudulent representations were made, notwithstanding defendant's residence in another county. *O'Neil v. Garrison* (Civ. App.) 229 S. W. 642.

Contract fixing venue.—See notes at head of article.

8. When attachment sued out or levied.

See *Claiborne v. Pickens* (App.) 16 S. W. 867; see, also, notes to subd. 9.

Wrongful suits and writs.—Under this subdivision, action for malicious prosecution and for maliciously suing out writ of attachment on an automobile in which plaintiff had a beneficial interest was properly brought in the county where levy was made, since, if the right to sue on one of the causes existed in that county, venue of the suit was properly there. *Headington Auto Co. v. Hood* (Civ. App.) 219 S. W. 511.

9. Cases of crime, offense, or trespass.

Trespass.—Under this subdivision, the district court has jurisdiction of an action for a trespass charged to have been committed in the county, though none of the defendants reside in that county. *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863.

Under this subdivision, an action for wrongful levy cannot be maintained against the sheriff's indemnitors, in a county other than that of their residence, unless the charge of misconduct against the sheriff is sustained. *Hilliard v. Wilson*, 76 Tex. 180, 13 S. W. 25.

The injury to a pregnant woman from a wrongful assault in her presence, being in the nature of a trespass on the case, is within this subdivision. *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618.

Under this subdivision, an action for the wrongful seizure of property under a writ of attachment may be brought in the county where the seizure took place, though none of the defendants are residents of such county. *Perry v. Stephens*, 77 Tex. 246, 13 S. W. 984.

Since there are no accessories in trespass, but all parties concerned are principals, and a trespass is any unauthorized entry upon the realty of another to the damage thereof, where one defendant leased land to plaintiff, and the other three defendants were in possession and refused to yield possession, their act, though an unau-

thorized entry, when not connived in by the lessor, did not make her a trespasser or a joint tort-feasor, and she was privileged to be sued in the county of her residence notwithstanding this subdivision. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

Under this subdivision, suit may be brought in the county where a person is run over and killed by an automobile, negligently driven by the owner's agent acting within the scope of his authority, "trespass" being "some wrongful act committed, and not merely a tort resulting from the negligent omission to perform a duty." *Campbell v. Wylie* (Civ. App.) 212 S. W. 980.

Suit for damages through defendant's having procured absolute deed which he represented he would treat as security, while he intended to and did convey to an innocent purchaser, was not maintainable in the county of plaintiff's residence, where the deed was procured, on ground that defendant committed a trespass there within the meaning of this article. *Adams v. Wallace* (Civ. App.) 217 S. W. 1079.

Where a druggist ordered elixir from a drug company located in another county, and the company in good faith delivered certain poison to a carrier in that county for transportation to the druggist, the delivery was in such county, and the druggist's cause of action for breach of contract and injuries from drinking the poison arose there; drug company's conduct not constituting an "offense," "crime," or "trespass," within this subdivision. *Guinn v. Texas Drug Co.* (Civ. App.) 219 S. W. 507.

A petition, alleging that defendant willfully and maliciously instituted criminal proceedings against plaintiff on the charge of forgery and that on such charge plaintiff was imprisoned in the county jail, did not state a cause of action for libel and slander, but for malicious prosecution and false imprisonment, within this subdivision. *Knox v. Cunningham* (Civ. App.) 226 S. W. 461.

Petition for recovery for offense or "trespass" consisting of threats of criminal prosecution and abuse, or other overt acts, held to constitute an action in trespass within the exception to the venue statute. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

10. Suits for personal property.

Cited, *State v. Waller* (Civ. App.) 211 S. W. 322.

Suit for personal property.—Parties who acquired notes after action to recover possession thereof had been brought, having acquired their rights pendente lite, were in no position to assert a right to be sued in the counties of their respective residences. *Wellington Railroad Committee v. Crawford* (Com. App.) 216 S. W. 151.

12. Foreclosure of mortgage or other liens.

Foreclosure.—Under this subdivision, an action on notes and to foreclose chattel mortgage was properly brought in county where a part of the mortgaged property was situated. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

Where a complaint in a suit by a city to foreclose a lien for taxes failed to allege that the property was in the county at the time of the commencement of the suit, it was error to overrule a plea of privilege; defendant being a nonresident. *Wilson v. City of Belton* (Civ. App.) 206 S. W. 366.

In view of subs. 5 and 12, venue of an action to foreclose a vendor's lien may be laid in the county where the land is situated. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Under the express provision of this subdivision, suit to recover on notes and foreclose a trust deed or mortgage securing them may be brought in the county where the land is situated, though defendant resides in another county. *McGhee v. Shely* (Civ. App.) 216 S. W. 422.

Art. 5664, giving owners of pastures a lien on animals for pasturage, does not give the owner of a leased pasture a lien on the animals pastured therein by the lessees, and the lessees are not deprived of their privilege to be sued in their own county under this subdivision. *Broad & Pearce v. Cage* (Civ. App.) 220 S. W. 104.

Vendor's action to recover purchase price placed in escrow, and in the alternative for the foreclosure of his vendor's lien, was properly brought in the county in which the land was situated under this subdivision. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

13. Suits for partition.—Suits for the partition of lands or other property may be brought in the county where such lands or other property or a part thereof, may be, or in the county in which one or more of the defendants reside, and any such suit for partition of lands or any other property may be brought and prosecuted in the county of the residence of any one or more of the defendants, notwithstanding any one or more of such defendants may assert an adverse interest in such property, or claim to be the owner thereof, or seek to recover the title to the same, provided that nothing herein shall be construed to fix venue of any suit whose real purpose is to recover the title to land other than in the county where such land, or part thereof, may lie, but whenever on the trial of the case, the co-tenancy of the parties or any of them is established, or becomes an issue of fact, it shall not be held that the real pur-

pose of the suit was to try the title of the land. [Acts Dec. 10, 1863; P. D. 1423; Acts 1913, p. 424; Acts 1919, 36th Leg., ch. 93, § 1, amending subd. 13, of art. 1830, Rev. Civ. St. 1911.]

Took effect March 20, 1919.

14. Suits concerning lands.

See *Watson v. Watson* (Civ. App.) 223 S. W. 699.

Cited, *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

Actions included.—Where petition, in trespass to try title, was insufficient, but set up cause of action for specific performance of contract to convey, venue must be determined as though the object of the suit was specific performance alone. *Ballard v. Ellerd* (Civ. App.) 199 S. W. 305.

A suit to cancel a mineral lease, which conveyed to the defendant plaintiffs' mineral rights in the land, the purpose of which was to recover an interest in land and to quiet the title, was within this subdivision. *Thomason v. Ham* (Civ. App.) 210 S. W. 561.

In suit to foreclose vendor's lien, a cross-action by one defendant against codefendants, averring that plaintiff had made some kind of a contract with another for sale of the land, from which he sought to remove the cloud, was within the obvious scope of this subdivision. *Shaw v. Stinson* (Civ. App.) 211 S. W. 505.

The venue of a suit which was primarily to recover possession of land, though injunction is asked as relief ancillary to the main suit, is governed by this subdivision, not by art. 4653, requiring suits for injunction to be brought in the county of defendant's residence. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

Where purchaser's agreement to pay vendor's broker was extinguished by new agreement whereby commission was deposited in bank to broker's credit, to be paid on certain contingency, if bank wrongfully turned over the deposit to the purchaser, broker's cause of action against purchaser, if any, was for wrongful appropriation, and the venue of such action would be the county of purchaser's residence, instead of county in which land sold was situated. *Meador v. Rudolph* (Civ. App.) 218 S. W. 520.

A suit by persons claiming to own undivided interests in land under an oral agreement with defendant, and claiming that they had been ejected by defendant, for restitution and judgment for rents and damages, was governed as to venue by this subdivision. *Galbreath v. Farrell* (Civ. App.) 221 S. W. 1015.

A suit by the owners of oil and gas leases which vested in the lessees an interest in the lands, to have removed a cloud on their title cast by instruments filed by defendant and to have the title and possession quieted, is properly brought in the county where the land is situated under this subdivision. *Stemmons v. Matthal* (Civ. App.) 227 S. W. 364.

Suit to obtain cancellation of an oil and gas lease held within this subdivision. *Texas Co. v. Tankersley* (Civ. App.) 229 S. W. 672.

In a vendor's action to correct description in recorded deed on the ground of mutual mistake, and praying for that and for other relief, general and special, legal and equitable, petition held broad enough to authorize correction of description, if facts warranted, and removal of cloud cast by deed on land not intended to pass thereby, so that the suit should be treated as in the nature of an action to quiet title, falling within this subdivision. *Babno v. Compton* (Civ. App.) 230 S. W. 240.

Objections and waiver.—See notes at head of article.

15. Breach of warranty.

See *Estes v. Ferguson*, 203 S. W. 941; note to subd. 4.

Application of statute.—Under this subdivision, when such an action is so brought, a plea of personal privilege by one co-defendant, to be sued in another county, where he resides, cannot be sustained. *Carruthers v. Johnson* (App.) 17 S. W. 1088.

17. Injunctions, etc.

Application in general.—In action against sheriff and others for misdelivery of property sold on execution, conspiracy, conversion, etc., court of another county than that in which execution was issued had no power to cancel credit on plaintiff's judgment, or to retax costs taxed against plaintiff in sheriff's favor. *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Under subds. 17 and 30, and article 4653, suit to enjoin execution of judgment not void must be brought in county in which judgment was rendered, but where the judgment attacked is void it may be attacked in any court. *Price & Beard v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478.

Objections and waiver.—See notes at head of article.

24. Private corporations, associations, etc.

See *International Travelers' Ass'n v. Powell*, 109 Tex. 550; 212 S. W. 931; *First Nat. Bank v. Gates*, Civ. App.) 213 S. W. 720; *Lakeside Irr. Co. v. W. C. Hedrick Const. Co.* (Civ. App.) 230 S. W. 1057.

Cited, *State v. Waller* (Civ. App.) 211 S. W. 322.

Application in general.—Effect of stipulations in contract, see notes at head of article, and notes to subd. 29.

If the courts of J. county had venue and jurisdiction to try cause against corporation arising by reason of alleged breach of guaranty as to quality or grade of peanut hulls shipped, the venue for the entire cause of action, with its several items of damages, was in said county. *Beaumont Cotton Oil Mill Co. v. Hester* (Civ. App.) 210 S. W. 702.

Where there are no express provisions as to venue of civil actions against a certain class of corporations, general statutes relating to venue will govern as to such actions. *State v. Waller* (Civ. App.) 211 S. W. 322.

So much of General Orders Nos. 18 and 18a issued by the federal Director General of Railroads in 1918, as undertook to fix the venue of personal injury suits against the Director General was invalid. *Hines v. Kelly* (Civ. App.) 222 S. W. 648.

The venue of suits against the Federal Agent on causes of action arising out of the operation of any particular railroad by the government is that fixed by law for the prosecution of such suits on such causes of action as if they had arisen against such carrier, under Federal Transportation Act 1920, § 206. *Payne v. Coleman* (Civ. App.) 232 S. W. 537.

Agency, representative, or office.—See *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690; notes to art. 1861.

Under this subdivision, an action against a railway company on its bond conditioned to return certain subscriptions was properly begun in S. county, it appearing that its treasurer and agent had an office in S. county, where he kept the money and some of the books of the company. *Red River, S. & W. Ry. Co. v. Blount*, 3 Civ. App. 282, 22 S. W. 930.

When the Legislature has not given a local habitation to a corporation in establishing it, it should be sued where it has its place of business and where its principal business is transacted. *State v. Waller* (Civ. App.) 211 S. W. 322.

Terms of commission contract and evidence held to constitute corporation local agents of foreign corporation, so that suit against foreign corporation was properly brought in county in which agents were located, as authorized by art. 1830, § 24, and art. 1861, though foreign corporation had main office in other county. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

Where rice growers sued a corporation which had sold rice for them for proceeds unpaid because of a lien asserted thereon by an irrigation company, which was also made a defendant, the action was properly brought in a county where the corporation had an agent, in view of subds. 4 and 24. *Trousdale v. Southern Rice Growers' Ass'n* (Civ. App.) 221 S. W. 322.

A local merchant, who sold machinery for a corporation having its headquarters in another county, was an agent or representative of the corporation; hence under this subdivision, action for breach of warranty might be maintained in the county wherein plaintiff and the merchant resided. *Avery Co. of Texas v. Wakefield* (Civ. App.) 225 S. W. 875.

The term "local agent," as used in the statute relating to venue, means a person who represents a corporation in the promotion of the business for which it was incorporated, etc. *Id.*

Where an unincorporated common-law association has an agent and representative in a certain county, it is not entitled to be sued in another county wherein its headquarters are located, in view of this subdivision. *Cotton States Petroleum Co. v. Britton* (Civ. App.) 230 S. W. 742.

Railroad line within county.—Under this subdivision, a railway company may be sued in a county through which it operates its road, and in which it has an agent, though the cause of action arose in another county. *Galveston, H. & S. A. Ry. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440.

Under this subdivision, and Act April 2, 1837, the district court of S. county, through which the road of a railroad corporation extended, had authority to appoint a receiver, though the principal office of the corporation was in A. county. *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38.

Place where cause arose in general.—Under Act Cong. Aug. 29, 1916, and Act March 21, 1918, section 9, the President's appointment of a Director General, and the orders of the Director General Nos. 18, 18a, and 26, in effect requiring suits against carriers under federal control to be brought in the county where plaintiff resided at the time of the injury, or where the cause of action arose, and prohibiting trial of a suit brought in any other county, are valid. *Rhodes v. Tatum* (Civ. App.) 206 S. W. 114.

A "cause of action," within this provision, is not confined to the genesis of the right, and does not comprise every piece of evidence which is necessary to prove each fact, but it embraces every fact necessary to be shown in order to recover. *San Jacinto Life Ins. Co. v. Boyd* (Civ. App.) 214 S. W. 482.

Under this statute, plaintiff, bringing action in good faith, is entitled to invoke the venue that accords with the allegations in its petition, regardless of possibility that venue may fall with the suit upon plaintiff's failure to sustain the merits of the suit. *Diamond Mill Co. v. Adams-Childers Co.* (Civ. App.) 217 S. W. 176.

This exception did not require granting a change of venue where, under the evidence on the plea, the acts chiefly resulting in the injuries alleged by the plaintiff were performed, if at all, in the county where suit was brought. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

Place of contract or performance.—Within this subdivision, the cause of action for a breach of contract consists of the contract and its breach, and the requirement that part of the cause of action must have arisen in the county where the suit is brought is satisfied by proof that the contract was made in that county. *Early-Foster Co. v. A. P.*

Moore's Sons (Civ. App.) 230 S. W. 787; Cuero Cotton Oil & Mfg. Co. v. Feeder's Supply Co. (Civ. App.) 203 S. W. 79; Dallas Waste Mills v. Early-Foster Co. (Civ. App.) 218 S. W. 515; Aynesworth v. Peacock Military College (Civ. App.) 225 S. W. 866.

Under this subdivision, where defendant corporation fails to sell produce consigned to it by plaintiff as agreed with him by its agent, an action therefor may be brought in the county in which the agreement was made. Western Wool Commission Co. v. Hart (Sup.) 20 S. W. 131.

In suit against corporation domiciled in another county, held, under evidence, that contract was consummated in T. county, so that court properly overruled plea of privilege, although breach did not occur in such county, in view of this subdivision. Cuero Cotton Oil & Mfg. Co. v. Feeders' Supply Co. (Civ. App.) 203 S. W. 79.

Under this article, a private corporation may be sued for breach of contract to furnish goods in the county where the contract was made through its agents, and the goods were to be delivered, even if it had to be ratified by it; part of the cause of action arising there. Cummer Mfg. Co. v. Kellam Bros. (Civ. App.) 203 S. W. 463.

Suit against corporation to recover excess of drafts accompanying bills of lading of cotton and paid by plaintiff over contract price of cotton, as determined by "Galveston Class and weights," held maintainable in Galveston county under this subdivision. Baker-Hanna & Co. v. Kempner (Civ. App.) 204 S. W. 350.

Under this subdivision, a private corporation may be sued in a county wherein it failed to deliver goods pursuant to a contract made therein by its authorized agents and ratified without change. Cummer Mfg. Co. v. Lilly (Civ. App.) 204 S. W. 1010.

Where contract for sale of hay was made at Bexar county, the seller being private corporation, buyer's suit for breach could be brought in Bexar county, under this subdivision. Garrett v. J. A. Hughes Grain Co. (Civ. App.) 208 S. W. 758.

Where contract of sale was entered into in D. county, and seed was sent by common carrier to K. county, and buyer was damaged in latter county from fact that seed was not that contracted for, cause of action arose in K. county, under this exception, only in case delivery was in K. county. Texas Seed & Floral Co. v. Schnoutze (Civ. App.) 209 S. W. 495.

Petition held not to state primarily a suit for rescission of contract for delivery of peanut hulls, weights and grades "guaranteed" at destination, but a cause of action for breach of alleged contract occurring in county of destination, so that cause of action arose there within this subdivision. Beaumont Cotton Oil Mill Co. v. Hester (Civ. App.) 210 S. W. 702.

Under this subdivision, suit against defendant corporation for breach of implied warranty of kind of seeds sold by it was properly brought in the county where the seeds were planted and the damage from their failure occurred. Pittman & Harrison Co. v. Boatenhamer (Civ. App.) 210 S. W. 972.

Under this subdivision, suit for compensation by the general agent of a life insurance company held properly brought in L. county in and around which he was to perform services, and for part of which he was paid in the county, in which he made his office headquarters; "arose" referring to every fact which has arisen and inheres in the cause of action. San Jacinto Life Ins. Co. v. Boyd (Civ. App.) 214 S. W. 482.

Under this statute, an action against corporation seller for refusal to deliver was properly brought in county in which the negotiations for the goods were made, and the purported acceptance by buyer of seller's offer was mailed, and to which goods were to be transported. Diamond Mill Co. v. Adams-Childers Co. (Civ. App.) 217 S. W. 176.

Where a contract of employment, made by a corporation with its employé, is made in a certain county, venue of a personal injury action against the corporation is properly laid within such county, within this subdivision. C. C. Slaughter Cattle Co. v. Pastrana (Civ. App.) 217 S. W. 749.

Where company agreed by telephone to sell cotton seed oil, and subsequently the sale was confirmed in writing by the seller at its domicile, and the contract sent to the purchaser and accepted by it in the county of its domicile, acceptance took place in the latter county, and action for breach was properly brought in such county, within this subdivision. Houston Packing Co. v. Cuero Cotton Oil & Mfg. Co. (Civ. App.) 220 S. W. 394.

Where plaintiff in C. county offered iron for sale, acceptance of final offer of private corporation was in C. county, and the "cause of action or part thereof" arose in C. county, and the county court of such county had jurisdiction of an action for the price, under this exception. Texas Supply Co. v. Clarke (Civ. App.) 220 S. W. 573.

As respects venue, a contract with an incorporated college by letters and telegrams was made in C., where plaintiff's letter and telegram, accepting defendant's offer by letter and telegram, was sent from C. Aynesworth v. Peacock Military College (Civ. App.) 225 S. W. 866.

Part of cause of action for breach of a warranty made at the time of oral sale held to arise in the county of buyer's residence, within this subdivision; hence, though defendant's headquarters were in another county, action might be maintained in the county of plaintiff's residence, notwithstanding he signed a writing purporting to order the tractor to be shipped from without the state. Avery Co. of Texas v. Wakefield (Civ. App.) 225 S. W. 875.

Where plaintiff, of H. county, sued corporation domiciled in G. county, alleging that through his agent he ordered winter turf oats, and that they proved to be common white oats, the court held to have erred in overruling defendant's plea of privilege under this exception. Pittman & Harrison Co. v. Shook (Civ. App.) 228 S. W. 993.

Under subs. 24, 28, defendant corporation having agreed to pay plaintiff an agreed commission for finding buyer for oil, he may sue it in a county in which he found one who accepted the terms, though defendant failed to sign the contract with the cus-

tomers, which was to be done in another county. *Danciger v. Smith* (Civ. App.) 229 S. W. 909.

The contract is made at the place where the acceptance of the offer is given. *Early-Foster Co. v. A. P. Moore's Sons* (Civ. App.) 230 S. W. 787.

An acceptance of an offer communicated over the telephone by the acceptor in one county to the offerer in another county is given in the county in which the acceptor was, so that, for purpose of venue, the contract was made in that county. *Id.*

25. Suits for damages against two or more railroad, etc., companies or receivers, etc.

See *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

In general.—In so far as General Orders 18 and 18a of the Director General of Railroads, relating to the venue of suits against carriers while under federal control, restricts the right created by Congress to maintain a suit in any court of competent jurisdiction, they are invalid. *El Paso & S. W. R. Co. v. Lovick*, 110 Tex. 244, 213 S. W. 489.

The order of the Director General of Railroads that suits against carriers while under federal control be brought in the county or district where plaintiff resided, or the cause of action accrued, is contrary to the act of Congress (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½h-3115½j) providing that actions may be brought "as now provided by law." *Pullman Co. v. Uribe* (Civ. App.) 225 S. W. 189.

In view of Federal Control Act March 21, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j), passenger's action for injuries sustained during federal control was not required to be brought either in the county in which the accident occurred or in the county in which passenger lived, as commanded by General Orders of Director General Nos. 18 and 18a, since the state law authorized maintenance of such suit in another county. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

Injury to freight or other property.—This subdivision does not require the apportionment of damage, where defendants have not filed pleadings asking apportionment. *Ft. Worth & D. C. Ry. Co. v. Kemp* (Civ. App.) 207 S. W. 605.

In an action against connecting carriers for damage to shipment under this subdivision, the last carrier is presumed to have been at fault and has burden of proving itself not at fault, or proving the proportion of damage for which it was not at fault, in which case the burden of proof is shifted to the next preceding carrier to acquit itself in the same way. *Crenweige v. Ponder* (Civ. App.) 228 S. W. 145.

Where initial carrier limited its liability to damage occurring on its line and did not receive goods on through contract, it was not jointly liable under art. 731, with connecting carriers for damages to shipment during transportation; this subdivision being applicable in such case. *Id.*

Where shipment was made on through bill of lading over several lines, the last of which extended into the county where suit was brought, held, that court erred in not sustaining a plea of privilege filed by other railroads, where the shipment had been taken by a sheriff before it had ever been delivered to the terminal carrier; the shipment not being "transported" by such last carrier within the meaning of this subdivision. *Payne v. Coleman* (Civ. App.) 232 S. W. 537.

A petition, brought in the county to which the terminal railroad alone ran, and which alone had representatives or agents therein, must allege "transportation" by such last railroad in order to bring the case within this subdivision, which would permit the other roads to be sued where they were not otherwise suable. *Id.*

26. Suits for personal injuries, against railroad corporations, assignees, receivers, etc.

Application in general.—By virtue of General Orders, Nos. 18, 18a, and 50 of the Director General of Railroads, suit may be brought against the Director General in the county where plaintiff resides, though the railroad involved has no agent in and does not run through the county. *Hines v. Avant & Coughran* (Civ. App.) 226 S. W. 821.

Agency.—Agents of a subsidiary domestic railroad company having a principal office in a certain county were not representatives of the foreign railroad, owning majority of stock in subsidiary road, to render foreign company suable for personal injuries in that county. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Sup.) 206 S. W. 921; *Same v. Ayers* (Sup.) 206 S. W. 922.

Railroads included.—Where several railroads were under one management and each operated trains over the road of the other, the court had jurisdiction of the subject-matter and the parties and properly overruled a plea of privilege of one of the companies whose road was out of the state but which was operating its trains over the road of the other within the county when it injured plaintiff. *Louisiana Western R. Co. v. White* (Civ. App.) 202 S. W. 794.

28. Foreign, private or public corporations, etc.

See *St. Louis, A. & T. Ry. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853.

Application in general.—See *Danciger v. Smith* (Civ. App.) 229 S. W. 909; notes to subd. 24.

Under this paragraph, and arts. 1861, 1862, a foreign railroad corporation which maintained a general management within the state of Texas, who by letter and telegram directed

the movement of its trains in other states, and under whom there was a force of employes, is "doing business within the state," and service on such general manager is sufficient. *Atchison, T. & S. F. Ry. Co. v. Weeks* (D. C.) 248 Fed. 970.

This provision allows a nonresident of the state to sue a New York life insurance company, doing business in the state when suit was begun, in a county where it has an agent. *Mutual Life Ins. Co. of New York v. Nichols* (Civ. App.) 24 S. W. 910.

In an action to recover payment on certain notes procured by fraudulent representation made in a county other than that of defendant's residence, the plea of privilege was erroneously granted, since venue should have been laid in the latter county, within exceptions 7 and 28. *Richardson v. Beckham Nat. Bank* (Civ. App.) 202 S. W. 142.

A foreign railway company is not suable in a county in which it has no agency or representative for injuries sustained by a nonresident occurring in another state. *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921; *Same v. Ayers*, 109 Tex. 270, 206 S. W. 922.

29. Fire, marine, life and accident insurance companies.

See *International Travelers' Ass'n v. Powell*, 109 Tex. 550, 212 S. W. 931.

Application in general.—Jurisdiction of a suit against a life insurance company in a county where it has an agent, under subd. 24, is not affected by this subdivision, nor by Rev. St. art. 2952, relating to the county, venue, and manner of service in suits against corporations. *Mutual Life Ins. Co. of New York v. Nichols* (Civ. App.) 24 S. W. 910.

Stipulations in policy.—Stipulations between an accident insurer and its policy holder for exclusive venue in the county of the insurer's residence do not control, under subds. 24, 29, and cannot be enforced. *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S. W. 630.

An insurance company cannot enforce a provision of its policy and by-laws prohibiting the maintenance of suits on its policies elsewhere than in the county of its domicile; such contract stipulation being contrary to public policy. *International Travelers' Ass'n v. Powell*, 109 Tex. 550, 212 S. W. 931.

30. Venue prescribed by particular law.

Venue expressly given.—Under art. 1830, subds. 17 and 30, and art. 4653, suit to enjoin execution of judgment not void must be brought in county in which judgment was rendered, but where the judgment attacked is void it may be attacked in any court. *Price & Beard v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478.

Art. 1832. If plea sustained, no dismissal, but transfer.

See *Poindexter v. First State Bank of Richland* (Civ. App.) 202 S. W. 809; *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288; *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

Transfer.—See *Camp v. Gourley* (Civ. App.) 201 S. W. 671; notes to art. 1833.

After order allowing change of venue under arts. 1832, 1833, plaintiff must effect actual transfer within reasonable time. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

Where a suit was brought for circulation of a libel in T. county against defendant domiciled in M. county, and defendant pleaded privilege, and plaintiff in an amended petition alleged circulation of the libel in H. county without praying removal thereto, and the court found it had not been circulated in T. county, the case should have been transferred to M. county, and it was error to transfer it to H. county, in view of arts. 1832, 1833, 1902, and art. 1903 amended by Acts 35th Leg. c. 176. *Shear Co. v. Neely* (Civ. App.) 214 S. W. 573.

Under this article, no party properly in suit can be dismissed from the action on such a plea. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

Under this article, the plea being by defendants in cross-action brought in by cross-bill of original defendant on an original cause of action against them alone, the cross-action alone is properly transferred. *National Union Fire Ins. Co. v. Littlejohn* (Civ. App.) 228 S. W. 595.

Requiring election.—When defendants raised question of misjoinder of causes of action in connection with plea of privilege to be sued in other county, if court thought there was misjoinder, it should have required plaintiff to elect between causes of action, and determined question of venue after election had been made, etc. *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Art. 1833. When plea sustained, order changing venue, record transmitted.

See *Poindexter v. First State Bank of Richland* (Civ. App.) 202 S. W. 809; *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288; *Shear Co. v. Neely* (Civ. App.) 214 S. W. 573; *Lewis & Knight v. Florence* (Civ. App.) 217 S. W. 1116.

Transfer in general.—Although defendant secured transfer of cause on plea of privilege, it was plaintiff's duty to see that transfer was actually effected within reasonable time. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

After order allowing change of venue under arts. 1832, 1833, plaintiff must effect actual transfer within reasonable time. *Id.*

Where after change of venue was ordered plaintiff was informed by clerk that papers could not be found, it was plaintiff's duty to ascertain from clerk of other county whether transfer had been effected. *Id.*

That defendant's counsel inquired of clerk regarding change of venue ordered did not show acquiescence in plaintiff's delay in having records transferred. *Id.*

This article is directory merely, and need not be strictly complied with where cross-action alone is transferred, and cross-bill and answer to original action is in the same paper. *National Union Fire Ins. Co. v. Littlejohn* (Civ. App.) 228 S. W. 595.

Defendant's claim of privilege to have action determined in another county, asserted by plea in abatement, is waived by his invoking action of the court on the general demurrer, and abiding by its act in sustaining the demurrer and dismissing the action; whereas, if it had merely sustained the plea of privilege, it would under this article, have transferred the case. *Martin v. Kieschnick* (Com. App.) 231 S. W. 330.

Several defendants.—If there is misjoinder of parties and causes of action in suit brought in county of one defendant's residence, transfer of entire case to another county in which another defendant resides is erroneous. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

In view of arts. 1832 and 1833, where a suit for rescission of a contract was brought against several parties, and the plea of privilege interposed by one of them was sustained, it was error to dismiss as to one of the parties upon the merits, but the entire case as to all parties should have been transferred to the county wherein that defendant resided who successfully made plea of privilege. *Camp v. Gourley* (Civ. App.) 201 S. W. 671.

When a separate cause of action is improperly attempted to be joined by defendant's cross-action against an additional party, the transfer of the cause against such party to the county of his residence does not carry the original cause to such county. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

Where defendant filed a cross-action against other parties who filed a plea of privilege, and plaintiff pleaded misjoinder of causes by reason of such cross-action, and plea of privilege was properly sustained, but plea of misjoinder was not sustained, the cross-action should not have been dismissed, but should have been transferred to proper county for trial. *Braley v. Samuels* (Civ. App.) 213 S. W. 684.

As to two defendants living in different counties and each entitled to succeed on his plea of privilege, one agreeing to transfer of the cause to the county of the other's domicile, transfer should be made thereto as to both. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

Where the controversies between plaintiff and one set of defendants and those between plaintiff and another set of defendants are severable, one set may succeed on their pleas of privilege, though plaintiff is entitled as against the others to have the action tried where brought. *Id.*

Under this article, where the plea of part only of defendants is sustained, all papers relating to the cause of action against them are to be sent, though this includes papers relating to the cause against the others. *Id.*

Appeal.—There being sufficient facts to justify the findings, determination of the jury against a defendant on an issue of fact on plea of privilege is conclusive against him on appeal. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

The appellate court on appeal from judgment against pleas of privilege has power to send part of the case where the trial court should have sent it, and return the other part to the trial court for trial. *Id.*

CHAPTER FIVE

PARTIES TO SUITS

Art.	Art.
1835. Suits by and against counties, etc.	1843. Parties conditionally liable may be sued, when.
1836. Suits by executors, etc.	1844. Sheriffs, etc., sued may make indemnitors parties.
1837. Suits for land against decedents.	1845. Sureties on official bonds, when joined.
1839. Suits for wife's separate property.	1848. Additional parties may be brought in, when.
1840. Against husband and wife, for necessities, etc.	
1841. For wife's debts, etc.	
1842. Several obligors to any contract may be joined, etc.	

Article 1835. [1196] [1200] Suits by and against counties, cities, etc.

Actions by or for use of county.—Where no statute gives county or district attorneys power to sue in behalf of a county, the commissioners' court alone has the right to determine whether a suit shall be brought. *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

Suit against county.—Where the commissioners' court refuses to allow a claim against the county, the remedy is by direct suit against the county. *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

Garnishment and execution.—Execution should not be awarded against municipal corporation on judgment secured by holders of municipal bonds.—*City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

Liability and consent of state to be sued.—When the state makes a contract, it is bound as much as a citizen would be bound by a like contract, notwithstanding the state cannot be sued without permission. *State v. Elliott* (Civ. App.) 212 S. W. 695.

Art. 1836. [1197] [1201] Suits by executors, etc.

Authority of administrator to sue—To cancel deed.—An administrator cannot sue to set aside a conveyance made by his intestate with intent to defraud creditors, though the estate is insolvent, as the fraudulent grantor could not have done so, and under Rev. St. 1879, art. 1201, the administrator can sue only in those cases in which his intestate could have so done. *Wilson v. Demander*, 71 Tex. 603, 9 S. W. 678.

Jurisdiction of suit.—District court had jurisdiction of suit by administrator with will annexed to have partitioned and set aside to estate, for purpose of administration, as against children of former wife, interest of estate in certain land, and authority to render decree establishing interest of parties and decreeing land incapable of partition and ordering it sold in view of arts. 1836, 6111. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

Executor or administrator need not be joined, when.—In trespass to try title brought by heirs of owner against his widow's devisees, it was not error to refuse to join the executors under the widow's will; such executors having no interest in the property. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

In trespass to try title to deceased's homestead, it is not necessary to join administrator, especially where a previous suit had determined creditors and administrator had no interest in the property. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

Right of heirs to sue.—Failure of administrator of the seller of lands, mortgage on which was foreclosed, so that the consideration failed, to bring suit until the cause of action against the buyer was barred, authorized the seller's daughter, as her heir, inheritor of the debt against the buyer, to bring suit, though the administrator may not have been discharged. *Smith v. Price* (Civ. App.) 230 S. W. 836.

Heirs not necessary parties, when.—See *East v. Dugan*, 79 Tex. 329, 15 S. W. 273; notes to art. 1837.

In view of this article, it was not necessary, in suit by administrator with will annexed to partition land of estate in which children of deceased's second wife had certain interest, to make children of deceased's third and surviving wife parties, to bind them by decree entered. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

Art. 1837. [1198] [1202] Suits for land against decedents.

Construction.—The plaintiff company brought suit against the executors and heirs of B. H. E. to quiet the title to certain land. Held, that under Rev. St. 1879, art. 1202, the heirs were necessary parties to the suit. *Russell v. Texas & P. Ry. Co.*, 68 Tex. 646, 5 S. W. 686.

Under Rev. St. 1879, arts. 1202, 1943,—a mortgage creditor may sue the executor for foreclosure, without making the heirs of the deceased mortgagor parties. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

The heirs are not necessary parties to an action to cancel a tax-deed by the executor and sole devisee, in which defendant files a plea in reconvention in the nature of a cross-action of trespass to try title in view of Rev. St. 1879, art. 1202. *Lufkin v. City of Galveston*, 73 Tex. 340, 11 S. W. 340.

Though under Rev. St. 1879, art. 1201, an administrator or executor may sue to recover land without joining the heirs, yet when the defendant in such a suit asks affirmative relief in his answer he becomes a plaintiff to the extent of such relief, and, if he fails to comply with the requirements of art. 1202, by making the heirs of the estate parties, a judgment in his favor will not operate to divest the title of the estate. *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

Art. 1839. [1200] [1204] Suits for wife's separate property.

See *City of Austin v. Emanuel*, 74 Tex. 621, 12 S. W. 318.
Cited, *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149.

Actions by husband.—A husband, under Rev. St. 1879, art. 1204, may sue alone to have declared a vendor's lien on land alleged to have formerly belonged to the husband and his wife, and to have been sold by them to defendants. *Meyer v. Smith*, 3 Civ. App. 37, 21 S. W. 995.

If land conveyed to a wife by deed reciting it to be her separate property was held in trust for husband, a suit could be maintained by him, it not being necessary to set aside or correct deed before suing for the interest claimed. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

This article is not in conflict with or repealed by Acts 35th Leg. (1917) c. 194, art. 4621, and the husband may therefore sue for personal injury to the wife, though the

damages are her separate property under Acts 34th Leg. (1915) c. 54, art. 4621a). Pullman Co. v. Cox (Civ. App.) 220 S. W. 599.

In a husband's action for injuries to his wife under this article, the petition need not allege that the suit is brought by the husband as agent of the wife or for her benefit. *Id.*

The authority conferred on the husband by this article, to sue for the recovery of the wife's separate property, only makes him her agent for the protection of her property and confers no authority to interfere with her management, control, or disposition of the property. *Id.*

Actions by wife.—By the terms of arts. 1839, 4621, the wife may sue in her own name by authority of the court when the husband fails or neglects so to do, and when the wife is abandoned by the husband or he refuses to sue she may prosecute suit in her own name for the protection of rights of person or property; but, in order to enable the wife to sue alone, she must not only allege failure or neglect on the part of her husband to join her in the suit, but also that the property is her separate estate. *Barmore v. Darragh* (Civ. App.) 227 S. W. 522.

Joinder of husband and wife.—Where a husband joins with his wife in a suit for her separate property, and a judgment is rendered against him, he may alone prosecute an appeal, since he is authorized by Rev. St. 1879, art. 1204, to sue either alone or jointly with his wife for the recovery of her separate property, and the appeal is in effect a continuation of the suit for the wife's benefit. *Corley v. Renz* (Civ. App.) 24 S. W. 935.

Husband having no interest in subject-matter, being joined with his wife to meet requirements of law, is only "nominal party," and where he alone executes appeal bond appeal will not be considered. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

Suits as to community property.—Where a trunk containing baggage of the husband and wife, most of which was community property, and part of which belonged to the wife, was lost by the innkeeper, both husband and wife could sue to recover the damage in the same suit. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

When a husband is proven untrue to the trust confided to him by the laws of the state in the management of the community property, and is ruthlessly defrauding his lawful wife of her means of support and lavishing her property on the companion of his lust, the outraged wife should have the courts thrown open for her protection. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

A wife is not a necessary party to suit upon a note given for a community debt and to foreclose a mortgage on community property. *Chandler v. Young* (Civ. App.) 216 S. W. 484.

In such action a husband has the right to answer for his wife, though she has not been cited. *Id.*

A husband has no right to appear for his wife in such action, so as to give the court jurisdiction to render personal judgment against the wife. *Id.*

In a suit by the vendor to recover under his reserved title land sold to the community of a husband and wife, the wife is not a necessary party. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

The wife is not a necessary party to trespass to try title against the husband as to community property, though he is insane, they having children so that title to the property does not pass to her by reason of his insanity, and she not having given the bond necessary for exclusive management and control to pass to her. *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

Wife is not a necessary party to an action against husband to try the title to, affect an interest in, or foreclose a lien on community real estate. *Cooley v. Miller* (Com. App.) 228 S. W. 1085.

Art. 1840. [1201] [1205] Against husband and wife, for necessities, etc.

Liability for necessities.—That husband has furnished wife with whom minor children are living sufficient money for necessities for herself and the children, held not to defeat his liability to person furnishing necessities for the children. *Sanger Bros. v. Trammell* (Civ. App.) 198 S. W. 1175.

Art. 1841. [1202] [1206] For wife's debts, etc.

Construed.—The husband must be joined in action against a married woman for negligent performance of her contract with the tenant of her separate property for repairs thereof, whereby the tenant's goods were injured. *Whitney Hardware Co. v. McMahan* (Civ. App.) 231 S. W. 1117.

Evidence.—In a suit to cancel a deed, brought against a feme sole, evidence held sufficient to prove the coverture of the woman prior to judgment, rendering the judgment ineffectual for lack of joinder of her husband. *Powell v. Dyer* (Civ. App.) 227 S. W. 731.

Art. 1842. [1203] [1207] Several obligors to any contract may be joined, but, etc.

Construction and application.—In view of art. 587, as to suing indorsers jointly with the principal obligors, and this article, an action by the payee against the maker, and a guarantor by separate instrument, for delinquent interest and attorney's fees, prior

to maturity of the note, is not separable so as to entitle nonresident guarantor to removal of the cause. *Parlin & Orendorff Implement Co. v. Frey* (Civ. App.) 200 S. W. 1143.

Under arts. 1842 and 1897, a judgment cannot ordinarily be had against a person secondarily liable until a judgment is had against the principal obligor. *Snyder v. Slaughter* (Civ. App.) 208 S. W. 974.

May sue one or more joint promisors.—Under arts. 1842, 1843, 6336, 6337, creditor company properly joined in one suit its debtor and the surety who signed with the debtor a purported guaranty of account. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

Additional parties.—If the holder of the note sued guaranteeing indorser, alleging that the maker was only an accommodation maker, it was right of the guaranteeing indorser to have the maker made a party for the determination of that issue. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Pleading.—Under *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1842, 1897, plea by principal of bond, contractor for building, which will release him if established, will also release sureties and will inure to their benefit whether or not urged in separate plea. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

When principal and sureties are sued in same action on same contract, if principal pleads facts showing nonliability, whether same facts are pleaded by sureties, they can urge on appeal nonliability under principal's plea. *Id.*

Dismissal of parties.—Where action to foreclose chattel mortgage was brought against mortgagor and purchasers of the mortgaged property, the purchasers cannot complain of the dismissal of the suit as to the mortgagor, who had not been served with citation, as the parties were not sued as joint obligors upon a contract, and it was immaterial that such purchasers had asked for a judgment over against the mortgagor, the rendition of a personal judgment against the mortgagor not being essential to the foreclosure, and art. 1897, having no application. *Smith v. Wall* (Civ. App.) 230 S. W. 759.

Art. 1843. [1204] [1208] Parties conditionally liable may be sued, when.

See *El Paso Bank & Trust Co. v. First State Bank of Eustis* (Civ. App.) 202 S. W. 522.

Cited, *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811; *Parlin & Orendorff Implement Co. v. Frey* (Civ. App.) 200 S. W. 1143.

In general.—Under arts. 1842, 1843, 6336, 6337, creditor company properly joined in one suit its debtor and the surety who signed with the debtor a purported guaranty of account. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

If the holder of the note sued guaranteeing indorser, alleging that the maker was only an accommodation maker, it was right of the guaranteeing indorser to have the maker made a party for the determination of that issue. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

By this article, any surety or guarantor may be sued without joining his principal, when the latter resides beyond the limits of the state. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

Under arts. 1843, 6336, 6337, only in case of a conditional guaranty, and not where the guaranty is absolute, need the principal be sued before the guarantor, or joined in the action against him. *Smith v. Cummer Mfg. Co. of Texas* (Civ. App.) 223 S. W. 338.

Insolvency of principal.—Indorsers on a note secured by vendor's lien are discharged if the maker is not sued as required by art. 579, before expiration of second term of court, and it is not shown that the land is of no value as security for the debt, under this article. *Prince v. Colvin* (Civ. App.) 198 S. W. 637.

Art. 1844. [1204] [1208] Sheriff, constable, etc., sued for damages, may make indemnitors parties, etc.

Construction and operation.—On appeal from a refusal of continuance to obtain service under this act, where the record shows an order granting the sheriff leave to make the principal and surety parties defendant, it will be presumed that the order was made upon such a proper showing of facts bringing the case within the statute as would authorize the granting of a continuance, although this does not appear affirmatively of record. *Rains v. Herring*, 68 Tex. 468, 5 S. W. 369.

Where a sheriff availed himself of this statute, and, judgment having been rendered against the sheriff, and also directly against the creditor in favor of the plaintiff, only the creditor appealed, a reversal as to the creditor would necessitate a reversal as to the sheriff. *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548.

Art. 1845. [1205] Sureties on official bonds, when joined.—In any suit brought by the State of Texas, or any county of said State, or any city, or any independent school district of said state against any officer, who has held an office for more than one term, or against any depository

which has been such depository for more than one term, or has given more than one official bond, the sureties on each and all such bonds may be joined as defendants in one and the same suit, whenever it is alleged in the petition that it is difficult to determine when the default sued for occurred and which set of sureties on such official bonds is liable therefor. [Acts 1891, p. 86; Acts 1919, 36th Leg., ch. 19, § 1, amending art. 1845, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 1848. [1208] [1209] Additional parties may be brought in, when.

See *Curtis v. Wilson*, 2 Civ. App. 646, 21 S. W. 787.

Bringing in new parties—In general.—In action against receiver of railroad company for death of passenger injured by express company's truck which, being left close to tracks, was struck by approaching train, receiver, having no right of action against express company, cannot implead it as defendant. *Andrews v. Rice* (Civ. App.) 198 S. W. 666.

In city's action to recover delinquent taxes not assessed until after defendant bought the land under warranty deed, it is proper to permit the answer to make the warrantors parties in the absence of affirmative showing of delay by so doing. *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

Purchaser of property subject to mechanics' lien, in suit by indorsee of notes upon them and to enforce lien, had right on timely application to make party original contractor, who; subsequently purchased property from original owner, who gave notes and lien, but waived right by proceeding to trial without making application. *Hartfield v. Greber* (Com. App.) 207 S. W. 85.

In a suit to foreclose a vendor's lien, a stranger to the notes holding an adverse claim to the estate conveyed by plaintiff cannot be made a party for the purpose of trying his adverse claim. *Shaw v. Stinson* (Civ. App.) 211 S. W. 505.

The courts will not allow a party to be brought in when the issue to be joined is on separate contracts in which there is no privity between the parties, and where to sustain the cause requires separate allegations; but where there is such a privity that no harm will result and where no material or substantial change or other unnecessary burden is imposed, the parties will be held properly joined. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

Where exception to petition to determine riparian water rights had been properly sustained, and there was no offer to amend, there was no error in refusing continuance to bring in riparian owners and contractual water right owners under this article, there being no case left to continue, and such owners not being necessary parties to the suit. *Ward County Water Improvement Dist. No. 2, v. Ward County Irr. Dist. No. 1* (Civ. App.) 222 S. W. 665.

— **Application and proceedings thereon.**—The substitution of federal agent appointed under Transportation Act 1920 as defendant, though made without notice held sufficient where such notice was waived by an appearance by the attorneys who signed the pleadings for the Director General and represented the agent at the trial, making objection and taking bills of exceptions. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

Mode of bringing in new parties.—An amendment may introduce new parties plaintiff or defendant. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Rights and liabilities of parties brought in.—In trespass to try title, defendants' vendor being in court, and having made separate answer, defendants were properly allowed to plead his covenants of warranty to them, and to ask judgment against him thereon in the event of a judgment against them for the land, under Rev. St. 1879, arts. 1209 and 4788. *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807:

Time for bringing in new parties.—If objection is made, additional parties cannot be brought in after the case is called for trial, though no delay will be caused thereby, under Rev. St. 1879, art. 1209. *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031.

Where party sought to be impleaded by defendant was not a necessary party, denial of defendant's petition to implead such party, filed shortly before trial and more than year after filing of plaintiff's petition, was not abuse of trial court's discretion. *Andrews v. Rice* (Civ. App.) 198 S. W. 666.

Substitution.—Plaintiff, in an action for injury to a railroad employee during federal control, pending at termination of federal control, is not deprived of a vested right by Act Cong. Feb. 28, 1920, § 206, subd. (a), providing for substitution of different agent as defendant to represent the government; this relating merely to the remedy. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

Though the President under Act-Cong. Feb. 28, 1920, § 206, appoints the Director General as agent against whom action may be brought or prosecuted after termination of federal control, there should be a formal substitution of him in his capacity as agent in an action pending at termination of federal control, in the absence of voluntary appearance by his duly constituted agents acting for him in his new capacity. *Id.*

DECISIONS RELATING TO SUBJECT IN GENERAL.

1. **Persons who may or must sue as plaintiffs—Capacity and interest in general.**—Vendor who has received no part of the consideration has sufficient title to maintain a suit to remove cloud from the title. *Masterson v. Pullen* (Civ. App.) 207 S. W. 537.

A taxpayer cannot sue to cancel bonds of an irrigation district without alleging and proving that the board of directors has refused to sue. *White v. Fahring* (Civ. App.) 212 S. W. 193.

Generally a person may assume a fictitious or artificial business name, or even the real names of other natural persons, in making contracts; and, where the contract is not inconsistent with such theory, recovery may be had by the person really contracting under the assumed name. *Martin v. Hemphill* (Civ. App.) 221 S. W. 333.

A married woman has no legal capacity to sue as next friend on behalf of her minor son, where her husband, who is the minor's stepfather, refuses to sue or join in the suit. *Carroll v. Embry* (Civ. App.) 229 S. W. 575.

9. — **Agent.**—A broker has no such interest in a written contract between the principals as would entitle her to specific performance, even assuming that one principal was entitled to that remedy. *Hume v. Bogle* (Civ. App.) 204 S. W. 673.

The undisclosed principal may sue a third party, with whom his agent has contracted, to enforce his rights under the contract. *Pittman & Harrison Co. v. Boatnamer* (Civ. App.) 210 S. W. 972.

12. — **Extent of interest.**—Where bailee brings an action for damages to property the right to recover for damages beyond those suffered by him as bailee or lessee must rest upon the theory of agency and, if defendant settles with the owner the bailee can only recover the amount of his own damage. *Missouri, K. & T. Ry. Co. v. Hunter* (Civ. App.) 216 S. W. 1107.

13. **Trustee and others holding legal title.**—Where a trust deed was silent as to the purposes of the trust and the identity of the cestui, it would be presumed that the trustee was empowered to sue and be sued in his own name. *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

Where trustee seeks to repudiate the trust, the beneficiary may sue to enforce the trust. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

14. **Numerous parties, one or more suing for all.**—Class suits may be maintained in equity; class suits being those in which one or more in a numerous class, having a common interest in the subject-matter, sue in behalf of themselves and all others of the class. *City of Dallas v. Armour & Co.* (Civ. App.) 216 S. W. 222.

Persons named in the record in a class suit are parties; but others of the class, although interested, are not parties. *Id.*

15. **Persons who may join as plaintiffs—In general.**—To recover for services as on a joint cause of action, plaintiffs must show a copartnership or other interest giving such right. *Paine v. Eckhardt* (Civ. App.) 203 S. W. 459.

Where plaintiffs who had each purchased a half section of land agreed jointly with lessee, that he should have grass for grazing purposes, the relation of landlord and tenant was established, and plaintiffs were properly joined as plaintiffs in action for rent. *Marshall v. Magness* (Civ. App.) 211 S. W. 541.

In suit to enjoin live stock inspectors from requiring the dipping of cattle several cattle owners had the right to join in asking the relief sought. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

19. **Persons who must join as plaintiffs—In general.**—In suit to cancel, for fraud, deeds of plaintiff and his son-in-law, which conveyed lands owned by them, all of which plaintiff was authorized by his son-in-law to contract to sell, the son-in-law was a necessary party. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

In a death action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), all beneficiaries must be joined in a single suit, and thus the question of negligence vel non must be determined as to all. *Davis v. Wight* (Civ. App.) 218 S. W. 26.

In an action to cancel an oil lease in the absence of evidence showing a transfer of some interest in the land or the leased premises to plaintiff, there was clearly a defect of parties plaintiff. *McKay v. Peterson* (Civ. App.) 220 S. W. 178.

A conveyance of part of the land by plaintiff pending a suit in trespass to try title did not abate the suit as to the land conveyed or make the grantee a necessary party to the litigation. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

20. — **Joint owners, when.**—In action for trespass to property owned by two brothers, both should join. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

22. — **Partners, when.**—Where defendant made a note payable to one partner alone who did not indorse it, the other partner was not an indispensable party to the payee partner's suit on the note. *Brown v. Arhelger* (Civ. App.) 198 S. W. 811.

It was no ground for peremptory instruction for defendant that claim sued on in name of firm belonged to members jointly, that one was dead, having left an estate, and that no administration had been had, while neither his heirs nor legal representatives were made parties plaintiff. *Gulf, C. & S.-F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853.

22½. — **Trustees and beneficiaries.**—While the beneficiary is usually a necessary party in suits by or against a trustee to recover trust property, he is not where it may be presumed that it was the intention to invest the trustee with power to prosecute and defend suits in his own name. *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

In suits by or against a trustee for recovery of trust property, cestuis que trust are generally necessary parties. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

Where a note is held for the benefit of another, the beneficial owner is not a necessary party to the suit, nor need holder of legal title sue as trustee or state that he sues for the benefit of the equitable owner. *Rabb v. Seidel* (Civ. App.) 218 S. W. 607.

24. — **Actions for broker's commissions.**—Realty broker, not member of a firm of brokers, but commonly associated with them, and entitled to even division of commission sued for by firm, was neither necessary nor proper party. *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347.

In action by brokers for commission, brokers' agent who was to get a part of the commission was not a necessary party plaintiff, since he was not a partner. *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170.

Though broker agreed to pay another a proportion of his commission, he may, there being no privity of contract between the third person and the landowner, recover the entire commission, the third person not being a necessary party. *Waurika Oil Ass'n No. 1 v. Ellis* (Civ. App.) 232 S. W. 364.

A broker could recover a commission for the sale of land listed with his agent, though the owner did not know that the person with whom he was listing the land was the agent of the broker, and the agent was neither a necessary nor proper party. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

25. — **Actions on contract.**—Notwithstanding a third person received part of the proceeds of a note, he was not a necessary party to an action on the note when his name did not appear on its face. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Where a fund placed in bank was to be divided between plaintiff and defendant, and other persons for whom they were attorneys in fact, such other persons were not necessary parties to an action by plaintiff to recover his and their shares. *Ferguson v. Mansfield* (Civ. App.) 215 S. W. 234.

34. **Persons who may be joined as defendants—In general.**—When the plea of misjoinder of parties or question of proper parties is urged, a very large discretion is allowed the courts. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597; *Bain v. Coats* (Civ. App.) 228 S. W. 571.

In action on contract for sale of assets of a bank which provided for redemption of real estate, parties defendant held properly joined. *Langford v. Power* (Civ. App.) 196 S. W. 662.

In suit against bank by clerk, bank counterclaiming for damages when its customer withdrew more money than he was entitled to through negligence of clerk, estate of customer was a proper but not a necessary party. *Commercial State Bank v. Van Hutton* (Civ. App.) 208 S. W. 363.

In county's action on county treasurer's bond, where it was claimed by drainage district that portion of funds turned over by county treasurer to his successor belonged to district, drainage district and its commissioners and depository were proper parties defendant. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

As to joinder of defendants, no positive general rule can be formulated as to what constitutes multifariousness; the question depending upon the circumstances of each case. *Id.*

The rights of all parties in the subject of litigation should be settled in one suit, where the introduction of parties defendant does not prejudice the rights of those who have already commenced the litigation. *Id.*

The assignee of a mortgage is properly joined in suit to compel acceptance of the balance due thereon and release of the mortgage, in order to adjust the equities between the parties and secure to mortgagor a perfect right of redemption upon payment of the balance due. *Morrow v. Gorter* (Civ. App.) 217 S. W. 164.

In a servant's personal injury action, allegations that the master is insolvent, and that the law affords plaintiff no remedy, do not authorize the making of the master's indemnity insurer a party. *Owens v. Jackson-Hinton Gin Co.* (Civ. App.) 217 S. W. 762.

Whenever the right to recover against one defendant, under allegations of the petition, would preclude the right to recover against another joined as defendant, there is a "misjoinder" of parties defendant. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

37. — **Principal and agent.**—In an action by maker of notes for fraud, and to cancel the notes, a bank in possession solely for collection, having no right or title, was not a proper party defendant. *Hutchison v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864.

40. — **To set aside conveyances and contracts.**—That a master's indemnity insurer securing a release of liability for injuries might be injured by the cancellation of the release in the servant's suit against the master for damages does not warrant making the insurer a party. *Owens v. Jackson-Hinton Gin Co.* (Civ. App.) 217 S. W. 762.

43. — **Joint tort-feasors.**—Generally, where an injury has been sustained by reason of the concurring negligence of two or more persons, a suit may be maintained against them jointly or separately. *Hines v. Welch* (Civ. App.) 229 S. W. 681.

When two or more persons participate in concerted action to commit a common tort and accomplish their purpose, they become "tort-feasors." *Anderson v. Smith* (Civ. App.) 231 S. W. 142.

45. **Persons who must be joined as defendants—In general.**—All persons interested in the object of a suit whose rights will be directly affected by the decree must be made parties. *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726; *Hitson v. Gilman* (Civ. App.) 220 S. W. 140; *Nail v. Taylor* (Civ. App.) 223 S. W. 719.

Where persons who may be interested consent to decree, or disclaim all interest, they are not necessary parties, unless their presence is required for protection of other parties, and error in omitting them originally is cured by subsequent consent or disclaimer. *Hale v. McKenzie* (Civ. App.) 198 S. W. 1004.

In trespass to try title wherein title depends on a mortgage with an incorrect description carried through to the sheriff's deed, the mortgagor, or his legal representative, is a necessary party to a reformation of such mortgage. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

A "necessary party" is one who is so vitally interested in the matter that a valid decree cannot be rendered without his presence as a party. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

In suit for payment for supplies furnished receiver during operation of business by receiver, failure to make the holders of labor liens, who had instituted the receivership proceeding, parties to such action, did not render petition subject to special exception, since, if bondholders, who were joined as defendants, were entitled to contribution from such labor lienholders toward satisfaction of claims for receiver's supplies, they should have asserted such equity, to make such labor lienholders parties to the suit. *Maytown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

Joint owners of land need not all be made parties to an action on a certificate of assessment for street improvements, the interest of each being liable for the entire tax. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Land claimed by individuals, if once a county road, having by extension of a city become a street thereof, subject to its exclusive control, the county is neither a necessary nor proper party to suit to enjoin interference with possession and use thereof. *Feris v. Bassett* (Civ. App.) 227 S. W. 233.

Necessary or indispensable parties include all persons whose interests will necessarily be affected by any decree that may be rendered. *Barmore v. Darragh* (Civ. App.) 227 S. W. 522.

The district court has no jurisdiction to construe an instrument affecting the title to land, unless all persons who would be affected by the judgment have been made parties to the action so as to be bound by the judgment. *State Nat. Bank of San Antonio v. Lancaster* (Civ. App.) 229 S. W. 883.

Where a landowner conveyed an undivided interest to another retaining a vendor's lien, and such other executed an oil and gas lease, and subsequently reconveyed to his grantor, who then conveyed to plaintiffs, in a suit by plaintiffs to set aside the lease neither the original owner nor the maker of the lease were necessary parties; both having conveyed their interest, and the maker of the lease having filed a disclaimer at a former trial. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

46. — **Actions on contract.**—Where purchaser of land who failed to make installment payments induced third person to take over his rights, and vendor executed deed to purchaser who executed deed to third person simultaneously, the effect of the transaction was a sale by vendor to third person, and third person in suing for shortage in acreage should bring action on such theory. *Taylor v. Hill* (Com. App.) 221 S. W. 267, reversing judgment (Civ. App.) 183 S. W. 836.

Where a contract provided for payment by the vendor of a commission to a broker, and for payment of one-half of the cash deposit in event of forfeiture, the broker was not a necessary or proper party to an action to forfeit the cash payment; his interest being contingent. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

48. — **Principal and surety.**—In action under art. 4982, to recover a penalty for collection of usurious interest on notes, paid by makers, since such payments did not inure to benefit of surety and paid nothing thereon, he was not a necessary party. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

50. — **Against corporation.**—While the receiver of an insolvent corporation appointed under subd. 3, takes interest owner had at time court took jurisdiction, and valid existing liens cannot be affected unless lienholder is party to suit, it is not necessary to make general creditors parties. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

50½. — **Stockholders suits.**—In suit by stockholders to recover property wrongfully disposed of by director, company, dissolution of which was not set up nor established, was not only proper but necessary party, and assignee of company, as private trustee to pay specified debts, was not proper party. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In suit by stockholders of an oil company, a joint-stock association, against trustees, alleging insolvency and misappropriation of trust funds, etc., and praying for appointment of receiver, held, that the association, while a property party, was not a necessary party. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

51. — **Suits by or against partnerships.**—Two of four partners, with whom another member, who had assumed indebtedness, had settled claim for contribution, held not necessary parties to suit against such assuming partner by fourth partner to recover difference between what he had paid and amount he was liable to contribute. *Chalk v. Collier* (Civ. App.) 208 S. W. 972.

52. — **Suits to cancel instruments or set aside sale.**—Transferee of purchase-money note is not necessary party to vendor's suit to cancel conveyance for fraud, as, if he has valid lien to secure note, and desires to foreclose it, judgment cannot affect his rights. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

Where all taxes due the state have been paid to it, it is not a necessary party to a suit by a former owner to set aside a tax judgment and sale thereunder. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

In a suit to set aside an execution sale, judgment could not be rendered requiring the sheriff to repay the money in his hands to the execution debtor, where he was not a party to the suit. *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

Where father and son executed an oil lease, the son owning an undivided interest, was an indispensable party to an action to cancel the lease on the ground that the land was the homestead of the parents. *McKay v. Phillips* (Civ. App.) 220 S. W. 176.

In action by maker of notes for fraud, and to cancel the notes, a bank in possession solely for collection, having no right or title, was not a proper party defendant. *Hutchinson v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864.

Where plaintiffs were induced by misrepresentations to convey lands, and the lands were exchanged for mineral rights, the ultimate grantee of such mineral rights is not a necessary party to an action for cancellation or damages for deceit. *Reeves v. Shook* (Civ. App.) 225 S. W. 429.

55. — Principal and agent.—In action against real estate agent to recover a deposit in a bank as earnest money on a sale of land, part by plaintiff and part by the agent, held that the owner of the land, as principal, was a necessary and proper party to the suit, and there was no error in rendering judgment against the owner, as well as the agent and the bank; but the judgment should provide that a payment to the plaintiff by the bank of the amount of the deposit should be in full satisfaction of the entire judgment. *Ballew & Huston v. Blakeny* (Civ. App.) 231 S. W. 495.

62. — Trial of right of property.—Where a chattel mortgagor had no interest in the crop covered by the mortgage, he is not a necessary party in foreclosure suit to issues raised by claimants of the crop as against the mortgagee who had seized it. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

A conveyance of part of the land by plaintiff pending a suit in trespass to try title did not abate the suit as to the land conveyed or make the grantee a necessary party to the litigation. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

64½. — Injunction suits in general.—Where tax board made improper valuation of railroad property and railroad sought injunction restraining assessment, but suit was dismissed and later railroad sought injunction solely against county attempting to enforce assessment, there was no fatal defect of parties. *Baker v. Druessedow* (Civ. App.) 197 S. W. 1043.

State tax board having certified its findings assessing railway property to various counties was not necessary party to suit to enjoin collection of taxes levied on their assessment, which was void and illegal. *Id.*

In taxpayer's suit to enjoin payment of monthly allowance to certain county officers, such officers were necessary parties. *Veltmann v. Slaton* (Civ. App.) 200 S. W. 539.

Contractors are indispensable parties to a suit by taxpayers to enjoin city making payment to the contractors, on the ground of invalidity of the contract; so, unless they are joined, the court should not proceed otherwise than to dismiss the suit. *Bonner v. City of Texarkana* (Civ. App.) 227 S. W. 505.

70. — Foreclosure proceedings.—Where the payee of vendor's lien notes indorsed without recourse to corporation as part payment for stock and left shares with corporation to secure payment, he was not a necessary party to subsequent foreclosure suit by corporation against maker. *Cattlemen's Trust Co. v. Cantrell* (Civ. App.) 196 S. W. 354.

Where deed from mortgagor, subsequent to execution of mortgage and prior to its foreclosure, was at once recorded, rights of parties holding under such deed could be divested in the foreclosure proceedings only if they were made parties. *Browne v. King* (Civ. App.) 196 S. W. 884.

In suit to foreclose mortgage at common law, it is unnecessary to make debtor a party where he has parted with his interest in property, unless personal judgment against him is sought and plaintiff may proceed against purchaser alone. *Hartfield v. Greber* (Com. App.) 207 S. W. 85.

Original contractor, payee of notes and beneficiary of mechanic's and builder's lien, who subsequently purchased property, assuming payment of notes, was not necessary party to proceedings to foreclose lien in sense that failure to make him party rendered foreclosure void. *Id.*

Where vendee sold land subject to incumbrances, he was neither a proper nor a necessary party to an action by the vendor to foreclose. *Rector v. Brown* (Civ. App.) 208 S. W. 702.

One purchasing land subject to a vendor's lien is not a necessary party to the foreclosure of the lien. *Howell v. Townsend* (Civ. App.) 217 S. W. 975.

The maker of a vendor's lien note who had transferred the property was a necessary party to a suit to foreclose, though a nonresident. *Spitzer v. Smith* (Civ. App.) 218 S. W. 599.

Where a corporation, dissolved by insolvency, which had transferred its assets to trustees for the benefit of creditors, had not parted with all interest in property against which foreclosure was sought, its representatives were necessary parties. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

Where notes payable to bearer secured by deed of trust were deposited with maker's creditor as security for debt, senior mortgagee with no actual notice thereof was not chargeable with constructive notice requiring it to make such creditor a party to foreclosure proceedings, though deed of trust was of record, and by inquiry it

could have ascertained such facts. *Masterson v. Ginnners' Mut. Underwriters' Ass'n of Texas* (Civ. App.) 222 S. W. 263.

71. **Interpleader.**—Bank, whose cashier's check for land sold by a divorced husband belonging to community was sued on by the wife after the husband's death, held to have the right, after it had been enjoined from paying the check to the husband's foreign executor, to place the money in the custody of the court, and notify the executor to appear and assert his claim, and thus relieve itself of further liability to the executor, if the court found the fund belonged to the wife. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

In an interpleader suit by a life insurance company against the executor of insured's estate and a third person claiming the proceeds of a life policy, payable "to the executors, administrators or assigns" the widow was not a necessary party. *Ætna Life Ins. Co. v. Osborne* (Civ. App.) 224 S. W. 815.

72. **Persons entitled to intervene and grounds of intervention**—In general.—Landowners may intervene in suit to enjoin location of road as adopted by district board though board has power to defend. *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644.

Discretion as to number allowed to intervene in proceeding affecting the general common interest, the number not materially adding to the costs, will not be interfered with. *Id.*

A city in suit by landowners to enjoin county officials from interfering with plaintiffs' possession of land may make itself a party and have the land in controversy adjudged part of a city street, and plaintiffs enjoined from interference with its use as such. *Feris v. Basset* (Civ. App.) 227 S. W. 233.

73. — **Interest in subject of action in general.**—See *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

Landowners and taxpayers in a road district are interested in the subject-matter of a suit, which is where a road shall be located, so as to be entitled to intervene. *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644.

76. — **Assignees.**—See *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

The buyer of purchase-money notes pending suit between the vendor and the purchaser can prosecute the suit in the name of the vendor without becoming a party thereto. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

80. **Application to intervene.**—Mechanic's lien defendant, who answered original petition, was bound to take notice of materialman's intervention. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

81. **Mode and form of intervention.**—In a proceeding for appointment of a receiver and administration of property of insolvent corporation, held, that creditor by a motion to vacate receivership and dismiss that part of proceeding thereby became a party. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Motion to vacate receivership which also raised issue of insolvency of corporation and right of court to administer its assets was in effect an intervention. *Id.*

Where plaintiff repurchased his cause of action and filed his petition after the original purchaser had filed suit thereon, objection that plaintiff had not made himself party to the suit is untenable. *Fleming v. Stringer* (Civ. App.) 225 S. W. 801.

82. **Status and rights and liabilities of interveners.**—Where intervener by plea resists plaintiff's alleged rights, in respect to pleading and proof she occupies position of defendant, and must be governed by rules applicable to defendants. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

Where one sued his employer for wages, and employer set up assignment to defendant, and defendant, who was also sued, appeared and filed the assignment, she thereby ratified the unauthorized act of another in giving notice of such assignment to the employer, and was bound thereby in an action by plaintiff for damages for discharge from employment by reason of such notice. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

83¹/₂. **Defects and grounds of objection to parties in general**—Necessity of objection.—No court should render a judgment or a decree, where it is apparent that all parties are not before it, and should itself raise the objection and refuse to proceed to judgment. *Barmore v. Darragh* (Civ. App.) 227 S. W. 522.

84. — **Time for objection.**—Nonjoinder of parties, presented for first time after judgment, will not support motion in arrest, but must be specially pleaded before trial. *Hale v. McKenzie* (Civ. App.) 198 S. W. 1004.

A plea of misjoinder of parties and causes of action, filed after the jury was impaneled, is too late. *Anderson v. Rich* (Civ. App.) 223 S. W. 540.

86. — **Want of capacity or interest.**—Plaintiff's authority to sue for the use and benefit of another cannot be raised by general demurrer, but only by plea in abatement. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

Objection that the widow, instead of the administrator of the deceased husband, was suing to recover lands which belonged to the community, and also constituted the homestead, should be raised by plea in abatement. *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

87. — **Nonjoinder of parties plaintiff.**—In action for trespass wherein plaintiff's co-owner should have been joined as a party, plaintiff in absence of a plea in abatement may recover in proportion to his interest. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

90. — **Misjoinder of parties defendant.**—In a suit to recover land, plaintiff cannot plead misjoinder of parties and causes of action as to defendants' cross-actions to recover the land after dismissing his petition, to which all of the cross-complainants except one were made defendants. *Anderson v. Rich* (Civ. App.) 223 S. W. 540.

91. — **Misnomer or misdescription.**—A misnomer of defendant can be taken advantage of only by plea in abatement, and cannot be urged for the first time on appeal. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

The misnomer of a corporation defendant has no different effect from the misnomer of an individual defendant, the misnomer of either which cannot mislead merely entitling defendant to abate the proceeding until the misnomer can be corrected. *Abilene Independent Telephone & Telegraph Co. v. Williams* (Sup.) 229 S. W. 847.

94. **Waiver of defects and objections—Nonjoinder of parties plaintiff.**—Defendant in partner's suit in individual capacity to recover partnership funds, who failed at proper time to have plaintiff's partner brought in as party, and his rights determined, waived nonjoinder of parties. *Hale v. McKenzie* (Civ. App.) 198 S. W. 1004.

96. — **Nonjoinder of parties defendant.**—Where defendant was sued as an individual and answered as such and went to trial, he waived his privilege to join other persons as parties defendant on the ground that they were partners and jointly liable. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

Allegations in an answer by one of several directors of an insolvent corporation, the others not being served, could not destroy the effect of allegations of plaintiff's petition which showed that all the directors were necessary parties. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

97. — **Misjoinder of parties defendant.**—Where plaintiff sued a partnership, which filed a cross-complaint against T., who in turn filed a cross-complaint against an elevator company, the latter's plea of misjoinder to the cross-action of the partnership held waived by its answer on the merits to the cross-complaint of T. *Wichita Mill & Elevator Co. v. Simpson* (Civ. App.) 227 S. W. 352.

CHAPTER SIX

PROCESS AND RETURNS

Art.	Art.
1850. Requisites of citation; when to issue.	1868. Same.
1852. Citation shall contain, what.	1869. Citation to defendants without the state.
1853. Defendant out of county to have copy of petition.	1870. By whom served.
1854. Citation where sheriff is a party.	1871. Service in such cases.
1856. Service of citation within the county.	1872. Return of service.
1857. Service without the county.	1873. Effect of such service.
1860. Against incorporated companies, etc.	1874. Citation by publication.
1861. Foreign corporations, how served.	1875. For unknown heirs or stockholders of defunct corporation.
1862. In suits against foreign corporations, cumulative mode.	1876. Citation by publications; requisites.
1862a. Service on foreign railway corporations.	1878. Return of citation by publication.
1862b. Same.	1880. Acceptance of service of process.
1863. Against partners.	1881. Entering appearance in open court.
1864. Return of citation.	1882. Answer constitutes appearance.
1866. Alias process.	1883. Motion constitutes appearance, when.
1867. Time of service of citation.	1885. No judgment without service.

Article 1850. [1212] [1213] Citation to issue, when.

Nature of citation.—The citation is the act of the court through its proper officer commanding the appearance of defendant at the time and place named to answer to plaintiff's petition, having the dignity of official character and weight of superior authority, while the petition alone bears neither verity nor authority. *Moran Oil & Gas Co. v. Anderson* (Civ. App.) 223 S. W. 1031.

When process "issued."—A process is not "issued" until it is sent forth from the clerk's office under his sanction and authority and given to an officer, or to some one else to give to an officer, for the purpose of being served. *Ferguson v. Estes & Alexander* (Civ. App.) 214 S. W. 465.

Effect of process.—A defendant, having been brought regularly into court by process, is in legal contemplation in court until the final disposition of the cause. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Art. 1852. [1214] [1215] Citation shall contain what.—Such citation shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside or be, and shall command him to

summon the defendant to appear and answer the plaintiff's petition at the next regular term of the court, stating the time and place of holding the same. It shall state the date of the filing of the plaintiff's petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall contain the requisites prescribed in article 2180; provided that where under the law it is necessary to accompany such citation with a certified copy of plaintiff's petition it shall not be necessary for the citation to state the nature of plaintiff's demand. [Acts 1854, p. 53, § 9; 1846, p. 363, § 10; 1866, p. 199, § 1; P. D. 1430-31; revision April, 1879; Acts 1919, 36th Leg., ch. 124, § 1, amending art. 1852, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

See *Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308.

Cited, *Carlton v. Miller*, 2 Civ. App. 619, 21 S. W. 697; *White v. Johnson*, 5 Civ. App. 480, 24 S. W. 568; *Milner v. Gatlin* (Civ. App.) 211 S. W. 617; *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Requisites and sufficiency in general.—Courts should not dismiss a suit by reason of the citation being fatally defective, but should continue the case, so that service might be perfected. *Farmers' State Bank of Merkel v. Briggs* (Civ. App.) 228 S. W. 267.

Indicating date of filing petition.—Under this article, citation stating petition was filed on certain day and month, "A. D. 191," is insufficient. *Sypert v. Rogers Lumber Co.* (Civ. App.) 201 S. W. 1102.

The provision of this article, requiring the citation to state the date of filing of plaintiff's petition, is mandatory, and a citation failing to give the date of the petition, or incorrectly stating the same, is insufficient to support a judgment by default. *National Ben Franklin Fire Ins. Co. v. Scott* (Civ. App.) 214 S. W. 604.

Indicating names of parties.—Under this article, service of citation, in action against residents of the county and residents of another county, had upon the latter, was insufficient to warrant judgment by default against them, where citation named none of defendants except one of resident guarantors. *Bridges v. Hollifield* (Civ. App.) 208 S. W. 756.

Garnishee process, see *Reed v. McCutcheon & Church* (Civ. App.) 217 S. W. 174; note to art. 276.

A citation, describing the action as one "wherein W. is plaintiff," but setting out in full plaintiff's petition showing action in his capacity as executor, held sufficient to support a default judgment for W. as executor. *Crutcher v. Williams* (Civ. App.) 217 S. W. 1115.

Under arts. 1850-1853, citations mentioning plaintiffs only as "E. J. Anderson et al.," held insufficient to support default judgment, though served with copies of plaintiffs' petition. *Moran Oil & Gas Co. v. Anderson* (Civ. App.) 223 S. W. 1031.

Indicating nature of plaintiff's suit or demand.—Under Rev. St. 1879, art. 1215, where plaintiff brought an action to recover land, and also made his grantor, M., a party defendant, praying that, in the event his title failed, he might have judgment against M. for the purchase money, a citation stating: "The nature of the plaintiff's demand is * * * for the title and possession of [describing the property,] for damages in the sum of \$500, for costs, and general relief" held insufficient as against M. *Miles v. Kinney* (Sup.) 8 S. W. 542.

A citation in an action on a note, and for foreclosure of a mortgage, which so states the nature of the demand, complies with Rev. St. 1879, art. 1215, though it describes the land as part of "section 19," while the petition, as filed, describes it as part of "quarter section 19." *Loungeway v. Hale*, 73 Tex. 495, 11 S. W. 537.

This article does not require setting out of detailed statement of cause of action. *Hoff v. Clark* (Civ. App.) 200 S. W. 431.

A citation, describing cause as "a suit on three promissory notes executed by J. in favor of the F. bank, aggregating the sum of \$4,731.65, deposit having been made in the bank of the same," held to sufficiently state the nature of the plaintiff's demand hereunder. *Farmers' State Bank of Merkel v. Briggs* (Civ. App.) 228 S. W. 267.

Under this article, the nature of the demand must be stated sufficiently in the citation to notify the defendant of the character of the demand made against him, and while the citation need not state the cause of action with the same particularity as the petition, it must correctly state the general nature of the plaintiff's demand. *Id.*

Mode of objection.—There being no defect in original citation to defendant, if he wished to take advantage of defect in copy, it should have been done by motion to quash supported by proof, and not by exception. *Schleicher v. Schmedt* (Civ. App.) 209 S. W. 185.

Art. 1853. [1215] [1216] Defendant out of county to have copy of petition.

See *Sanders v. City Nat. Bank* (Sup.) 12 S. W. 110; *Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308.

Art. 1854. [1216] [1217] Citation where sheriff is a party.

Service by deputy sheriff.—Where sheriff is a party, or interested, citation should be addressed to any constable and a citation served by a sheriff through his deputy, on either the sheriff or his codefendant, is erroneous, and will not support a judgment by default. *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330.

But where in suit against a sheriff and judgment creditor the judgment creditor objected only to the service on the sheriff by the deputy, objection that under this article sheriff could not serve his codefendant was waived. *Id.*

Art. 1856. [1218] [1219] Service of citation within the county.

Necessity of personal service.—That personal service of citation on defendant is difficult to obtain does not dispense with its necessity. *Gordon v. Reeder* (Civ. App.) 202 S. W. 983.

Copy to each defendant.—The return of an officer serving process is insufficient under Rev. St. 1879, art. 1219, unless it shows that a true copy thereof was delivered to each one of the several defendants named therein. *Rutherford v. Davenport* (App.) 16 S. W. 110.

Art. 1857. [1219] [1220] Service without the county.

See *Sanders v. City Nat. Bank* (Sup.) 12 S. W. 110.

Service of uncertified copy.—Under Rev. St. 1879, art. 1220, the return must show that the copy delivered to the defendants was certified, and it is not sufficient to state that "a copy of the petition" was delivered, though the citation recites that a certified copy accompanies the citation, and is to be served with it. *Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308.

Under this article, where the officer serving citation on a defendant who was temporarily residing without the county in which action was brought delivered to such defendant only an uncertified copy of the petition, and no copy of a supplemental petition, it was error to render judgment by default. *Lazarus v. Barrett*, 5 Civ. App. 5, 23 S. W. 822.

Art. 1860. [1222] [1223] Against incorporated companies and joint stock associations.

Service—Local agent.—Return of service of citation, in an action against an insurance company, which shows a delivery in person to its local agent of a true copy of the writ, is sufficient to show service upon the company. *United Mut. Fire Ins. Co. v. Talley* (Civ. App.) 211 S. W. 653.

Conclusiveness of return.—See *San Antonio & A. P. Ry. Co. v. Wells*, 3 Civ. App. 307, 23 S. W. 31; note to art. 1864.

Art. 1861. [1223] Foreign corporations, how served.—In any suit against a Foreign, Private or Public Corporation, Joint Stock Company or Association, or Acting Corporation or Association, citation or other process may be served on the President, Vice-President, Secretary or Treasurer, or General Manager, and in any such suit upon any cause of action arising within the State of Texas citation or other process may also be served upon any local or traveling agent, or traveling salesman, within the State, of such Corporation, Joint Stock Company or Association, or acting Corporation or Association. [Acts 1885, p. 79; Acts 1919, 36th Leg., ch. 115, § 1, amending art. 1861, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

Service—Local agent.—Foreign corporation held for purpose of citation within the state when plaintiff's cause of action for personal injury accrued, and never without it during the two years thereafter, in view of this article, so that under art. 5687, subd. 6, and art. 5702, action was barred; it at all times having local soliciting agents, on whose orders, when approved at the home office, it shipped. *Alley v. Bessemer Gas Engine Co.* (C. C. A.) 262 Fed. 94.

A "local agent," within this article, is one at a given place or within a district. *Id.* E., who had been furnished by a foreign insurance company with blank applications for insurance, supplied some to A., who solicited insurance from plaintiff, took his application, delivered a policy to plaintiff, and collected and paid over the premium. Held, that A. was the company's agent, within Gen. Laws Sp. Sess. 1879, p. 32, and service of summons on him in an action against the company was sufficient, under Rev. St. 1879, art. 1223. *Southern Ins. Co. of New Orleans v. Wolverton Hardware Co.* (Sup.) 19 S. W. 615.

Terms of commission contract with foreign corporation and the evidence adduced held to constitute corporation having the contract local agents, so that suit against foreign corporation was properly brought in county in which agents were located, as authorized by art. 1830, subd. 24, and art. 1861, though foreign corporation had main office in other county. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

If terms of contract constitute party local agent of foreign corporation, within art. 1830, subd. 24, stipulation of contract that agent has no authority to accept process, etc., is of no effect. *Id.*

Where the petition alleged a cause of action against a foreign fire insurance company having an agent in Texas, said agent being a partnership, a return reciting service of citation on one of the partners will not support a default judgment under this article, the return not affirmatively showing that partner served was a local agent. *National Ben Franklin Fire Ins. Co. v. Scott* (Civ. App.) 214 S. W. 604.

— **On general manager.**—Under art. 1830, par. 28, and arts. 1861, 1862, a foreign railroad corporation which maintained a general manager within the state, who by letter and telegram directed the movement of its trains in other states, and under whom there was a force of employes, is "doing business within the state." and service on such general manager is sufficient. *Atchison, T. & S. F. Ry. Co. v. Weeks* (D. C.) 248 Fed. 970.

Art. 1862. In suits against foreign corporations, cumulative mode.

See *Atchison, T. & S. F. Ry. Co. v. Weeks* (D. C.) 248 Fed. 970; notes to art. 1861.

Art. 1862a. Service on foreign railway corporations.—Service may be had on foreign railway corporations in addition to the means now provided by law by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations where one of said railway corporations is a foreign railway corporation and the other railway corporation is a domestic corporation, if said conductor handles and operates trains over such foreign and domestic corporations' tracks across the State line of Texas, and on the track of the domestic corporation within the State of Texas, or upon any agent who has an office in Texas who sells tickets or makes contracts for the transportation of passengers or property over any line of railway, or part thereof, of such foreign railway corporation or company. [Acts 1919, 36th Leg., ch. 156, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 1862b. Same.—For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains and employed by a foreign railway corporation and a domestic corporation, and who operate such trains across the State line of Texas, and agents engaged in the selling of tickets or making contracts for the transportation of property, as described in Section 1 of this Act [Art. 1862a], are hereby designated as agents of such foreign railway corporations or companies upon whom citation may be had. [*Id.*, § 2.]

Art. 1863. [1224] [1224] Against partners.

See *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Moran Oil & Gas Co. v. Anderson* (Civ. App.) 223 S. W. 1031.

Art. 1864. [1225] [1225] Return of citation.

Manner of service—Parties served.—Sheriff's return reciting service on "Jack Reed also known as Jack Reeves," notwithstanding the presumption that service was made on the person named in sheriff's return, is not a sufficient showing that Jack Reed was the person intended to be sued. *Reed v. McCutcheon & Church* (Civ. App.) 217 S. W. 174.

Conclusiveness of return and impeachment thereof.—Where the sheriff makes return that a citation, which directed him to serve a corporation, was served on the secretary thereof, in accordance with Rev. St. 1879, art. 1223, further proof that the person served was the secretary is not necessary, before judgment by default. *San Antonio & A. P. Ry. Co. v. Wells*, 3 Civ. App. 307, 23 S. W. 31.

Party's testimony that he was not served and testimony of his wife that she did not know, but that papers were left for him which she did not know whether he saw or not, held insufficient to overcome return. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Evidence must be clear and satisfactory to impeach officer's return. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

Failure to identify defendant as party served with citation would not furnish such corroboration of her denial of service as to make it clear, satisfactory, and convincing that she was not served. *Id.*

In a suit to set aside a tax judgment and proceedings thereunder, evidence held to corroborate plaintiff's testimony that no citation or process in the tax suit had ever

been served on her notwithstanding the recitals of the return. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

Corroborating evidence to impeach the return of a citation must be from other sources than from the witness who requires corroboration. *Id.*

Number of witnesses.—Two witnesses are required to set aside a deputy sheriff's return on a service of citation, or one witness corroborated by strong, clear, and satisfactory circumstances. *McBride v. Kaulbach* (Civ. App.) 207 S. W. 576; *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

Return cannot be impeached by oath against oath. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

The testimony of the officer must be met by the oath of two witnesses, or of at least one with strong corroborating circumstances, but such rule is not to be applied so as to deprive a person of the right to have the jury pass on the credibility of witnesses. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

Art. 1866. [1227] [1227] Alias process.

To another county.—Under Rev. St. 1879, art. 1227, where the return to a citation was that defendant was not found, and plaintiff filed a "suggestion to the clerk," asking that citation issue to another county, the clerk had authority to issue an alias citation to such county without leave of court, and a copy of the "suggestion" needed not to be served with the copy of the petition. *Gillmour v. Ford* (Sup.) 19 S. W. 442.

Art. 1867. [1228] [1228] Time of service of citation.

See *Guerra v. Guerra* (Civ. App.) 213 S. W. 360; notes to art. 1850.

Service after return day.—Under Rev. St. 1879, art. 1228, a service after the return day is a nullity, and a judgment by default thereon is erroneous. *Harrington v. Harrington* (App.) 16 S. W. 538.

Art. 1868. [1229] [1229] Same.

Service after return day.—In view of this article, default judgment granting divorce was erroneous, where notice to serve wife as nonresident was issued November 24th, returnable the 27th, but was not delivered to her until December 5th. *Sparkman v. Sparkman* (Civ. App.) 209 S. W. 252.

Art. 1869. [1230] [1230] Citation to defendant without state.—

Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding court, naming such time and place. Its style shall be, "The State of Texas," and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties and shall state that a copy of the plaintiff's petition accompanies the notice, but such notice shall not be required to state plaintiff's cause of action. It shall be dated and filed, and attested by the clerk, with the seal of the court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice. [Acts 1875, p. 170, § 2; Acts 1919, 36th Leg., ch. 136, § 1, amending art. 1869, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

Cited, *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *London Assur. Corporation v. Lee*, 66 Tex. 247, 18 S. W. 508; *Thomson v. Shackelford*, 6 Civ. App. 121, 24 S. W. 980; *Milner v. Gatlin* (Civ. App.) 211 S. W. 617.

Constitutionality.—Arts. 1869-1873, are not violative of due process of law clauses of the federal and state Constitutions, so far as they authorize the rendition of a personal judgment against a citizen of the state upon personal service of process upon him while temporarily absent from the state. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

Construed, how.—Statutes authorizing constructive service of citation are strictly construed. *Gordon v. Reeder* (Civ. App.) 202 S. W. 983.

Must be addressed to whom.—Under this article, a writ issued to sheriff directing him to summon defendant is void, and handing such writ to defendant outside state confers no jurisdiction. *Givens v. Givens* (Civ. App.) 195 S. W. 877.

Contents of notice.—Judgment against nonresident secured by attaching property within state and serving process under this article, is not invalid because notice or citation did not show that defendant's property had been attached. *Mann v. Brown* (Civ. App.) 201 S. W. 438.

An attachment lien on land of a nonresident defendant, duly served personally by notice as provided by statute, can be foreclosed, though the defendant was not informed

by the nonresident notice served on him that foreclosure was sought. *Lane v. First Nat. Bank* (Civ. App.) 216 S. W. 490.

Waiver of objections.—Defendants, non-residents, were served with notice of suit as provided by Rev. St. 1879, arts. 1230, 1231, and moved to quash the writ for defects appearing upon the face of the notice and in the manner of the service, but did not impeach the validity of such notice. Held that, having it in their power to set up several objections to the process with the view to abating it, they, in effect, abandoned all objections not alleged, and the invalidity of the notice could not be thereafter urged. *Feibleman v. Edmonds*, 69 Tex. 334, 6 S. W. 417.

Judgment.—See *Barnett v. Rayburn* (App.) 16 S. W. 537; *Mann v. Brown* (Civ. App.) 201 S. W. 438; notes to art. 1873.

Art. 1870. [1231] [1231] By whom served.

See *Becker v. Becker* (Civ. App.) 218 S. W. 542. Cited. *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *London Assur. Corp. v. Lee*, 66 Tex. 247, 18 S. W. 508; *Thomson v. Shackelford*, 6 Civ. App. 121, 24 S. W. 980.

Waiver of objections.—See *Feibleman v. Edmonds*, 69 Tex. 334, 6 S. W. 417; notes to art. 1869.

Art. 1871. [1232] [1232] Service in such cases.

See *Becker v. Becker* (Civ. App.) 218 S. W. 542. Cited. *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *London Assur. Corporation v. Lee*, 66 Tex. 247, 18 S. W. 508; *Thomson v. Shackelford*, 6 Civ. App. 121, 24 S. W. 980.

Art. 1872. [1233] [1233] Return of such service.

See *Becker v. Becker* (Civ. App.) 218 S. W. 542. Cited. *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *London Assur. Corporation v. Lee*, 66 Tex. 247, 18 S. W. 508; *Thomson v. Shackelford*, 6 Civ. App. 121, 24 S. W. 980.

Art. 1873. [1234] [1234] Effect of such service.

See *Becker v. Becker* (Civ. App.) 218 S. W. 542. Cited. *London Assur. Corporation v. Lee*, 66 Tex. 247, 18 S. W. 508.

Effect of service in general.—Where the property of a non-resident is attached, and service had on him, at his residence in the manner provided by Rev. St. 1879, art. 1230 et seq., and he appears and pleads want of jurisdiction, the court has power to enter judgment against and order execution to be levied on the property attached. *Barnett v. Rayburn* (App.) 16 S. W. 537.

Where nonresident's property has been attached and process served under this article, resulting lien and sale is unaffected by fact that judgment was rendered by default. *Mann v. Brown* (Civ. App.) 201 S. W. 438.

Personal judgment.—Attaching nonresident's property and serving process upon him under this article, confers jurisdiction to satisfy plaintiff's demand by selling attached property, but not to enter personal judgment. *Mann v. Brown* (Civ. App.) 201 S. W. 438.

Art. 1874. [1235] [1235] Citation by publication.—Where any party to a suit, his agent or attorney, shall make oath at the time of the institution of such suit, or at any time during its progress that any party defendant therein is a non-resident of the State, or that he is absent from the State, or that he is a transient person, or that his residence is unknown to affiant, the clerk shall issue a citation for such defendant, addressed to the sheriff or any constable of the county in which such suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of such citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for four consecutive weeks previous to the return day thereof. [Acts 1848, p. 106, § 13; Acts 1875, p. 170, § 1; Acts 1879, ch. 96, p. 103; P. D. 25; Acts 1917, 35th Leg., ch. 13, § 1; Acts 1919, 36th Leg., ch. 109, § 1, amending art. 1874, Rev. Civ. St. 1911.]

In general.—Where plaintiff, before case was finally called for trial, ascertained he was unable to get personal service on nonresident defendants not served, it was his duty to proceed within reasonable time to procure service by publication. *Cain v. Wharton* (Civ. App.) 196 S. W. 962.

Service by publication as on a transient person gives the court no jurisdiction over her person, unless she is in fact a transient. *Gordon v. Reeder* (Civ. App.) 202 S. W. 983.

That suit for delinquent taxes was against the nonresident owner and his unknown heirs, the petition specifically reciting the suit was brought pursuant to Acts 24th Leg. c. 42, relating to the collection of delinquent taxes, did not bring it within arts. 1874, 1875, as to service of citation, instead of art. 7698. *Rousset v. Settegast* (Civ. App.) 210 S. W. 219.

Must be strictly followed.—Statutes authorizing constructive service of citation are strictly construed. *Gordon v. Reeder* (Civ. App.) 202 S. W. 983.

Statement of cause of action—In general.—A citation published in an action to foreclose a lien on notes, accounts, contracts, etc., should, under this article, contain such a description of the collateral as is necessary to identify it. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

Description of the collateral as "certain notes, accounts, contracts for the sale of merchandise and choses of action assigned, transferred, and sold to her (the plaintiff) by L. P. Co.," held insufficient. *Id.*

Affidavit.—An erring wife, by leaving her husband, cannot fix his domicile at the place of her own residence, to enable her, after removal to a foreign state, to make accurate affidavit of his residence there in her divorce suit, based on substituted service. *Richmond v. Sangster* (Civ. App.) 217 S. W. 723.

An unverified petition for the foreclosure of a lien for street improvements, not accompanied by an affidavit, does not authorize service of unknown owners of the property by publication, under this article, as amended by Acts 1917, c. 13. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

"Transient person."—Woman who had no fixed place of residence, but lived around over state with her three or four children, though she could not call either of her children's homes her own, was not a "transient person" within this article. *Gordon v. Reeder* (Civ. App.) 202 S. W. 983.

Will not sustain personal judgment.—A personal default judgment rendered against a nonresident served by publication is void. *Reed v. First State Bank of Purdon* (Civ. App.) 211 S. W. 333.

Art. 1875. [1236] [1236] For unknown heirs or stockholders of defunct corporation.—Where any property of any kind in this State may have been granted or may have accrued to the heirs as such, of any deceased person, or to the stockholders of any defunct corporation, any party having a claim or cause of action against them relative to such property, if their names be unknown to him, may bring his suit or action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him or unknown stockholder of such corporation and if the plaintiff, his agent, or attorney shall make oath at the time of the institution of such suit, or at any time during its progress that the names of such heirs or stockholders are unknown to the affiant, the clerk shall issue a citation for such heirs or stockholders, addressed to the sheriff or any constable of the county in which such suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of such citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for four consecutive weeks previous to the return day thereof. Provided that in cases of citation by publication as provided for in this and in the foregoing articles, it shall not be necessary to state in the citation the details and particulars of the cause of action; provided that in suits by publication involving land it shall be sufficient in making the brief statement of the cause of action in such citations to state the kind of suit, the number of acres of land involved in the suit, or the number of the lot and block of any other plat description that may be of record if the land is situated in a city or town, the survey on which the land is situated, the county in which said land is situated, and the special pleas, if any, which are relied upon in such suit. [Acts 1866, p. 125, § 1; Acts 1848, p. 106, § 26; P. D. 5460, 26; Acts 1917, 35th Leg., ch. 13, §

2; Acts 1919, 36th Leg., ch. 109, § 2, amending Art. 1875, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

See *Rousset v. Settegast* (Civ. App.) 210 S. W. 219; notes to art. 1874.

Cited, *Carlton v. Miller*, 2 Civ. App. 619, 21 S. W. 697.

Presumption as to appearance.—Where plaintiff made unknown heirs parties defendant, as provided by this article, it must be presumed on appeal that unknown heirs appeared and answered where attorney signed answer as answer of all defendants and court did not appoint an attorney ad litem to represent unknown heirs, as required by article 1941. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Conclusiveness of judgment.—In an action against the heirs of a deceased person by one having a claim against them relative to such property, under 2 Pasch. Dig. art. 5460, a judgment for plaintiff concludes all who claim by inheritance in the succession of the deceased, whether inheriting immediately from him or as successors of those so inheriting. *Sloan v. Thompson*, 4 Civ. App. 419, 23 S. W. 613.

Art. 1876. [1237] [1237] Citation by publication to contain same requisites as other writs.

Cited, *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072.

Art. 1878. [1238] [1238] Return of citation by publication.

Showing manner of service.—Where there were two citations in the record, but it did not appear in the officer's return nor in the certificate of the printer, in what county the citation was published, nor in the return that publication was made on the date stated by the printer, the return was insufficient to confer jurisdiction under this article. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

Art. 1880. [1240] [1240] Acceptance of service of process.

Cited, *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

Acceptance and waiver—Failure to object.—Failure to notify defendant of an intervention is waived, where not raised until after trial. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

— **Effect.**—Where divorce was granted at a special term, on defendant husband's appearance, reciting he agreed "that this cause may be taken up at any time for trial," was filed, without laying over 10 days, but on the day of its filing, and at plaintiff's instance, plaintiff could not, on the ground of collusion in procuring the decree by default or the lack of jurisdiction of the court, set the divorce aside notwithstanding arts. 1880, 1867, 4633; for art. 1714, excepting divorce cases from those may be tried in vacation, does not except them from being tried at special term under art. 1720. *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Art. 1881. [1241] [1241] Entering appearance in open court.

What constitutes appearance and effect thereof in general.—A motion by a defendant for an order requiring plaintiff to give security for costs constitutes a voluntary appearance by defendant, and is a waiver of any defect in the service of citation on him. *St. Louis & S. F. R. Co. v. Hale*, 109 Tex. 251, 206 S. W. 75.

In an action to disbar an attorney, appearance in court was a waiver of any defects in the service. *Lotto v. State* (Civ. App.) 208 S. W. 563.

Where a person sui juris appeared, answered, and pressed his interest in a suit concerning title to land, it was wholly immaterial whether or not citation had ever been served upon him. *Cunningham v. Cunningham* (Civ. App.) 227 S. W. 221.

Plea of privilege.—Under art. 1903, as amended by Acts 35th Leg., c. 176, and in view of arts. 1832 and 1833, and notwithstanding art. 1910, defendant, after filing plea of privilege, is not required to appear until he receives notice of a contest and of order setting a day for hearing; the filing of plea being appearance for purpose of plea. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

Continuance.—A motion to continue constitutes a general appearance. *Republic Oil & Gas Co. v. Owen* (Civ. App.) 210 S. W. 319.

Plea to jurisdiction.—Since all defensive pleadings are styled the "answer," a special plea to the jurisdiction, filed by a nonresident, is a sufficient appearance to confer jurisdiction under Rev. St. 1879, art. 1242. (*York v. State*, 73 Tex. 657, 11 S. W. 869, followed.) *N. K. Fairbanks Co. v. Blum*, 2 Civ. App. 479, 21 S. W. 1009.

Special appearance is unknown to Texas practice, and filing by a defendant of any defensive pleading, as a plea of privilege, and later an answer, though only to challenge jurisdiction, constitutes appearance and submission to jurisdiction of forum. *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921; *Same v. Ayers*, 109 Tex. 270, 206 S. W. 922.

The court does not acquire jurisdiction over the person of a defendant by his appearance for the purpose alone of questioning the jurisdiction. *Schleicher v. Schmedt* (Civ. App.) 209 S. W. 185.

Voluntary appearance of defendant foreign corporation to attack the court's jurisdiction constituted an appearance subjecting its person to the jurisdiction of the court. *Roberts v. Stewart Farm Mortgage Co.* (Civ. App.) 226 S. W. 1108.

General appearance.—A "general appearance" is entered whenever defendant invokes the judgment of the court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by previous rulings sustaining the jurisdiction. *St. Louis & S. F. R. Co. v. Hale*, 109 Tex. 251, 206 S. W. 75.

Art. 1882. [1242] [1242] Answer constitutes appearance.

See *Ætna Life Ins. Co. v. Hanna*, 81 Tex. 487, 17 S. W. 35.

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

In general.—See *N. K. Fairbanks Co. v. Blum*, 2 Civ. App. 479, 21 S. W. 1009; notes to art. 1881.

Where defendant appeared and answered, judgment against him will not be set aside because no citation was served upon him. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

Where, in injunction suit, defendant filed an answer to the entire petition, in obedience to a notice of the court, both parties thereafter appearing before the judge in chambers, who heard the evidence and refused the temporary writ, such answer constituted an "appearance," under this article, rendering unnecessary the issuance of a citation, as required by article 4662, where not dispensed with by art. 4652. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

A defendant, who appeared by an attorney and filed an answer to a cross-action, thereby made an appearance for all purposes, and it was not necessary for plaintiff to serve him with citation, although petition was not served upon him. *Hickman v. Swain* (Civ. App.) 210 S. W. 548.

A party who appeared and filed an answer submitted herself to the jurisdiction of the court. *Walker v. Goetz* (Civ. App.) 218 S. W. 569.

By filing a general answer defendant waived the issuance and service of citation and voluntarily submitted himself to the jurisdiction of the court, and was bound by any judgment thereafter rendered. *Hines v. Mills* (Civ. App.) 218 S. W. 777.

Answer by nonresident.—In action by decedent's creditor against nonresident administrator, heirs, and heirs' grantees, to foreclose creditor's lien under arts. 3391, 3456, on land that had vested in the heirs under art. 3235, and had been sold by heirs to grantees, where there was no other creditor and no heirs not parties to such action, administrator, heirs, and grantees, by filing answers, subjected themselves to the jurisdiction of the court, and waived all pleas of privilege or venue. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

Failure to defend.—Mechanic's lien defendant cannot destroy court's jurisdiction, which had attached to him, by leaving state and instructing his attorney to make no further defense. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

Art. 1883. [1243] [1243] Motion constitutes appearance, when.

See *Republic Oil & Gas Co. v. Owen* (Civ. App.) 210 S. W. 319.

Motion as appearance.—Under Rev. St. 1879, art. 1243, when a motion to quash a defective citation is passed to another term, without action on the part of the court, the defendant will be treated as having appeared at the next term after the motion was made. *Felbleman v. Edmonds*, 69 Tex. 334, 6 S. W. 417.

Hereunder a plea to the jurisdiction may be filed at succeeding term by a defendant who appeared at the prior term to set aside a default judgment rendered on insufficient service. *Atchison, T. & S. F. Ry. Co. v. Adams* (App.) 14 S. W. 1015.

Under arts. 1883, 1936, 1938, held that the trial court did not err in hearing proof on a writ of inquiry and rendering judgment instead of permitting defendant to file answer and introduce testimony on the merits, as though no default judgment had been rendered. *Mach v. Wofford* (Civ. App.) 223 S. W. 275.

Art. 1885. [1245] [1245] No judgment without service of process, etc.

Process to sustain judgment—Necessity of process.—Where attorney purporting to act for party in arranging compromise judgment was not in fact his attorney and person for whom he purported to act was never served with citation, and never appeared, judgment against him will be set aside, irrespective of fraud. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245.

Where sheriff's return of "Not found" affirmatively showed a defendant was not served with citation, judgment against him was unauthorized. *Holland v. Wood* (Civ. App.) 196 S. W. 309.

A judgment rendered without service of process is void, though the return shows legal service, and the judgment recites legal service, whether or not plaintiff was guilty of fraud or collusion in procuring a false return. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Judgment against plaintiff on cross-bill, supported by judgment record silent on question of service on plaintiff or his appearance, is not nullity. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

Plea in reconvention or a cross-bill held a suit within this article. *Jarratt v. McCarty* (Civ. App.) 209 S. W. 712.

Where plaintiff fails to appear without notice of defendant's cross-action, defendant was not entitled to judgment on the cross-action, but merely to dismissal of the suit for want of prosecution, since plaintiff was not required to take cognizance of an in-

dependent claim asserted as a matter of convenience. *Commercial Credit Co. v. Wilson* (Civ. App.) 219 S. W. 298.

The court is without jurisdiction to render judgment against one party in favor of another without a pleading filed as a basis in favor of such party, with process duly served upon him, such judgment being a nullity. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

Judgment cannot be entered in favor of a nonresident defendant who has not been served with process. *Fleming v. Stringer* (Civ. App.) 225 S. W. 801.

In trespass to try title, judgment granting affirmative relief on defendant's answer and cross-action filed on the day of the trial without notice to plaintiff, where defendant by cross-bill set up title himself, and plaintiff did not appear on the day of the trial, was invalid. *McGowan v. Lowry* (Civ. App.) 230 S. W. 465.

— **Sufficiency.**—Where original petition in suit to foreclose vendor's lien did not ask for personal judgment against defendant, and there was no personal service after amendment, there could be no personal judgment. *Henson v. C. C. Slaughter Co.* (Civ. App.) 206 S. W. 375.

Within this article, citation on the original petition is sufficient to authorize judgment on amended petition, not changing cause of action, filed after reversal and remand. *Williamson v. Cayo* (Civ. App.) 211 S. W. 795.

CHAPTER SEVEN

ABATEMENT AND DISCONTINUANCE OF SUIT

Art.	Art.
1886. Suit not to abate where plaintiff dies, if, etc.	1896. When some defendants not served.
1888. Death of defendant.	1897. Discontinuance as to principal obligor.
1891. Death between verdict and judgment.	1898. Discontinuance in vacation.
1893. Marriage of defendant feme sole.	1899. As to defendant served.
1894. Suit to the use of another.	

Article 1886. [1246] [1246] Suit not to abate where plaintiff dies, if, etc.

Actions which survive.—The right of action accruing to one employed in interstate commerce by reason of violation of federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8623) is not extinguished by the death of the injured servant, and survives to his personal representative by virtue of Act April 22, 1908, § 9 (U. S. Comp. St. § 8665). *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Sup.) 232 S. W. 494.

Art. 1888. [1248] [1248] Death of defendant.

Abatement in general.—Suit abates on death of the defendant, and cannot be prosecuted further without the substitution of a personal representative. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

Heir can be made party, when.—The words "in a proper case," as to revival against heirs, mean where there is no administration and no necessity for any, or where it would be legally impossible to have an administration. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Actions which survive.—An attachment does not abate, nor is its lien lost, by defendant's death, after the levy of the writ, and before the rendition of judgment, under Rev. St. 1879, arts. 179, 1248. *Rogers v. Burbridge*, 5 Civ. App. 67, 24 S. W. 300.

Revival of judgment.—See *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 633; notes to art. 1994.

Art. 1891. [1251] [1251] Death between verdict and judgment.

Death before final judgment.—Where husband for whom interlocutory divorce judgment had been rendered died before entry of final judgment but after expiration of the year he was required to wait before final judgment could be entered, the final judgment where not entered nunc pro tunc had no validity as a judgment. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

Art. 1893. [1253] [1253] Marriage of defendant feme sole.

Husband necessary party.—Where a feme sole is sued, but marries while the suit is pending and before judgment rendered the husband must be impleaded as a defendant under this article, before an effective judgment can be rendered, a requirement not affected by Acts of 1913, c. 32, enlarging the rights of married women; the burden to see that the requirement is met being on plaintiff. *Powell v. Dyer* (Civ. App.) 237 S. W. 731.

Art. 1894. [1254] [1254] Suit to the use of another.

Right to sue for another's use.—Although plaintiff's son-in-law was a necessary party to the suit, yet in view of this article, this requirement would be met if it were proper for plaintiff to conduct the suit for the use and benefit of his son-in-law. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

— **Objections.**—Plaintiff's authority to sue for the use and benefit of another cannot be raised by general demurrer, but only by plea in abatement. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

Art. 1896. [1256] [1256] Where some of defendants not served.

Cited, *Keeseey v. Old*, 82 Tex. 22, 17 S. W. 928; *McGowan v. Lowry* (Civ. App.) 230 S. W. 465.

Dismissal as to party not served.—In a suit on a forfeited recognizance, the state may dismiss as to a surety who has not been cited and proceed to judgment against the principal and the other surety, under Rev. St. 1879, art. 1256, though diligence has not been used to obtain service. *Pleasants v. State*, 29 Tex. App. 214, 15 S. W. 43.

In an action against one not in the state and who was not personally served, evidence held to show that he was a resident of New York, and so the action was properly dismissed as to him. *Prince Line, Limited, of Newcastle, England, v. Steger* (Civ. App.) 210 S. W. 223.

Art. 1897. [1257] [1257] Discontinuance as to principal obligor.

Cited, *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

In general.—In a suit on an alleged contract for defending C. who did not join in the contract, but allowed his official position to be used by his co-defendants to test the question of removal of a county-seat, C. was not the principal obligor within the meaning of Rev. St. 1879, art. 1257. *Keeseey v. Old*, 82 Tex. 22, 17 S. W. 928.

Under arts. 1842 and 1897, a judgment cannot ordinarily be had against a person secondarily liable until a judgment is had against the principal obligor. *Snyder v. Slaughter* (Civ. App.) 208 S. W. 974.

Where action to foreclose chattel mortgage was brought against mortgagor and purchasers of the mortgaged property, but dismissed as to the mortgagor, who had not been served with citation, as the parties were not sued as joint obligors upon a contract, this article had no application. *Smith v. Wall* (Civ. App.) 230 S. W. 759.

Pleading.—Under arts. 1842, 1897, plea by principal of bond, contractor for building, which will release him if established, will also release sureties. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Under arts. 1842, 1897, plea by principal of bond, contractor for building, which will release him, will also inure to sureties' benefit whether or not urged in separate plea. *Id.*

Art. 1898. [1258] [1258] Discontinuance in vacation.

See *E. H. Bruyere Const. Co. v. Bewley* (Civ. App.) 229 S. W. 610.

Cited, *Keeseey v. Old*, 82 Tex. 22, 17 S. W. 928.

Art. 1899. [1259] [1259] Discontinuance as to defendants served, etc.

See *Schmick v. Noel*, 72 Tex. 1, 8 S. W. 83.

In general.—Under Rev. St. 1879, art. 1259, in a suit against C. and others on a contract to defend a suit against one who was not a party to the contract, but allowed his name to be used, the dismissal as to C. was proper; it not being shown that his co-defendants were thereby injured. *Keeseey v. Old*, 82 Tex. 22, 17 S. W. 928.

Error is not shown by the fact that, after verdict was returned in favor of plaintiff, he was permitted to dismiss as to one of the defendants as to whom the jury made no finding, where such defendant was disposed of by the judgment. *Buchanan v. Gribble* (Civ. App.) 216 S. W. 899.

In an action for conversion brought against a partner by former partners, a defendant who had never been a member of the partnership and had no interest in the controversy was properly dismissed. *Christian-Holmes Cedar Co. v. Dewees Cedar Co.* (Civ. App.) 221 S. W. 681.

Plaintiffs had the right to dismiss from their suit two parties not shown by the bill of exceptions to have had any interest, and defendants had no right to interfere to prevent such dismissal. *Prairie Oil & Gas Co. v. State* (Civ. App.) 229 S. W. 585.

Where the court had indicated that he would allow the plea of special privilege of one defendant, but not of another, plaintiff could, before the decision, dismiss as to the one whose plea was to be allowed. *First Nat. Bank of Jacksonville v. Childs* (Civ. App.) 231 S. W. 807.

DECISIONS RELATING TO SUBJECT IN GENERAL

Discontinuance in general.—Common-law rule that if plaintiff leave "chasm" in prosecution of his suit it was discontinued by operation of law has been abrogated in this state. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

Grounds of abatement.—Where action is brought in Texas on a judgment rendered in Indiana, from which an appeal is pending, and the right to sue thereon in Indiana is not shown, the action is governed in that respect by the laws of Texas. *Van Natta v. Van Natta* (Civ. App.) 200 S. W. 907.

Though the President, as a war measure, pursuant to Act Cong. Aug. 29, 1916, § 1 (U. S. Comp. St. § 1974a), assumed control of the railroads, such control is no ground for the abatement of suits on causes of action accruing before governmental operation. *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.) 216 S. W. 444.

Failure or refusal to submit to examination after loss does not bar recovery, but merely suspends the right of recovery until the condition of examination is complied with; and is therefore to be pleaded in abatement, and not in bar, and, if the plea be sustained, its only effect is dismissal of suit as prematurely brought. *Humphrey v. National Fire Ins. Co. of Hartford, Conn.*, (Com. App.) 231 S. W. 750.

— **Transfer of cause of action.**—A conveyance of part of the land by plaintiff pending a suit in trespass to try title did not abate the suit as to the land conveyed. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

— **Dissolution of corporation.**—Dissolution of a corporation under arts. 1206-1208, did not abate a suit pending against the corporation, or deprive the court of power to render judgment. *Butcher v. J. I. Case Threshing Mach. Co.* (Civ. App.) 207 S. W. 980.

— **Another action pending.**—A prior pending suit to enjoin further transfer of a note in hands of bank and for cancellation of such note will abate action by bank upon note. *Camp v. First Nat. Bank* (Civ. App.) 195 S. W. 217.

A prior suit pending between same parties involving same cause of action, when interposed by a plea in abatement in proper form, will abate subsequent suit, where facts are undisputed. *Id.*

Plea of another action pending is not available where plaintiff in one suit is defendant in other, and defendant in one is plaintiff in other. *McCoy v. Bankers' Trust Co.* (Civ. App.) 200 S. W. 1138.

Where defendant upon his plea of another suit pending did not sustain the burden of proving that he filed his amendment, making plaintiff a party at an earlier hour than plaintiff's suit was filed on the same day, his plea was properly overruled. *Bragg v. Bragg* (Civ. App.) 202 S. W. 992.

Trespass to try title to section 18, depending on whether L. got title by sale under judgment in suit to foreclose lien erroneously naming section 18, is not abated by pendency of suit to set aside the judgment, and for reformation and foreclosure on the proper land. *Anderson v. Lockhart* (Civ. App.) 209 S. W. 218.

The pendency of a prior suit between the same parties and involving the same subject-matter does not necessarily deprive another court of equal dignity and jurisdiction of the power to try a case, though commenced after the institution of a former suit, though comity requires court in subsequent action to sustain a plea in abatement presented before court has tried the case. *Phillips v. Phillips* (Civ. App.) 223 S. W. 243.

When plea of abatement is urged on ground of pendency of another suit in another court, plaintiff is required to elect which suit he will prosecute, and if he fails to do so the court will dismiss the suit in which the plea is filed. *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

The buyer's action for breaching a threshing machine sales contract cannot be pleaded in abatement against seller's action on purchase-money notes and to foreclose chattel mortgages securing them. *Blume v. J. I. Case Threshing Mach. Co.* (Civ. App.) 225 S. W. 831.

Where purchaser brought suit for cancellation of vendor's lien notes for fraud, the vendor, though he could seek recovery on the notes by cross-action in the same suit, can also bring an independent suit to recover on the notes in the district in which they are payable. *Spark v. Lasater* (Civ. App.) 232 S. W. 345.

Involuntary dismissal.—Where a plaintiff fails to appear in person or by attorney, and there is no cross-action the only judgment which should be rendered is one dismissing for want of prosecution, and court cannot render judgment on the merits. *American Surety Co. v. Thach* (Civ. App.) 213 S. W. 314; *Scarborough v. Ward* (Civ. App.) 219 S. W. 505; *Parr v. Chittim* (Com. App.) 231 S. W. 1079.

Motion to dismiss for want of prosecution after allowance of change of venue is addressed to discretion of trial court. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

Where plaintiff, suing to set aside judgment, took no action since early in January, 1913, to procure service by publication on nonresident defendants not served, and case was not finally called for trial till January term, 1916, court did not abuse discretion in dismissing for want of prosecution. *Cain v. Wharton* (Civ. App.) 196 S. W. 952.

In action against alleged joint-stock company when plea in abatement for lack of service on the officers was sustained, in the absence of showing that plaintiffs declined to make further efforts to procure service, it was error to dismiss the cause. *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

Where the court on a plea in abatement dismissed the petition on the ground that the corporation sought to be dissolved was at least a de facto corporation, the fact that plaintiffs who had failed to serve officers of company failed to ask for time in which to complete service, did not bar them from asking on appeal that the case be reversed for failure to allow such time. *Id.*

Where, after the court held that plaintiff could prove damages that accrued under some of the paragraphs of the petition, plaintiff announced he would offer no evidence, that was an abandonment of the case, authorizing a judgment of dismissal in-

stead of a judgment for defendant on the merits. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 209 S. W. 186.

Although inference might be drawn from preliminary recitals in an order that court intended to dismiss as to all parties, yet order would not effect a dismissal as to defendants whose names were omitted in decree of dismissal proper; names of other defendants being given. *Hickman v. Swain* (Civ. App.) 210 S. W. 548.

Where, on vacating a judgment rendered at a former term in a partition suit, for fraud or mistake owing to defect of parties, by a bill of review, the plaintiffs were given an opportunity to make proper parties and to secure and introduce their evidence, but refused to do so, the cause was properly dismissed. *Farrias v. Delgado* (Civ. App.) 210 S. W. 610.

Notwithstanding art. 1944, a suit in which there is no pleading for affirmative relief by defendants should be dismissed for want of prosecution if plaintiff fails to appear at time set for trial, not tried in plaintiff's absence, and judgment on the merits rendered for defendants. *Chittim v. Parr* (Civ. App.) 216 S. W. 638.

Where plaintiff fails to appear without notice of defendant's cross-action, defendant was not entitled to judgment on the cross-action, but merely to dismissal of the suit for want of prosecution, since plaintiff, though bound to take notice of the pleadings and procedure in answer to the charges made in the original petition, was not required to take cognizance of an independent claim which might be asserted in the suit as a matter of convenience. *Commercial Credit Co. v. Wilson* (Civ. App.) 219 S. W. 298.

In action on note where answer set forth fraud and failure of consideration and prayed that plaintiff take nothing by its suit, that the notes be canceled, and that defendant recover his costs, plaintiff's failure to appear did not entitle defendant to a judgment granting such relief, the answer not presenting a counterclaim or cross-action, the only proper judgment in such case being dismissal of the suit. *Id.*

Cross-action of one defendant against another is properly dismissed on plaintiff's motion, where to permit its prosecution would necessitate continuance of the cause, and where there is a suit pending between one defendant and the predecessor in interest of the other involving the subject-matter of the cross-action. *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 222 S. W. 665.

Where the amount recoverable is reduced by exceptions to an amount below the jurisdiction of the court, and plaintiff fails to amend the proper judgment is one dismissing the cause for want of jurisdiction, and not one which would bar a recovery in a court of competent jurisdiction. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

Courts should not dismiss a suit by reason of the citation being fatally defective, but should continue the case, so that service might be perfected. *Farmers' State Bank of Merkel v. Briggs* (Civ. App.) 228 S. W. 267.

A garnishment proceeding should not be dismissed, on motion of the garnishee, on the ground that the main or original suit has been dismissed, but should be continued to await the result of an appeal in the original suit. *Farmers' State Bank of Merkel v. First Nat. Bank of Anson* (Civ. App.) 228 S. W. 268.

— **Reinstatement.**—Plaintiff's statement that it was not his intention to abandon prosecution after delay in effecting change of venue is not conclusive in application to reinstate cause. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

In application to reinstate cause after failure to perfect change of venue ordered, held that refusal to hear testimony of plaintiff's attorney was not abuse of discretion. *Id.*

That defendant could have taken depositions of scattered witnesses is not conclusive that he would have suffered no injury by reinstating cause after plaintiff's failure to prosecute it. *Id.*

Where an action in trespass to try title was dismissed for plaintiff's failure to file a cost bond, the court is without jurisdiction to reinstate the same at a subsequent term. *Osborne v. Younger* (Civ. App.) 218 S. W. 1089.

Where evidence tending to show that plaintiff was pursuing a course of tactics tending to delay the case was sufficient to support action of court in dismissing the case, court's refusal to reinstate the case will not be disturbed on appeal. *Guyer v. Chapman* (Civ. App.) 227 S. W. 217.

CHAPTER EIGHT

PLEADINGS OF THE DEFENDANT

Art.	Art.
1902. Answer may include several matters; due order of pleading; general denial.	1905. In cases of citation by publication.
1903. Requisites of plea of privilege; prima facie proof; controverting plea by plaintiff; service; hearing; appeal.	1906. Certain pleas to be verified by affidavit.
1904. To be filed, when.	1907. Plea of payment, counter claim, etc.
	1908. General denial need not be repeated.
	1909. Pleas to be filed in due order.
	1910. Certain pleas to be determined during the term at which filed.

Article 1902. Answer may include several matters; due order of pleading; general denial.

See *St. Louis, A. & T. Ry. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853; *Shear Co. v. Neely* (Civ. App.) 214 S. W. 573; *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

Cited, *York v. State*, 73 Tex. 651, 11 S. W. 869; *Trawick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. 216; *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256; *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

Operation in general.—Under Rev. St. 1879, art. 1262, an answer may embrace a general demurrer. *Alliance Milling Co. v. Eaton* (Civ. App.) 23 S. W. 455.

Inconsistent pleas and duplicity.—Plaintiff is permitted, in different counts, to present inconsistent pleas, asserting right in one to recover on facts stated, and to claim in another that, if facts are not as previously alleged, but as stated in such other, he is entitled to relief against another defendant. *Bückholts State Bank v. Thalman* (Civ. App.) 196 S. W. 687.

In action by an employé of a third person for injuries, allegations of supplemental answer, that plaintiff had accepted compensation under Workmen's Compensation Act could not be used to nullify general denial, in view of this statute as one plea, though contradictory in terms, cannot be used to destroy another. *Lancaster v. Hunter* (Civ. App.) 217 S. W. 765.

A party may in the alternative file contradictory pleas.—*Taylor Milling Co. v. American Bag Co.* (Civ. App.) 230 S. W. 782.

Paragraph in answer alleging an oral contract held not demurrable notwithstanding another paragraph setting out exhibits and alleging, in the alternative, that if defendant is mistaken as to the contract being verbal, nevertheless plaintiff breached the contract. *Id.*

It was permissible to combine the legal plea of trespass to try title with the plea in equity to reform a judgment, by making it properly describe land the title to which is questioned, though they are distinct, separate causes of action. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

Admissions.—Under answer and admissions made to obtain right to open and close, plaintiff's right to recover penalty and attorney's fee held admitted, and judgment therefor properly entered, though demand was not alleged or approved. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616.

Statement in abandoned pleading in conflict with other allegations in same pleading does not constitute admission. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

City's answer pleading "not guilty of the wrongs, trespasses, and injuries, complained of," did not admit possession of plaintiffs' premises, where the suit against the city was not for title and possession, nor in trespass to try title, but merely to recover for land alleged appropriated. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

Answers describing defendants as receivers of the respective railroads, were admissions that they were receivers at the time the answers were filed. *Baker v. Lyons* (Civ. App.) 218 S. W. 1090.

In an action to recover land, admissions in answer which followed a plea of not guilty, making it incumbent on plaintiff to show a prima facie right to the property, will not support a judgment in favor of plaintiff and relieve him of the burden of showing a prima facie case. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

Where there was no general denial by defendant, but merely a denial of such matters as were not admitted, the trial court properly overruled objection to the admission in evidence of portions of the answer containing certain admissions. *Coopwood v. Wofford* (Civ. App.) 219 S. W. 504.

Where the facts pleaded by defendant properly constituted a plea in confession and avoidance, evidence in support thereof was admissible notwithstanding defendant's admission of plaintiff's cause of action under rule 31 for district and county courts (142 S. W. xx). *Rawlings v. Ediger* (Civ. App.) 231 S. W. 163.

— **Failure to traverse or deny.**—Facts alleged by petition not controverted by answer are to be taken as true on appeal. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

A general allegation, not specially denied in the answer, of insolvency of the maker of the note, will not prevail over a specific, alleged, and proven fact of a lien on land not apparently of less value than the note, in an action against indorsers. *Prince v. Colvin* (Civ. App.) 198 S. W. 637.

Where plaintiff alleged damages from defendant's breach of contract to lease land on shares, and defendant replied that he had cultivated in a farmerlike manner and harvested crops of a specified value, mere absence of general or special denial as to the damages did not admit amount alleged in petition. *Thompson v. Fleming* (Civ. App.) 200 S. W. 1134.

Denials.—In an action by scire facias on the bond of a person held to answer to an indictment for swindling, a general denial renders it necessary for the state to produce the bond in evidence under this article. *Baker v. State*, 21 Tex. App. 359, 17 S. W. 256.

In suit to collect taxes, correctness of defendant taxpayer's verified rendition of property could not be attacked by general denial; same formality being required as when attacking a note. *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

Where plaintiff, in personal injury suit, alleged that consignment was in defendant's railroad car, and that it was negligent in failing to have car repaired, defendant's gen-

eral denial put in issue ownership of car as well as negligence charged. *Kansas City, M. & O. Ry. Co. of Texas v. Pysher* (Civ. App.) 195 S. W. 981.

In suit by vendor to rescind contract for sale of land for failure to pay all of purchase-money note, defendants' answer alleging not guilty raised issues of waiver and laches. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Defendant's pleading denying the existence of a written contract, raises the issue of whether such contract ever existed, although contract was not pleaded by plaintiff, and evidence tending to show whether it existed is competent. *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408.

A general denial only put plaintiff on proof of the allegation of his petition in order to make a prima facie case. *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

In mandamus by district attorney to compel judge and clerk of the city court to permit him to prosecute criminal cases, where the judge specially denied that he refused to permit the plaintiff to prosecute cases, but did not deny an allegation in a verified supplemental petition that he purposely set cases so that plaintiff or his assistants could not be present, the district court was authorized, in the absence of other evidence, to find that the judge refused to recognize plaintiff's right. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

In an action by a creditor under arts. 3971-3973, against one receiving stock in bulk, the defendant was entitled to prove, under a general denial, that there was no liability on its part under the Bulk Sales Law. *John T. Barbee & Co. v. American Brewing Ass'n* (Civ. App.) 207 S. W. 334.

Where defendant pleaded a general denial, any admissions thereafter pleaded in the answer would not lift the burden from plaintiff of proving his case against the general denial. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 210 S. W. 737.

In a suit to compel an irrigation plant to furnish water at reasonable rates, orders in a previous suit, wherein the plant was sold at judicial sale free from all easements, were admissible under the general denial. *McBride v. United Irr. Co.* (Civ. App.) 211 S. W. 498.

In an architect's action to recover for plans and specifications, any proof admissible under defendant's allegation that its agent was not authorized to represent it in employing the architect, and that he acted in excess of his authority, was admissible under general denial, so that this part of the answer cannot be termed a special defense. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

A particular act of negligence alleged is put in issue by a general denial, and plaintiff is limited to the act specified. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In an action on a supplemental insurance policy, providing for double liability in event of accidental death, insurer under a general denial could introduce evidence that the death was purposely self-inflicted. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

In an action by a merchant to recover overdrafts by his salesman, the contract of employment and evidence to show commissions not credited to the salesman are admissible under the general denial, as directly contributing to the defense and not in the nature of a confession and avoidance or affirmative matter. *Newton, Weller & Wagner Co. v. Hocker* (Civ. App.) 220 S. W. 233.

In action against former administrator and his surety for an accounting as to a note owing by the administrator to decedent, a defense by the surety that the former administrator was insolvent if it constitutes a defense as against art. 3378, is not availing to the surety, unless it be pleaded; proof thereof under a general denial being insufficient. *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

Where one is sued as receiver, or in any other special capacity, the averments of the petition as to that relation are to be taken as true, without proof, unless specially denied in the answer, notwithstanding a general denial. *Baker v. Clement Grain Co.* (Civ. App.) 221 S. W. 679.

A general denial operates to put in issue every material fact alleged in plaintiff's petition. *Newcom v. Ford* (Civ. App.) 222 S. W. 592.

In an action on a vendor's lien note where plaintiff by a supplemental petition alleged that defendant had possession of the note through mistake and that he owed the note and had not paid it, evidence to explain his possession and show that it was not through mistake was admissible under a general denial. *Id.*

In an action on a vendor's lien note, a general denial was a sufficient pleading to support a judgment for defendant, assuming that a special plea was insufficient. *Id.*

Plaintiff, having pleaded ownership and right to possession of cattle as basis of his right to recover them, must prove one or the other; and defendant could rely on a general denial, and, when plaintiff failed to prove his right to recover, defendant need not prove title in another. *Terrazas v. Holmes* (Civ. App.) 225 S. W. 848.

Where the petition alleged that plaintiff held under a certain deed attached thereto, a general denial requires plaintiff to prove the deed under which he claimed, regardless of a subsequent statement that the deed referred to in the petition was procured by fraud. *Shumaker v. Byrd* (Civ. App.) 226 S. W. 817.

Where petition in action on note was good as against a general exception, and where the note was produced, court's refusal, after entry of default, to permit defendant to file answer, consisting of a general exception and general denial, held not error; no defense being shown thereby. *Mach v. Wofford* (Civ. App.) 228 S. W. 275.

— **Waiver.**—Waiver of any issue of title under general denial in specific performance held sufficiently shown, by further pleading, in connection with his not objecting

to plaintiff testifying he had good title, and not alleging want of title, or claiming abstract did not show it. *Stroburg v. Walsh* (Civ. App.) 203 S. W. 391.

All pleas to be filed at same time and in due order.—A plea in abatement, filed after general denial and special demurrers, is not "in due order of pleading" as contemplated in Rev. St. 1879, art. 1262. *Graham v. McCarty*, 69 Tex. 323, 7 S. W. 342.

When the petition shows a case within the jurisdiction of the court, the issue of lack of jurisdiction can only be presented by plea in abatement; and Rev. St. 1879, art. 1262, requires that such plea shall be filed before an answer to the merits. *Hoffman v. Cleburne Bldg. & Loan Ass'n*, 85 Tex. 409, 22 S. W. 154.

That defendant's plea in abatement was not filed in its proper order is immaterial where the same issues were raised by exceptions to the petition which were properly sustained. *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397.

A plea in abatement cannot be filed after answer to the merits; consequently, that part of an answer alleging that the suit was prematurely brought, being a plea in abatement, and not having been filed in the due order of pleading, will be stricken. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

Right of a defendant under art. 1830, subd. 17, to have action to enjoin execution tried in the county of the judgment, is not waived though the general demurrer filed contemporaneously with the plea in abatement precedes it in the arrangement in the answer under this article. *Martin v. Kieschnick* (Com. App.) 231 S. W. 330.

Art. 1903. Requisites of plea of privilege; prima facie proof; controverting plea by plaintiff; service; hearing; appeal.

See *Shear Co. v. Neely* (Civ. App.) 214 S. W. 573; *Clarke v. Taylor* (Civ. App.) 223 S. W. 378; *Bingham v. Emanuel* (Civ. App.) 228 S. W. 1015.

Cited. *Price & Beard v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478; *Texas Seed & Floral Co. v. Hairrill* (Civ. App.) 211 S. W. 539; *Russell v. Green* (Civ. App.) 214 S. W. 448; *Fears v. Fish* (Civ. App.) 218 S. W. 507; *First Nat. Bank v. Sanford* (Civ. App.) 228 S. W. 650.

Constitutionality of amendatory act.—Act April 2, 1917, amending this article, to give right of appeal from orders sustaining or overruling plea of privilege, is not unconstitutional. *Hill v. Brady* (Civ. App.) 231 S. W. 145.

Operation of amendment in general.—Acts 35th Leg. c. 176, amending this article, to require plea of privilege to be controverted under oath and notice served on interested parties, being enacted after overruling of such a plea, and pending appeal, does not apply where on remand, the court's attention is again called to the plea. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 209 S. W. 205.

The Court of Civil Appeals will take judicial notice that this article, as amended by Acts 1917, c. 176, has for its two primary purposes, the enabling of a party pleading privilege to be sued in county of his residence to negative, by general averment, the existence of any exceptions to the general venue statute, and the providing of right of appeal directly upon a judgment sustaining or overruling the plea without awaiting trial on merits. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

Necessity and nature of plea.—Raising question by demurrer, see *Thomason v. Ham* (Civ. App.) 210 S. W. 561.

A plea of privilege, being dilatory in its nature, does not go to the merits of a controversy. *Trousdale v. Southern Rice Growers' Ass'n* (Civ. App.) 221 S. W. 322.

Time for filing plea.—Defendant's plea of privilege, returnable July 7, 1919, but filed June 12, 1919, was not prematurely filed, but complied with this article, as amended, and, though properly excepted to, required controverting plea from plaintiff under oath. *Bennett v. Rose Mfg. Co.* (Civ. App.) 226 S. W. 143.

Effect of filing.—Under this article, as amended, and in view of arts. 1832 and 1833, and notwithstanding art. 1910, defendant, after filing plea of privilege, is not required to appear until he receives notice of a contest and of order setting a day for hearing; the filing of plea being appearance for purpose of plea and proof of rights asserted. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

Sufficiency of plea.—In suit to recover the purchase money under a contract for the sale of land and to foreclose a vendor's lien, plea of privilege denying that plaintiff had any lien and charging that it was fraudulently set up in order to give jurisdiction where the land was located which negated several of the statutory exceptions, under Rev. St. 1879, art. 1198, but omitted to specifically deny the existence of all of them, held insufficient because of such omission, and because it was not filed until after defendant had answered. *Burchard v. Record* (Sup.) 17 S. W. 241.

Before the amendment of this article became effective, where plaintiff to defeat plea of privilege set up a financial statement, signed by defendant for his firm, agreeing that all indebtedness should be payable in county where plaintiff brought suit, defendant's plea alleging in general terms that said statement was procured by fraud, though introduced in evidence without objection, did not warrant change. *J. M. Radford Grocery Co. v. Flynn* (Civ. App.) 202 S. W. 332.

In suit on notes alleged to have been executed by a defendant authorized to bind the other defendants to pay notes in Tarrant county, a sworn plea of privilege under this article, as amended, was tantamount to a sworn denial of such alleged authority of maker to act for other defendants. *Ray v. W. W. Kimball Co.* (Civ. App.) 207 S. W. 351.

This article is permissive, and defendant's plea, stating that he was not a resident

of the county at the time suit was instituted and at the time the plea was signed and sworn to, was sufficient. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

In a suit to cancel a mineral lease, allegations in defendant's plea of privilege under this article, that none of the exceptions of art. 1830 or 2308 existed, and that the suit was not concerning land or to quiet title thereto, held to show no intention to deny plaintiffs' allegations as to defendant's acquisition from the plaintiffs of the mineral lease. *Thomason v. Ham* (Civ. App.) 210 S. W. 561.

This article requires denial of facts, and not denials involving mere conclusions of law drawn from an interpretation of plaintiff's petition. *Id.*

Whether or not a suit to cancel a mineral lease is one coming within art. 1830, subd. 14, providing for venue of suits concerning land, is a legal question, and defendant's allegation in his plea of privilege, that it was not such a suit is a mere conclusion of law. *Id.*

Defendant's plea of privilege need not state that defendant has a meritorious defense; the right to change of venue being a statutory and not an equitable right. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

In suit on accident policy, where company's plea of privilege did not negative exceptions contained in subdivisions 24 and 29 of art. 1830, it was properly overruled in view of this article. *International Travelers' Ass'n v. Powell*, 109 Tex. 550, 212 S. W. 931.

Defendant's plea of privilege, held to negative the possible exceptions to exclusive venue in the county of one's residence. *Coca-Cola Co. v. Collins* (Civ. App.) 218 S. W. 1087.

In an action against a stakeholder and a party claiming a lien on plaintiff's money, an allegation that the plaintiff, as a mere subterfuge for wrongfully fixing venue, made fraudulent allegations of conversion, does not charge conspiracy or collusion of plaintiff and stakeholder to fix wrongfully the venue of the suit. *Trousdale v. Southern Rice Growers' Ass'n* (Civ. App.) 221 S. W. 322.

Where a plea of privilege was denied as to original petition, the issue raised by plea of privilege to an amended petition was too late, having already been adjudicated; it not being alleged in the second plea or shown by the evidence or record that the cause of action set out in the amended petition was different from that pleaded in the original petition. *Planters' Cotton Oil Co. v. Godwin-Humphreys Co.* (Civ. App.) 221 S. W. 642.

While a proper plea of privilege is prima facie proof and unless contested should be granted, a "proper plea of privilege" must put in issue the jurisdictional facts alleged, and this rule is not changed by the Amendment of 1917. *Knox v. Cunningham* (Civ. App.) 226 S. W. 461.

If allegations are made which, if true, confer venue on all defendants, it is necessary for a plea of privilege to aver that these allegations are fraudulently made. *Payne v. Coleman* (Civ. App.) 232 S. W. 537.

Controverting plea or affidavit.—Under Acts 35th Leg. c. 176, § 1, defendant's plea of privilege held tantamount to complete and detailed denial under oath of jurisdictional facts in plaintiff's petition, so that plaintiff was required to file controverting plea or affidavit, even though repeating jurisdictional facts alleged in petition. *Murphy v. Dabney* (Civ. App.) 208 S. W. 981.

Plaintiff's written request for hearing on a plea of special privilege, asking that the same be set aside, held not a "controverting plea" within the meaning of Acts 35th Leg. c. 176, and entitled to treatment only as a request to overrule or strike such plea. *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

Where court, on overruling demurrer to plea of privilege, instructed plaintiff to file controverting affidavit, and on plaintiff's refusal stated that he would proceed to hold hearing, unless plaintiff requested time to file controverting affidavit, plaintiff by not filing controverting affidavit or requesting time as required by this article, as amended, waived the right to file controverting affidavit, and was not injured by court's refusal to defer the case until subsequent term. *Coca-Cola Co. v. Collins* (Civ. App.) 218 S. W. 1087.

Where two defendants filed pleas of privilege, and plaintiff filed a controverting affidavit only as to one of them, both of the pleas should have been sustained under Acts 35th Leg. (1917) c. 176, and the cause as to both defendants transferred, since the trial court on its own motion cannot enter an order of severance and transfer same in so far as it affected the defendant, whose plea was not controverted. *Masterson v. O'Fiel* (Civ. App.) 219 S. W. 1117.

Under Acts 35th Leg. (1917) c. 176, where no contest of defendant's plea of privilege is filed by plaintiff by way of controverting plea under oath, plea of privilege establishes right to be sued in the county of residence, and the court no longer has jurisdiction over defendant's person. *Bennett v. Rose Mfg. Co.* (Civ. App.) 226 S. W. 143.

Where the original and amended petitions showed the suit was brought in the proper county, and the original controverting affidavit alleged facts which fixed the venue in that county, there was no occasion for plaintiffs to file an amended controverting affidavit. *Stemmons v. Matthal* (Civ. App.) 227 S. W. 364.

Plaintiff's controverting plea to defendant's plea of privilege to be sued in county of his residence held sufficient, in connection with the petition made a part thereof to fix the venue in the county in which action was brought, under art. 1830, subd. 4. *Perkins v. Texas Bank & Trust Co.* (Civ. App.) 230 S. W. 736.

Conceding that petition alleged misrepresentations as to quality of corn sold by defendant, resident in another county, the case was not brought within the exception of fraud in the general venue statute where the controverting plea did not set out specifically the facts relied on nor refer to the petition for the facts. *Gottlieb v. Dismukes* (Civ. App.) 230 S. W. 792.

A plea controverting a plea of privilege to be sued in another county was not insufficient because not specifically alleging facts relied on to confer venue, as required by statute, where it pleaded that the suit was founded upon an offense and trespass committed by defendants in the county as set out in the petition to which reference was made. *First Nat. Bank of Jacksonville v. Childs* (Civ. App.) 231 S. W. 807.

— **Service.**—Under Acts 35th Leg. (1917) c. 176, defendants did not have sufficient notice of plaintiff's plea controverting their plea of privilege merely because counsel for plaintiff phoned defendants' attorneys that he was filing such controverting plea, called the attention of one of defendants' attorneys to the fact of filing, showed it to him, and mailed an exact copy of the controverting affidavit and notation of the judge setting the matter for hearing to defendants' attorneys. *McGhee v. Maxey* (Civ. App.) 230 S. W. 735.

— **Demurrer to plea.**—Defendant, duly cited, must take notice of the filing of demurrer to its plea of privilege just as of any other pleading. *Auds Creek Oil Co. v. Brooks Supply Co.* (Civ. App.) 221 S. W. 319.

Evidence—Burden of proof.—The burden is on a plaintiff, suing another in a county other than his residence, not only to allege, but prove, facts which would take the suit out of the general rule as to venue, where the defendant files a plea of privilege. *Hutchinson v. R. Hamilton & Son* (Civ. App.) 223 S. W. 864; *Masterson v. O'Fiel* (Civ. App.) 219 S. W. 1117; *Strawn Merchandise Co. v. Texas Grain & Hay Co.* (Civ. App.) 230 S. W. 1094.

Under this article, a defendant's plea of privilege is prima facie proof of his right to a change of venue, and the burden is on plaintiffs to show that the venue is rightly laid. *Cotton States Petroleum Co. v. Britton* (Civ. App.) 230 S. W. 742; *Clarke v. Taylor* (Civ. App.) 223 S. W. 878; *Reece v. Langley* (Civ. App.) 230 S. W. 509.

Under this article, defendant's plea of privilege was prima facie proof of its right to have the case transferred to another county for trial. *Sinton State Bank v. Tyler Commercial College* (Civ. App.) 231 S. W. 170; *Payne v. Coleman* (Civ. App.) 232 S. W. 537.

Where defendant's plea of privilege alleged facts necessary under art. 1830 to entitle it to be sued in another county, and there was nothing in the record showing that plaintiff's cause of action came within exception to statute, burden was on plaintiff to show his cause of action came within one of the exceptions. *Reliance Life Ins. Co. v. Robinson* (Civ. App.) 202 S. W. 354.

Where in habeas corpus defendants' plea of privilege was not controverted, the plea itself is prima facie evidence of their right to a transfer, in view of Acts 35th Leg. c. 176. *Lucid v. McDowell* (Civ. App.) 206 S. W. 203.

In suit on money demand filed subsequent to Acts 35th Leg. c. 176, plea of privilege of one defendant was prima facie proof of his right to change of venue, and, in absence of controverting plea and proof, plea should have been sustained. *Morrison v. Richards* (Civ. App.) 207 S. W. 205.

In action on notes, where there was a sworn plea of privilege under this article, as amended, and issue joined as to such authority, plaintiff was bound to sustain his claim that defendants had bound themselves to pay notes in county of venue, and without any evidence thereof court was required to sustain plea. *Ray v. W. W. Kimball Co.* (Civ. App.) 207 S. W. 351.

Under this article, as amended, the averments of a verified plea of privilege that he was a resident of a county other than the one in which suit was brought are prima facie proof of the facts averred, and must be accepted as true, where the controverting answer filed by plaintiff attempted to defeat the plea solely on the ground that contract on which suit was brought was to be performed in the county where the venue was laid. *Harris v. Moller* (Civ. App.) 207 S. W. 961.

Where no affidavit controverting defendant's plea of privilege under Acts 35th Leg. c. 176, § 1, was filed, trial court should have promptly granted change of venue; plea being prima facie proof of statements made. *Murphy v. Dabney* (Civ. App.) 208 S. W. 981.

Defendant's plea of privilege, where no controverting plea was filed, and no evidence offered to bring action within the purview of art. 1830, subd. 7, relating to actions for fraud, should have been sustained, in view of Acts 35th Leg. c. 176, making plea prima facie proof. *Griffin v. J. W. & J. R. Bryan* (Civ. App.) 211 S. W. 296.

Defendant's plea in justice court of special privilege to be sued in his own county and precinct, under Acts 35th Leg. c. 176, constituted prima facie proof of right to change of venue, and the facts therein alleged must be taken as true, in the absence of a controverting plea specifically setting out facts relied upon to confer venue. *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

Under Acts 35th Leg. c. 176, held prima facie proof of right to change of venue, despite a superfluous statement characterized by clerical error, so that, in the absence of plaintiff's controverting affidavit, the cause must be transferred. *E. L. Witt & Sons v. Stith* (Civ. App.) 212 S. W. 673.

Acts 35th Leg. c. 176, making a verified plea of privilege prima facie proof of defendant's right to change of venue, applies to pending actions, as well as those thereafter instituted. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

When defendants in an action for conversion filed written plea of privilege under oath, and alleged that none of the exceptions to exclusive venue existed, the plea conforming to this article, and plaintiff filed controverting affidavit to the plea, an issue was joined, and in the absence of proof on either side the trial court should have sustained the plea. *Hayes v. Penney* (Civ. App.) 215 S. W. 571.

In view of Acts 35th Leg. (1917) c. 176, where no other evidence than a plea of privi-

lege and contest were submitted, the burden was upon contestant, and it was error to overrule the plea; contest without other proof not alone being sufficient to offset the plea. *Texas Supply Co. v. Bankers' & Merchants' Oil Co.* (Civ. App.) 219 S. W. 838.

Under this article, as amended, in action against husband and wife on note executed by wife, plea of privilege of husband constituted prima facie proof, and it devolved on plaintiff to file controverting affidavit and introduce evidence showing right to sue in county. *Bledsoe v. Barber* (Civ. App.) 220 S. W. 369.

Though plaintiff pleaded agency of wife for husband in executing note, and asserted it in controverting affidavit, plaintiff still remained under necessity to prove it to show contract sued on was that of husband, so that action was properly brought in county of execution, art. 1830, subd. 5. *Id.*

Pleas of privilege under this article are prima facie proof of defendants' right to change venue, and the verified controverting plea joins the issue, and the burden is upon plaintiff to show that the trial court had jurisdiction of the defendant, and in the absence of such proof plea should prevail. *Eyres v. Crockett State Bank* (Civ. App.) 223 S. W. 268.

Under this article, as amended, the burden is on plaintiff to prove allegations of his controverting affidavit, and where plaintiff offered no such proof it was error to overrule the plea. *Standard Rice Co. v. Broussard* (Civ. App.) 223 S. W. 323.

A defendant, in suit, in form to partition land, filing a plea of privilege, in due form and verified, under this article, as amended, plaintiff must not only contest the plea by controverting affidavit, but support the contest by proof, though the plea made the unnecessary averment of false and fraudulent allegation in the petition that the suit was one for partition only. *Watson v. Watson* (Civ. App.) 223 S. W. 699.

That a certain town is located in a certain county must not only be averred by plaintiffs in an affidavit controverting a plea of privilege, but they must also, in view of this article, as amended, produce evidence to establish such averment. *Cassidy-Southwestern Commission Co. v. Chupick Bros.* (Civ. App.) 225 S. W. 215.

In an action claimed by plaintiff to be one for malicious prosecution and false imprisonment, under plea of privilege not denying the jurisdictional grounds but alleging the conclusion that the action was for libel and slander, plaintiff was not required to offer proof to sustain the venue. *Knox v. Cunningham* (Civ. App.) 226 S. W. 461.

On plea of privilege, plaintiff to sustain the venue on the ground that it was an action for fraud perpetrated in county, under art. 1830, subd. 7, was not required to prove the fraud, but merely that a transaction which might constitute an actionable fraud occurred in county where the suit was filed; the question of whether plaintiff sustained an injury and the extent of such injury being the matters to be determined in a trial on the merits. *Edmonds v. White* (Civ. App.) 226 S. W. 819.

It is the facts, and not the averments of plaintiff's pleadings, which are determinative, and when defendant under this article, as amended, asserts the privilege, he is entitled as a matter of law to have the cause of action transferred unless plaintiff by controverting plea not only alleges, but by testimony proves to the contrary. *First Nat. Bank v. Sanford* (Civ. App.) 228 S. W. 650.

Under this article, plea of privilege constituted prima facie proof, and when the controverting affidavit was filed, the burden rested on plaintiff to show that one defendant, acting as agent of another, had employed plaintiff to sell land, and not only had promised that the other defendant would pay commission, but that he would also be liable individually. *Sargent v. Wright* (Civ. App.) 230 S. W. 781.

— **Admissibility.**—While general rule is that a plea of privilege is inadmissible as evidence, where defendant's plea was introduced without objection, court was authorized to consider it in so far as it tended to prove defendant's residence in another county. *J. M. Radford Grocery Co. v. Flynn* (Civ. App.) 202 S. W. 332.

Evidence that defendant delivered a draft and certain vendor's lien notes to plaintiff for purpose of paying indebtedness sued upon was immaterial and irrelevant upon question of defendant's right to change of venue. *Id.*

In a suit to recover land in which plaintiffs claimed to own undivided interests, evidence of facts contrary to the fact that the land was situated in the county in which the suit was brought was proper, but proof of facts other than the situation of the land was incompetent under defendant's plea of privilege. *Galbreath v. Farrell* (Civ. App.) 221 S. W. 1015.

— **Sufficiency.**—In an action based on alleged fraudulent representations as to the title to land in the county, evidence by plaintiff, on plea of privilege, held not to sustain his allegation of fraud. *Masterson v. O'Fiel* (Civ. App.) 219 S. W. 1117.

Buyers of land, suing sellers in a county other than that of their residence, relying on art. 1830, subd. 5, held not to have overcome prima facie proof made by sellers in their pleas of privilege. *Clarke v. Taylor* (Civ. App.) 223 S. W. 378.

In action for fraud, evidence on plea of privilege held sufficient to sustain plaintiff's right to bring action in county in which it was filed, on the ground that the fraud was perpetrated therein. *Edmonds v. White* (Civ. App.) 226 S. W. 819.

In an action for breach of contract brought in the county where the seller was located, evidence, on a plea of privilege to be sued in another county, held to show that the contract was consummated by the seller's acceptance of a counter proposition made by the buyer after rejecting the seller's offer. *Early-Foster Co. v. A. P. Moore's Sons* (Civ. App.) 230 S. W. 787.

In an action against a bank and its attorney, evidence tending to show that the attorney acted with the bank's authority in doing alleged wrongful acts constituting trespass, and tending to show ratification or acquiescence, held sufficient to overcome the prima facie right to change arising from the sworn plea of privilege. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

Waiver of plea.—See *Murphy v. Dabney* (Civ. App.) 208 S. W. 931; *Auds Creek Oil Co. v. Brooks Supply Co.* (Civ. App.) 221 S. W. 319; notes to art. 1830.

Hearing and determination.—Where defendant filed his plea of privilege in the justice court at the September term, plaintiff was not compelled to file a controverting plea until the October term, and the defendant did not waive his right by failing to call up such plea for hearing before the October term, in view of Acts 35th Leg. c. 176. *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

That plaintiff permitted court to prematurely try issue on a plea of privilege filed under this article, as amended, and thus waived his controverting affidavit, would not require the court on appeal to render judgment sustaining the plea, where the judgment must be reversed for other reasons. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

It is proper and not an abuse of discretion to first take up and dispose of the plea of privilege. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

There is nothing in this article, which expressly requires the court to determine a plea of privilege in advance of the trial on the merits, where the evidence thereon would disclose the facts necessary to determine the fact questions raised by the plea and controverting affidavit, and such a determination of the plea was in the discretion of the court. *Wichita Mill & Elevator Co. v. Simpson* (Civ. App.) 227 S. W. 352.

Upon hearing of a plea of special privilege, it is not proper to express any opinion upon matters which are for determination upon the trial upon the merits. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

— **Notice.**—Under this article, where no controverting plea or affidavit was filed to plea of privilege, and no notice was given defendant of contest or hearing thereon, court could not render default judgment upon defendant's failure to appear. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

Effect of sustaining plea.—Under this article, as amended, the sustaining of plea of privilege to be sued in county of residence does not abate the suit, but simply changes the venue. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

Appeal—Right to appeal.—Where plaintiff contested plea of privilege by special and general demurrers, entry of order after hearing "that the general demurrer * * * be sustained," and that the "plea of privilege be, and the same is, overruled," and adjudging costs against defendant, was sufficient to support an appeal under this article. *Cecil v. Fox* (Civ. App.) 208 S. W. 954.

Under this article, as amended, an appeal lies from an order overruling a plea of privilege. *Adams v. Wallace* (Civ. App.) 217 S. W. 1079.

This article, as amended, is subordinate to and must be construed in harmony with art. 2078, limiting appeals from county court to Court of Civil Appeals to cases involving more than \$100, exclusive of interest and costs. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

And it is subordinate to and must be construed in harmony with art. 2391, which limits appeals where the controversy exceeds \$20. *Id.*

Under this article, as amended, the right of appeal is given from an order overruling the plea of privilege made by a justice of the peace, the same as from that made by any other court. *McKay v. King-Collie Co.* (Civ. App.) 228 S. W. 991.

Where the trial court neither sustained nor overruled pleas of privilege, but only overruled their motion for order transferring the cause and asking the court to sustain pleas of privilege and to transfer the cause, such order was merely interlocutory, from which there is no right of appeal, under this article, and art. 2078. *Seale v. Anderson* (Civ. App.) 232 S. W. 928.

— **Effect of appeal.**—Where plea of privilege was sustained, whereupon defendant excepted and gave notice of appeal, it was not error to try the case before determination of the appeal; the only effect of the notice being to suspend the transfer of the case under this article, as amended. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

— **Failure to appeal.**—Under the statute the Court of Civil Appeals has jurisdiction to review on writ of error the action of the county court in overruling plea of privilege, the right given by this article, as amended, to appeal from judgment sustaining or overruling such a plea, not being exclusive. *Bennett v. Rose Mfg. Co.* (Civ. App.) 226 S. W. 143.

In view of this article, defendant waived the right to have the action of the trial court in overruling his plea reviewed when he failed to prosecute an appeal from the order overruling the plea. *Hill v. Brady* (Civ. App.) 231 S. W. 145.

— **Disposition of appeal.**—Where it is clear that judgment should have been rendered sustaining plea of privilege under this article, as amended, the appellate court on reversing the order will not remand, but will render judgment sustaining the plea and directing transfer to the proper county as provided by art. 1833. *Lewis & Knight v. Florence* (Civ. App.) 217 S. W. 1116.

Art. 1904. [1263] [1263] Answer to be filed, when.

Time for filing in general.—Plaintiff, on the fifth day of the term, moved for judgment by default, when an attorney stated that he had been retained in the case, and asked leave to file an answer forthwith, which was refused, and plaintiffs' motion was granted. Held, that under Rev. St. 1879, arts. 1263, 1280-1282, he was entitled to the whole of the fifth day in which to file his answer, and that the judgment was erroneously entered. (*Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. 663, followed.) *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60.

Under Rev. St. 1879, arts. 1280, as amended by Laws 1891, p. 94, and 1263, as amended in 1891, defendant has the whole of the second day of the term to file his answer; and, while the appearance docket is called on the second day, yet judgment for default cannot be taken until the third day; repeal by implication not being favored in law. *McKay v. Barlow* (App.) 18 S. W. 650.

Rev. St. 1879, art. 1263, must yield to Act April 13, 1891, amending art. 1280, to make the second day of the term appearance day, and, if defendant did not appear when his case was called on the second day, judgment was properly rendered against him. *Graham v. Miller* (Civ. App.) 24 S. W. 1107.

But under Rev. St. 1879, arts. 1263 and 4835, it was error to render judgment by default against the claimant of attached property on the second day of the term, though that was designated as appearance day by Laws 1891, p. 94, c. 76. *Martin v. Hartnett* (Civ. App.) 24 S. W. 963.

Act July 13, 1891, amending Rev. St. 1879, art. 1280, so as to substitute the second for the fifth day of the term, as appearance day, repealed the conflicting provision of art. 1263, requiring defendants served more than five days before term to answer on or before the fifth day, and authorized the entry of defaults on the second day under arts. 1281, 1282. *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115; reversing (Civ. App.) 24 S. W. 963.

Notice of filing.—While plaintiff in an action for breach of contract is charged with notice of any pleading filed by defendant in answer to his claim, plaintiff is not required to anticipate and take notice of any claim which defendant may assert against him by plea in reconvention. *Jarratt v. McCarty* (Civ. App.) 209 S. W. 712.

Art. 1905. [1264] [1264] Answer in cases of citation by publication.

Cited, *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072.

Art. 1906. [1265] [1265] Certain pleas to be verified by affidavit.

See *Wallis v. Wood* (Sup.) 7 S. W. 852; *McCormick Harvesting Mach. Co. v. Slover* (App.) 16 S. W. 105; *San Antonio & A. P. Ry. Co. v. Wilson* (App.) 19 S. W. 910.

Cited, *Baker v. Wahrmond*, 5 Civ. App. 268, 23 S. W. 1023; *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

Subdivision 2.—Under subd. 2 and 3, where bank sued as guardian, and there was no plea putting in issue its capacity to sue as such, there was no necessity for any proof as to its capacity, and it is unnecessary to inquire whether evidence of proceedings culminating in appointment and qualification of bank as guardian was properly admitted. *Davis v. White* (Civ. App.) 207 S. W. 679.

Subdivision 3.—See *Davis v. White* (Civ. App.) 207 S. W. 679.

Cited, *Richardson v. Allison* (Com. App.) 213 S. W. 252.

Subdivision 6.—In an action by alleged partners, owners of cattle shipped by one of them, the partnership, not being denied under oath, need not be proved under this article. *Good v. Galveston, H. & S. A. Ry. Co.* (Sup.) 11 S. W. 854, 4 L. R. A. 801.

It was not necessary for defendant, under this subdivision, to deny under oath the existence of a partnership between it and another company, when not alleged in the petition. *Smith v. Western Union Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

Where defendant was sued individually, and not as partner, his denial of partnership between himself and one who contracted with plaintiff need not be verified. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

Subdivision 7.—In view of arts. 1822, 1906, where defendants in an action on notes answered and failed to raise the issue that the plaintiff bank was not duly incorporated, they could not raise such question by motion to set aside the judgment. *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 323.

Subdivisions 8 and 9.—See *Kansas City Life Ins. Co. v. Jinkens* (Civ. App.) 202 S. W. 772.

Cited, *City Nat. Bank of El Paso v. El Paso & N. E. R. Co.* (Civ. App.) 225 S. W. 391; *Stokes v. Waller* (Civ. App.) 230 S. W. 1085.

Under Rev. St. 1879, art. 1265, subd. 8, where the mortgagor pleads a general denial, not verified by oath, no proof of the execution of the mortgage is necessary as to him. *Chator v. Brunswick-Balke-Collender Co.*, 71 Tex. 588, 10 S. W. 250.

It was not necessary for defendant, under Rev. St. 1879, art. 1265, subd. 8, to deny, under oath, the execution of a written contract with it for the transmission of a message, when not alleged in the petition. *Smith v. Western Union Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

If defendant desired to place in issue either signing or delivery of bill of sale pleaded by plaintiff, it was necessary for him to deny same under oath as required by this article. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

Though in a suit on a note assigned a verified plea of non est factum was hardly in compliance with subd. 8, in absence of objection below, it may be considered as regular in form. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

Under subd. 8, and article 3710, defendant in suit for taxes held bound to deny under oath that rendition of property was made by it, to be entitled to deny that it made rendition. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

Where the sender of a telegram telephoned the message and the telegraph agent, without the sender's knowledge, wrote it upon one of its forms, a verified reply denying

the execution of a written contract by the sender was not necessary. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

The absence of a sworn pleading questioning genuineness of a written instrument does not dispense with its production in court; and, where a written instrument is declared on and there is a general denial, it is necessary to establish plaintiff's case for him to offer the instrument in evidence. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Art. 588, and art. 1906, subd. 9, were not intended to dispense with proof of an administrator's authority to sell or assign, as such authority, under art. 3480, depends upon an order of court, so that absence of any verified denial of administrator's assignment thereof to plaintiff did not dispense with proof of its validity. *Id.*

Subdivision 10.—Effect of sworn plea, see *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157.

Under this subdivision an affidavit that the answer is true "to the best of [affiant's] knowledge and belief" is insufficient. *Cates v. Mass* (App.) 14 S. W. 1066.

In an action by a stockholder against the officers and managers of a private corporation, where an unverified answer set up that the stock was donated to plaintiff, and no consideration was ever paid for it, that evidence was not admissible under defendant's plea in view of this subdivision. *Pickett v. Abney*, 84 Tex. 645, 19 S. W. 859.

The court held to have erred in refusing to instruct that a shipper, by his contract of shipment, had waived all claims for damages previously accrued, since, under Rev. St. 1879, art. 1265, subd. 10, the want of consideration for such contract could be set up only by a proper plea supported by affidavit, which was not done in this case. *Gulf, C. & S. F. Ry. Co. v. Wright*, 1 Civ. App. 402, 21 S. W. 80.

Subdivision 11.—The rule that the justness of the account cannot be impeached unless a counter affidavit is filed does not mean that ownership of the debt is conceded by failing to file an affidavit. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

Art. 1907 [1266] [1266] Plea of payment, counter claim, etc.

Payment.—An answer, in an action on a note, which alleges various payments to plaintiff's attorney, who had the note for collection, and final payment to such attorney, but fails to state the times or amounts of such payments, or how made, is insufficient, under Rev. St. 1879, art. 1266. *Hanna v. Broussard*, 3 Civ. App. 481, 23 S. W. 83.

In a suit against former administrator and his surety for an accounting as to a note owing by such administrator to his decedent in order that the presumption of payment from undisputed testimony that the note had been seen in the administrator's possession three days before testator's death, and that it was the community property of decedent and decedent's wife, may be availing, such defenses must be advanced in the statutory way, as provided by arts. 1906, 1907. *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

Set-off or counterclaim.—In a vendor's action for the price, allegations held sufficient in view of the prayer for general relief, to authorize the court to allow a set-off to the amount that vendor was entitled to recover. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

In action for price of a tractor, where defendants counterclaimed for damages to their crops and prayed an amount in excess of that awarded, interest on the amount awarded could be allowed in the absence of a specific prayer therefor. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676.

In trespass to try title, where there was no pleading on the part of defendants of the payment of specific taxes and no prayer for any set-off, the court did not err in refusing to set off against the damages awarded plaintiffs taxes paid by defendants, in view of this article. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

In an action on note where answer set forth fraud and failure of consideration and prayed that plaintiff take nothing by its suit, that the notes be canceled, and that defendant recover his costs, plaintiff's failure to appear did not entitle defendant to a judgment granting such relief, the answer not presenting a counterclaim or cross-action. *Commercial Credit Co. v. Wilson* (Civ. App.) 219 S. W. 298.

Art. 1908. [1267] [1267] General denial need not be repeated.

Operation.—Under direct provisions of this article, a general denial is not required to be repeated when plaintiff amends his pleading. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

Denial of material allegations in an original petition would not have to be repeated because such allegations are repeated in amended petition. *Id.*

Art. 1909. [1268] [1268] Pleas to be filed in due order, etc.

Cited, Houston & T. C. R. Co. v. City of Ennis (Civ. App.) 201 S. W. 256.

In general.—Under arts. 1909 and 1910, requiring pleas to be filed in due order, etc., a plea of privilege waives right to thereafter plead to court's jurisdiction over subject-matter. *San Antonio Drug Co. v. Red Cross Pharmacy* (Civ. App.) 199 S. W. 324.

Agreement in open court that case might be transferred to another county, as if on plea of privilege, held equivalent to such plea in so far as waiving right thereafter to plead to court's jurisdiction over subject-matter. *Id.*

To obtain the benefits of the venue provision of art. 1830, subd. 17, the privilege must be claimed seasonably and in due order of pleading, otherwise it will be deemed to have been waived. *Klieschnick v. Martin* (Civ. App.) 208 S. W. 948.

One who presents a plea of privilege at a different time from that fixed by statutes and rule of court has the burden of showing that his plea has not been abandoned by his previous neglect. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

If special exception presenting defendants' privilege of being sued in the county of their residence was filed for the first time in the amended answer, it came necessarily after other and prior pleading, and consequently was not filed in due order. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

A plea in abatement should precede a general demurrer, as such a plea cannot be sustained and still have an adjudication on the merits which result from the sustaining of a general demurrer and a refusal to amend. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

Where the record showed that a plea in abatement based on misjoinder of causes of action was not disposed of until the date on which judgment was rendered, it will be assumed that the plea was not filed in time and hence was waived. *McDonald v. Ax-tell* (Civ. App.) 218 S. W. 563.

Under arts. 1902, 1909, 1910, 1947, and rules 7 and 24 for District Courts (142 S. W. xvii, xix), as to order of pleas in abatement, where, in action on fire insurance policy, failure of insured to submit to examination was not pleaded except as one of several special defenses, it was not filed in due order, as a plea in abatement, and not being called up at the first term of court, and no special ruling being asked thereon before a trial on the merits, the plea was waived. *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

Answer to merits as waiver of matter in abatement.—Where two railway companies filed a joint answer, not complaining of misjoinder of causes of action, and subsequently filed separate answers, pleading misjoinder in abatement, the objection was waived. *Missouri, K. & T. Ry. Co. of Texas v. Baker Bros.* (Civ. App.) 210 S. W. 244.

Generally, when a defendant answers in bar before he presents his dilatory plea, he will be held to have waived his plea of privilege. *McClure v. Pair* (Civ. App.) 214 S. W. 683.

Where defendant pleaded in abatement that the plaintiff, a minor, was not represented by next friend, etc., an answer to the merits after the overruling of the plea in abatement is a waiver of the plea in abatement. *Gross v. Griffin* (Civ. App.) 221 S. W. 764.

Where plaintiff was given a judgment against a partnership, and the partnership a judgment against T., and T. against the defendant appellant, T. was, in respect to his cross-action against appellant, a plaintiff controlling the cause as an independent suit, and by answering the cross-action on the merits appellant waived his plea of special privilege as against the defendant partnership. *Wichita Mill & Elevator Co. v. Simpson* (Civ. App.) 227 S. W. 352.

Art. 1910. [1269] [1269] Certain pleas to be determined during the term at which filed.

See *San Antonio Drug Co. v. Red Cross Pharmacy* (Civ. App.) 199 S. W. 324; *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256; *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750; notes to art. 1909.

Construction and application.—Where court sustained defendant's plea of privilege, but set aside order on plaintiff's motion, and passed cause to next term, and defendant failed to appear at such term, and no order was made with respect to such plea, by failing to appear and present his plea of privilege defendant waived it, and it was overruled by operation of law. *Hill v. Alexander* (Civ. App.) 195 S. W. 957.

Where record does not indicate that pleas of privilege were called to court's attention during two years, they will be considered waived. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

Plea of privilege is waived, where no action was taken during term in which it was filed, and it was not continued without prejudice. *Id.*

Under this provision, failure to determine plea of another action pending at term at which it is filed, in absence of showing that court business prevented, waives plea. *McCoy v. Bankers' Trust Co.* (Civ. App.) 200 S. W. 1138.

Error, if any, in disposing of plea of other action pending, is harmless, where pleader's failure to have such plea determined at term at which it was filed waived plea. *Id.*

Where a plea of privilege, filed in the county court, was continued by agreement, the order reciting "without prejudice to" defendant's right to such plea, the continuance was not a waiver of the plea. *Torno v. Cochran* (Civ. App.) 201 S. W. 735.

Where the record shows that, while a cause was continued for several terms, this was done by agreement and without prejudice to defendant's plea of special privilege to be sued in county of his residence, such continuance does not constitute waiver of the plea. *Poindexter v. First State Bank of Richland* (Civ. App.) 202 S. W. 809.

In view of art. 1910, and district court rule 24 (142 S. W. xix), as to dilatory pleas, it is duty of party filing plea in abatement to call trial court's attention to it during term to which it is filed, and failure to do so will be held a waiver of such plea. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120.

Plea in abatement, or other dilatory plea, must be disposed of during term to which it is filed, except where business of court will not permit, or where plea is passed without prejudice, with consent of parties. *Id.*

Trial court's failure to enforce rule, that failure of party filing plea in abatement to call court's attention to it during term to which it is filed will be held a waiver of plea,

is reversible error, where it is made to appear there was no sufficient reason for trial court's action. *Id.*

Where it appears plea in abatement was not disposed of at term to which filed, if trial court had held plea was waived, in absence of showing of record as to why it was not disposed of, Court of Civil Appeals would sustain action below on presumption no sufficient reason existed for failure to dispose of plea. *Id.*

A motion by defendant for a continuance does not constitute an abandonment of a plea of privilege, where the motion shows that defendant was insisting thereon, and the judgment shows that it was continued without prejudice. *Ozbolt v. Lumbermen's Indemnity Exchange (Civ. App.) 205 S. W. 158.*

Where defendant's plea of privilege in justice court was overruled during December term, and the cause taken to county court on February 19th following certiorari returnable to the March term, and where motion to dismiss certiorari which was filed during the March term was not disposed of until June 2d, when motion to strike out plea was made, there was no waiver of plea in county court. *Poole v. Pierce-Fordyce Oil Ass'n (Civ. App.) 209 S. W. 306.*

Under art. 1903, as amended by Acts 35th Leg. c. 176, and in view of arts. 1832 and 1833, and notwithstanding art. 1910, defendant, after filing plea of privilege, is not required to appear until he receives notice of a contest and of order setting a day for hearing; the filing of plea being appearance for purpose of plea and proof of rights asserted. *Brooks v. Wichita Mill & Elevator Co. (Civ. App.) 211 S. W. 288.*

In view of a rule of the district court authorized by arts. 1910, 1945, where there was no reason why exceptions to defendant's second amended answer were not presented by plaintiff when the docket was called for such purpose during the first week of the term at which the case was tried, the refusal of the trial court to consider such exceptions was proper. *Conner v. McAfee (Civ. App.) 214 S. W. 646.*

Under this article, and in view of rule 24, for district and county courts (142 S. W. xix), the failure of defendant to call to the attention of the trial court its plea of privilege at the term at which it was filed is a waiver thereof, notwithstanding the amendment of article 1903, by Acts 35th Leg. (1917) c. 176. *Auds Creek Oil Co. v. Brooks Supply Co. (Civ. App.) 221 S. W. 319.*

Where a cause was continued to another term without declaring it was without prejudice to a defendant's plea of privilege, or without anything in record showing it was passed by agreement, or that business of court was such that plea could not have been disposed of at term had it been called to its attention, there was a waiver by defendant of his plea of privilege. *Griffith v. Sawyer (Civ. App.) 221 S. W. 687.*

The mere filing of plea of privilege, without calling the attention of a court to it until long after the case has been tried, does not require the court to set aside its judgment and dismiss the suit. *Phillips v. Phillips (Civ. App.) 223 S. W. 243.*

In husband's divorce action, where wife who had previously instituted action, filed plea in abatement, but failed to call court's attention thereto until long after the judgment was rendered, and where there was nothing to indicate fraud, concealment, or deception, the court did not err in overruling the plea. *Id.*

Under this article, and rule 24 (142 S. W. xix), the defendants by permitting the cause to be continued to succeeding terms without calling the court's attention to pleas in abatement urging plaintiff's legal incapacity by reason of its having no permit to do business in the state and demanding action thereon waived such pleas. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas (Com. App.) 227 S. W. 1095.*

DECISIONS RELATING TO SUBJECT IN GENERAL

See *Tucker v. Angelina County Lumber Co. (Com. App.) 216 S. W. 149.*

1. **Necessity of pleading in defense in general.**—Ordinarily, defendant seeking exception from liability under statutory proviso has burden of pleading such exception. *Quanah, A. & P. Ry. Co. v. Bone (Civ. App.) 199 S. W. 332.*

Parties claiming a right by prescription to divert waters from a stream were not required to plead or prove that the parties against whom the right was claimed and those under whom they claimed were free from disabilities, as the law presumes a grant, and such presumption involves a grantor sui juris. *Martin v. Burr (Sup.) 228 S. W. 543.*

4. **Style of pleadings.**—That an answer was without indorsement showing its character, is not ground for reversal, it on its face adopting the answer of another, and thus clearly indicating the claim of firm ownership of funds garnished as those of an individual. *Brown v. Cassidy-Southwestern Commission Co. (Civ. App.) 225 S. W. 833.*

5½. **Matters of evidence.**—In an action for wrongful death of plaintiff's alleged common-law husband, it was not incumbent upon defendants to plead the evidence to show that plaintiff had never married the deceased, and they could produce evidence to prove that deceased was the lawful husband of another by a prior existing marriage. *Lopez v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 222 S. W. 695.*

10. **Plea to the jurisdiction.**—In suit praying for cancellation of instruments with reference to cutting of guayule from land in Mexico, plea to jurisdiction held not to go to the jurisdiction of the court to inquire into the question of fraud, but to the power of the court to grant cancellation of instruments. *Griner v. Trevino (Civ. App.) 207 S. W. 947.*

12. **Plea in abatement.**—See *Moon Automobile Co. v. Avery (Civ. App.) 219 S. W. 511.*

In materialman's action on paving contractor's bond required under art. 6394f, the defense that materialman's action was prematurely brought should be raised by plea in abatement. *Fennell v. Trinity Portland Cement Co. (Civ. App.) 209 S. W. 796.*

Proof as to inhabitancy of state and residence of county, required by art. 4632, is as essential as any other fact in a divorce case, and though the question is not raised by plea in abatement, it is not waived, but the plaintiff must allege and prove residence as part of his case. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

In an action to set aside part of a judgment on the ground that plaintiff was never served, a motion or plea that the case be dismissed because the petition was not pleaded with certainty demanded by law, held not a plea in abatement, and no more than a special exception. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

In an action on notes where it was sought to foreclose a vendor's lien, the sustaining of exceptions to the answer held warranted despite the contention that an estoppel was set up the assignment merely calling into review the action of the court in striking out that portion of the pleading alleging extensions which was really a plea in abatement. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

If suit is brought prematurely, the matter must be shown and established by the defense, and the fact does not render the petition, otherwise good, demurrable. *Paine v. Hart-Parr Co.* (Com. App.) 228 S. W. 121.

14. **Denials—General denial.**—Threats made and communicated are admissible under self-defense plea; but, before admitting evidence of the general character of the assaulted party as a justification, there must be a proper pleading putting it in issue, and evidence to support it, it being the general rule that matters in justification cannot be pleaded under the general issue. *Pfuger v. Schoen* (Civ. App.) 221 S. W. 1090.

16. **Cross-complaint against plaintiff.**—In action on notes given for price of land, cross-bill, alleging that the notes were given in payment for land on condition and under representations of plaintiff that the land would be irrigated adequately, and that the irrigation was not adequate, was demurrable for failure to allege that plaintiff did not intend to irrigate or that defendants were induced to enter into the contract by misrepresentation. *Lott Town & Improvement Co. v. Harper* (Civ. App.) 204 S. W. 452.

If a fence was defendant's property at the time plaintiff had writ of injunction issued to prevent removal thereof, defendant was entitled to file cross-action for damages. *Anderson v. Wilson* (Civ. App.) 204 S. W. 784.

Where plaintiff sued to prevent defendants' interference with a fence, although the writ of injunction became functus officio at the convening of the term of court at which it was returnable, and plaintiff kept the property, the suit was still pending, and a cross-action could be filed. *Id.*

Cross-action in divorce suit alleging "cruel, harsh, and inhuman treatment," though in words of statute, does not state cause of action for divorce; it being necessary to state the facts and circumstances. *Rowden v. Rowden* (Civ. App.) 212 S. W. 302.

In an action to recover lands, answer in the usual form of an answer setting up affirmative matter, to the effect that plaintiff was bound by his lines as run by a surveyor, etc., and concluding with a prayer that defendant go hence without day and recover his costs, must be treated as an answer and not as a cross-action. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

In action to foreclose vendor's lien where defendant in cross-action pleaded damages for breach of contract with plaintiffs, and set out contract purporting to have been made with other parties, without showing how plaintiff's liability accrued, court did not err in sustaining general demurrer. *Zimmerman v. Keith* (Civ. App.) 224 S. W. 288.

In an action on a written lease of a farm and dairy stock, an exception to allegations in defendant's cross-bill that plaintiff failed to furnish an engine as agreed should have been sustained, plaintiff not having so agreed under the written contract, in the absence of a showing in the cross-bill of a new contract on a valuable consideration. *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

In an action on purchase-money note, a cross-petition alleging that the note and others were given for lots purchased from plaintiff, located at a distance from defendant's residence, and that plaintiff falsely represented the lots had a 50-foot frontage, and that curbing and sidewalks would be installed, stated cause of action as against general demurrer. *Dingman v. Pahl* (Civ. App.) 226 S. W. 446.

In a seller's action for a balance due, the buyer's cross-bill, setting up the seller's failure to deliver during the month of July on the ground that the subsequent delivery caused greater expense in hauling, is open to exception; there being nothing to show that the contract was made with reference to the special circumstances. *Myrick v. Tolivar* (Civ. App.) 227 S. W. 255.

In action to foreclose vendor's lien, purchasers' cross-bill, alleging that the vendor guaranteed sufficient irrigation for the land, that the land had not been adequately irrigated, and that the purchaser had sustained damage by reason thereof, held good as against general demurrer. *Harper v. Lott Town & Improvement Co.* (Com. App.) 228 S. W. 188.

In a suit in the nature of a bill of review to set aside a judgment of divorce, testimony showing grounds for a divorce was admissible as a reply to plaintiff's pleadings and proof that there was no cause of action for divorce, independent of the cross-demand for divorce. *Harris v. Harris* (Civ. App.) 230 S. W. 224.

17. **Cross-complaint against codefendant.**—In an action against a partner, the latter's cross-petition, to enforce a settlement and fix liability of a silent partner, alleging existence of partnership and that firm assets have all been disposed of, held sufficient. *Lester v. Park* (Civ. App.) 205 S. W. 734.

In depositor's action against bank for deposits wrongfully misappropriated by bank's cashier, it was proper for the bank by cross-action to join surety on cashier's bond; the depositor's right to recover against the bank and bank's right to recover over against surety involving the same facts and issues. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

In a suit by a bank on a partnership note, a cross-action by one of the partners against the other, seeking an accounting as to partnership matters not related to the note in suit, is foreign to the plaintiff's suit, and should be dismissed on plaintiff's objection. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

19. Construction of pleading.—Any doubt as to the proper construction of a prayer of answer will be solved in favor of the judgment. *Poole v. Cage* (Civ. App.) 214 S. W. 500.

22½. Conclusiveness of allegations.—In a suit to foreclose a mortgage, where defendant pleaded a tender and testified that the tender was to cover principal, interest, taxes, and some attorney's fees, he could not, on appeal, question plaintiff's right to declare the whole of the principal due, or to recover taxes and reasonable attorney's fees. *Marti v. Wooten* (Civ. App.) 217 S. W. 447.

23. Theory of defense.—In action on notes for price of engine and fixtures, answer alleging parol agreement to take back the engine and fixtures in settlement of the last two notes, and that plaintiff had taken the engine and was claiming it, held not a plea of accord and satisfaction as distinguished from payment. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

In a suit for specific performance of a compromise agreement, whereby defendant agreed to deed 2,800 acres of land, an answer held not a plea for rescission of the contract on the ground of fraud, mutual mistake, or mistake of defendant, accompanied by inequitable conduct of plaintiffs, but simply a plea that the contract did not express defendant's intention. *Flores v. Flores* (Civ. App.) 200 S. W. 1157.

Under answer in suit for title and possession of an automobile, trial court held authorized to treat defendant's claim as a suit for conversion of the car. *Hyway Motor Co. v. Saulsbury* (Civ. App.) 223 S. W. 322.

In action to foreclose vendor's lien, cross-bill, alleging that the vendor guaranteed sufficient irrigation for the land, and that the irrigation had not been adequate, held to set up an action for breach of contract, and not an action based upon fraud. *Harper v. Lott Town & Improvement Co.* (Com. App.) 228 S. W. 188.

In an action against a fraternal insurer, answer held in the nature of a bill of interpleader, and not a plea of the pendency of another suit; and hence, where without objection to the jurisdiction of the Texas courts over the nonresident minor the rights of the parties were adjudicated, the insurer cannot complain. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

24. Withdrawal or abandonment of pleading.—The pendency of wife's divorce action in one county did not affect the jurisdiction of district court of other county in husband's divorce action, though wife filed plea of abatement in husband's action, where court's attention was not called thereto until after rendition of judgment. *Phillips v. Phillips* (Civ. App.) 223 S. W. 243.

26. Variance between pleading and proof.—In divorce actions the courts will not quibble as to whether evidence showing plaintiff not entitled to divorce is supported by the pleadings. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

29. Waiver of defects and objections.—See *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

30. Form and sufficiency of allegations—Conclusions.—See *Knox v. Cunningham* (Civ. App.) 226 S. W. 461.

In suit to enjoin construction of certain houses on land adjoining that owned by plaintiffs, allegation that the houses which plaintiffs were threatening to build would constitute a public and private nuisance held a conclusion of the pleader. *Worm v. Wood* (Civ. App.) 223 S. W. 1016.

In an action by a lessor of stock to recover one-half the difference in value between animals dying and those replacing them, as required by the agreement, an allegation in the answer that "the death of said cattle was wholly due to plaintiff's negligence" was a conclusion and insufficient. *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

32. — Inconsistent allegations.—An express allegation, in an action for breach of contract to purchase cattle, that cattle tendered were fully according to contract, is alone sufficient, when tested by a general demurrer, to show that plaintiff tendered cattle which in all respects complied with his contract obligations, and it is not lightly to be presumed that such an averment is contradicted and overruled by other allegations. *Laxson v. Scarborough* (Civ. App.) 221 S. W. 1029.

Such allegation was not overthrown by an allegation that on account of severe weather conditions the cattle had greatly deteriorated in value; the word "deteriorated" sometimes being used as a synonym for the word "decline," in view of district and county court rule 17 (142 S. W. xviii). *Id.*

33. — Irrelevancy and surplusage.—In buyer's action for seller's failure to deliver cotton, the seller's allegations that the buyer falsely represented he was solvent and of large means were immaterial, where it appeared from the seller's pleading that after learning of the buyer's insolvency he failed to repudiate the contract, but voluntarily acted on it, making an effort to carry it into effect and claiming its benefits; so that the court did not err in sustaining exceptions to such allegations. *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

37. Pleading particular facts or defenses—Abandonment or breach of contract.—Vendor's pleadings in action involving purchaser's right to specific performance, held not to support a claim of forfeiture and abandonment of or failure by purchaser to perform contract. *Occidental Life Ins. Co. v. Montgomery* (Civ. App.) 226 S. W. 750.

37½. — **Accord and satisfaction.**—An answer alleging a bona fide controversy over the amount due, that defendant sent its draft with a letter saying it was in full payment, which draft plaintiff collected, under the rules applicable to justice and county courts, sufficiently pleads accord and satisfaction. *Miller Bros. & Co. v. H. Lesinsky Co.* (Civ. App.) 202 S. W. 992.

39. — **Another action pending.**—In an action against a fraternal insurer, the insurer's answer held in the nature of a bill of interpleader, and not to plead the pendency of another suit. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

41. — **Assumption of risk.**—In an action for injuries to servant, the defendant must plead and prove its defense of assumed risk. *Southern Pac. Co. v. Hazelbusch* (Civ. App.) 200 S. W. 268.

44. — **Consideration and want or failure thereof.**—In action on notes given for price of engine, held, that failure of consideration was sufficiently pleaded and shown to defeat right of plaintiff to recover. *Southern Engine & Pump Co. v. Teneha Light & Power Co.* (Civ. App.) 196 S. W. 260.

In action against indorser under plea of no consideration, defendant could explain nature of indorsement. *Wheelock v. Mayfield* (Civ. App.) 197 S. W. 475.

In action on note given for price of piano, answer alleging failure of consideration held sufficient. *Stevens v. Gustine Mercantile Co.* (Civ. App.) 197 S. W. 1126.

In action on note given for a churn, defendant's averment that the churn was wholly incapable of doing the work that the payees represented it would do, and was of no use, and unsalable, is very general, but is sufficient against a general demurrer. *Lang v. Bohlen* (Civ. App.) 200 S. W. 429.

In an action on notes, answer setting up contemporaneous oral agreement for future determination of the amount to be paid, and alleging that it was found that only a small part of the note was to be paid, was not a good plea of failure of consideration, but was an attempt to vary the note by parol. *Cameron v. Williams* (Civ. App.) 203 S. W. 928.

In an action on a note, where defendant pleaded an oral extension agreement, the burden was upon him to allege and prove a consideration for such agreement. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

In action to recover land conveyed to plaintiff by defendant, the defense that the deed was without any consideration, to be available, must have been pleaded. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

In an action on a sale contract, an exception to the answer, on the grounds that all verbal specifications and guaranties antecedent to the contract were included and that facts were not alleged to show sufficient consideration for any subsequent agreements, should not have been sustained as to an alleged independent fact that the plaintiff had failed to ship a part of the machinery contracted for. *Browning Engineering Co. v. Willett* (Com. App.) 228 S. W. 151.

In an action on purchase-money notes and to foreclose vendor's lien, a plea held sufficient as a plea of partial failure of consideration. *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

45. — **Coverture.**—Defense of coverture need not be pleaded where the petition discloses the disability. *Shannon v. Childers* (Civ. App.) 202 S. W. 1030.

In suit by a married woman against a warehouseman for loss of goods, plaintiff cannot object to judgment on cross-action for storage fees, where she did not plead coverture as a defense to such cross-action, and in a supplemental petition alleged facts showing that the goods were her separate property, that she had separated from her husband, and that she had power to make the contract of storage. *Lowery v. McCrary Transfer & Storage Co.* (Civ. App.) 213 S. W. 736.

46. — **Damages and mitigation thereof.**—In action for breach of contract of employment, burden of pleading and proving facts showing mitigation of damages by reason of employé's earnings after termination of contract is upon employer. *Mindes Millinery Co. v. Wellborn* (Civ. App.) 201 S. W. 1059.

While it may be that an injured person must show reason for failure to use adequate means to effect a recovery and mitigate his damages rather than to aggravate them, it is the better practice for defendant to plead special facts showing contributory negligence by plaintiff in aggravating his injury. *Baker v. Cobb* (Civ. App.) 221 S. W. 314.

In a servant's action the defense that the servant was negligent in the treatment of his injuries or in failing to observe and obey the instructions of his attending physician must be pleaded to be available. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

In an action for the conversion of ore taken from a mining claim by trespassers, the purchasers cannot recover for their expenditures on the ore, where they did not plead nor prove the items of such expenditures. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

47. — **Discharge of surety.**—In action against sureties where defense is alteration of obligation, the sureties must plead and prove facts entitling them to a discharge by reason of alteration. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 460.

48. — **Estoppel, waiver, and ratification.**—In action on note and trust deed securing it, in the absence of plea of estoppel, the issue of estoppel under trust deed was properly withheld from the jury. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

A waiver of the right to insist that a tender was of too small an amount by refusing it on other grounds must be specially pleaded. *Marti v. Wooten* (Civ. App.) 217 S. W. 447.

In suit to cancel an oil and gas lease, defendants' pleas of after-acquired title by plaintiff, and of estoppel through the acceptance of annual rentals held sufficient. *Smith v. Bateman* (Civ. App.) 230 S. W. 831.

51. — **Fraud and mistake.**—In action on note given for price of piano, answer alleging fraud held sufficient. *Stevens v. Gustine Mercantile Co.* (Civ. App.) 197 S. W. 1126.

Defendant in answer to charge of fraud, being entitled to set out in answer history of transaction, may allege plaintiff's statement of value, though it constitute only plaintiff's opinion. *Brooks v. Long* (Civ. App.) 199 S. W. 510.

In an action for goods sold and delivered an allegation, pleaded on information by defendant, that defendant's intestate signed the contract under a mistake of fact as to contents thereof, due to misrepresentations held insufficient to raise the issue of fraud or mutual mistake. *Detroit Steel Products Co. v. Houston Printing Co.* (Civ. App.) 202 S. W. 984.

A plea, whereby defendant sought to avoid an agreement for release, alleging that she executed it with a certain understanding and under a certain belief as to its legal import, is insufficient as a plea of mutual mistake. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

A plea whereby defendant sought to avoid an instrument, alleging that she was induced to sign by contemporaneous oral agreement and that she executed it with the understanding and under the belief that such was its legal import, and that she was not indebted in the amount named in it, is insufficient as a plea of fraud. *Id.*

To have entitled a railroad company to relief, against its contract to transport a carload of corn, on the ground of mistake, the road must have set up such mistake in its pleadings. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Civ. App.) 214 S. W. 833.

In action to foreclose chattel mortgage, defendant having admitted indebtedness in writing and execution of mortgage, the court could have properly excluded evidence tending to show that defendant was in jail when he executed the mortgage; there being no allegation of duress. *Bejil v. Blumberg* (Civ. App.) 215 S. W. 471.

In the absence of exceptions, the allegations of an answer of a fraternal insurer held sufficient to raise the issue that the applicant was guilty of fraud in falsely representing that he was not engaged in the saloon business. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

A contract for materialman's lien on a homestead being complete on its face, evidence to show that contract was invalid because resting partly in writing and partly in parol, was inadmissible under a pleading only that there was no valid lien, and not pleading omission of material part of the agreement by fraud, accident, or mistake. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

In a seller's action against buyers of machinery, an allegation of the answer that plaintiff knew the character of work the machine was intended to do was material on the issue of fraud in inducing defendants to contract. *Browning Engineering Co. v. Willette* (Com. App.) 228 S. W. 151.

Buyer's allegations as to the defects which prevented it from doing the work for which it was intended held proper on the issue of fraud inducing sale, and not subject to exception as not being included in the contract or lacking in definiteness and certainty. *Id.*

In an action for liquidated damages, because of defendant's refusal to consummate a land exchange transaction, defendant's allegations held sufficient to sustain proof that the contract was obtained pursuant to a conspiracy between plaintiff and brokers to defraud defendant. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

In suit for title to an undivided one-quarter interest in and to all gas, oil, and other minerals in a certain 160 acres of land, the petition alleging that defendants executed and delivered to plaintiffs a general warranty conveyance to the minerals, but after loss of such conveyance prior to registration refused to give a substituted conveyance, and the answer enumerating facts constituting fraud, but not specifically, charging fraud, where the facts charged in the answer relative to plaintiffs' standing by while defendants made a miscalculation of royalties in the lease constituted fraud, it was proper for the court to permit defendants to testify to anything which tended to prove their allegations. *Morris v. McGough* (Civ. App.) 230 S. W. 1092.

In suit for title to an interest in gas, oil, and other minerals in a certain 160 acres of land, the petition alleging that defendants executed and delivered to plaintiffs a general warranty conveyance to such minerals, but after loss of such conveyance prior to registration refused to give a substituted conveyance, answer enumerating facts constituting fraud, but not specifically charging fraud, held good as against general demurrer. *Id.*

Fraud must be specifically alleged, and if defendant, in action by broker to recover commissions, wished to set up the defense that an agent of plaintiff, with whom the land was listed, whom he did not know to be an agent, made the fraudulent statement that he was not connected with plaintiff, he must specifically allege such fraud. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

52. — **Homestead.**—See *Eureka Paving Co. v. Barnett* (Civ. App.) 216 S. W. 903.

In a suit to foreclose a lien executed by a husband and attacked by wife as in fraud of her homestead rights, the wife's pleadings held to abandon her homestead claim in a particular tract of property and place her entire claim for homestead on another tract. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

Where an oil and gas lease was attacked on the ground of insufficient acknowledgment, in that the notary who took the acknowledgment was interested therein, being agent of the lessee, a specific averment that the leased property alleged to belong to a husband and wife constituted the homestead of the lessors is necessary. *Cooper v. Casselberry* (Civ. App.) 230 S. W. 231.

54. — **Illegality of contract.**—In an action on county road warrants, an answer that the materials for which the warrants were issued were purchased in contravention of Const. art. 11, § 7, held to set up a good defense as against plaintiff's general demurrer. *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702.

In buyer's action for failure to deliver cotton contracted for, the seller's plea that it was contemplated that contract might be settled by payment of the difference in price, without actual delivery of and payment for the cotton, held sufficient pleading of illegality to render admissible parol evidence that the contract was a "future contract." *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

61. — **Negligence and contributory negligence.**—Contributory negligence is matter of defense which must be pleaded and proved, except where plaintiff in pleading or developing his case pleads or develops contributory negligence. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

In order for a defendant to recover on contributory negligence, he must prove negligence in the way he specially pleaded it, and the court is restricted to grounds alleged in the answer. *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340.

In an action by a father for death of his son against the latter's employer, in the absence of plea of contributory negligence, there was no basis for submission of the issue. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

63. — **Notice or knowledge of facts.**—In suit by bank, assignor of cotton receipts issued by public weigher, against weigher and sureties for breach of duty in releasing cotton without surrender of receipts by assignor, where weigher and sureties did not make, in trial court, defense that there was no indorsement of receipts and no notice to weigher of assignment, it is not available to them on appeal. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

An answer, in an action by landlord on notes and to foreclose lien, wherein defendant sought damages for breach of contract to lease by plaintiff, held to sufficiently charge that plaintiff had notice of the kind of crops that defendant intended to plant on the tract which plaintiff later refused to let. *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

64. — **Payment.**—Though allegations as to parol agreement to take back engine if notes for price were not paid would have been bad under parol evidence rule, held, that pleading as a whole showing the engine had been taken back had the effect of showing a discharge of the unpaid notes. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

In an action concerning the right of mortgagee to foreclose, landowner was not entitled to show that the mortgage note had been paid, where he did not plead payment. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

In suit by a national bank on a note executed for accommodation purposes by controlling stockholders in a borrowing company, allegations as to overloan to the company and the device adopted to enable the bank by discounting defendants' paper to exceed the legal limit held properly pleaded as matter of inducement leading up to the agreement of the bank to apply deposits by the company solely to any accommodation paper. *Goldstein v. Union Nat. Bank of Dallas* (Civ. App.) 216 S. W. 409.

It was proper also to plead that a prior note, executed under the same agreement, had been discharged in such manner. *Id.*

Defendants, under the answer, held entitled to introduce in evidence entries made in the bank book of the company by the receiving teller of the bank. *Id.*

In a life insurance company's action on assigned lien notes secured by its policies, also on a policy loan note, where defendant did not plead agreement that the amount collected on a policy should be applied first to payment of the balance due on a particular vendor's lien note, defendant's oral testimony to such effect was inadmissible. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 218 S. W. 1109.

66. — **Res Judicata.**—In a suit to compel an irrigation plant to supply water at a reasonable rate, it was not error to admit decrees in a previous suit whereby the irrigation plant was conveyed to purchasers at a judicial sale free from easements, notwithstanding an exception to a plea of res judicata was sustained. *McBride v. United Irr. Co.* (Civ. App.) 211 S. W. 498.

Where a judgment for defendant was not entered upon the minutes and a new trial was awarded at a subsequent term, resulting in a judgment for plaintiff, defendant was not required to plead the judgment first entered in bar to further proceeding upon the second trial. *Aetna Ins. Co. v. Dancer* (Com. App.) 215 S. W. 962.

The defense of a former judgment must be presented in bar, and not in abatement of the second suit. *Whiteman v. Whiteman* (Civ. App.) 232 S. W. 888.

68. — **Tender and offer of equity.**—In an action on a life policy, where it appeared that plaintiff had been tendered, through her attorney, more than three months before the suit was brought, the full amount the company had received, and liability for which it admitted, no plea of tender was necessary. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

An answer, admitting part of the claim sued on and pleading waiver of formal tender of the amount admitted, must also plead the deposit in court of the amount admitted to be due. *Miller v. Poff* (Civ. App.) 217 S. W. 399.

68/2. — **Title and ownership.**—In suit between creditors involving title to coal purchased by defendant creditor to supply debtor coal company's trade, allegation of ownership in defendant and coal company's possession as its agent was, in the absence of exceptions requiring a particularization of claim of title, sufficient to admit proof of

contract between defendant and coal company. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

70. **Defense or relief in particular actions.**—In an action by a creditor under arts. 3971-3973, against one receiving stock in bulk, a special answer, as against a general demurrer, held to sufficiently allege that there had been no sale in violation of such statutes. *John T. Barbee & Co. v. American Brewing Ass'n* (Civ. App.) 207 S. W. 334.

72. — **Against railroad companies.**—The issue of failure of caretakers to properly look after cattle shipped was not raised where, though the railway pleaded specially the stipulations of the shipping contract obligating the shipper to attend and take care of his cattle, there was no allegation of breach of this condition, nor any charge of contributory negligence in this respect. *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891.

73. — **Against surety.**—Sureties on administrator's bond sued thereon are not entitled to any credit, as for commissions of administrator, they neither pleading nor showing any such commissions were due and owing him. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

In an action by the payee of a promissory note against the surety, the promise of the payee to the surety to bring action against the maker which promise was not kept constitutes no defense where not alleged. *Fisher v. Russell* (Civ. App.) 204 S. W. 143.

75. — **By broker for commissions.**—In realty broker's action for commission, defendant's answer held not subject to exception on ground it did not negative plaintiff was procuring cause of sale. *Buck v. Woodson* (Civ. App.) 209 S. W. 244.

76. — **By foreign corporation.**—Defense that plaintiff corporation had not obtained permit to do business in Texas, held not available when raised for the first time on appeal without being pleaded in the court below. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

76½. — **By or against counties.**—In an action on county road warrants issued for materials, an answer setting up that the materials were sold to the county in view of a special road law and subject to its provisions, and that plaintiff knew that such materials were to be used in certain designated road districts which were not districts from the funds for which plaintiff attempted to recover, held to set up a good defense. *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702.

78. — **For breach of promise to marry.**—In suit for breach of marriage promise, previous unchastity of plaintiff must be pleaded as a defense. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

78¼. — **For cancellation.**—In action to cancel deed, it is defendant's duty to plead specifically such sums as he contends should be paid him if rescission is granted. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

78½. — **For divorce.**—Plaintiff husband's connivance in his wife's adultery is an affirmative defense in so far as it is unnecessary for plaintiff to negative connivance, and defendant cannot introduce evidence thereof unless the issue is made by the pleadings. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

78¾. — **For injunction.**—In a suit to enjoin a cotton gin, exceptions to the answer alleging that the gin was a public necessity, etc., held properly overruled, though none of the allegations, standing alone, was sufficient to constitute a defense, as the case was one calling for a consideration of all facts, circumstances, and conditions. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

79. — **For injuries to servant.**—If city did not employ five men so as not to come within the Employers' Liability Act, such matter should be alleged and proved by the city. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

In action for injuries to lineman's assistant when motorcar was derailed, evidence of prior derailments from the same cause was admissible, even in the absence of allegations thereof, to show the master's knowledge of the defects in the car. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

Exemption from provisions of Workmens' Compensation Act must be alleged and proved. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

81. — **For services.**—In an action by an engineer for services rendered in supervising construction of highways, the answer setting up that the roads were improperly built and that the engineer failed to keep a maintenance fund, held open to exceptions made, and hence such portion of the answer was properly stricken. *McDonald v. Axtell* (Civ. App.) 218 S. W. 563.

85. — **On bonds and notes.**—In an action on a note, defendant, having pleaded extension agreement as an affirmative defense, had the burden of alleging and proving all facts necessary to substantiate it. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

In an action on notes and to foreclose vendor's lien, the answer which set up an agreement that the maker should procure a loan and pay off part of the series and that the rest should be postponed to a second lien, held insufficient to state a defense, because not alleging facts sufficient to establish a binding agreement. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

In an action on a note, wherein defendant pleaded failure of consideration, it was not error to allow defendant to show that a third person owned an interest in the note, where such fact was pleaded and shown in the presentation of the real defense that defendant had not received the consideration and that an agreement had been made for rescission and for cancellation and return of the note. *Rawlings v. Ediger* (Civ. App.) 231 S. W. 163.

86. — **On contracts in general.**—Answer alleging that alleged right of plaintiff "was never agreed or contemplated by" contract between the parties, "nor was there any provision therein" conferring such right, was not subject to exception as attempting to construe the written contract. *Armstrong v. Gifford* (Civ. App.) 196 S. W. 723.

In action on notes for price of engine and fixtures, where answer alleged that plaintiff had accepted the return of the engine, allegation that it was tendered back at the same place and in the same condition as when delivered, held unnecessary. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

Answer, in action for price of lighting fixtures, held to sufficiently show wherein those furnished failed to comply with contract, and their smaller market value. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.

In action for purchase price of tractor, answer alleging that the engine as a whole and throughout all of its parts showed defective material and workmanship, and that it gave way, further specifying a number of parts which broke, was not indefinite and uncertain. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676.

Where lumber company enters into two piling contracts with same party and accepts 300 extra pieces under and as part performance of the contracts, in latter's action to recover balance due, the company cannot urge on appeal that it is liable as to excess only an implied contract, where it did not plead or urge such defense during trial. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

In suit to recover rental value of premises held by defendant under agreement with plaintiff's grantor, answer alleging defendant's possession and plaintiff's notice of agreement between defendant and plaintiff's grantor, etc., held not subject to general demurrer. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

In a contractor's action for balance due for construction work, the rejection of defendant's testimony held not error, there being no allegation by the defendant that it had been induced to enter the contract by the fraud of plaintiff, nor that he represented that the dam as he would build it would be of any use or value to defendant; the material issue being merely whether the work was done as contracted. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

87. — **On insurance contracts.**—In an action on an insurance policy wherein company claimed a reduction of loss because of a co-insurance clause, defendant was not entitled to such reduction, where it did not plead the clause nor prove facts showing it was entitled to the reduction. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

Judgment against a bonding company could not be assailed on appeal because the company had been dissolved and its charter forfeited after suit was instituted, where neither in its answer nor during the trial did the company disclose such fact. *Texas Fidelity & Bonding Co. v. Elliott* (Civ. App.) 195 S. W. 301.

Where fidelity insurance company did not plead damage by delay in giving notice of defalcation, or that the principal had disposed of his property between the giving of notice and the time when it should have been given, whether the notice actually given was within a reasonable time was immaterial. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

Where defendant insurer, did not plead insured's failure to furnish proofs of loss, and there was no evidence on the question, it could not be raised on appeal. *St. Paul Fire & Marine Ins. Co. v. Clark* (Civ. App.) 200 S. W. 229.

A plea by bonding company that claimant had waived his rights to share in indemnity by permitting judgments to be collected for the maximum amount of the insurance is sufficient to include negligence of the claimant in delaying his suit until after such judgments. *Darrah v. Lion Bonding & Surety Co.* (Civ. App.) 200 S. W. 1101.

Defendant beneficial association cannot invoke breach of warranty involved in alleged misrepresentation in application of member, where such breach is not pleaded. *Knights and Ladies of Security v. Russell* (Civ. App.) 209 S. W. 766.

The failure of insurer, which terminated a policy, to plead condition authorizing it to terminate, will not prevent it from defeating recovery of premiums already paid, on the theory there was a breach of contract, on the ground that the policy allowed it to terminate the risk; such condition being part of the contract alleged to have been breached. *American Nat. Ins. Co. v. Ball* (Civ. App.) 213 S. W. 71.

In an action on a policy, insuring an automobile while being transported by water, the defense of breach of implied warranty of seaworthiness of ferry was waived by failure to set it up by pleading or otherwise. *American Automobile Ins. Co. v. Fox* (Civ. App.) 213 S. W. 92.

A clause, not in the same part of a life policy in which an insurer promises to pay upon the death of insured, to the effect that insurer will not be liable in event of suicide, is in the nature of a condition subsequent, or a proviso which courts treat as a defeasance clause, and which, if relied on to defeat a recovery under the policy, must be sufficiently pleaded and proved by the insurer. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 213 S. W. 591.

In an action on a life insurance policy, an allegation by defendant that insured "died by his own hand" held equivalent to alleging that he intentionally took his own life. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

In an action on a life policy containing a suicide clause, where it appeared that insured committed suicide 33 days after the issuance of the policy, an answer denying liability for the face of the policy and admitting liability for repayment of all insurer had received from insured, with tender of such amount, held good on general demurrer. *Id.*

Where fraternal society by-law required the member on change to a more hazardous

occupation to give notice and pay an additional rate of assessment, the beneficiary was not required to allege and prove that the member died during the 30 days following the change and before a regular assessment fell due, the society having the burden of alleging and proving that the member died subsequent to the expiration of such 30-day period, and after the regular assessment had become due. *Sovereign Camp, W. O. W., v. James* (Civ. App.) 230 S. W. 435.

Answer alleging that the deceased member changed occupation and died while engaged in new occupation without payment of increased rate, without alleging that the regular rate had become due prior to the member's death, held insufficient to show that the member had been suspended at the time of his death. *Id.*

Answer alleging that the deceased changed his occupation without giving the society notice thereof, and that he died while engaged in the new occupation, without alleging that deceased died more than 30 days after the change of occupation, held insufficient to present a defense. *Id.*

To avail itself of the failure of insured to submit to examination after loss under a fire policy, insurer must not only plead the policy clause providing for examination, but must plead and prove that it fixed a reasonable time and place for such examination. *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

Where it is not alleged that representations made in the application for a life insurance policy were false, the policy will not be forfeited on such ground, as forfeitures are not favored and should never be permitted except under full allegation and proof. *Sovereign Camp, W. O. W., v. Hubbard* (Civ. App.) 231 S. W. 828.

89. — **Specific performance.**—In a suit in which plaintiffs sought specific performance of a compromise agreement, answer held wholly insufficient to authorize proof of an intention other than that deducible from the language of the instrument. *Flores v. Flores* (Civ. App.) 209 S. W. 1157.

In an action for specific performance of contract to convey an oil lease, answer alleging plaintiff, to bind the bargain, gave a check on a nonexistent bank, and that she had no bank deposit as claimed, coupled with the fact that plaintiff did not return as agreed and deposit the sum in cash, and made no attempt to enforce the contract for a long time, is not open to demurrer. *Greenameyer v. McFarlane* (Civ. App.) 220 S. W. 613.

Where defendant, in an action for specific performance, asserted that the agreement was unenforceable under the statute because not in writing, the contention that the description was insufficient is not available unless specifically pleaded. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

89½. — **To foreclose liens and mortgages in general.**—Title not being in issue in suit to foreclose a mortgage lien, the limitation title of defendant purchaser from the mortgagor cannot be set up as a defense. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

In suit to foreclose lien for an improvement loan on the homestead, the husband's trustee in bankruptcy having answered without asking any affirmative relief except as to costs, the question to whom the residue of the fund after paying plaintiff's debt shall go is not raised, and is not proper for determination. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

In an action to foreclose a deed of trust on real estate, there was no reversible error in directing a foreclosure as to a defendant who disclaimed; there being no plea as to him. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

90. — **To foreclose mechanic's lien.**—In action to foreclose contract lien, plaintiff's failure to prove compliance with the contract did not render judgment of foreclosure invalid; noncompliance with contract being a matter of defense. *Johnson v. Barker* (Civ. App.) 215 S. W. 348.

91. — **To foreclose vendor's lien.**—The vendor of land may recover the land on his reserved legal title, notwithstanding the payments and improvements by the purchasers, unless the purchasers assert their equities. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

CHAPTER NINE

CHANGE OF VENUE

Art.

1911. By consent of parties.

1912. Granted on application, when.

Art.

1913. Shall be granted, unless, etc.

1914. To what county.

Article 1911. [1270] [1270] By consent of parties.

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

Art. 1912. [1271] [1271] Granted on application, when.

See *Lucid v. McDowell* (Civ. App.) 206 S. W. 203; *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288; notes to art. 1830.

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

Art. 1913. [1272] [1272] Shall be granted, unless, etc.

Cited, Atchison, T. & S. F. Ry. Co. v. Stevens, 109 Tex. 262, 206 S. W. 921.

Art. 1914. [1273] [1273] To what county.

Cited, Atchison, T. & S. F. Ry. Co. v. Stevens, 109 Tex. 262, 206 S. W. 921.

**CHAPTER TEN
CONTINUANCE**

<p>Art. 1917. Continuance not to be granted, except, etc.</p>	<p>Art. 1918. Application for continuance, requisites of.</p>
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Article 1917. [1276] [1276] Continuance not to be granted, except, etc.

Cited, St. Louis & S. F. Ry. Co. v. Woolum, 84 Tex. 570, 19 S. W. 782.

In general.—Where plaintiff voluntarily invoked the jurisdiction of the court, and the case has been pending for 11 years, the court properly denied his motion for continuance on ground that it was uncertain whether land in question was in the United States or Mexico, and that the case should be deferred until report of joint boundary commission should fix true boundary. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

Where exception to petition to determine riparian water rights had been properly sustained on the ground that it was not alleged plaintiff owned the rights, and there was no offer to amend, there was no error in refusing continuance to bring in owners, there being no case left to continue, and such owners not being necessary parties to the suit under art. 1848. *Ward County Water Improvement Dist. No. 3 v. Ward County Irr. Dist. No. 1* (Civ. App.) 222 S. W. 665.

Court did not err in refusing to postpone a hearing to a future day of the term on the ground that on a former partial hearing of the case in another district it developed that other parties than plaintiff owned or had an interest in the note sued on, since the court could, on the hearing, determine the question. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

It was proper to refuse a continuance in an action for slander causing breach of the promise of marriage, because of pending action by plaintiff for such breach of marriage promise, since the judgment in such case could not bar or mitigate the damages. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

Amendment of pleadings.—Where the affidavits relied on to show that defendant was estopped to set up limitations were before the court it will not be said as a matter of law that the court abused its discretion in overruling a motion for continuance to plead estoppel. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

Where on the day the case was called for trial plaintiff filed amendment which presented new and material issues, the denial of defendant's motion for a continuance on the ground of surprise and to obtain material testimony was erroneous; it not appearing defendant was negligent. *Indiana Silo Co. of Texas v. Bigham* (Civ. App.) 228 S. W. 274.

Where, on the morning of the trial of an action for breach of contract plaintiff made an amendment inserting further allegations of damage the denial of a continuance was not an abuse of discretion. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

Process.—In suit on promissory note and to foreclose vendor's lien, there was no error in overruling defendant's motion for continuance to perfect service upon codefendant, made a party by amended answer, where cause was filed July 12, 1912, but codefendant was not sought to be made party until May 24, 1916. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

Absence of party.—It is the legal duty of a party to an action to keep himself posted as to the setting of the case for trial, and to be present to testify and aid his counsel. *Adams v. Overland Automobile Co.* (Civ. App.) 202 S. W. 207.

Where plaintiff was his most material witness and he was in the military service, his attorney's due application for continuance for his testimony should have been granted, and refusal was ground for a new trial. *Vaughn v. Charpiot* (Civ. App.) 213 S. W. 950.

Absence of counsel.—Where continuance because of the absence of one of defendant's attorneys was refused, the trial court held not to abuse its discretion where there was nothing to indicate that defendant was deprived of any defense or that it was not ably and fully represented. *Early-Foster Co. v. El Campo Rice Milling Co.* (Civ. App.) 212 S. W. 964.

Where defendant's attorney was forced to trial in other actions, held, that defendant should have been granted a continuance, the time being too short to engage other attorneys, and defendant's attorney being particularly familiar with the facts, regard-

less of fact that delay might work hardship on plaintiff. *Modern Woodmen of America v. Floyd* (Civ. App.) 218 S. W. 1085.

Absence of witness or evidence.—Refusal to postpone a civil trial to enable plaintiff to find a misplaced deposition and introduce it in evidence, held within the sound discretion of the court under art. 1952. *Owensboro Wagon Co. v. San Antonio Tire & Lumber Co.* (Civ. App.) 199 S. W. 701.

Continuance should have been granted defendants in foreclosure who showed illness of two material witnesses of whom a defendant was one. *Alderete v. Mosley* (Civ. App.) 200 S. W. 261.

In cross-action by tenants against landlords, application for continuance, not statutory, but addressed to discretion of trial court, on ground that continuance would render it certain what crop had been grown or could have been grown, and its value, held properly denied. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In a suit to abate a nuisance, it was error to deny a continuance to obtain the testimony of certain witnesses, where the witnesses were material, statutory diligence was shown, and there was no controverting affidavit as to diligence. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

Court did not err in refusing to grant a continuance on account of the absence of a witness, where his deposition was taken, which fully stated his version of the matter involved. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

It was not error to refuse continuance for a witness, where no process was issued, and where he was an expert witness as to the proper construction of a building, and others testified, and doubtless others could have been found to testify concerning the matter. *Goodman v. Republican Inv. Co.* (Civ. App.) 215 S. W. 466.

— **Competency or materiality.**—In action on notes given by the husband and his partner for a release of the wife's dower, continuance was properly refused when asked to secure testimony of absent witnesses that the partnership was dissolved prior to the giving of the notes. *Stewart v. Watts* (Civ. App.) 197 S. W. 324.

In suit involving title to land it was not abuse of discretion to refuse continuance to enable plaintiffs to obtain evidence that a corporation had become dissolved, and its property thereby vested in those claiming under its only stockholders, where there was, up to that point in the trial, no evidence that plaintiffs were the sole stockholders. *Holmes v. Tennant* (Civ. App.) 211 S. W. 798.

Refusal of continuance for absence of witness is not error, where it appears that his testimony was not of a character that would have brought about a different result. *Parker v. Harrell* (Civ. App.) 212 S. W. 542.

In suit to cancel an oil and gas lease wherein plaintiffs' attorney intervened to enforce his contract for compensation, overruling of defendants' application for continuance held not justified on ground that desired evidence of one defendant, tending to show that in his dealings with the lease he had merely acted for accommodation, would have been immaterial. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

— **Cumulative evidence.**—Where a continuance to obtain evidence was denied, there was no abuse of discretion where all the material facts alleged in the motion as a basis for continuance were proved by other testimony. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

There was no error in denying continuance, where testimony of absent witness would have been merely cumulative. *Quanah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606.

— **Contradictory evidence.**—It is not error to deny a continuance asked to secure the testimony of a witness which, if given, would contradict that of another of applicant's witnesses and be of no value. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

— **Diligence.**—See *Hutson v. Cade* (Civ. App.) 217 S. W. 438; notes to art. 1917.

Where a witness resides out of the county and a deposition could have been had, it was not an abuse of discretion to refuse a continuance. *Hall v. Hall* (Civ. App.) 198 S. W. 636.

Application held not to show due diligence where absent witness lived near courthouse, and applicant knew his illness would prevent attendance, but made no effort to take deposition. *Palm v. Theumann* (Civ. App.) 201 S. W. 421.

In action against contractor and surety for nonperformance of contract, a motion by surety because contractor was not present to testify contract had been complied with was properly overruled, where surety had exercised no diligence to procure his attendance. *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798.

In suit to recover balance on check drawn on defendant bank, in refusing continuance on account of absence of drawer, whom plaintiff desired as witness, trial court held not to have abused discretion; plaintiff having made no effort to take witness' deposition, though knowing he had moved to another state. *Falfurrias Mercantile Co. v. Citizens' State Bank* (Civ. App.) 207 S. W. 568.

Where subpoena was issued September 25th, and sheriff was permitted to delay return showing the witness temporarily absent, until October 12th, and nothing was done until trial on October 23d, no attempt being made to take his deposition, the return indicating where witness could be found, there was a lack of diligence, and it was not an abuse of discretion to deny continuance. *Ayo v. Robertson* (Civ. App.) 207 S. W. 979.

Where no effort had been made to take deposition of absent witness, a resident of another county, no such diligence had been exercised to procure the evidence of

such witness as to justify postponement. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

Because of want of diligence, there was no error in refusing a defendant postponement on suppression of deposition of himself, the only witness on issue of payment, the case having at his request been set late in the term, deposition having been returned shortly before trial, and he in taking the deposition having been attorney for the other defendants. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 209 S. W. 205.

In suit on policy, court held not to have erred in overruling defendant's application for continuance because of absence of witnesses; the witnesses not having been subpoenaed, no effort having been made to take their depositions, and application not stating that due diligence had been used. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

Court properly refused to continue trial to permit defendant to obtain a copy of the statutes of another state where trial was held almost three years after filing of original petition. *Texas & N. O. R. Co. v. Pipkin* (Civ. App.) 209 S. W. 757.

Court properly refused continuance on ground of absence of witness, where trial was held almost three years after original petition was filed, and witness was not subpoenaed until two days before trial, and no explanation was given for delay. *Id.*

The statute on continuance requires not only that due diligence be alleged in motion, but that it be shown, and where it is apparent that the applicant was not duly diligent in ascertaining what witness' answers in his deposition would be and in securing the deposition, denial of continuance was not an abuse of discretion. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

Where plaintiff in his petition set forth his version of a conversation with an agent of defendant, the court did not err in refusing a continuance on account of the absence of an employé in the office wherein the conversation took place, defendant having taken a deposition of the agent, but having failed to take a deposition of the witness in question. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

A motion for continuance, based on absence of nonresident witnesses, was properly overruled, where no effort had been made to take their depositions, and their testimony at a previous trial was read. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

It was not error to refuse continuance for a witness, where no process was issued. *Goodman v. Republican Inv. Co.* (Civ. App.) 215 S. W. 466.

It is not error to overrule a motion for continuance for a witness residing out of the county of trial who has not been served by subpoena and from whom no deposition has been taken. *Hardin v. Hanson* (Civ. App.) 220 S. W. 363.

Where plaintiff had three months within which to have process issue court's refusal to continue the case upon the ground that supplemental interrogatories had been propounded to such witness, who had failed to answer them, in order to prosecute legal process to compel such witness to testify, was not error; sufficient diligence not having been shown. *Gateway Produce Co. v. Sunset Fruit & Produce Co.* (Civ. App.) 222 S. W. 654.

Where no commission was issued and placed in the hands of an officer authorized to take depositions, the party asking for a continuance to procure witness' evidence cannot be said to have used due diligence, although his adversary waived the issuance of a commission. *Short v. Walters* (Civ. App.) 231 S. W. 161.

Surprise.—A litigant must be prepared to prove such issues of fact as he might reasonably foresee from the nature of the case, and is not entitled to withdraw announcement of ready on the ground of surprise as to such matters, in the absence of any misleading acknowledgment or declaration of the adverse party. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

One suing on a paving certificate is held chargeable with notice of a stipulation in such certificate, and the city charter, that such certificate became wholly due on default on one installment, and cannot claim surprise on introduction of evidence under plea of limitations to show that installment was paid after due date. *Id.*

Discretion of court.—An application for continuance is not statutory, but is addressed to the discretion of the trial court. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167; *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

Where an application for continuance is not statutory, the party is not entitled to continuance as a matter of right, but the application is addressed to the sound discretion of the court, exercise of which will not be revised unless a pronounced abuse is shown. *Hutson v. Cade* (Civ. App.) 217 S. W. 438; *Smith v. Potts* (Civ. App.) 226 S. W. 480.

Court did not abuse its discretion by continuing divorce suit after partial hearing of evidence. *Hunt v. Hunt* (Civ. App.) 196 S. W. 967.

Where parties agreed on trial date, defendant's attorneys' application for continuance on ground of defendant's absence from city held not a statutory application, but dependent on discretion of court. *Adams v. Overland Automobile Co.* (Civ. App.) 202 S. W. 207.

Discretion of trial judge in method of control and disposition of docket of his court is large, and, unless continuance on his own motion is so unreasonable as to be clear abuse of discretion, it cannot be regarded as refusal to proceed with trial pursuant to law. *Matagorda Canal Co. v. Styles* (Civ. App.) 207 S. W. 562.

Action of trial judge in continuing on his own motion cause involving water rights, until board of water engineers, in pending proceeding, had determined rights of parties, held not an abuse of discretion or refusal to proceed with trial pursuant to law. *Id.*

Where a motion for continuance was based upon the absence of a material witness, and was in form and manner in compliance with the statutory requirements, the question of granting or overruling the motion was within the sound discretion of the trial court. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

Refusal to continue trial in action against railroad for injuries sustained in Illinois, upon application based upon order of Director General of Railroads No. 26, was discretionary. *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642.

In view of Act Cong. March 21, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j), court did not abuse its discretion in refusing a third continuance of action against a railroad for injuries sustained in Illinois, notwithstanding order of Director General where suit had been brought before railroads were placed under Director General's control. *Id.*

General Order No. 26 of the Director General of Railroads, making the continuance of a case for the period of federal control dependent on a showing that the just interests of the government would be prejudiced by a trial, if within the power of the Director General, does not deprive the trial court of power to exercise discretion in determining the sufficiency of the showing of prejudice. *El Paso & S. W. R. Co. v. Lovick*, 110 Tex. 244, 218 S. W. 489.

Where action was begun against a railroad in a county other than that of plaintiff's residence or that in which the cause of action arose, held that it was not an abuse of discretion to refuse an abatement and continuance for the period of federal control of the railroad under General Orders Nos. 18 and 18a of the Director General, on the ground that it would be necessary to bring two switchmen and an engineer engaged in hauling war materials and troops to the county of the trial as witnesses. *Id.*

Application for continuance of witness not living in county in which suit was pending, not being a statutory one, was addressed to the sound discretion of the trial court. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

In an action for breach of contract, the question whether defendant was entitled to a continuance on account of an amendment made the morning before trial which amplified the allegations as to damages is, under rule 16 for the district and county courts (142 S. W. xviii), a matter to be adjudged by the trial court. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

When an application for continuance shows that the means provided by law to secure testimony have not been used, the application is addressed to the sound discretion of the trial court, and, unless it clearly appears that such discretion has been abused, the case should not be reversed for overruling the application. *Short v. Walters* (Civ. App.) 231 S. W. 161.

Exception and review.—Discretion of court in granting or refusal of continuance will not be interfered with unless it has been abused. *Alderete v. Mosley* (Civ. App.) 200 S. W. 261; *Gateway Produce Co. v. Sunset Fruit & Produce Co.* (Civ. App.) 222 S. W. 654.

In suit against father and daughter, where father died before he was cited and daughter's motion for dismissal on ground that she was married, was granted, where plaintiff made no motion for continuance to make husband party, he cannot complain that court failed to continue cause for such purpose. *City of Ft. Worth v. Cotton* (Civ. App.) 198 S. W. 1015.

Discretion of court in passing on application for continuance on grounds not statutory will not be reviewed unless abused. *Adams v. Overland Automobile Co.* (Civ. App.) 202 S. W. 207; *Hutson v. Cade* (Civ. App.) 217 S. W. 438.

Where defendant's motion for continuance for absent witnesses was excepted to on ground that there is no pleading on which to predicate the testimony, that testimony was not material, and that no diligence was shown, and court overruled motion without showing basis of his ruling, court's ruling is available as error, on appeal, notwithstanding inadmissibility of testimony under general denial, since it will be assumed that defendant would have amended pleading if motion had been overruled on such ground. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In support of the action of the trial court in refusing continuance, every presumption of its correctness consistent with the record is to be indulged. *Hutson v. Cade* (Civ. App.) 217 S. W. 438.

Where there was evidence tending to show that plaintiff was pursuing a course of tactics tending to delay the case, court's refusal to continue the case will not be disturbed. *Guyer v. Chapman* (Civ. App.) 227 S. W. 217.

Art. 1918. [1278] [1278] Application for continuance, requisites of.

Affidavits and motion for continuance.—Trial court held within judicial discretion in overruling application of defendants for continuance, which was not in writing, where failure to put in writing and to verify was not waived by plaintiffs. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

The action of the trial court in refusing continuance on account of engagement in trial of another suit of defendant and his claimed necessary witness held not reversible error; there being no showing that any process had been issued for the witness, that any effort had been made to take his or defendant's deposition, of what he or defendant would have testified to, etc. *Hutson v. Cade* (Civ. App.) 217 S. W. 438.

— **Amendment.**—Where application for continuance claiming surprise as to new matter in amended petition served five days before trial, did not show that time was

too short to procure testimony, no error was shown in refusing continuance. *Hahl v. Davidson* (Civ. App.) 202 S. W. 792.

Although defendant, filed his amended answer and cross-bill only three days before trial, held, there was no abuse of discretion in denying continuance to enable plaintiff to prepare for trial, where she failed to state in her motion, that by a continuance she could probably obtain testimony to contradict alleged new issues presented. *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

— **Materiality of evidence.**—Under Rev. St. 1879, art. 1278, an application for a continuance, not showing what movant expected to prove by the witnesses, was properly denied. *Rubrecht v. Powers*, 1 Civ. App. 282, 21 S. W. 318.

— **Diligence.**—In an application for continuance to obtain testimony of certain witnesses, no abuse of discretion by the court was shown in denying same, as to one witness, as to whom no statutory diligence was shown. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

Court did not err under this article, in denying an application for a second continuance on a second trial more than three years after the first trial, where application did not show that absent witnesses had been notified that the cause had been set down by trial or were requested to attend, nor that any fee had been paid or tendered them. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

In action involving a boundary dispute, refusal of continuance to permit defendant to have a survey made of the land was not an abuse of discretion, in absence of showing that such survey could not have been previously made. *Barlow v. Greer* (Civ. App.) 222 S. W. 301.

— **Absence of witness.**—Trial court held within judicial discretion in overruling application of defendants for continuance, where testimony of defendants whose absence was basis of application was not shown to be necessary. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

Where application for continuance on ground of illness of witness did not state how long illness had existed, so as to excuse failure to take deposition, or that he could have added to testimony on former trial which was introduced in evidence, its refusal was not error. *Hahl v. Davidson* (Civ. App.) 202 S. W. 792.

An application for continuance for absent witness cannot be treated as a second application merely because it was first presented on the day the case was called for trial, and again on the date to which the case has been reset, where such postponement of the trial was not based on the application. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

Application for continuance for absence of witness after trial had already been continued to permit deposition of witness to be taken, stating that witness was ill and not able to testify by deposition without giving opinion of physician as to ability of witness to make a deposition, held properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

An application for continuance, which is not statutory, and therefore addressed to the court's discretion, should state that the applicant expected to procure the testimony by the next term of court; otherwise denial of continuance is not error. *Short v. Walters* (Civ. App.) 231 S. W. 161.

Determination of application.—On motion for continuance trial court should act on facts in evidence as to whether a defendant was malingering by feigning illness, instead of on his own impression on facts outside record. *Alderete v. Mosley* (Civ. App.) 200 S. W. 261.

Affidavits used in answer to a motion to postpone a hearing may be considered by the trial court. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

CHAPTER ELEVEN

STENOGRAPHIC REPORTERS

Art.		Art.	
1923.	Duties of reporters.	1930.	Special stenographer appointed, when.
1924.	Same.	1931.	Compensation of special stenographer.
1925.	Compensation of reporter; how paid; preparation of transcript on request of parties; deputy reporter.	1932.	Stenographer for county court, etc., in civil cases, appointed when; oath; compensation.
1925a.	Compensation of court reporter of 80th judicial district.	1933.	In felony cases reporter to keep stenographic record to be made when and how; transcript for appointed attorney, when, and compensation for same.
1925b.	Compensation of court reporters for 3d, 39th, and 50th judicial districts; poverty affidavit to secure transcript.		
1925c.	Compensation of court reporters in 88th and 91st judicial district.		
1926.	Reporters to make transcript for any person; compensation.		

Article 1923. Duties of reporter.

Loss of notes.—That the official reporter had lost the shorthand notes which he was required to take and preserve under arts. 1923 and 1924, so that he could not prepare a statement of facts, and that the attorneys who represented appellant at hearing had moved from the county, held not to entitle appellant to reversal, where appellant made no showing of an attempt to proceed under arts. 2068, 2112, 2157, 2158. *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569.

Art. 1924. Same; preparation of transcript; compensation.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

Effect of failure to transcribe.—Upon a motion for affirmance of judgment for failure to file statement of facts, that court reporter failed to transcribe testimony in form required by this article, did not excuse appellant, where neither attempt to mandamus reporter nor to make statement of facts from memory under art. 2068 was made. *Fruitt v. Blesi* (Civ. App.) 204 S. W. 714.

Loss of notes.—See *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569; notes to art. 1923.

Fee as costs.—Under Acts 32d Leg. c. 119, §§ 5, 6, amending arts. 1924, 2070, where narrative form of testimony was transcribed by stenographer on request of appellant his fee is not taxable as cost of appeal. *Schallert v. Boggs* (Civ. App.) 210 S. W. 601.

Art. 1925. Compensation of reporter; how paid; preparation of transcript on request of parties; deputy reporter.—The official shorthand reporter of each judicial district in this State shall receive a salary of one thousand eight hundred dollars per annum, in addition to the compensation for transcript fees as provided for in this Act, said salary shall be paid monthly by the commissioners court of the county, out of the general fund of the county, upon the certificate of the district judge. In judicial districts in this State composed of two or more counties said salary shall be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties in the district. When any party to a civil suit reported by any such reporter shall desire a transcript of the evidence in said suit, said party may apply for same and shall indicate whether he desires same in question and answer form or in narrative form. In the event said transcript should be ordered made in narrative form, then such reporter shall make the same up in duplicate narrative form and shall receive as compensation therefor the sum of twenty cents per hundred words; and no statement of facts shall be made up in question and answer form or charge made therefor, except when requested by the parties to the suit. It is especially provided, however, that the necessity for a deputy official shorthand reporter is to be entirely left to the discretion of the district judge of the judicial district. [Acts 1911, p. 264, § 8; Acts 1917, 35th Leg., ch. 189, § 1; Acts 1917, 35th Leg. 1st C. S., ch. 27, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 79, § 1; Acts 1919, 36th Leg., ch. 111, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 47, § 1.]

Explanatory.—Took effect 90 days after June 18, 1920, date of adjournment.

Acts 1920, 36th Leg. 3d C. S., ch. 47, § 1, amends § 8, chapter 119, General Laws, Regular Session, 32d Leg. 1911, as amended by chapter 189, Regular Session 35th Leg., and as amended by ch. 27 of First Called Session of the 35th Leg. and as amended by ch. 79 of the Fourth Called Session of the 35th Leg. and as amended by ch. 111 of the Regular Session of the 36th Leg. Sec. 2 of the act repeals "all laws and parts of laws in conflict with section 8, chapter 119, of the General Laws of the State of Texas, passed by the regular session of the Thirty-Second Legislature of the State of Texas, 1911, and as amended," as set forth above.

This act supersedes the following local and special acts fixing the compensation of official stenographers in particular districts:

- Acts 1919, 36th Leg. ch. 100, relating to the 4th judicial district;
- Acts 1920, 36th Leg. 3d C. S., ch. 8, relating to the 59th judicial district;
- Acts 1920, 36th Leg. 3d C. S., ch. 13, relating to the 63d judicial district;
- Acts 1920, 36th Leg. 3d C. S., ch. 15, relating to the 7th, 13th, and 86th judicial districts.

Inability to pay for transcript.—Under Acts 32d Leg. c. 119, §§ 5, 8, 9, and 14, arts. 1924, 1925, 2071, 1926, 1933), official court stenographer upon application of a defendant who had been defended by his own attorney alleging his inability to pay for transcript or to give security therefor would be directed to prepare a transcript of his

notes and to file them with clerk of district court. Ex parte Fread, 83 Cr. R. 465, 204 S. W. 113.

Art. 1925a. Compensation of court reporter of 80th judicial district.—The official court reporter of the Eightieth Judicial District of Texas shall receive the same salary and compensation for transcript fees as court reporters for the other district courts in Harris County; and such salary shall be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties. [Acts 1920, 36th Leg. 3d C. S., ch. 19, § 1.]

Explanatory.—Took effect 90 days after June 18, 1920, date of adjournment. The following note appears in the Session Laws:

"**Note.**—The record of the above Senate Bill No. 32, in both the Senate and the House Journals, shows that said bill as introduced and read in both Houses, considered and reported on by appropriate committees, and thereafter regularly considered and finally passed by each House, was in good form, and contained the required enacting clause, and said journals fail to show that any motion or amendment was offered or adopted in either House to strike out the enacting clause. Said journals disclose that the omission of the enacting clause from the enrolled bill, now on file in the office of the Secretary of State, is an error of the enrolling clerk of the Senate. The situation presented in reference to this Act is the same as that in reference to Senate Bill No. 97, Chapter 32 of this volume, and the Attorney General's Department has given an opinion to the effect that, in view of the regular history of the proceedings on that bill in the Legislature, failure of said enrolling clerk to enroll the enacting clause in the bill does not invalidate same. C. D. Mims, Secretary of State."

Art. 1925b. Compensation of court reporters for 3rd, 39th and 50th judicial districts; poverty affidavit to secure transcript.—The official shorthand reporters of the Third, Thirty-ninth and Fiftieth Judicial Districts of Texas shall receive a salary of eighteen hundred dollars per annum in addition to the compensation for transcript fees, as heretofore or may hereafter be provided for by law; such salary shall be paid monthly by the commissioners courts of the counties composing said districts out of the general fund of said counties upon the certificate of the district judge, in proportion to the number of weeks provided by law for holding court in the respective counties of said districts; provided, that when any criminal case is appealed and the defendant is not able to pay for a transcript, as provided for by law, or to give security therefor, he may make affidavit of such fact, and upon the making of such affidavit, the court shall order the official shorthand reporters to make such transcript in duplicate and deliver it, as provided by law in civil cases, but the official shorthand reporters shall receive no pay for same; provided, that should any affidavit so made by such defendant be false, he shall be prosecuted and punished as is now provided by law for making false affidavits. In any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, such appellant or plaintiff in error may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall order the official shorthand reporters to make a transcript as provided in other cases, but the official shorthand reporters shall receive no pay for the same; provided, that should any such affidavit by such appellant or plaintiff in error be false, he shall be prosecuted and punished as is now provided by law for making false affidavits. [Acts 1920, 36th Leg. 3d C. S., ch. 52, § 1.]

Explanatory.—Took effect 90 days after June 18, 1920, date of adjournment. Sec. 2 of the act repeals all laws in conflict.

Art. 1925c. Compensation of court reporters in 88th and 91st judicial districts.—Hereafter, the official shorthand reporters in and for the Eighty-eighth and Ninety-first Judicial Districts of Texas shall each receive for their services as such reporters a salary of Twenty-four Hundred Dollars per annum, in addition to the compensation for transcript fees as provided by law, said salaries to be paid monthly by the Commis-

sioners' Court of the county constituting said Eighty-eighth and Ninety-first Judicial Districts upon accounts duly approved by the respective judges of said District Courts. [Acts 1921, 37th Leg., ch. 140, § 1.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

Art. 1926. Reporters to make transcript for any person; compensation.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

Art. 1930. [1295] [1295] Special stenographer appointed, when.

Appointment in criminal cases.—In the absence of a statute providing for the employment of a stenographer in criminal cases, as is provided by Rev. St. 1879, arts. 1295, 1296, in civil cases, on the application of a party, there is no error in the court's refusing to appoint a stenographer, though there be one present, and accused offers to pay his fees. *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640.

Art. 1931. [1296] [1296] Compensation of special stenographer.

See *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640; note to art. 1930.

Art. 1932. Stenographer in civil case in county court; appointment; oath; compensation; other provisions applicable.

Taxation of costs.—Under arts. 1932, 2035, 2048, the trial court is authorized to adjudge costs of the stenographer against even the successful party, as where the stenographer was demanded by a defendant as to whom plaintiff admitted in open court he had no case. *Brod v. Luce* (Civ. App.) 225 S. W. 553.

Art. 1933. In felony cases reporter to keep stenographic record, to be made when and how; transcript for appointed attorney, when, and compensation for same.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

CHAPTER TWELVE

TRIAL OF CAUSES

Art.	Art.
1934. Appearance day.	1948. Trial by court.
1935. Call of appearance docket.	1949. Agreed case.
1936. Judgment by default.	1950. Cases brought up from inferior courts tried <i>de novo</i> .
1938. Damages on liquidated demands, now assessed.	1951. Order of proceedings on trial by jury.
1939. On unliquidated demands.	1952. Additional testimony allowed, when.
1941. Procedure in case of service by publication where no answer.	1953. Order of argument.
1942. Guardian ad litem for minors, lunatics, etc.	1954. Charge and instructions.
1943. Suits called in their order, etc.	1955. Nonsuit may be taken, when.
1944. To be tried when called, unless, etc.	1957. Jury may take certain papers.
1945. Day set for jury docket.	1959. Duty of officer in charge of jury.
1947. Issues of law and dilatory pleas, tried when.	1960. Caution to the jury.
	1961. May communicate with the court.
	1962. May ask further instruction.
	1965. Disagreement of jury.

Article 1934. [1280] [1280] Appearance day.

Default judgment.—See *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60; *McKay v. Barlow* (App.) 18 S. W. 650; *Graham v. Miller* (Civ. App.) 24 S. W. 1107; *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115; notes to art. 1936.

Art. 1935. [1281] [1281] Call of the appearance docket.

See *Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. 663; *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60; *McKay v. Barlow* (App.) 18 S. W. 650; *Graham v. Miller* (Civ. App.) 24 S. W. 1107; notes to art. 1936; *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115.

Art. 1936. [1282] [1282] Judgment by default.

See *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115.

Character of judgment.—Where defendants, after the overruling of their objections to election of special judge, withdrew from the courtroom, a judgment against them by the special judge, treating their withdrawal as an abandonment of their defense, after hearing evidence and trying the case, would be treated as a judgment on trial, and not as a judgment by default. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Default in pleading.—A default judgment cannot be rendered where defendant has an answer on file. *Counts v. Southwestern Land Co.* (Civ. App.) 206 S. W. 207.

Plaintiff, in absence of answer, general demurrer having been sustained to that filed, was entitled to judgment by default. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

Time of answering or filing answer.—Although defendants were cited to appear November 19th, court had jurisdiction, no answer having been filed, to render default judgment October 13th, in view of Acts 35th Leg. c. 91, § 2, art. 30, changing term of court so that it began October 8th. *Queiroli v. Simon & Dunlap* (Civ. App.) 206 S. W. 123; *Queiroli v. Whitesides* (Civ. App.) 206 S. W. 122.

Plaintiff, on the fifth day of the term, moved for judgment by default, when an attorney asked leave to file an answer forthwith, which was refused, and plaintiffs' motion was granted. Held that, under Rev. St. 1879, arts. 1263, 1280-1282, he was entitled to the whole of the fifth day in which to file his answer, and that the judgment was erroneously entered. (*Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. 663, followed.) *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60.

Under Rev. St. 1879, art. 1280, as amended by Laws 1891, p. 94, and art. 1263, as amended in 1891, defendant had the whole of the second day of the term to file his answer; and, while the appearance docket was called on the second day, yet judgment for default could not be taken until the third day. *McKay v. Barlow* (App.) 18 S. W. 650.

Under Rev. St. 1879, arts. 1263, 1280-1282, if defendant did not appear when his case was called on the second day of the term, judgment was properly rendered against him. *Graham v. Miller* (Civ. App.) 24 S. W. 1107.

Act July 13, 1891, amending Rev. St. 1879, art. 1280, so as to substitute the second for the fifth day of the term, as appearance day, repealed the conflicting provision of art. 1263, requiring defendants served more than five days before term to answer on or before the fifth day, and authorized the entry of defaults under arts. 1281, 1282, on the second day. (24 S. W. 963, reversed.) *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115.

Construction and operation.—On the record and under arts. 1883, 1936, 1938, held that the trial court did not err in hearing proof on a writ of inquiry and rendering judgment instead of permitting defendant to file answer and introduce testimony on the merits, as though no default judgment had been rendered. *Mach v. Wofford* (Civ. App.) 228 S. W. 275.

Art. 1938. [1284] [1284] Damages on liquidated demands, how assessed.

Cited, *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

Liquidated damages.—Under Rev. St. 1879, art. 1284, final judgment by default, on defendant's failure to answer in action on note and to foreclose mortgage, was proper, as the action was on a liquidated demand. *Loungeway v. Hale*, 73 Tex. 495, 11 S. W. 537.

Where a contract provided that a \$200 check deposited therewith was placed as a forfeit, defendant had the absolute right to arbitrarily refuse to carry out the sale and lose such amount, and plaintiff had no cause of action against such defendant; the deposit not being earnest or escrow money, but liquidated damages or forfeit. *Richardson v. Terry* (Civ. App.) 212 S. W. 523.

Where it cannot be ascertained from the face of the contract that the damages stipulated to be paid in case of a breach are excessive, and it cannot be determined from evidence whether the stipulated amount reasonably approximates the actual damages, the provision cannot be construed as a penalty. *Walsh v. Methodist Episcopal Church, South, of Paducah, Tex.* (Com. App.) 212 S. W. 350.

Provision of contract of sale of land for deposit by each party of a sum to be paid, in case of his default, to the other party as his damages, precludes enforcement of the contract against the vendor electing to make such payment. *Western Union Telegraph Co. v. Southwick* (Civ. App.) 214 S. W. 987.

The provision of a building contract that the owner was to be allowed \$5 a day for delay in completion as liquidated damages was valid. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Where a contract between a military school and the parent of a student provided for payment of the amount agreed upon for tuition and board, even though the student should withdraw, such provision cannot be treated as a penalty. *Peirce v. Peacock Military College* (Civ. App.) 220 S. W. 191.

Where there was no fluctuation in the price of flour, and contracts prepared by the Food Administration provided, in event of buyer's default, he should pay 25 cents per barrel as booking charge, the charge must be deemed liquidated damages, recoverable by the seller in event the buyer breached the contract by failure to give shipping orders. *Rock v. Keton* (Civ. App.) 229 S. W. 362.

Where each of the parties to a contract deposited a note payable to the other in escrow, with the understanding that the maker should become liable thereon on his failure to perform the contract, the actual delivery of the note to the payee was not

a prerequisite to the payee's right to sue thereon as the parties stood in the same relation to the note and contract as would have existed with reference to a sum of money representing liquidated damages and a contract of forfeiture left in the hands of a stakeholder. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

A provision in a contract for the sale of oil and gas lease that the initial payment deposited in escrow, should be forfeited in the event of the buyer's nonperformance, is one for liquidated damages, and hence it is unnecessary to show actual damages. *Garrard v. Cantrell* (Civ. App.) 232 S. W. 911.

Where the parties agreed that in the event of the purchaser's nonperformance he should forfeit a cash payment as liquidated damages, the fact that his vendor later made an equally advantageous sale is no defense to a claim for such damages. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

Where a contract for the sale of land provided for forfeiture of a cash payment in event of the purchaser's failure to consummate the contract, the agreement was one for liquidated damages; it appearing that real estate fluctuated, and that the property also had a speculative value as trackage for a railroad. *Id.*

Proof of cause of action.—In an action against a surety company for amount of judgment rendered against plaintiff and costs of the suit wherein the judgment was rendered, held, that it was error, in the absence of proof of the amount of such judgment and costs, to render a default judgment for the amount thereof. *Southwestern Surety Ins. Co. v. Gulf, T. & W. Ry. Co.* (Civ. App.) 196 S. W. 276.

Art. 1939. [1285] [1285] On unliquidated demands, etc.

Cited, *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

Inquest of damages.—On the record and under arts. 1883, 1936, 1938, held that the trial court did not err in hearing proof on a writ of inquiry and rendering judgment instead of permitting defendant to file answer and introduce testimony on the merits, as though no default judgment had been rendered. *Mach v. Wofford* (Civ. App.) 228 S. W. 275.

Art. 1941. [1346] [1212, 1345] Procedure in case of service by publication where no answer, etc.

Presumptions.—Where plaintiff made unknown heirs parties defendant, as provided by art. 1875, it must be presumed on appeal that they appeared and answered, where attorney signed answer as answer of all defendants, and court did not appoint an attorney ad litem to represent unknown heirs, as required by art. 1941. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Attorney's fee as part of costs.—Under direct provisions of this article, court may award reasonable compensation to attorney appointed to represent a nonappearing defendant served by publication, and tax such compensation as costs. *George v. Thompson* (Civ. App.) 211 S. W. 835.

Art. 1942. [1211] [1211] Guardian ad litem for minors, lunatics, etc.

Application and appointment in general.—The purpose in the appointment of a guardian ad litem is to secure the services of a disinterested person who will see that all matters affecting the interests of the party under legal disability are fully presented to the court. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

The appointment as guardian ad litem of insane person being sued by grantees to whom she conveyed while insane, of person who had received a commission on the sale, was not calculated to develop full and disinterested presentation of the rights of the insane person. *Id.*

Appointment as guardian ad litem for a minor of her mother holding an adverse interest to her would be illegal. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Where the adult beneficiaries under the will of testator made a partition agreement which affected the rights of infants, it was proper, in a friendly partition action brought to carry the agreement into effect, to appoint a guardian ad litem for the infants, though the plaintiff in the partition action purported to act as their next friend, it appearing that he was a party to the agreement and seeking its confirmation, for, in such case, it is inappropriate that he be allowed to represent the infants. *Brown v. Brown* (Civ. App.) 230 S. W. 1053.

Duty and power of court.—Until service on a minor is had, the court has no power to appoint a guardian ad litem. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Powers of guardian.—The guardian ad litem representing an insane defendant should make no admissions against the interest of defendant, but should require that proper legal proof be made of the facts entitling plaintiff to the relief which he seeks. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Art. 4051, declaring that the provisions governing estates of decedents shall apply to and govern "such" guardianship, applies only to guardianships dealt with in the title, and so not to minors represented only by guardian ad litem. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 134.

Validity of judgment.—Where court, in action against insane person by grantees to whom she had conveyed while insane, rendered judgment confirming conveyance

upon admissions by her guardian ad litem where fair price had not in fact been paid, insane person held entitled to relief against the judgment. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Judgment against infant defendants, for whom no guardians ad litem were appointed, is void, or at least voidable. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

Where the subject-matter of the suit was the title to land as to which court had jurisdiction, the defendants appeared and answered, the minor defendant by guardian ad litem, under this article, and the decision rendered was in accordance with the issues made by the pleadings, the judgment was not void. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

Compensation for services.—By virtue of the original citation in a suit against infants, they were before the court for purpose of any adjudication of the fees of their guardian ad litem which it had power to make. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

The court having jurisdiction of infant defendants for award against them of the fee of their guardian ad litem and power to so award it, the judgment is not void, even if in that respect such guardian be regarded as their antagonist, and another guardian ad litem should have been appointed to represent them. *Id.*

Offer of plaintiff in the petition against infants that the costs of the suit be decreed against him does not take away the court's power under the statute to adjudge payment otherwise of the fee of the guardian ad litem of the successful infant defendants. *Id.*

Despite arts. 1942 and 2055, under art. 5048, judgment charging the fee of a guardian ad litem on the lands recovered for the infants in the suit is not void, and this though the "good cause" be not stated on the record; this being at most but an irregular exercise of the court's power. *Id.*

Under this article, the fee allowed the guardian should be taxed as part of the costs of the suit and, like other costs, follows the judgment and is taxed against the losing party. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

Where an agreed partition between the adult beneficiaries under testator's will was fair and should have been confirmed, the fee of a guardian ad litem appointed for infant beneficiaries in partition action cannot be taxed against the adult parties, as they were entitled to have the land partitioned according to agreement, and hence, under this article, it should be taxed against the interest of the infants. *Id.*

Art. 1943. [1287] [1287] Suits called in their order, etc.

See *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

Call for trial.—A litigant cannot, as matter of right, have his case set down for trial by the bar committee of the county, especially where the court has made no order authorizing such committee to set the cases for call on the trial docket or to set this particular case, in view of this article. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

Trial out of order.—Though under Rev. St. 1879, arts. 1181, 1182, 1287, 3070, causes should be placed on the general and jury dockets and tried in the order in which the petitions are filed, unless for good cause shown the court otherwise directs, yet the placing of a cause on the jury docket, and trying it in advance of a cause previously filed and preceding it on the general docket, are not reversible error, unless it is shown that injury resulted therefrom. *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408.

Under Rev. St. 1879, art. 1287, where a defendant was served with process in a divorce suit in another state, and on the return-day the cause was called and passed without order, and a week later was taken up at plaintiff's instance, according to a long-established custom, and a trial was had, and in view of the nonresidence and absence of defendant, the allegations of fraud on the court, and the policy of the law encouraging defenses to actions for divorce, a new trial held to be granted. *Bostwick v. Bostwick*, 73 Tex. 182, 11 S. W. 178.

Art. 1944. [1288] [1288] To be tried when called, unless, etc.

Absence of party.—Defendants cannot prevent trial from commencing by filing answer and not appearing for trial. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

Notwithstanding this article, a suit in which there is no pleading for affirmative relief by defendants should be dismissed for want of prosecution if plaintiff fails to appear at time set for trial, not tried in plaintiff's absence, and judgment on the merits rendered for defendants. *Chittim v. Parr* (Civ. App.) 216 S. W. 638.

Refusal to proceed.—Where a case had been regularly called for trial, and both parties had announced themselves ready, and certain exceptions filed by defendant had been sustained, and others overruled in part and sustained in part, and where plaintiff did not take a nonsuit, or ask that the case be continued or postponed or placed at the end of the docket, but refused to go forward with his case, the only proper judgment the court could enter was one for the defendant, under this article, and a judgment of dismissal would have been improper. *Munger Oil & Cotton Co. v. Beckham* (Com. App.) 228 S. W. 128.

Art. 1945. [1289] [1289] Day set for jury docket.

Cited, *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811.

Demurrers and exceptions to pleadings.—In view of a rule of the district court authorized by this article, where there was no reason why exceptions were not presented when the docket was called for such purpose during the first week of the term at which the case was tried, the refusal of the trial court to consider such exceptions was proper. *Conner v. McAfee* (Civ. App.) 214 S. W. 646.

Art. 1947. [1291] [1291] Issues of law and dilatory pleas, when tried.

Motions and dilatory pleas.—Under arts. 1902, 1909, 1910, 1947, and rules 7 and 24 for district courts (142 S. W. xvii, xix), as to order of pleas in abatement, where, in action on fire insurance policy, failure of insured to submit to examination was not pleaded, except as one of several special defenses, it was not filed in due order, as a plea in abatement, and not being called up at the first term of court, and no special ruling being asked thereon before a trial on the merits, the plea was waived. *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

Discretion of court.—Under this article, it is within the discretion of the court to hear evidence upon a defendant's plea in abatement, before hearing evidence upon merits of case. *City of Ft. Worth v. Cotton* (Civ. App.) 198 S. W. 1015.

Art. 1948. [1292] [1292] Trial by the court.

Trial of special issues by jury.—An independent suit for a new trial to cancel a judgment and enjoin enforcement is an equitable proceeding, and answers of the jury as to issues submitted are merely persuasive, and not binding. *Huddleston v. Texas Pipe Line Co.* (Civ. App.) 230 S. W. 250.

Art. 1949. [1293] [1293] Agreed case.

Admissions.—In action for taxes, statement in agreed statement of facts held an admission that the property assessed was defendant's property. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

Certification by court.—Where agreed statement of facts was not signed and certified by trial court to be correct as required by this article, motion to strike such statement will be granted. *Lutcher v. Fuller* (Civ. App.) 200 S. W. 553.

Where an agreed statement of facts was stricken on appeal because not signed and certified to be correct, no order by trial court after expiration of term at which statement was submitted approving same would give it validity. *Id.*

Conflict in facts stated.—Where a case is submitted to court upon an agreed statement of facts under this article, and facts stated are in conflict, the court is authorized to resolve the conflict according to the dictates of his judicial conscience. *Fuller v. Cameron* (Civ. App.) 209 S. W. 711.

Appeal.—An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, was sufficient, under Rev. St. 1879, art. 1293, to authorize a revision of the judgment on matters growing out of such facts, in the absence of a statement of facts or findings of fact by the court, or an agreed case for appeal, under arts. 1333 and 1414. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

Art. 1950. [1294] [1294] Cases brought up from inferior courts, tried de novo.

Cited *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

Art. 1951. [1297] [1297] Order of proceedings on trial by jury.

Cited, *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783.

Proof to show sufficiency of pleadings.—In an action to set aside part of a judgment, on the ground that defendant had never been served with notice or process, court was not authorized by this article, or otherwise, to hear testimony and require the plaintiff to introduce testimony for the purpose of ascertaining whether or not there was sufficient testimony contesting the service in the complaint to authorize the submission of such an issue to the jury. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

Opening statements.—See *Watson v. Watson* (Civ. App.) 229 S. W. 899; notes at end of chapter.

Right to open and close.—In condemnation proceedings, held, defendants' admissions went far enough to entitle them to open and close. *Texas Power & Light Co. v. Moerbe* (Civ. App.) 199 S. W. 503.

In action involving ownership of attached property claimed by third party, where court ruled that burden of proving title was upon claimant, claimant was entitled to open and conclude without invoking District and County Court Rule 31 (142 S. W. xx). *Frost v. Smith* (Civ. App.) 207 S. W. 392.

In a proceeding by a city to condemn land for a waterworks, since the burden is upon a landowner, part of whose land was condemned, to show the amount of dam-

age, he is entitled to open and conclude upon both the evidence and the argument. *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

After court hearing an appeal in eminent domain proceeding by city had granted property owners right to open and close on theory they had made agreement which placed burden on them, city waived no right by requesting charge that burden was on owners as to question of value. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

The property owners' admission in open court on appeal after the conclusion of the introduction of evidence, dictated to the stenographer, if sufficient under rule 31 of the Courts of Civil Appeals (142 S. W. xiii), came too late to entitle the owners to open and close. *Id.*

In an action under a policy, providing for double liability in event of accidental death, insurer was not entitled to demand the right to open and close by filing an admission under rule 31 for district courts (142 S. W. xiii), insurer claiming that death was by suicide, since the effect of such an admission was to admit that the plaintiff was entitled to recover. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

Rule 31 for district courts (142 S. W. xiii) is simply one of practice and for the purpose to expedite the trial and relieve the plaintiff of the necessity of proving his case upon consideration that the defendant take the burden. *Id.*

In trespass to try title, where defendants pleaded general denial and by way of cross-action set up limitation title to a portion of the land, but did not in accordance with district court rule 31 (142 S. W. xx) file a written admission of plaintiff's case other than as to the limitation title, they were not entitled to open and close, under this article. *Carter v. Brown* (Civ. App.) 219 S. W. 292.

That trial court in such action charged that plaintiffs had established title to all of the lands sued for, unless defeated by the plea of limitation, did not cast on defendants the burden of proof on the whole case so as to entitle them to open and close. *Id.*

— **Effect of admissions to obtain right.**—Claimant of attached property, who alleged ownership, did not, by admitting, for purpose of opening and closing, that plaintiffs had good cause of action as set forth, under district and county court rule 31 (142 S. W. xx), admit that he was not owner of property. *Frost v. Smith* (Civ. App.) 207 S. W. 392.

Where petition set up causes of action, on the plain life insurance policy and on supplemental policy providing double indemnity for accidental death, and defendant set up suicide, and filed an admission under rule 31 for district courts (142 S. W. xiii), defendant did not thereby admit that the death under the plain policy was an accident, although its effect was to admit that the death was accidental as far as the count on the supplemental policy was concerned. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

Discretion of court as to order of proof.—Under Rev. St. 1879, art. 1298, error could not be predicated, in the absence of a showing of an abuse of discretion, on the fact that plaintiff was allowed to introduce evidence out of the order prescribed by this article. *Folts v. Ferguson* (Civ. App.) 24 S. W. 657.

Evidence dependent on preliminary proof.—Where witness has admitted that he has been convicted of a felony and sentenced, but subsequently pardoned, it is immaterial whether pardon is introduced before or after testimony is received. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

It is often necessary to introduce evidence whose admissibility depends on other evidence subsequently to be introduced, and if such later evidence is not forthcoming the trial court will, on motion, or of his own volition, exclude the preliminary evidence. *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

Evidence in rebuttal.—In trespass to try title, the plaintiffs traced title to their ancestor, proved his death, and rested. The defendants then offered a deed from the ancestor. In reply, the plaintiffs offered evidence that the grantee in this deed had reconveyed to their ancestor. Held, that the evidence was admissible in reply under this article. *Bounds v. Little*, 79 Tex. 128, 15 S. W. 225.

Plaintiff may testify in rebuttal of the testimony of witnesses introduced by defendant. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

In suit to enjoin the inspector of a county from requiring cattle to be dipped pursuant to the Tick Eradication Statute (art. 7314 et seq.), testimony that, instead of being harmful, the dipping of cattle is beneficial held admissible in rebuttal of testimony that dipping caused injuries to their milk and butter supply. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

Art. 1952. [1298] [1298] Additional testimony allowed, when.

Reopening case for further evidence.—Where district court on appeal from a justice of the peace heard evidence and took case under advisement, a party was properly denied leave at date fixed for rendition of judgment to offer additional evidence. *Cross v. Flewellen* (Civ. App.) 199 S. W. 500.

Refusal to postpone a civil trial to enable plaintiff to find a misplaced deposition and introduce it in evidence held within the sound discretion of the court under this article. *Owensboro Wagon Co. v. San Antonio Tie & Lumber Co.* (Civ. App.) 199 S. W. 701.

Refusal to allow plaintiff's attorney to introduce in evidence a carbon copy of a deposition alleged to have been misplaced, held not an abuse of discretion hereunder. *Id.*
The admission of evidence after the case had been partially closed rests largely in

the discretion of the trial court. *Cooper Grocery Co. v. H. T. Hamrick & Co.* (Civ. App.) 229 S. W. 356.

— **After close of evidence.**—In action against receiver of railroad company, admission of evidence, after defendant had offered its evidence which tended to establish plaintiff's case, held not abuse of trial court's discretion. *Andrews v. Rice* (Civ. App.) 198 S. W. 666.

The trial court is vested with a liberal discretion in reopening a case, after plaintiff has closed and defendant has declined to offer any testimony, and its action in regard thereto will not be reversed, unless it appears that complaining party has suffered injury. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

Generally the question of reopening the evidence after the parties have rested lies in the discretion of the court. *Massachusetts Bonding & Ins. Co. v. Florence* (Civ. App.) 216 S. W. 471.

In an action on a health insurance policy, wherein defendant set up a release from liability for disability due to particular cause, it was error to exclude such release, where through inadvertence it was not formally offered in evidence until the close of the evidence, though trial court entertained view that release constituted no defense. *Id.*

Refusal to permit defendant to introduce testimony, on plaintiff's motion for a directed verdict on the ground that there was absence of proof as to certain facts, held not error where testimony as to such facts was not admissible under the pleadings. *Sovereign Camp, W. O. W., v. James* (Civ. App.) 230 S. W. 435.

— **After argument begun or closed.**—Where witness was taken suddenly ill and had to leave court, and the court refused a postponement, and, after plaintiff's counsel had made his opening argument, the witness was again tendered, the court should have allowed defendant opportunity to supply the proof, under this article. *Ft. Worth & D. C. Ry. Co. v. Johnson*, 5 Civ. App. 24, 23 S. W. 827.

Refusal to reopen case for introduction of deposition, after argument of law of case for two days, and announcement that it would not be introduced, held not abuse of discretion. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

Recalling witnesses.—There was no reversible error in the action of the court permitting plaintiff to recall a witness and allowing him to testify regarding a conversation already detailed, although the evidence and argument by both sides had been closed. *Pierce Oil Corporation v. Gilmer Oil Co.* (Civ. App.) 230 S. W. 1116.

Order of proof.—See *Folts v. Ferguson* (Civ. App.) 24 S. W. 657; notes to art. 1951.

Art. 1953. [1299] [1299] Order of argument.

See *Hittson v. State Nat. Bank of Fort Worth* (Sup.) 14 S. W. 780.

Cited, *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783.

Right to open and close.—See *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728; notes to art. 1951.

Where defendant who counterclaimed did not admit all facts essential to plaintiff's claim, held that under rule 31 (142 S. W. xx) for district and county courts, defendant was not entitled to open and close argument. *Lott v. Ballew* (Civ. App.) 198 S. W. 645.

On appeal from condemnation award, the property owners were not entitled to open and close the argument because of admitting that certain ordinances were duly passed, not admitting the right of the city to exercise the right of eminent domain, nor of the legal sufficiency of the steps taken. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

This article gives the right to open and close the argument only to the party having, under the pleadings, the burden of proof on the whole case. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

In an action by a seller, the burden of proof of the whole case rested on the seller, although the purchaser sought to avoid the contract by reason of fraudulent representations, and court erred in depriving seller of right to open and conclude argument, in view of art. 1953; District and County Court Rule 31 (142 S. W. xx); defendant not making the required admission. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881.

— **Demand therefor.**—Where defendant filed the admission and request as provided by the rule, the trial court erred in refusing to grant right, the admission and request having been filed after announcement of ready for trial and impaneling of the jury, but before any pleadings were ready or evidence offered. *Duke v. Walter* (Civ. App.) 227 S. W. 714.

Effect of obtaining right.—Error of instruction in placing the burden of proof on plaintiff, over his objection, is not invited, though plaintiff claimed and was allowed the opening and concluding argument to which under this article, the party having the burden of proof is entitled. *First Nat. Bank v. Todd* (Com. App.) 231 S. W. 322.

Art. 1954. Charge and instructions before argument.

See *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753.

Art. 1955. [1301] [1301] Nonsuit may be taken, when.

Right to move.—The right to take a nonsuit is liberally construed by the courts. *Weil v. Abeel* (Civ. App.) 206 S. W. 735.

Plaintiff's right to take a nonsuit before a final decision is announced is a statutory right under this article, and is not a matter of discretion for the court. *Id.*

Announcement of decision.—Where court stated that he considered the demurrer to plaintiff's evidence well taken, but extended time for counsel for plaintiff to present authorities, plaintiff was entitled to take voluntary nonsuit, under this article, the court not having sustained demurrer. *Weil v. Abeel* (Civ. App.) 206 S. W. 735.

Where the court had indicated that he would allow the plea of special privilege of one defendant, but not of another, plaintiff could, before the decision, dismiss as to the one whose plea was to be allowed. *First Nat. Bank v. Childs* (Civ. App.) 231 S. W. 807.

Art. 1957. [1303] [1303] Jury may take papers with them, except, etc.

Depositions and papers connected therewith.—Under Rev. St. 1879, art. 1303, it is not error to refuse to send out a plat of the land in question, made by a witness, and attached to his deposition. *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673.

Art. 1959. [1305] [1305] Duty of officer in charge of jury.

Permitting view.—In personal injury action, action of deputy sheriff in taking the jury for a walk after it had been sent back to reconsider case after report of disagreement and in passing the scene of the accident held ground for reversal, since the taking of the jurors by the place of the accident was in effect the introduction of further testimony. *Texas Midland R. R. v. Brown* (Com. App.) 228 S. W. 915.

Art. 1960. [1306] [1306] Caution to the jury.

Necessity of exception.—A mandamus to compel a county judge, who tried a cause, to certify a bill of exceptions stating that he failed to comply with Rev. St. 1879, art. 1306, requiring him to admonish the jury, when about to disperse for the night, not to converse with any one on the subject of the trial, will not issue where no exception was reserved at the time, as required by art. 1358, or presented within 10 days after the close of the trial, as allowed by art. 1363. *Gulf, C. & S. F. Ry. Co. v. Lockhart* (App.) 18 S. W. 649.

Art. 1961. [1307] [1307] Jury may communicate with the court.

See *Oates v. Maxcy* (Civ. App.) 206 S. W. 535, notes to art. 1962.

Art. 1962. [1308] [1308] May ask further instruction.

Cited, *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Instructions after retirement in general.—In suit to set aside a deed, it was not erroneous for the court to inform the jury after retirement of the legal results of their answers to issues submitted. *Faville v. Robinson* (Civ. App.) 201 S. W. 1061.

It is not only the right, but the duty, of the court to give the jury additional instructions as to the law of the case after they have retired, upon proper request being made therefor. *Oates v. Maxcy* (Civ. App.) 206 S. W. 535.

In action involving boundary dispute, an instruction, in response to request from jury as to whether measurements in deeds immediately following first grant should be considered as circumstances to locate corner, held a direct answer to jury's question. *Id.*

General charge having said that plaintiffs could recover only if operation of defendant's mill caused this or that to be conveyed to plaintiffs' premises, etc., instruction, in answer to inquiry of jury, that defendant had right to operate its plant, but if in doing so it provided a condition materially disturbing and annoying persons of ordinary sensibilities, etc., it would be liable, could not have been considered authority for judgment for annoyance suffered by plaintiffs elsewhere than in their home. *Id.*

Whether or not the court should give additional instructions on request by the jury must be left to some extent to the discretion of the trial court, and a case will not be reversed on account of a ruling on such a request, unless abuse or injury is shown. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Instructions during absence and without consent of party or his attorney.—It was illegal for the trial judge orally to advise the jury after their retirement without the knowledge or presence of plaintiffs, and such action is sufficient cause for reversal of the judgment whether or not it affected the verdict. *Holman Bros. v. Cusenbary* (Civ. App.) 225 S. W. 65.

Mode of giving instructions.—Where court, upon written request from jury after it had retired, sent jury written answer containing further instructions, its failure to summon the jury into open court to further instruct it, as required by arts. 1961 and 1962, was not reversible error, in view of rule 62a (149 S. W. x), where written instruction was handed to officer in charge of jury, who handed instruction to jury foreman. *Oates v. Maxcy* (Civ. App.) 206 S. W. 535.

Form of instruction.—An instruction that the findings of an arbitrator would be binding unless he acted fraudulently and in bad faith, given in response to a question by the jury as to the effect of interest and partiality, held not erroneous, although a repetition of the main charge; the instruction following issues presented by the pleadings. *Smith v. Bryan* (Civ. App.) 204 S. W. 359.

Art. 1965. [1311] [1311] Disagreement of jury.

Urging or coercing agreement.—In a personal injury action wherein the jury failed to agree, a statement by the judge after the jury had retired as to the desirability of bringing in a verdict held not coercive. *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340.

In personal injury suit, in which testimony was sharply conflicting on material issue, keeping the jurors together from Thursday noon until Friday afternoon, after they had informed the court that they were unable to agree and asked to be discharged, and urging them to agree to avoid additional expense to the county, etc., requires reversal. *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Com. App.) 209 S. W. 394.

While the trial judge is allowed considerable discretion in matters of keeping the jury together, he has no authority to insist upon an agreement in order to avoid additional expense to the county or personal inconvenience to jurors. *Id.*

Trial court's remarks that jury might as well reach a decision, that it would save the cost of another trial, and that regardless of their verdict the case would go to the higher courts, shown to have caused the minority members to agree to a verdict contrary to their judgment, held reversible error. *Sunshine Oil Corporation v. Randal*s (Civ. App.) 226 S. W. 1090.

Remarks of judge called in to hear report of jury after it had reported disagreement, held ground for reversal, being coercive. *Texas Midland R. R. v. Brown* (Com. App.) 228 S. W. 915.

DECISIONS RELATING TO SUBJECT IN GENERAL

3. Remarks and conduct of judge in general.—In a personal injury action, a statement by the court that he saw no benefit in so much medical testimony offered by defendant held incompetent, as a comment on the evidence, in violation of art. 1971. *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085; *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364.

In action against stockholders of insolvent corporation court by eliciting testimony held not to indicate bias or prejudice. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Where plaintiff's attorneys objected that defendant's counsel had violated the order putting witnesses under the rule, and the court stated that their action appeared to be a violation of its spirit and intent, but later instructed the jury instance to disregard such remarks and the observations of the court thereon, the court's remarks are not ground for reversal. *Hines v. Messer* (Civ. App.) 218 S. W. 611.

Where in an action for personal injuries the parties agreed that physicians might measure in the jury's presence plaintiff's legs to determine whether one was shorter than the other, it was error for the judge to make measurements himself, and to state before the jury that one of plaintiff's hips was higher than the other. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Where plaintiff's counsel objected to the browbeating manner in which witness was being examined, remark of the court that he did not believe in such manner of examination, and did not approve of it, etc., was not error; and if it was error, it was so trivial as not to be ground for reversal. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

In a personal injury action, where a medical witness testified to facts directly contradictory of plaintiff's case, a remark by the trial judge that he did not think so much medical testimony was beneficial, coupled with the further remark, when defendant took bill of exceptions, to call another doctor, and he would give a second bill of exceptions, was prejudicial error, notwithstanding in the charge the trial court admitted his error and withdrew the statement, for such remarks might well have influenced the jury. *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085.

The rules of the district court govern the conduct of counsel in the trial of causes, and they should be required to observe them though it be necessary to impose a penalty, but the trial court should be careful in making observations that may tend to influence the jury to the one side or the other. *S. Lightburne & Co. v. First Nat. Bank of Rockport* (Civ. App.) 232 S. W. 343.

6. Presence of jury during proceedings.—It is a matter within the discretion of the court whether the jury should be dismissed during a colloquy between counsel as to admission of evidence. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

11. Misconduct of jurors.—In action for personal injuries, it was flagrant misconduct for the jury in assessing damages to consider the fact that the plaintiff's attorneys would receive 50 per cent. of the recovery, and to double their verdict on that account, and to consider items for expenses not submitted to it. *San Antonio Traction Co. v. Mendez* (Civ. App.) 199 S. W. 691.

That some of jurors, in passing upon question of negligence of defendant's agent, stated, in substance, that one of plaintiffs was more guilty of negligence than said agent did not show misconduct. *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 382.

It was error and prejudicial for the jurors, who had retired, to obtain a dictionary to be used by them, since no maker of dictionaries should ever be allowed to define legal terms to a jury, unless such definitions go through the medium of the trial judge, the only one authorized by law to give definitions and explanations to a jury. *S. Lightburne & Co. v. First Nat. Bank of Rockport* (Civ. App.) 232 S. W. 343.

13. **Misconduct of others affecting jurors.**—Applause and laughter should not be permitted in the trial of a case. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

16. **Application of personal knowledge of jurors.**—From a detailed statement of the position of the wife, her family, her ordinary duties and labor, the jury can ascertain the value of her services in the performance of household duties, as well as any witness. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

In determining whether defendant's foreman was negligent in attempting to hold up a lumber pile by his own strength while men were working under it, the jury can look to their own experiences. *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

23. **Arguments and conduct of counsel—Scope and effect of opening statement by counsel.**—As art. 1951, subd. 4, permits the party having the burden of proof to state the nature of his claim or defense and facts relied on, it was not improper in an action for specific performance, where the widow of the plaintiff was substituted in his stead, for plaintiff's counsel to state the existence of the minor children of the marriage, and that defendant refused to consummate the agreement as the result of a conspiracy, there being nothing to show that such statements caused an improper verdict. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

23½. — **Scope of closing argument.**—Rule 39 (142 S. W. xx), as to arguments of counsel, was not intended to prevent a proper reference in the closing argument to evidence heard, simply because counsel preceding has referred to the same evidence. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

24. — **Presentation of evidence.**—It was prejudicial for counsel to inquire three times after adverse ruling whether witness had been paid anything for his injuries and to argue that master knew it was liable because it had paid such employé for former injuries at hands of same motorman. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256.

Act of counsel for plaintiff in replevin case in calling jury's attention to flaw in diamond during testimony of plaintiff as to its identity, which act would have been proper in argument, was not admission of attorney's unsworn testimony. *Hall v. Collier* (Civ. App.) 200 S. W. 880.

A case will not be reversed because an attorney asks an improper question to which an objection is sustained, unless it be made to appear that he did not ask it in good faith, but to influence the jury improperly, and that it was calculated to have that effect. *Clayton v. Kerby* (Civ. App.) 226 S. W. 1117.

25. — **Limiting scope or time of argument.**—The trial judge has wide latitude in controlling the argument, and only a flagrant abuse of such discretion will authorize reversal. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

26. — **Statements as to facts, comments, and arguments in general.**—In action against a railway company argument to jury that, "You would have stood out there with a shotgun and stopped them from building that side track," but that plaintiff, a "nigger," had to submit to it, was improper. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

In case submitted on special issues counsel should not discuss in their argument to jury effect on judgment to be rendered by court of findings of jury on issues involved. *Patterson v. Bushong* (Civ. App.) 196 S. W. 962.

Statement of plaintiff's counsel in closing argument to jury that reason that counsel for defendants wanted jury to answer first question "No" was because they knew that it would end the case, was improper. *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105.

Trial courts should compel counsel to confine their arguments to the facts applicable to the law. *Kansas City, M. & O. Ry. Co. v. Swith* (Civ. App.) 204 S. W. 135.

Remark of counsel that the jury might consider "the fatherly care the child was entitled to receive," "up to the date it was twenty-one years of age," in estimating pecuniary loss to child by wrongful death of father, held legitimate argument. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

Statement of plaintiff's counsel, "Remember, if you want the plaintiff to recover, answer the first question, 'No,'" held improper, since it ought not to be assumed that an impartial jury wanted to return a verdict for either party. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

In action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) statement by plaintiff's counsel that jury should answer certain special verdict "No," since an answer "Yes" would make it appear that jury thought that employé was a fool in going upon tank on which he had been working at time of injury, held improper. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

It is not improper for counsel in argument to state to the jury how much they think the plaintiff should recover. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

27. — **Stating or reading and commenting on proceedings in cause.**—It was unnecessary to produce the memorandum book of a party in corroboration of his statement as to entry made therein, and the trial court should not have permitted counsel to read the memorandum book. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

29. — **Arguing or reading law to jury.**—Plaintiff's attorney, in closing argument, erroneously stated that laws of state required railroad to run trains on schedule time, that, in absence of proof to contrary, it is presumed to be law elsewhere, it being duty of judge to inform jury as to law. *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 199 S. W. 502.

If charge by court, similar to argument by counsel, would have been erroneous, it was error for court not to sustain defendants' objections to the argument as to matter of law. *Id.*

Counsel had the right to state to the court his understanding of the testimony in discussing the admissibility, and also the right to state to the jury what he considered to be the law of the case, if it was not contrary to any instruction given by the court. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

A statement by plaintiff's counsel, that "the law of assumed risk is an infamous law and a bastard offspring of the doctrine of contributory negligence," was improper, and court erred in denying a new trial. *Denison Cotton Mill Co. v. McAmis* (Com. App.) 215 S. W. 442.

The reading of court opinions during argument to the jury is not to be encouraged or commended. *Walker v. Kellar* (Civ. App.) 226 S. W. 796.

The reading during argument to the jury, in an action for tarring and feathering plaintiff because of his unpatriotic conduct, of portions of a court opinion criticizing a prosecution under a sedition statute, condemned as tending only to engender prejudice in the jury. *Id.*

31. — **Matters not sustained by evidence.**—An argument: I will tell you that neither J. nor old man F. would swear a lie for this horse, another, and yet another. If you knew them like I do, you couldn't be made to believe so"—was improper, because an attorney should not make a witness of himself in his argument to the jury. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

In servant's action for injuries, argument of plaintiff's counsel that there had been irregular things done in connection with case as shown by the record, which the speaker would not be guilty of, for the whole of defendant's plant, held justified by defendant's witness' testimony on cross-examination. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

32. — **Comments on evidence or witnesses.**—Where defendant introduced record of plaintiff's conviction for theft in another state, argument of plaintiff's counsel that conviction should not be held against boy, who was motherless, uneducated, penniless, and wayward, and had been wrongfully convicted, was not improper. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

In action against feed company for death of horse, caused by rat poison in feed, argument of plaintiff's attorney: "A specimen. A specimen of what, gentlemen? Of that rat poison that F. got out of the feed that he bought from the W. Grain Company"—was proper. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

In an action for breach of employment contract, the statement of defendant's counsel that the evidence would sustain a verdict for \$25,000, there being nothing inflammatory in its character, was not misconduct, counsel having the right to present to the jury his deductions from the evidence. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

There being evidence that though Dr. M., was first called in by plaintiff to attend him, continuance of his attendance was at request of R., defendant's surgeon, statement of plaintiff's counsel in argument that R. sent M. to see plaintiff was unobjectionable. *Galveston, H. & S. A. Ry. Co. v. White* (Civ. App.) 216 S. W. 265.

Plaintiff's attorney had a right to comment on fact that self-interest of defendant's employé might prompt him to shield himself from a charge of negligence or inattentiveness to duty, and to argue that such fact could be taken into consideration in determining the credit to be attached to employé's testimony. *Hines v. O'Brien* (Civ. App.) 219 S. W. 497.

33. — **Comments on failure to produce evidence or call witness.**—It is not improper for counsel to comment on failure of party to call known favorable witnesses for his opponent. *Sovereign Camp, Woodmen of the World, v. Martin* (Civ. App.) 211 S. W. 270.

The argument by plaintiff's counsel in a suit for personal injuries that, since defendant did not produce any witness to testify that plaintiff was warned of danger, it might be concluded that such fact did not exist, is a legitimate argument. *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

34. — **Comments on character or conduct of party.**—In the absence of showing of prejudice, held not error for plaintiff's counsel to state that the railroad would not hesitate to fire a man who had testified against it. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881.

35. — **Appeals to sympathy or prejudice.**—It was highly improper, in mortgage foreclosure suit, for defendant's counsel to argue that the matter was of little importance to the bank as plaintiff, but of great importance to defendant, who was a poor widow, having no other property, and that, if the jury did not want the bank to have the property, it should answer a special issue in the affirmative. *First National Bank v. Porter* (Civ. App.) 204 S. W. 463.

In action by widow on accident policy, conduct of counsel, in referring to the widow as a "poor old woman without friends and without money," and in criticizing insurer's counsel for objection to such remarks, held improper and prejudicial. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

In action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), statement of employé's counsel, in argument that he did not know whether the railroad company had any soul or not, and that no one kicked it about like it was kicking the plaintiff, held an appeal to the passion and prejudice of the jury and improper. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

In an action for death of son on a defective tramroad locomotive, argument that any company which would have a deathtrap like that (the locomotive) to coin dollars with ought to have to confess negligence held improper, and not to be repeated on new trial. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

In an action by plaintiff, who claimed to be the common-law wife of decedent, and as such entitled to one-half of the community property, argument based on result to plaintiff which stated that it would have the effect of bastardizing the issue is not improper; for the court cannot restrict arguments of counsel so that they cannot present the issues. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

In injured employé's action for compensation against insurer, remarks during argument that the plaintiff was an old man without money and without friends, who had suffered a terrible accident, whose health was broken, and whose nervous system was impaired, and that the jury was his only place of refuge, and that the defendant was a rich and powerful insurance company, an artificial person without a soul, etc., held ground for reversal; such remarks tending to inflame the minds of the jurors against the defendant. *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

37. — Reference to protection of defendant by insurance or other indemnity.—Where questions of negligence and contributory negligence were close, conduct of plaintiff's counsel in examining witnesses and during argument in pointedly intimating that insurance company was defending case held reversible error, though court charged that such intimations should be disregarded. *Coon v. Manley* (Civ. App.) 196 S. W. 606.

In a personal injury action, it was error for counsel to elicit a statement by plaintiff that one who had investigated the accident said he was "working for the insurance company." *Wichita Falls Motor Co. v. Meade* (Civ. App.) 203 S. W. 71.

In action for injuries sustained by plaintiff when meter box lid gave way, permitting introduction of evidence showing that defendant was insured in an indemnity company, held error and prejudicial to rights of defendant. *Water, Light & Ice Co. of Weatherford v. Barnett* (Civ. App.) 212 S. W. 236.

38. — Retaliatory statements and remarks.—Argument of attorney: "I will tell you that neither J. nor old man F. would swear a lie for this horse, another, and yet another. If you knew them like I do, you couldn't be made to believe so"—was not reversible, where in reply to argument of opposing counsel that F. was manufacturing and concealing testimony. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

A defendant, whose counsel in his argument commented upon absence of a certain witness, and asked where he was, and why plaintiff had not brought him to court to testify, and then challenged opposing counsel to explain his absence, cannot complain where opposing counsel not only stated why witness was absent, but also that his depositions had been taken by plaintiff, and had been quashed. *Sims v. Ford* (Civ. App.) 209 S. W. 699.

The rule that it is reversible error to permit an attorney to advise a jury what the legal effect of their answer to an issue would be is subject to the exception that a party, whose counsel improperly pursues a line of argument not called for by the facts, will not be heard to complain of reply of adverse party's counsel thereto. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

In action for son's death, where defendant's counsel, after submitting issue of number of years son would have continued to contribute to parents' support stated in argument to jury that their only answer thereto could be, "We don't know," parents' counsel had the right to tell jury to answer some number of years or none, and that answer of "We don't know," would have caused mistrial. *Id.*

Assignments of error that statement of counsel for defendant in argument, informed jury of legal effect of answer to issue will be overruled; the argument being responsive to arguments of plaintiff appellant. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

39. — Objections and exceptions in general.—Courts should be diligent and forceful in detecting and reprimanding improper argument without waiting for objection from opposing counsel, so as to avoid occasion for a provoked reply. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

Where the argument of counsel was improper because on a matter of fact not in issue and not submitted to the jury, but was not objected to upon that ground, and was supported by some evidence and was not objectionable upon the ground stated, overruling the objection was not error. *Ft. Worth & R. G. Ry. Co. v. Bryant* (Civ. App.) 210 S. W. 556.

Argument of counsel not objected to at trial will not be considered on appeal. *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365.

Where court fails, on its own motion, to confine counsel strictly to the evidence, under court rules 39 and 41 (142 S. W. xx), the opposing counsel has the privilege of presenting his point of objection, but is not required to do so to subsequently avail himself thereof. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

An objection to argument of counsel and request for action by the court thereon is not necessary to authorize reversal, where the argument was so prejudicial in character that no action by the court could have removed the effect thereof from the jury. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Under Court Rules 39 and 41 (142 S. W. xiii, xiv), improper remarks of counsel in argument are available on appeal, notwithstanding failure to object; it being the duty of the court on its own motion to confine counsel to legitimate argument. *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

42. — **Withdrawal or correction of objectionable matter.**—Argument by railroad employé's counsel in which he adverted to fact that employé had wife and children, though evidence of that fact had not been allowed to go to jury, having been withdrawn and jury instructed to disregard it, held not to warrant reversal. *Schaff v. Riha* (Civ. App.) 201 S. W. 210.

Statement of plaintiff's attorney in argument that corporation employé did not tell truth for fear of losing their jobs, was not reversible error, where on objection the attorney qualified remarks by statement that what he meant was that jury had a right to consider railroad employé's interest. *Hines v. O'Brien* (Civ. App.) 219 S. W. 497.

Where an alleged objectionable argument was withdrawn, error cannot be predicated thereon. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

43. — **Action of court.**—Improper argument of counsel is no ground for reversal, where the court specifically instructed that the jury must find its verdict according to the pleadings and evidence and not the argument. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

Error held cured by a specific instruction not to regard the argument of counsel. *Id.*

Where argument was withdrawn by counsel, and court charged jury to disregard it, argument that jury should consider whether estate should go to proponent, a disreputable character, or to contestant, a mother, held not harmful. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

While it was improper for plaintiff's counsel to state that defendant's witness came from Mississippi to testify and made merchandise of his oath, the error was cured by express instruction by the trial court to disregard the language. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

Conceding plaintiff's argument to have been beyond proper bounds, the error was cured by prompt instruction not to consider such remarks and by the withdrawal of such remarks. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

Argument in trespass to try title, although highly improper, held not reversible where the jury was admonished. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

In an action for wrongful death, inflammatory remarks by plaintiff's attorney as to the verdict which the jury should award held not reversible error in view of instructions not to consider them. *Galveston H. & S. A. Ry. Co. v. Hill* (Civ. App.) 202 S. W. 358.

Although remarks of counsel may have been stronger than the evidence warranted, there was no reversible error where the court cautioned the jury not to consider the remarks. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In view of rules 39, 40, 41, for the district and county courts (142 S. W. xx), it is duty of district judge to keep counsel within the record, and not to jeopardize appellants' rights by inferentially sanctioning highly wrought and inflammatory argument. *Houston Ice & Brewing Co. v. Harlan* (Civ. App.) 212 S. W. 779.

Reiterated statement in argument by plaintiff's counsel, without support in the evidence, that a doctor, who testified that there was nothing the matter with plaintiff, was a fake, held not prejudicial, the jury having been instructed to disregard it, and counsel having been twice fined for repeating it. *Galveston, H. & S. A. Ry. Co. v. White* (Civ. App.) 216 S. W. 265.

In trespass to try title, wherein a former owner had intervened, a statement of counsel in argument that he had made himself a party to protect his warranty held not reversible error in view of instructions not to consider it. *Bishop v. Paul* (Civ. App.) 217 S. W. 435.

In a servant's action for injuries, argument of counsel as to an issue submitted respecting a plea of privilege held harmless, where the venue was nevertheless properly laid, and court instructed to disregard such improper argument. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

CHAPTER THIRTEEN

CHARGES AND INSTRUCTIONS TO THE JURY

Art.	Art.
1970. Court shall charge the jury, unless waived, etc.	instructions refused; as bill of exceptions; presumption on appeal; endorsement when instruction given or modified.
1971. Requisites of the charge; submission to parties; objections, etc.	
1972. Charge need not be excepted to.	1975. Jury may carry charge, etc., with them.
1973. Parties may ask instructions.	
1974. Endorsement by judge on special in-	

Article 1970. [1316] [1316] Unless waived court shall charge jury or submit issues of fact; failure to give time for examination, etc.

See *Benavides v. State*, 31 Cr. R. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717; *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099; *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

1. **Necessity and propriety of instructions in general.**—Art. 1985 did not relieve the court from the duty to comply with this article, where special issues were requested in due time. *Dorsey v. Cogdell* (Civ. App.) 210 S. W. 303.

2. **Issues and theories of case in general.**—Where court's general charge fails to adequately instruct jury concerning vital principles affecting issues, it is the privilege of a litigant to request and have given a correct charge covering such matters. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

Requested charge that, if plaintiff's driving his automobile at a greater than the lawful rate of speed was the proximate cause of the collision with street car, plaintiff could not recover, embodied a correct proposition of law, and, being applicable to an issue not affirmatively presented by the main charge, should have been given. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457.

A defendant is entitled to a charge, when properly and seasonably requested, requiring the jury to find whether the evidence establishes the existence of any specified group of facts which, if true, would establish a defense properly pleaded and made an issue by the evidence, and instructing them, if they find such facts, to find for defendant. *Hannes v. Raube* (Civ. App.) 210 S. W. 935.

Where plaintiff sought to rescind a conveyance on the ground defendant failed to carry out his agreement to grant plaintiff an oil and gas lease, and defendant insisted that he was to receive \$1 per acre for the lease, the charge should present defendant's contention. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

There was no necessity that the trial court should instruct the jury that there was no controversy on a particular matter, which fact was admitted. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

Both plaintiff and defendant have the right to prepare and demand charges presenting for the consideration of the jury a fact or group of facts which, if found to be true, establish in law some material issue; that is, they have the right to have the court explain to the jury the principle of law applicable to the very facts constituting a cause of action or defense. *Haverbekken v. Johnson* (Civ. App.) 228 S. W. 256.

3. **Duty to submit all the issues.**—It is the duty of the court in the first instance to submit all the issues raised by the pleadings and evidence. *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

4. **Affirmative and negative of issue.**—A party is entitled, when he requests it by correct instructions, to have facts establishing his cause of action or grounds of defense affirmatively stated by the court to the jury. *Southern Kansas Ry. Co. of Texas v. Wallace* (Com. App.) 206 S. W. 505; *Baker v. Williams* (Civ. App.) 198 S. W. 808; *Hart-Parr Co. v. Paine* (Civ. App.) 199 S. W. 822; *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793; *Hamilton v. Harris* (Civ. App.) 204 S. W. 450; *Quanah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606; *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 209 S. W. 775; *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In servant's action for personal injury, charging violation of Federal Safety Appliance Act, wherein defendant pleaded accident, and there was evidence thereon, it was entitled to an affirmative charge upon that theory of its defense, though a general charge was given to the same effect. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

When a case is submitted on a general charge, issues of each party should be affirmatively submitted, but such is not the case if the submission is on special issues. *Jackson v. Graham* (Civ. App.) 205 S. W. 755.

Where a case is submitted either under a general charge or upon special issues, a party is entitled to an affirmative presentation of an issue raised by pleadings and evidence. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

In action for damages from collision between plaintiff's automobile and defendant's interurban car, failure to affirmatively present defense of contributory negligence, based on alleged voluntary intoxication of plaintiff, would be a substantial denial of right if defendant had requested a correct charge. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457.

In a servant's action, the refusal of a special charge, directing a verdict for the master unless a machine was in a defective condition, and unless the master had failed to use ordinary care with reference thereto, held error; the master being entitled to have the affirmative of the issue presented. *Gammage v. Gamer Co.* (Com. App.) 213 S. W. 930.

In personal injury case, defendant was entitled to an instruction in the affirmative form that, although defendant's brakeman committed the act charged by plaintiff, yet if jury further found the brakeman not guilty of negligence in so doing verdict should be for defendant; there being evidence raising the issue whether the act was negligent. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In action for injuries to employé, refusal to give employer's special charge grouping

and presenting in an affirmative way the defenses to employé's charge of negligence held error. *Bering Mfg. Co. v. Sedita* (Civ. App.) 216 S. W. 639.

A litigant, where he properly requests it, is entitled to have the facts clearly and affirmatively presented to the jury, and when a defendant presents a special charge grouping certain facts which the jury may find from the evidence, the legal effect of which is to acquit him of liability, the court commits reversible error in refusing to give such instruction; the general charge containing nothing specifically to indicate such defense. *McElroy v. Dobbs* (Civ. App.) 229 S. W. 674.

8. Presumptions and burden of proof.—It was error to refuse charge that burden of proof was on defendant as to certain issues, where instruction that burden was on plaintiff to make out case by preponderance of evidence was so placed that it led jury to believe that burden was on plaintiff as to all issues. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

In an action against a charterer of vessel for failure to furnish cargo, held that the failure to charge that the burden was on the charterer to sustain the defense that the owner would have suffered no loss had it used any diligence in accepting other cargoes was not error. *Prince Line, Limited, of Newcastle, England, v. Steger* (Civ. App.) 210 S. W. 223.

Unless the evidence shows a case without proof tending to show negligence, it is not error to refuse to charge that negligence cannot be presumed from the mere fact of accident or injury, but is a fact that must be proven as any other fact in issue. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

A court which has not instructed on the burden of proof should do so on request, if necessary for the better aid and guidance of the jury, though special issues have been framed so as to indicate the burden. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

In a father's action to recover his child from its maternal grandparents, it was error not to charge the jury that the burden was on defendants to prove that the plaintiff was disqualified or incompetent to have the care, custody, and control of his child. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

A charge on the burden of proof is not necessary or proper in every case, but its propriety depends on the state of the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

In a suit to set aside a sheriff's sale on the ground that the purchaser had bid in the property in violation of an agreement, the burden was on plaintiffs to show such agreement and a fraudulent conspiracy to stifle bidding, and failure to so instruct on proper request was reversible error. *Jenkins v. Moore* (Civ. App.) 230 S. W. 886.

10. Purpose and effect of evidence.—In an action for flooding lands by negligent construction of a railroad bridge, where testimony that lower bridges were similarly constructed was admitted over defendant's objection, it was error to refuse to charge that jury should not award any damages as having resulted from the condition of bridges below plaintiff's land. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

A requested instruction to limit testimony to a particular issue was properly refused, where some of the testimony at least bore on other issues. *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502.

Where evidence of a conversation was admitted only because it was not conclusively shown that prior thereto defendants had possession of the strip in controversy, the court should instruct that if defendants were in possession prior to the conversation the agreement would not be binding upon him, but that if possession was secured by lessee by the contract with plaintiff the lessee's possession would not support defendants' plea of limitations. *Cass v. Green* (Civ. App.) 227 S. W. 238.

Where action was brought against manufacturer and his alleged agent, an instruction that, unless the jury found that he was the manufacturer's agent, letters written by him should not be considered, was properly refused, as it would have been error to charge that they could not be considered in determining the agent's liability. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

11. Exclusion of evidence from consideration.—Instruction submitting the true measure of damages for conversion of ore, but not excluding inadmissible evidence of value at times other than when converted, is reversible error, where it cannot be determined whether such evidence influenced the verdict. *Bartlesville Zinc Co. v. Compania Minera Ygnacio Rodriguez Ramos, S. A.* (Civ. App.) 202 S. W. 1048.

The court did not err in charging the jury not to consider the decree of Pres. Carranza of Mexico confiscating ore, the conversion of which was the subject of the suit, where at such time he and Gen. Villa were acting together, and were contending with each other, and the defense claimed they were seized by Villa. *Id.*

In a wife's action for the death of her husband it was not error to charge that the jury should not consider in mitigation of damages the fact of her remarriage, inadmissible evidence as to such remarriage, having been admitted. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

12. Circumstantial evidence.—Where a litigant relies on circumstantial evidence, it is not only proper, but it is his right, to have the court charge the jury that they may consider that character of testimony in determining the issue. *Rounds v. Coleman* (Civ. App.) 214 S. W. 496.

15. Matters of law in general.—It is the duty of the court to instruct the jury as to the law applicable to the facts. *Lillard Milling Co. v. Brooks & Few* (Civ. App.) 204 S. W. 686.

Ordinarily it is correct to instruct a jury as to what the law is on any particular issue submitted for their consideration. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

16. Law applicable to particular issues or theories.—Where plaintiff sued, claiming contract with agent, who failed to disclose his principal, under which he performed work and labor, and sought recovery of contract price or in quantum meruit, held not error, under the evidence, to refuse a charge on quantum meruit. *Allen v. Orear* (Civ. App.) 195 S. W. 670.

Where in action for goods sold wife living apart from husband after notice not to sell on his credit, evidence of conduct made question for jury as to equitable estoppel, held, that instructions on that subject should have been given. *Sanger Bros. v. Trammell* (Civ. App.) 198 S. W. 1175.

In action to cancel oil leases on ground of forfeiture, court properly submitted issue of defendant lessees' intention voluntarily to abandon grants. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

Evidence of breach of a logging contract held sufficient upon which to base instruction as to the amount and measure of damages. *Liberty Hardwood Lumber Co. v. Stevens* (Civ. App.) 199 S. W. 869.

In an action against fire insurance companies for conspiring to prevent plaintiff from obtaining insurance by representations as to his character, it was error to refuse instruction that such representations made by an insurance agent to his company were conditionally privileged. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

In a passenger's action for ejection, instructions should cover the question whether the acts of the conductor were reasonable and necessary, and whether in fact plaintiff suffered humiliation, chagrin, and mortification. *Southern Kansas Ry. Co. of Texas v. Wallace* (Com. App.) 206 S. W. 505.

In action by husband for divorce for excesses, cruel treatment, or outrages held, under facts, that jury should have been instructed that, if conduct of defendant wife was due to her mental or physical condition, there would be no cruelty. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

Where contestants denied testator's capacity and the court submitted the question whether the testator was of sufficiently sound mind to understand his acts, refusal of charges as to mentality which a person must have to execute a will held not error, for it must be presumed that the jury knew what mentality was necessary for them to answer the question. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

In an action for partnership accounting, it was material error to refuse special charge that profits were to be determined only upon business transacted before the purchase of plaintiff's interest by another, clearly indicated by the evidence. *Hannes v. Raube* (Civ. App.) 210 S. W. 985.

In action to ingraft parol trust upon deed, court properly instructed jury that, if it was proved that no trust was intended, the failure to pay consideration named did not in itself constitute the transaction one of trust. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Where plaintiff alleged and testified that deed was procured by fraud, and where attack on deed upon ground of fraud was barred by statute of limitations, court properly instructed that suit was not brought to set aside for fraud. *Id.*

In suit by the landlord to enforce his right to rent out of the crops, where sequestration was warranted by facts, the tenant not having sought in his cross-action to recover damages on account of excessive levy, submission to the jury of any question relative to his right to recover damages was properly refused. *Gaylor v. Monroe* (Civ. App.) 221 S. W. 330.

The court should construe to the jury a chattel mortgage in evidence and relied on as justification for mortgagee taking possession of the chattels. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

In trespass to try title, evidence that defendant's predecessor had been in possession under a deed and claim of ownership, and that the heirs of the original patentee had paid no taxes and claimed no ownership for more than 30 years, held to require an instruction as to the presumption of a sale. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

In an action by a negro passenger shot in an altercation with the train auditor, who, according to plaintiff's testimony unwarrantedly cursed and abused him, and was threatening to shoot him at the time he grabbed the auditor's arm, a special charge presenting that issue was improperly refused, not being covered by the main charge. *Wright v. Schaff* (Civ. App.) 228 S. W. 333.

In such action the refusal of charges submitting the question of the assault and insults held improper under the evidence and pleadings. *Id.*

Where the pleadings and testimony present an issue of whether adverse claimant recognized title paramount, it is error to refuse a requested correct special charge to the effect that such recognition would stop the running of limitations, when the cause was submitted on a general charge. *Collins v. Megason* (Civ. App.) 228 S. W. 583.

In an action for commission on procuring an exchange of lands, held, in view of the evidence, that the court should have given at defendant owner's request a special instruction presenting the issue whether the land was exchanged by defendant owner through his own efforts. *McElroy v. Dobbs* (Civ. App.) 229 S. W. 674.

17. — Negligence.—In action against waterworks company for injuries received when plaintiff stepped into hole made by cut-off box, company was entitled to instruction presenting defense that defect was brought about by action of another. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

Where the judge did not define the rights and duties of the railroad company in the operation of its engine in respect to preventing the escape of fire, the refusal of a correct requested instruction covering that issue would be error. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

In an action for a railroad employé's death by a derailment, where there was evidence of defective track, an instruction on master's duty in furnishing appliances was proper; term "appliances" including a railroad track. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

In an action for injuries to an elevator passenger, whose leg was caught in the door and held while the car descended, evidence held not to call for the submission of a charge on unavoidable accident. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

18. — **Agency and respondeat superior.**—In an action for conversion of mortgaged automobile, where there was testimony that one of the defendants authorized the mortgagor to execute the mortgage, it was error for the court to refuse to give requested instruction requiring the jury to find whether or not such defendant authorized the mortgagor to execute such mortgage. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

22. — **Proximate cause.**—In an action for injuries to a passenger while alighting, testimony that she fell because the porter had put his knee across the step box held not to have made an issue as to unavoidable accident, to call for instruction thereon. *Ft. Worth & D. C. Ry. Co. v. Courtney* (Civ. App.) 214 S. W. 839.

23. — **Fraud.**—In grantee's action to enjoin sale on execution where there was evidence raising the issue of whether land exceeded in value the land conveyed in exchange, refusal to charge on fraudulent intent of grantor held error. *Slaton v. Citizens' Nat. Bank* (Com. App.) 221 S. W. 955, affirming judgment (Civ. App.) *Citizens' Nat. Bank of Plainview v. Slaton*, 189 S. W. 742.

25. **Determination of amount of recovery.**—It is trial court's duty to furnish jury elements of damage which may be considered by them. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In lessee's action for wrongful dispossession by third person, if he had agreed to sublet part of land, it was error to refuse to submit question of damages, limited by fact that he had so agreed. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

Where charge as to measure of damages was correct, special charge with reference thereto, which would merely have had effect of explaining that "reasonable probability" did not mean "mere possibility," was properly refused. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

In action for breach of marriage promise, plaintiff has right to have attention of jury specifically directed to fact that they might consider seduction and anguish it alone may have added in estimating her damages. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

In action for loss of use of personality for over two years, court should have given requested charge that the jury should not base their estimate on the daily, weekly, or monthly value of the use, but to determine the value of the use for the entire period, though testimony as to monthly value had been admitted without objection, and refusal was not justified because as there was no evidence of daily or weekly value of use, charge was on weight of evidence. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

28. **Definition or explanation of terms.**—In suit against railroad for damages by fire though it would have been proper for the court to define "market value," failure to do so was not reversible error. *Quanah, A. & P. Ry. Co. v. Stearns* (Civ. App.) 206 S. W. 857.

In action against railroad for death at crossing of one driving automobile, on plaintiff's request, court should have defined "crossing," and "view of the crossing," as used in Acts 35th Leg. c. 207, § 17 (Vernon's Ann. Pen. Code Supp. 1918, art. 820l). *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In an architect's action for plans and specifications furnished defendant upon the authority of his general local agent, a requested instruction should have been submitted upon the term "apparent authority," which is technical and not easily understood by laymen (citing Words and Phrases, First and Second Series, Apparent Authority). *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In an action for the death of intending passenger struck by defendant's interurban car which passed the station at a high rate of speed, it was not error to refuse to define the word "control" as applied to the operation of the car. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

Where the court had required the jury to find whether the negligence of defendant directly caused the accident, it was not error to refuse a charge that the direct cause is the proximate cause without which the accident would not have happened, since "direct cause" needs no definition, and would be better understood than "proximate cause," and laid a heavier burden on plaintiff than a requirement to find proximate cause would have done. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

In a suit to set aside an award to parents as dependents, for the death of their son, refusal of the trial judge to define the word "dependents" was not erroneous; the statute itself failing to define it. *Southern Surety Co. v. Hibbs* (Civ. App.) 221 S. W. 303.

Where the court submitted correct issues as to whether defendant knew facts which would put a prudent man on inquiry as to restrictions and whether reasonable inquiry would have disclosed the restrictions without using the term "constructive notice," it was not error to fail to define that term. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

The legal question being whether certain funds were subject to garnishment, depending on whether a certain arrangement had been made and whether that arrangement

created a partnership, it was not necessary to define a partnership. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

Where a special issue required the jury to find whether a cotton gin was within the part of the town set aside to gins and like industries, or in "reasonable proximity thereto," the quoted words did not need to be defined, as they are words of ordinary use. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

In a suit for commission on sale of cattle, the trial court did not err in failing to instruct as to the meaning of the term "procuring cause" (of sale); the words "efficient and procuring cause" as used not being technical. *Lumsden v. Jones* (Civ. App.) 227 S. W. 358.

In an action against a railroad and others for damages to plaintiff's land through the spread of Johnson grass from a switch or spur line, it was unnecessary for the jury to define the meaning of "preponderance of the evidence." *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

29. **General or special charge.**—See notes to art. 1984a.

35. **Objections and exceptions.**—See *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427; *Christian v. Dunavent* (Civ. App.) 232 S. W. 875; notes to art. 1971.

Art. 1971. [1317] [1317] Requisites of charge; submission to parties; objections, etc.

See *Benavides v. State*, 31 Cr. R. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Streeper v. Thompson* (Civ. App.) 23 S. W. 326; *Texas Midland R. R. v. Combs* (Civ. App.) 195 S. W. 1178; *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753; *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

1. PROVINCE OF COURT AND JURY

(A) *Questions of Law or Fact*

1. **Questions of law or fact in general.**—In an action on notes given for work done on a railroad it was for the court, and not the jury, to state whether plaintiff sought recovery on the account or on the notes. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

In action by county, through district attorney, a plea in abatement, denying the authority of the district attorney to institute and prosecute the suit, where there was no question of fact arising under the pleadings, should have been decided directly by the court as a matter of law, and not by the verdict of the jury. *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

3. **Preliminary or introductory questions of fact.**—The question whether sufficient predicate for the introduction of testimony to establish the existence and loss of a deed has been established is a question of law addressed to the sound discretion of the court. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Whether the conditions under which experiments were made so substantially similar to those under which an accident occurred as to authorize introduction of the result is for the decision of the trial court, and he has considerable latitude of discretion in deciding it. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

4. **Sufficiency of evidence to take case to jury.**—To authorize the court to take a question of fact from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusions to be drawn from it. *Daugherty v. Wiles* (Com. App.) 207 S. W. 900; *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Western Assur. Co. of Toronto, Canada, v. Busch* (Civ. App.) 203 S. W. 460; *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909; *Nevill v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 211 S. W. 523; *Westchester Fire Ins. Co. v. Biggs* (Civ. App.) 216 S. W. 274; *Kirksey v. Southern Traction Co.*, 110 Tex. 190, 217 S. W. 139; *Hoot v. Walker County Lumber Co.* (Civ. App.) 219 S. W. 544; *Hines v. Jones* (Civ. App.) 225 S. W. 412.

Where the evidence raised issues of fact, direction of a verdict for defendant is improper. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135; *Clopton v. Jolley & Terry* (Civ. App.) 203 S. W. 799.

The circumstances of the case must be clear and decisive to justify its withdrawal from the consideration of the jury. *Pollack v. Perry* (Civ. App.) 217 S. W. 967; *Texas Life Ins. Co. v. Legg* (Civ. App.) 229 S. W. 587.

It is only where reasonable and ordinary minds may arrive at different conclusions on any issue of fact that such issue should be submitted to the jury. *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

If issue of fact is raised as to any material question in case, it must be submitted to jury. *Reeves v. Avina* (Civ. App.) 201 S. W. 729.

Court cannot peremptorily instruct verdict on any issue as against party, where there is some evidence in his favor on issue involved. *Toole v. Moore* (Civ. App.) 203 S. W. 429.

In an action under federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) for death of a brakeman, the judgment would be reversed on appeal from a directed verdict for defendants if the evidence, taken most favorably to appellant, would authorize men of reasonable minds to conclude that defendants' negligence proximately resulted in death. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

Although the evidence was not entirely plain and satisfactory, yet where it cannot be said as a matter of law that defendant legally failed to prove the allegations of her cross-action, the court erred in directing a verdict against her. *Walker v. Douglass* (Civ. App.) 211 S. W. 348.

In an action by an engineer for services rendered in supervising the construction of a highway, a peremptory instruction in his favor held warranted under the rule that, where there is no reason for ordinary minds to differ as to the conclusion to be drawn from the evidence, a peremptory instruction is proper. *McDonald v. Axtell* (Civ. App.) 218 S. W. 563.

When a state of facts is presented from which an ultimate question must be drawn and reasonable minds might differ as to what conclusion should be drawn from the ultimate facts proven, the question is for the jury. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

The court will not take a case from the jury and direct a verdict for defendant merely because the evidence preponderates, or greatly preponderates in favor of defendant. *National Life & Accident Ins. Co. v. Weaver* (Civ. App.) 226 S. W. 754.

If a state of facts be such that all reasonable minds would draw the same conclusion, it presents a question of law for the court rather than a question of fact for the jury. *Tisdale v. Panhandle & S. F. Ry. Co.* (Com. App.) 228 S. W. 133.

Where, in an action for personal injury, a verdict could be predicated on a finding of the negligence of fellow servants alone, there was no error in refusing a special charge directing a verdict for defendant on the ground that the charge of negligence on the part of defendant's foreman was not sustained. *Payne v. Harris* (Civ. App.) 228 S. W. 350.

6. Weight and probative force of evidence.—See *Drew v. American Automobile Ins. Co.* (Civ. App.) 207 S. W. 547; note 7.

Weight of testimony is for the jury. *Hall v. Hall* (Civ. App.) 198 S. W. 636; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Falfurrias Mercantile Co. v. Citizens' State Bank* (Civ. App.) 207 S. W. 568; *Weisner v. Missouri, K. & T. Ry. Co., of Texas* (Civ. App.) 207 S. W. 904; *Lanham v. West* (Civ. App.) 209 S. W. 258; *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652.

It is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a suspicion of the existence of the facts sought to be established, and whether the testimony has more than such force is for the court. *Mills v. Mills* (Civ. App.) 206 S. W. 100; *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

The trial court is the judge of the weight of the testimony. *Rossetti v. Venavides* (Civ. App.) 195 S. W. 208.

It is province of jury to give such weight to the testimony as they think proper. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Credibility of plaintiff as witness and weight of her testimony are for the jury. *Dean v. Dean* (Civ. App.) 196 S. W. 567; *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

The question of whether there is any evidence is one for the court, and whether sufficient evidence is one for the jury. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

7. Credibility of witnesses.—The credibility of a witness is for the jury. *Hall v. Hall* (Civ. App.) 198 S. W. 636; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 382; *Falfurrias Mercantile Co. v. Citizens' State Bank* (Civ. App.) 207 S. W. 568; *Quanah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606; *Weisner v. Missouri, K. & T. Ry. Co., of Texas* (Com. App.) 207 S. W. 904; *Lanham v. West* (Civ. App.) 209 S. W. 258; *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652; *Poulter v. Miller* (Com. App.) 221 S. W. 965, reversing judgment (Civ. App.) *Miller v. Poulter*, 189 S. W. 105; *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652; *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

The trial court is the judge of the credibility of witnesses. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

It is province of jury to pass upon credibility of witnesses and to give such weight to their testimony as they think proper. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

In view of Const. art. 1, § 15, preserving the right to jury trial, and art. 2024, limiting the number of new trials, it is the province of the jury to determine the credibility of witnesses and the weight of testimony, and the court may not assume its functions by deciding that testimony is entitled to no credit because overborne by contradictory testimony, or that it is so contradictory to circumstances and proof as to be improbable. *Drew v. American Automobile Ins. Co.* (Civ. App.) 207 S. W. 547.

The credibility of opinion evidence as to market value of an article is for the jury. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

8. — Parties and persons interested.—In action by lessor to forfeit lease for non-payment of rent, as lessee was an interested witness jury were at liberty to disbelieve him. *Crawford v. Texas Improvement Co.* (Civ. App.) 196 S. W. 195.

Credibility of plaintiff as witness is for the jury. *Dean v. Dean* (Civ. App.) 196 S. W. 567.

Where defendants admitted plaintiff's cause of action, except as it might be defeated by facts proven by defendants, and where such facts could not be proven without testimony of defendants themselves, it was not error to refuse a peremptory instruction for defendants. *Turrentine v. Doering* (Civ. App.) 203 S. W. 802.

Credibility of a witness is a question for the jury, and the court cannot assume the

truthfulness of the unsupported testimony of an interested party. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

Where a party, testifying concerning a transaction, introduced original entries made by him at the time covering the points involved, his testimony was taken out of the rule that the court cannot assume the truthfulness of the unsupported testimony of an interested party. *Id.*

Where a party's case is proven only by his own testimony, it is an issue of fact for the jury, even though it be uncontradicted and unimpeached. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

No matter how positive and uncontradicted the testimony of an interested party may be, the question of his credibility must be submitted to the jury. *Mills v. Mills* (Com. App.) 228 S. W. 919.

The credibility of plaintiff as a witness and the weight to be given his testimony in view of his interest is for the jury. *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

9. Uncontroverted facts or evidence.—A requested charge, submitting an undisputed question, is properly refused. *Pullman Co. v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 741; *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

There being no disputed issue of fact for the jury, a verdict may be directed. *Meyer-Forster Realty Co. v. Read* (Civ. App.) 195 S. W. 987.

Facts admitted in pleadings need not be submitted to the jury. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Under art. 6603, in action for killing stock on track, where undisputed evidence disclosed no adequate fence had been maintained, it was court's duty to direct verdict for plaintiff. *Baker v. Schroeder* (Civ. App.) 198 S. W. 394.

In an action for a commission for furnishing a buyer for land, evidence held not to warrant a directed verdict for plaintiff, although the contract was admitted but was claimed to have been annulled. *Turner v. Garrard* (Civ. App.) 198 S. W. 655.

In action for damages for breach of contract to deliver oil, where facts were undisputed, peremptory instruction was proper. *Planters' Oil Co. v. Gresham* (Civ. App.) 202 S. W. 145.

Issues of fact should not be submitted to the jury for decision, when they are established by the evidence beyond controversy. *Smith v. McBroom* (Civ. App.) 203 S. W. 1130.

It is not error to peremptorily instruct jury on issue upon which evidence is uncontradicted, and it is the better practice to do so. *Etter v. Stamp & Eichelberger* (Civ. App.) 204 S. W. 143.

Where defendant insurance company admitted that plaintiff had good cause of action except so far as it might be defeated by facts to be established, it was not error to refuse defendant's request to submit question whether or not attorney's fees sued for were reasonable; no evidence having been introduced upon that question. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

In action under lease for rent, tenant having vacated by reason of plaintiff's failure or inability to stop leaks in roof, court properly refused to submit issue whether or not holes made by sign braces erected by tenant caused roof to leak, where evidence that plaintiff had stopped all leaks caused by braces was uncontroverted. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

In action of trespass to try title, it was not improper for the court to declare facts properly in evidence and undisputed as part of his findings without submitting to the jury. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Where the facts were undisputed, except that a defendant testified one way on direct examination and another way on cross-examination, there was no question of fact for submission to a jury, but the case presented a question of law for the court. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

10. Inferences from evidence.—A jury is not authorized to render a verdict merely upon inferences drawn by it, but such inferences must have basis in the evidence in order to be warranted. *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

The jury were the judges, not only of the facts proved, but of the inferences to be drawn therefrom, provided such inferences were not unreasonable. *Stephenville, N. & S. T. Ry. Co. v. Shelton* (Com. App.) 208 S. W. 915.

That evidence concerning material issues was undisputed does not make them any the less issues of fact, as it is only when reasonable minds would not differ as to the inferences to be drawn from a given state of facts that the question becomes an issue of law. *House v. House* (Civ. App.) 222 S. W. 322.

11. Conflicting evidence.—Where the evidence is conflicting, the question is for the jury, and a verdict should not be directed. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135; *Parlin & Orendorff Co. v. Glover* (Civ. App.) 203 S. W. 1174; *Hays v. Deeley* (Civ. App.) 204 S. W. 1177; *Lanham v. West* (Civ. App.) 209 S. W. 258; *Conner v. McAfee* (Civ. App.) 214 S. W. 646; *Grice v. Herrick Hardware Co.* (Civ. App.) 219 S. W. 502; *Wakeland v. Robertson* (Civ. App.) 219 S. W. 842; *Wortman v. Young* (Civ. App.) 221 S. W. 660; *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513; *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368; *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

Duty to reconcile conflicts in evidence, or to adopt one or other theory shown by evidence, is on jury. *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347; *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652; *Scheps v. Giles* (Civ. App.) 222 S. W. 348.

A preponderance of evidence on one side or the other is not sufficient to justify a trial court in denying the right of trial by jury. *Drew v. American Automobile Ins. Co.*

(Civ. App.) 207 S. W. 547; *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687; *Rouser v. Wright* (Civ. App.) 205 S. W. 849.

If there is any evidence tending to dispute defendant's evidence on issues, verdict cannot be directed for defendant. *American Nat. Ins. Co. v. Frankel* (Civ. App.) 199 S. W. 1132.

Though it is the duty of trial judge to set aside a verdict when it is contrary to great preponderance of the testimony, that rule does not affect the primary right to have the case submitted to the jury. *Gulf, C. & S. F. Ry. Co. v. Clements* (Civ. App.) 203 S. W. 623.

The giving of plaintiff's requested charges which were tantamount to peremptory instructions, when the only facts, which would in any event have entitled plaintiff thereto, were sharply controverted, would have been affirmative error. *Pyle v. Park* (Civ. App.) 214 S. W. 652.

Affirmative matters of defense should be submitted to the jury, where the evidence is conflicting. *Jackson v. Martin* (Civ. App.) 213 S. W. 4.

In case of disputed facts, the issue should be submitted to the jury. *Young v. Blain* (Civ. App.) 231 S. W. 851.

12. Withdrawal of particular counts or issues.—Where plaintiff sued on contract, or in the alternative on a quantum meruit, he was entitled to the submission of a quantum meruit, although in his testimony he insisted that he only performed the services by virtue of the alleged contract. *Guyer v. Chapman* (Civ. App.) 207 S. W. 428.

Where there were two defendants, and plaintiff's right to recover of them rested upon different grounds and was attempted to be sustained by different proof, the court properly refused peremptory instruction if he thought the evidence was sufficient to sustain the judgment as to one defendant. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

14. Demurrer to evidence.—A motion to strike from the record all testimony introduced by the adverse party is very far-reaching, and should never be entertained, where there is any material testimony, however slight, bearing on issues under investigation. *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

16. Direction of verdict.—Where there is a material issue of fact, it is error for the trial court to take the case from the jury and to peremptorily instruct a verdict. *Early-Foster Co. v. W. F. Klump & Co.* (Civ. App.) 229 S. W. 1015; *Crawford v. Thos. Goggan & Bros.* (Civ. App.) 217 S. W. 1106.

Where there was no evidence to support verdict for plaintiff, and motion to instruct verdict for a certain defendant was sustained, entering judgment without a formal jury finding is not erroneous. *Thornton v. Daniel* (Civ. App.) 199 S. W. 831.

Action of a court, in peremptorily instructing a jury, held equivalent to a denial of the right of trial by jury and in violation of Const. art. 1, § 15. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858.

Where court was authorized to direct verdict, and in so doing directed verdict against one not served with citation, it was equally authorized to set it aside as to such person, and enter judgment accordingly. *American Surety Co. v. Sheerin* (Civ. App.) 203 S. W. 1120.

Where defendant's motion, made after plaintiffs had closed their evidence in chief, was overruled, and defendant then proceeded to introduce testimony, all rights to complain of the court's failure to grant the motion were waived. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

Where matters were proven by the uncorroborated testimony of plaintiff, and defendant, with full knowledge thereof, was present in court, but did not dispute such testimony by any evidence, it was not error to give a peremptory instruction for plaintiff. *Brown v. McKinney* (Civ. App.) 208 S. W. 565.

Where, under the evidence, plaintiff was entitled to some recovery, a general peremptory instruction denying any recovery was properly refused, even though plaintiff was not entitled to recover as to all of the amounts claimed. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

There being no issue to go to the jury, the trial court properly instructed a verdict for defendants. *Rich v. Eason* (Civ. App.) 214 S. W. 581.

In an action on a life policy, providing for double liability in event of accidental death, where insurer set up defense of suicide, and filed an admission under district court rule 31 (142 S. W. xiii), and the court erroneously permitted it to open and close, it was error, after the case was submitted, to recall the jury and direct a verdict in favor of plaintiff on the ground that the defendant had admitted that the death was accidental, as the insurer was deprived of the right to move to withdraw the admission. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

Court has no power to take from jury on issue of adverse possession suit in trespass to try title, where there is a question of fact involved. *Davis v. Cisneros* (Civ. App.) 220 S. W. 298.

Where damage to insured building was caused partly by an explosion and partly by fire, and where policy provided against liability for damage by explosion, verdict should have been directed for insurer in action on policy in which there was no evidence on which jury could base a finding as to amount of damage caused by the fire. *Northwestern Nat. Ins. Co. v. Mims* (Civ. App.) 226 S. W. 738.

In an action for breach of contract to drill an oil well, where there were other elements of damage on which plaintiff was entitled to go to the jury, peremptory instruction should be refused, though plaintiff may not have been entitled to recover profits. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

Plaintiffs, who stood by and saw defendants making a mistake in calculation as to royalties to be paid held guilty of fraud, and in their suit wherein defendants ask only

the consideration in fact agreed on, the trial court properly refused a peremptory instruction for plaintiffs. *Morris v. McGough* (Civ. App.) 230 S. W. 1092.

17. Operation and effect of motion or request.—A motion by defendant for an instructed verdict, which was overruled, does not, like demurrer to the evidence, preclude defendant from proceeding with case. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

In action by assignee of claim for real estate commission, a peremptory instruction to find that \$500 of such commission was unpaid did not preclude court from finding for defendant on the issue of limitations. *Campbell v. Wyatt* (Civ. App.) 217 S. W. 743.

(B) *Particular Questions or Issues*

18. In general.—In an architect's action for services, evidence held sufficient to go to the jury. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In action on a promissory note for corporate stock, evidence held to make a jury question whether the stock had been "issued" in violation of the constitutional provision that no corporation shall issue stock except for money paid, labor done, or property actually received. *Wilson v. Bankers' Trust Co.* (Civ. App.) 218 S. W. 803.

In action by lessees, entitled under lease to the necessary space to operate oil wells which they brought in, to restrain defendant, who had leased the other land from owners, from interfering with plaintiffs' operation of their wells and for possession of certain land, question of whether the land in dispute was necessary space for operation of the plaintiffs' wells held for jury. *Moore v. Decker* (Com. App.) 220 S. W. 773, reversing judgment (Civ. App.) 176 S. W. 816.

In a building contractor's action for a balance alleged to be due on an award of arbitration, which defendants sought to avoid on the ground of unfairness of one of the arbitrators and intimidation towards the board on the part of the plaintiff, evidence held sufficient to require the court to submit the issues of fairness and intimidation to the jury. *Anderson Bros. v. Parker Const. Co.* (Civ. App.) 222 S. W. 677.

Whether a provision in a contract is one for a penalty, or liquidated damages, is one for the court, and not for the jury. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

18½. Accord and satisfaction and settlement.—With conclusive evidence of a bona fide controversy over the amount due, and undisputed evidence that plaintiff cashed defendant's check sent with a letter stating it was in full payment, an instructed verdict for defendant upon the ground of accord and satisfaction was not error. *Miller Bros. & Co. v. H. Lesinsky Co.* (Civ. App.) 202 S. W. 992.

Plaintiff's receipt, reciting that the amount "settles all accounts" "up to date," did not, as a matter of law, settle a claim based on check dated prior to the receipt, and by agreement not to be presented until after the date of the receipt. *Weller v. Burns* (Civ. App.) 210 S. W. 861.

Evidence that plaintiff employé accepted certain checks after advising defendant employer that he was entitled to an extra month's pay, and that the employer stated he would receive it if he was entitled to it, etc., held to make the issue of accord and satisfaction a question of fact. *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225.

In buyer's action for nondelivery in which he claimed an agreed settlement by the terms of which seller was indebted for specified amount, question of whether such settlement had been entered into held for jury. *Arminger v. City Nat. Bank of Paris* (Civ. App.) 226 S. W. 707.

In seller's action for balance of purchase price, the question of whether there had been an accord and satisfaction by seller's acceptance of an amount less than that first demanded, in view of buyer's telegrams demanding certain deductions, held a question for the jury. *Early-Foster Co. v. W. F. Klump & Co.* (Civ. App.) 229 S. W. 1015.

19. Account and accounting.—In an action by a member of an association against its treasurer, after dissolution, evidence held not conflicting as to accounting between defendant and the other members so that directing a verdict for plaintiff was not error. *Bellew v. Jacobs* (Civ. App.) 229 S. W. 928.

20. Acknowledgment.—Whether a notary who takes an acknowledgment is financially or beneficially interested is ordinarily an issue of fact. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

21. Adverse possession.—Evidence that house and improvements of adverse possession claimant were on one tract, and only minor and incidental improvements on a second tract, did not make his adverse holding of second tract beyond his actual possession a jury question. *Bailey v. Kirby Lumber Co.* (Civ. App.) 195 S. W. 221.

In trespass to try title, court properly submitted to jury question of plaintiff's claim of title by adverse possession to more of land than six acres which had been cultivated by plaintiff and predecessors. *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668.

In trespass to try title, where it appeared that plaintiffs asserted right to the land which it was claimed had not been asserted by their ancestors for 50 years, the question of the presumption of the grant by reason of the lapse of time should be submitted to the jury. *House v. Stephens* (Civ. App.) 198 S. W. 384.

In trespass to try title, wherein plaintiffs claimed an equitable interest, held that whether there was such a repudiation of the trust and notice thereof to the beneficiary as made the alleged trustee's possession adverse, was for the jury. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

Where defendant claimed title by adverse possession, whether defendant was a tenant of plaintiff held for the jury. *Dolen v. Lobit* (Civ. App.) 207 S. W. 143, 964.

Where plaintiff relied on adverse possession, held, that the question whether he had perfected an adverse title to the entire premises, though he was only in possession of a portion, and did not render the whole for taxes, was for the jury. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Where a tenant in common takes adverse possession of land, notoriously using and enjoying it adversely and claiming to own it, it becomes a question of fact for the jury as to whether limitations are not in favor of such tenant. *Id.*

An issue adverse to claim of title by limitations is raised when the possessor pays rent, or agrees to pay rent, for any part of the period, which becomes a question for the jury to settle. *Davis v. Cisneros* (Civ. App.) 220 S. W. 298.

The giving of crop mortgages by one in possession of land is not necessarily conclusive that he held the same adversely to others having an interest therein, but the question is for the jury. *Liddell v. Gordon* (Civ. App.) 226 S. W. 459.

Question whether heir entitled to a half interest and his successors had claimed the land adversely for a sufficient period to ripen into title held, under the evidence, for the jury, so that it was error to direct that an adverse title was established. *Id.*

Whether defendant had paid the taxes for five consecutive years as required by the statute held for the jury. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

Whether plaintiff, claiming to have acquired title by adverse possession, had actual, continuous, adverse possession for a period of 10 years, held for the jury. *Evans v. Houston Oil Co. of Texas* (Com. App.) 231 S. W. 731.

Where the evidence showed that a man occupied certain land as the avowed tenant of a married woman who held the land as her separate property, and the separate ownership of said land was open and notorious in the community, there was evidence tending to show notice of adverse possession, and a peremptory instruction was properly refused. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

22. Agency and respondeat superior.—Evidence held sufficient to raise a question of fact as to agent's apparent or implied authority to agree to deliver threshing machine parts within a specified time. *J. I. Case Threshing Mach. Co. v. Morgan* (Civ. App.) 195 S. W. 922.

It is within the province of the court to determine whether under an ascertained state of facts an agency exists, but it is for the jury to determine the existence of facts sufficient to constitute agency. *Daugherty v. Wiles* (Com. App.) 207 S. W. 900.

In an architect's action to recover for plans and specifications furnished under an agreement with defendant's general local agent, held, that there is sufficient evidence to require the court to submit the issue of the agent's apparent authority. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In an action against the owner of a theater by a bill poster for services, a peremptory instruction for plaintiff held not warranted by evidence on theory that one in possession of the theater and who hired plaintiff was defendant's manager. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

Whether a bank had by its directors acquiesced in or ratified the issuance of drafts by its president, and hence was estopped to deny his authority, held, under the evidence, a question of fact. *Ft. Worth Nat. Bank v. Harwood* (Com. App.) 229 S. W. 487.

In shipper's action for loss of goods in which the undisputed evidence showed that a transfer company had been employed to receive goods from the railroad, and had sent its employee to get the goods, and that employee did get what he supposed to be the entire shipment, the question of whether such employee was an agent of the transfer company so as to warrant admission of his testimony that he signed delivery freight receipt, and of the receipt itself, held for the jury. *Hines v. Rush* (Civ. App.) 229 S. W. 973.

Where a landowner, who desired to take up vendor's lien note appointed the agent of a loan company to make payment and the holder sent the note accompanied by a release to the agent, who misappropriated the funds, the question whether such agent was agent of the holder authorized to receive payment of the note, held, under the evidence, for the jury. *Shaw v. First State Bank of Abilene* (Com. App.) 231 S. W. 325.

In an action by a bank to recover an overdraft, evidence held to make an issue of fact as to whether the president of the bank in purchasing defendant's cotton and promising to put the proceeds in the bank to his credit was acting as president of the bank or individually. *Hull v. Guaranty State Bank of Carthage* (Civ. App.) 231 S. W. 810.

23. Alteration of instrument.—In action to cancel oil and gas lease, held that under the evidence, it was reversible error to submit to the jury issue as to whether interlineations were made before or after the execution and delivery of the lease by striking out a six-months term and inserting a ten-year term. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

25. Assumption of risk.—Ordinarily the question of assumed risk is one of fact for the jury, unless the facts present a situation so plain that intelligent men would not draw different conclusions. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637; *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 381.

Testimony of a car repairer that he had never worked with electricity, and that he was ordered to pick up a wire off the track of defendant, and did not know it was a live wire, was sufficient to make the question of assumption of risk one for the jury. *Houston Belt & Terminal Ry. Co. v. Wolkarte* (Civ. App.) 197 S. W. 1023.

In railroad servant's action for injuries while handling timber, question whether plaintiff assumed risk of injury from insufficient number of fellow workers held for jury. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

Evidence held insufficient to warrant direction of verdict for master, on ground that servant assumed the risk in riding on a flat car having no standards. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188.

In an action by a railroad engineer for injuries occasioned by being struck by a mail crane while leaning out of his cab, whether plaintiff assumed the risk held for the jury. *Southern Pac. Co. v. Berkshire* (Civ. App.) 207 S. W. 323.

Question whether conductor's negligence was the proximate cause of death of locomotive engineer, being under the evidence for the jury, it cannot be held as a conclusion of law that engineer assumed the risk. *Pope v. Kansas City, M. & O. Ry. Co. of Texas*, 109 Tex. 311, 207 S. W. 514.

Foreman's statement, "Well, I will see," was insufficient as matter of law to sustain finding of a promise to repair defective condition. *Schaff v. Hendrich* (Civ. App.) 207 S. W. 543.

In action for injuries sustained by plaintiff switch tender thrown under a moving train, because of stumbling over a pipe left in such position as to partially obstruct a path along the track, whether plaintiff assumed the risk held, under the evidence, for the jury. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

In an action by the engineer of a wrecker, the question whether he assumed the risk of injury from defective cables and from the fact that no outriggers were used before attempting to move a derailed box car, held, under the evidence, for the jury. *Houston Belt & T. Ry. Co. v. Christian* (Civ. App.) 209 S. W. 816.

In an action by a switchman for personal injuries evidence held sufficient to go to the jury on the issue of assumed risk. *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283.

In action for injuries to a minor servant operating mangle, whether servant understood danger of her hand being drawn between rollers so that she assumed the risk, held for the jury. *Hotel Dieu v. Armendarez* (Com. App.) 210 S. W. 518.

In an action for death of an inexperienced servant caught by cogwheels of an electrically driven merry-go-round, which started because of a defective switch while he was making repairs, whether deceased assumed the risk held question for the jury. *Hutcher-son v. Amarillo St. Ry. Co.* (Com. App.) 213 S. W. 931.

In an action for injuries to a railroad bridge painter knocked from a scaffold by a vehicle passing on the street below, held, under the evidence, that it could not be said, as a matter of law, that he assumed the risk of injury from foreman's failure to keep a lookout. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

Whether servant appreciated the extent of the danger of operating a circular saw on a defective table top, and assumed the risk, held for the jury. *Worden v. Kroeger* (Com. App.) 219 S. W. 1094.

In action for death of employé of electric company from the breaking of a telephone pole, evidence held insufficient to show as a matter of law that employé assumed the risk. *Halbrook v. Orange Ice, Light & Water Co.* (Com. App.) 221 S. W. 587.

In an action for injuries to a railroad section foreman, when a maul or hammer slivered and the piece struck his eye, question of assumed risk held for jury. *Hines v. Flinn* (Civ. App.) 222 S. W. 679.

Assumption of risk by a trucker injured in unloading a truck in a required manner, after he had been assured of its safety by his foreman assisting in the work, held for the jury. *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

In an action by a railroad machinist's helper, for negligence in failing to provide an adequate force of men for handling parts of a locomotive, evidence held sufficient to warrant submission of the issue of assumed risk. *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 223 S. W. 490.

Evidence that an employé unfamiliar with the particular work, was riding on a work train behind a car insecurely loaded with poles, one of which fell off and knocked him from his car, does not conclusively show that he assumed the risk. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

Evidence held to make a question for the jury as to whether a brakeman on a work train, injured when the overhanging bottom and side of a dump car closed by gravity after dumping, realized and comprehended the danger. *Schaff v. Morris* (Civ. App.) 227 S. W. 199.

In an action for the death of a railway fireman, killed when an engine left unattended on a side track ran upon the main track and collided with his engine, evidence held insufficient to show that a custom existed of leaving engines unattended, or that deceased knew of such custom, so as to charge him with assumption of the risk as a matter of law. *Lancaster v. Morgan* (Civ. App.) 227 S. W. 524.

Where member of a railroad wrecking gang was injured by the tightening of a wire cable, evidence held not to show as a matter of law that in moving the cable he was acting on his own volition, and therefore assumed the risk. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

In action for injury to railroad section hand, by lifting while assisting to move motorcar from toolhouse onto the track, evidence held to make assumption of risk a question for the jury. *Olds v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 228 S. W. 336.

Whether a railway shop laborer assumed the risk in lifting a heavy box with the help of fellow servants held an issue for the jury. *Payne v. Harris* (Civ. App.) 228 S. W. 350.

In action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries to roundhouse hostler who slipped on water and grease on the floor of the engine cab, the question whether he assumed the risk held for the jury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to a railroad roundhouse hostler who slipped and fell while descending from cab to ground, in which it was claimed that railroad was negligent in not having furnished lights, question of whether he assumed the risk held for the jury. *Id.*

If the evidence shows with such certainty that reasonable minds cannot differ that the employee knew or must necessarily have known that his master was not taking precaution for his safety, charge denying recovery on the ground of assumption of risk would be proper. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 231 S. W. 745.

27. Bills and notes.—Evidence held to present jury question whether plaintiff in action on note was the owner of the note. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

Telephoning to holder of note regarding extension, and failure of holder to keep promise to meet maker, did not even raise a question for the jury on the issue of agreement for extension. *Thomas v. Derrick* (Civ. App.) 207 S. W. 140.

28. Bona fide purchase.—Whether transferee of vendor's lien notes acquires notes without notice before maturity held for the jury. *Durst v. Bludworth* (Civ. App.) 209 S. W. 217.

Whether purchaser of secured vendor's lien note had notice, constructive or actual, that note arose out of a simulated sale of a homestead, held for the jury. *Brooker v. Wright* (Civ. App.) 216 S. W. 196.

Though the evidence showed purchase of a negotiable instrument originating in fraud before maturity and showed no notice by the purchaser of the fraud, it was a question for the jury whether she was a bona fide purchaser, where the evidence was not conclusive that she paid value. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

Whether or not vendee's possession under unrecorded contract was such as should have placed a subsequent lessee from the vendor on inquiry held for the jury. *Aurelius v. Stewart* (Civ. App.) 219 S. W. 863.

In trespass to try title, where plaintiffs claimed under a deed conveying an undivided half interest executed in 1848, and defendants claimed under a deed executed in 1846, but not recorded until 1853, evidence of assertion of title by plaintiff's predecessors in interest for more than 70 years, with payment of taxes and active steps towards protecting the lands from trespass, held sufficient to require the submission to the jury of plaintiff's purchase in good faith for a valuable consideration without notice of the first conveyance. *Starr v. Brooks* (Civ. App.) 222 S. W. 660.

In an action to cancel a note and a deed of trust on the ground of never having received the money thereon from brokers, notwithstanding deed of trust recites that the brokers had paid off original vendor's lien notes, facts held to require submission of the issues of lender's good faith and notice. *Steele v. Butler* (Civ. App.) 227 S. W. 506.

Whether one receiving a bank's drafts in payment of the president's individual debt was put on inquiry held a question of fact in view of evidence. *Ft. Worth Nat. Bank v. Harwood* (Com. App.) 229 S. W. 487.

28½. Boundaries.—Acquiescence in boundary is question of fact for judge or jury. *Lopez v. Vela* (Civ. App.) 200 S. W. 1111; *Buie v. Miller* (Civ. App.) 216 S. W. 630.

What boundary was intended by a deed of part of a lot held a jury question. *Rose v. Hays Inv. Co.* (Civ. App.) 205 S. W. 140.

Location of eastern boundary line of certain survey held for the jury. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

While acquiescence in a boundary line raises a strong presumption that the line is correct, where there is no room to doubt the true location, a mere acquiescence in another line will not support a verdict based thereon. *Buie v. Miller* (Civ. App.) 216 S. W. 630.

In suit between two school districts to fix their boundary line, evidence held to make the case one for the jury. *Trustees of Dover Common School Dist. No. 66 v. Dawson Independent School Dist.* (Civ. App.) 223 S. W. 556.

30. Brokers' commissions.—In realty broker's action for commission, whether plaintiff was procuring cause of sale held for jury. *Buck v. Woodson* (Civ. App.) 209 S. W. 244; *Moye v. Park* (Civ. App.) 216 S. W. 205.

The efficient and procuring cause of a sale is a question of fact to be determined by the court or jury trying the case. *Ford v. Cole* (Civ. App.) 195 S. W. 661.

In broker's action for commission, evidence held to make proper the submission of issue whether the defendant company attempted to terminate the agreement after negotiations were begun, but before sale, in good faith, and not to escape payment of commissions. *Kirby Lumber Co. v. West* (Civ. App.) 220 S. W. 639.

In broker's action brought after real estate transaction had been rescinded for fraud, question whether broker who acted as agent for both parties was a party to such fraud or had notice thereof held for the jury. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

Where broker, with whom defendant had listed lands, communicated information to defendant, evidence tending to show that the information given to defendant was the primary, proximate, and procuring cause of the consummation of the trade held to make a question for the jury. *Barnes v. Beakley* (Civ. App.) 224 S. W. 531.

Where plaintiff, with whom property had been listed, listed it with defendant, who effected a sale to his son, evidence held sufficient to carry to the jury plaintiff's contention that it was agreed that defendant should pay him one-half of a certain percentage of the sale price as commission. *Porter v. Cox* (Civ. App.) 225 S. W. 84.

The court properly refused to submit to the jury the question of the broker's fraudulent representations, where there was no evidence that defendant was misled and thereby induced to promise to pay the commissions, and he at no time objected to the value of the

property after inspecting it or sought to repudiate or alter his promise to plaintiff, but on the contrary confirmed it. *Howell v. McCreless* (Civ. App.) 227 S. W. 214.

In suit to recover a commission from the owner of a farm and other brokers, held that the court did not err in directing verdict for defendant owner and the other intervening brokers, because the evidence presented no issue of fact as to who procured the sale. *Bustin v. Murray* (Civ. App.) 229 S. W. 680.

31. Cancellation, rescission, and abandonment of contracts.—In action to cancel oil leases for voluntary abandonment, whether lessees intended voluntarily to abandon held for jury. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

In suit to rescind contract for purchase of land, where plaintiff owned superior title until purchase money was paid whether he waived right to rescind was a question of fact. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

In suit to rescind contract for sale of land for failure to pay all of purchase-money note, where plaintiffs answered that note had been fully paid, and that they had in good faith made valuable improvements, whether defendants believed purchase money had been fully paid was properly submitted. *Id.*

In action to cancel deeds alleged to have been executed as an accommodation without intention to pass title or possession, where defense was that deeds were executed in settlement of indebtedness, evidence held insufficient to entitle defendant to instructed verdict. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

In action involving contract whereby parties were to divide profits arising from purchase and sale of certain land, whether such contract was abandoned held for jury. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

In a suit to set aside a deed because procured by fraud, a denial by defendant that he made any misrepresentations is evidence that the statements he made were true, requiring the submission of the issue of their truth to the jury. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In a suit to forfeit an oil lease, evidence held insufficient to raise the issue of abandonment. *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, reversing judgment (Civ. App.) *Owens v. Corsicana Petroleum Co.*, 169 S. W. 192.

In purchaser's action to rescind question of misrepresentations held for the jury. *Massire v. Milam* (Civ. App.) 223 S. W. 302.

Whether lessee abandoned lease by failure to drill wells held, under the evidence, question for jury. *Buie v. Porter* (Civ. App.) 228 S. W. 999.

Usually it is a question for the jury whether there has been a forfeiture or abandonment of an oil lease, and, when there is a dispute as to the acts done, the court should not determine the question as a matter of law. *Battle v. Adams* (Civ. App.) 229 S. W. 930.

In a suit to cancel an oil lease, evidence held to make questions of fact for the jury as to whether a well drilled within the required distance of lessor's lands by a third party was drilled under a contract with the lessee, and whether the lessee secured the drilling of the well. *Id.*

In trespass to try title, facts held insufficient for submission of question of whether there had been a rescission of a sale of the land by plaintiff's ancestor to defendant's predecessor. *Davis v. Cox* (Civ. App.) 229 S. W. 987.

If the estate created by an oil grant was of such a nature as might be forfeited by abandonment, the question whether an abandonment had occurred was one for the jury, where there was strong evidence to the contrary. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

32. Carriage of goods and live stock.—Evidence regarding goods consigned to plaintiff by third party held to make a jury question whether goods belonged to plaintiff or third party during transit. *Quannah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

In action against carrier for damages from decay of peaches shipped, evidence held not to warrant directed verdict for plaintiff. *Texas & P. Ry. Co. v. Woldert Grocery Co.* (Civ. App.) 199 S. W. 1139.

In an action for injuries to live stock in shipment, where there was a sharp conflict in the testimony as to their condition when shipped, the question of negligence must be submitted to the jury. *Gulf, C. & S. F. Ry. Co. v. Clements* (Civ. App.) 203 S. W. 623.

In action against railroad for failure to furnish car for shipment of live poultry within reasonable time after application therefor, as required by Interstate Commerce Act (U. S. Comp. St. § 8563, subd. 2), where there was evidence of shipper's application for such car, the question whether railroad furnished car within a reasonable time was for the jury. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

In action by shipper of live stock against an initial carrier, it was not error to refuse a peremptory instruction for defendant, where there was evidence to show that some damage was inflicted upon defendant's line, for which it would be liable. *Chicago, R. I. & G. Ry. Co. v. Hallam* (Civ. App.) 211 S. W. 809.

Testimony of a caretaker accompanying a shipment of cattle held insufficient to warrant submission of the carrier's negligence in handling the train. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

In a shipper's action for damages from failure to ship certain mules according to contract wherein special damages were claimed, based upon a purchase for sale to the government, the question whether the mules would have passed inspection if they had reached destination, held, under the evidence, one for the jury. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

Evidence that it required 60 hours to transport cattle between specified points, whereas the usual and customary time was 25 to 30 hours, held to make the issue of delay a jury question. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

Unreasonable delay in unloading the cattle at the point of destination held for the jury. *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891.

Whether the railway in the exercise of ordinary care should have given the shipper information as to the probable congestion and inability to handle the cattle promptly, upon which he might not have made the shipment or might have unloaded his cattle in transit for food and water, held for the jury. *Id.*

34. — Connecting carriers.—In an action against the terminal carrier of an interstate shipment of onion sets to recover damage by wetting in transit, evidence held sufficient to raise the issue as to whether or not some of the damage occurred before the sets came upon the terminal carrier's line. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Civ. App.) 212 S. W. 208.

It was not error, in a suit for damages to a shipment of cabbage, to instruct a verdict in favor of a connecting carrier, where there was no evidence of negligence on its part. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son* (Civ. App.) 212 S. W. 530.

36. Carriage of passengers—Performance of contract of carriage.—In action against carrier for agent's mistake in selling ticket whereby passenger was carried to wrong station, submission of theory of contributory negligence, held proper. *Walls v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 195 S. W. 863.

In action for damages for railroad's failure to stop train upon signal by passenger with ticket, the question whether the railroad employes were negligent was for the jury. *Nevill v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 211 S. W. 523.

37. — Ejection.—In an action for injuries sustained through being shot by a deputy sheriff on being ejected from a train for nonpayment of fare, evidence held not to raise the issue of the carrier's liability, so that a directed verdict was proper. *Samaritano v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 230 S. W. 1049.

39. Community property.—In suit to set aside a sale, evidence held sufficient to take to the jury the issues whether the debts for which the sale was made were claims against the community estate, whether the sale was free from coercion, and whether it was with a view to the interest of the parties, so that a directed verdict was erroneous. *Rice v. Lipsitz* (Civ. App.) 211 S. W. 293.

40. Consideration and want or failure thereof.—In action on written guaranty of note, where evidence as to valuable consideration for guaranty by extension of note was in main undisputed, issue of consideration was one of law for court. *McDaniel v. Cage & Crow* (Civ. App.) 201 S. W. 1078.

Seventy dollars cash actually paid for an option to explore and develop oil lands was sufficient to make the issue of valuable and adequate consideration one of fact to be passed on by the court or the jury. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

41. Conspiracy.—Evidence, in an action for damages by one who was tarred and feathered, held to make it a question for the jury whether a defendant, who was present, was a conspirator, or in any way encouraged the assault. *Walker v. Kellar* (Civ. App.) 226 S. W. 796.

42. Construction and effect of writings.—Lease contract being unambiguous, it was a court's duty to construe it. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

Refusal to submit to jury construction of defendant taxpayer's written rendition was proper; as construction was for court. *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

Whether letter authorized delivery of policy was question of law, where letter was unambiguous. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

Both parties introducing testimony to show the meaning, according to commercial usage, of the words "delivered" and "delivery," in an ambiguous contract for sale of car of corn, defendant was entitled to submission of issue to jury. *Marlin Lumber Co. v. Samuel Hastings Co.* (Civ. App.) 198 S. W. 1076.

Oil lease held ambiguous as to number and place of wells required to be drilled, presenting a question for jury under evidence of facts and circumstances that may throw light thereon. *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687.

It was the duty of the trial court to construe the contract of sale in suit. *Taylor Cetton Oil Co. v. Early-Foster Co.* (Civ. App.) 204 S. W. 1179.

Where it clearly appears from the language of a bill of sale that it is intended as a mortgage, it is error to leave its construction to the jury. *Walker v. Wilmore* (Com. App.) 212 S. W. 655.

The construction of written contracts upon which there was no attack upon ground of fraud, accident, or mistake was a matter of law, and not a question of fact for the jury. *Pyle v. Park* (Civ. App.) 214 S. W. 652.

The question of whether or not a lessor was bound to make repairs under a lease was a question for the court and not the jury. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

Where the sales contract if any, was embodied in correspondence, it was for the court to construe the correspondence and to determine whether any contract resulted. *Diamond Mill Co. v. Adams-Childers Co.* (Civ. App.) 217 S. W. 176.

Contract to convey an interest in an oil lease having been in writing, evidenced by telegrams, the issue of whether the seller's proposition had been unconditionally accepted and the trade consummated by the buyer is primarily one of law for the court. *Langford v. Bivins* (Civ. App.) 225 S. W. 867.

Where an oil lease provided that, if the lessee began a well in the same general locality within one year and prosecuted it to completion with due diligence, the time employed should not be part of the time allowed for beginning operations on the particular land, and there was nothing else to indicate what was meant by the "same general locality,"

its meaning was to be proved and determined by the jury, and the court could not hold as a matter of law that a well 14 miles from the land in question was in the same general locality. *Sunshine Oil Corporation v. Randals* (Civ. App.) 226 S. W. 1090.

The construction of a grant as written is a question of law for the courts, unless some fact is raised. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

Contract for sale of cotton linters "f. o. b." common points held not so unambiguous as to require court to hold as a matter of law that seller was required to pay freight charges, where shipments were made from other points at a less rate than common points. *Early-Foster Co. v. W. F. Klump & Co.* (Civ. App.) 229 S. W. 1015.

In determining whether a contract for sale of goods for resale violates the anti-trust statute (arts. 7796-7818), it is the province of the court to construe the original contract and also to construe facts found by the jury as to communications subsequent to the contract in connection with the original contract. *W. T. Rawleigh Co. v. Smith* (Civ. App.) 231 S. W. 799.

Where defendant admitted the execution of a deed, not pleading non est factum or that it was secured by fraud, but asserting that it was in fact a mortgage, evidence held insufficient to carry that issue to the jury. *Young v. Blain* (Civ. App.) 231 S. W. 851.

In a suit to enjoin defendant from conducting in her own name a millinery business sold to plaintiff, wherein defendant contended that the conveyance constituted nothing but a mortgage, the question held for the jury under conflicting evidence. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

43. Contracts—Legality.—Whether contract for future delivery of grain was a gambling contract held a question for the jury in view of evidence of conversations, though the only communications theretofore was by correspondence, none of which tended to show any understanding other than expressed in the contract. *Clark v. Merriam & Millard Co.* (Civ. App.) 233 S. W. 869.

44. — Making and terms of contract.—Whether plaintiffs' subscription to corporation stock, and loan from corporation to them secured by mortgage on land enabling purchase of stock, were valid and bona fide, held for the jury. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

Question whether a certain written contract ever existed is for the jury. *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408.

In landlord's action to restrain tenant from cutting maize stocks after heading of feed, submission of issue as to whether landlord was to have stocks in consideration of furnishing tenant with tools and pasturage held unauthorized under the evidence. *James v. Blake* (Civ. App.) 206 S. W. 546.

In action against insurance company whether employé agreed to work for employer as agent under its new plan of insurance with inferior contract, and the company annulled the contract on account of agent's bad faith in going to work for another company, was an issue of fact for the jury, under the pleadings and evidence, which was sufficient to sustain a finding upon the issue for plaintiff. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

In subcontractor's action for damages for inability to perform contract because of failure of contractor to furnish gravel, question of whether contractor orally agreed to furnish and have on hand sufficient gravel held for jury. *Hartwell v. Fridner* (Civ. App.) 217 S. W. 231.

In an action against a church, a building contractor, the building committee, and the contractor's sureties, brought by one who furnished material, testimony held to raise the issue of an express contract between the materialman and the church and its committee. *Burton Linto Co. v. First Baptist Church* (Civ. App.) 224 S. W. 913.

Evidence in support of a plea of reconvention for failure to deliver oil in accordance with the contract held sufficient to require submission to the jury of the issues whether the buyer had accepted the option purchase, and whether the price stated in letters conformed to the option price which was dependent on the market price of crude oil. *Texarkana Pipe Works v. Caddo Oil & Refining Co. of Louisiana* (Civ. App.) 228 S. W. 586.

45. — Construction and effect.—Where a deed with agreement for a reconveyance did not state whether grantor's notes would be satisfied in event of his failure to repurchase, the question of intention was for the jury. *Wedgworth v. Pope* (Civ. App.) 196 S. W. 621.

In action on guaranty of accounts of mercantile corporation, intention of parties as to whether guaranty should continue as to accounts of new corporation, which took over assets and business of first, was question of fact. *Cooper Grocery Co. v. Eppler* (Civ. App.) 204 S. W. 338.

In action to cancel deeds alleged to have been executed for accommodation of defendant in raising money, whether it was understood at time of execution that property was to vest in defendant, purely for purpose of enabling him to raise money, was an issue of fact for the jury. *Sanger v. Futch* (Civ. App.) 208 S. W. 631.

In action to cancel sheriff's deed upon ground that purchaser verbally promised to reconvey on payment of purchase price, the question of whether time was of the essence of such contract was one of fact for the jury under appropriate charge. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

In trespass to try title by brokers to recover lands as commission, whether there was such intention to convey that a deed conveyed title as a contract for conveyance of land under art. 1116, held for the jury under the evidence, though defendants admitted they signed the instruments. *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

In suit to restrain cutting of timber, the court properly submitted to jury what size timber was merchantable on the date of the timber deed, which conveyed only merchantable timber to be cut within a reasonable time, the question being for the jury to determine as to what size timber was in the minds of the parties when the word "merchanta-

ble" was used. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

In an action against a church, a building contractor, the building committee, and the contractor's sureties, brought by one who furnished material personal liability of the church and the members of its building committee to the materialman held for the jury under the evidence. *Burton Lingo Co. v. First Baptist Church* (Civ. App.) 224 S. W. 913.

In an action on an oil sale contract providing for payment of the "regularly established and published market quotations," evidence as to the market quotations of a certain oil pipe line company being bona fide held sufficient to make a jury question as to their being regularly established market quotations. *Taylor Oil & Gas Co. v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 226 S. W. 467.

Where plaintiffs claimed that instrument in the form of a general warranty deed was in fact a mortgage and was void under Const. art. 16, § 50, because the land was a part of the ancestor's homestead, the question whether it was intended as a mortgage held for the jury. *Davis v. Cox* (Civ. App.) 229 S. W. 987.

Whether time is of the essence of a contract is a question of fact for the jury unless the contract expressly makes it so or the subject-matter of the contract is such that a court will take judicial notice that the parties obviously intended that time should be of the essence. *Taylor Milling Co. v. American Bag Co.* (Civ. App.) 230 S. W. 782.

Expressions used in correspondence, held insufficient to show that, as a matter of law, time was of the essence of sales contract. *Id.*

46. — **Performance or breach.**—The question whether a marketable title as it appears upon record has been furnished is one of law. *Moser v. Tucker* (Civ. App.) 195 S. W. 259.

In action for breach of contract to pay for logs hauled, where evidence was conflicting as to which party breached the contract, the court erred in peremptorily instructing for defendant. *Turner-Cummings Hardwood Co. v. Phillip A. Ryan Lumber Co.* (Civ. App.) 201 S. W. 431.

Evidence held to make an issue for the jury on the question of forfeiture of an oil lease by failure to drill required wells and abandonment of operations. *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687.

The question of breach of contract and liability therefor should be submitted to the jury, unless the evidence is of such character that there is no room for ordinary minds to differ as to inferences to be drawn from it. *Hamilton v. Wm. H. Swanson Film Co.* (Civ. App.) 206 S. W. 574.

In a suit on an express contract to lay tile floors, evidence to show that the floor was laid in a neat and workmanlike manner, or substantially so, held insufficient to raise an issue for the jury so that peremptory instruction for defendant was proper. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

In an action for contractor's breach of agreement, the submission of the issue as to whether plans of the building were drawn by the contractor or by its agent under the direction of the agent of a lessee, who was a party to the contract, held proper under the evidence. *Stowers v. H. L. Stevens & Co.* (Civ. App.) 208 S. W. 365.

In an action for a balance due under a contract to cut and bale hay, held that defendant's peremptory instruction was properly refused. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

In suit for breach of contract of sale of 1,000 cows and calves, whether plaintiffs were ready and able to pay for cattle tendered held under the evidence, for the jury. *Carothers v. Finley* (Civ. App.) 209 S. W. 801.

In action for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, whether there was a breach held for the jury. *C. R. Garner & Co. v. Beaumont Cotton Oil Mill Co.* (Civ. App.) 212 S. W. 690.

Whether plaintiff acted promptly in claiming the breach held for the jury. *Id.*

Where the time for testing a plow was extended without designating any time, and the jury found that the time consumed was reasonable and that the buyer did not keep, use, or treat the property as his own after testing it, and there was evidence to support such finding, it could not be said as a matter of law that he accepted the plow. *Hackney Mfg. Co. v. Celum* (Com. App.) 221 S. W. 577, affirming judgment (Civ. App.) 189 S. W. 988.

Where an oil lease provides for the sinking of a well within a stated time, and gives lessee the alternative of paying a stated rental annually, refusal to develop does not, as a matter of law, avoid the contract. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

In an action for the price of rags held that it was not the province of the jury to determine whether the rags were put in a warehouse as the property of one or the other of the parties, so that the refusal to submit the issue was proper. *Ehrenberg v. Guerrero* (Civ. App.) 225 S. W. 86.

47. **Contributory negligence.**—Whether railway crossing flagman used ordinary care in warning driver of a wagon which pushed flagman close to track, causing him to be struck by car, was for jury. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

Contributory negligence does not arise as matter of law, unless acts constituting such negligence are in violation of law or the evidence is of such a character as to permit of but one reasonable inference. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

In action for injuries sustained by pedestrian run down by an automobile, held, that court did not err in denying peremptory instruction for defendant who pleaded contributory negligence. *Burnett v. Anderson* (Civ. App.) 207 S. W. 540.

Court will direct verdict for defendant where evidence in its entirety is such that fair

and reasonable minds could reach no conclusion but that plaintiff was contributorily negligent. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

In view of Vernon's Ann. Pen. Code Supp. 1918, art 820k, whether plaintiffs suing for personal injuries could have seen defendant's automobile before driving on bridge which was too narrow for passing, and used due caution to prevent the collision, was for the jury. *Melton v. Manning* (Civ. App.) 216 S. W. 488.

Ordinarily the question whether a tenant was contributorily negligent is a question of fact for the jury. *Pollack v. Ferry* (Civ. App.) 217 S. W. 967.

Refusal to submit question of whether plaintiff overloaded cattle, where there was evidence thereof, held error. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

Testimony by a bicyclist that he saw a truck before it started to turn, but did not see it after it started to turn before reaching the center of the street intersection until it was too close for him to avoid the accident, held to justify refusal of a directed verdict for defendant on the ground of contributory negligence. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Where there were any facts or circumstances excluding contributory negligence, the existence of which was not excluded by the testimony, the jury may be justified in including the supposition that such facts did exist. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 623.

48. — **Acts in emergencies.**—In view of deceased's previous experience of no evil effects from cutting broken live wire in saving his cow, it cannot be said as a matter of law that he was negligent in subsequently attempting to save his horse, which also came in contact with the wire. *Ablene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

Where one under the impulse of fright, in a sudden situation of danger, chose an unwise alternative he cannot, as a matter of law, be held contributorily negligent. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Whether a mother, in attempting the rescue of her child on a railroad track, was guilty of such rashness as to preclude recovery for her injuries held under the evidence, a question for the jury. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

49. — **Children.**—Evidence in action for injury to minor son of consignee of express from being thrown from top of load, when driver ran express wagon into telephone pole held insufficient to go to jury on issue of contributory negligence in not having hold on wagon. *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

In action for injuries sustained by a child over 10 years old, struck by street car while attempting to cross a street at a place other than a street intersection, question of contributory negligence, held, under the evidence, for the jury. *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739.

Whether a 15 year old child was guilty of contributory negligence in using a path along an unguarded pit filled with hot ashes and burning coal held a question for the jury. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

50. — **Care of children.**—Whether parents of a child which got on a railroad track and was killed by a train exercised ordinary care to prevent it from going into danger held, under the evidence, a question for the jury. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

52. — **Employés.**—In action for death of employé of an electric company from the breaking of a telephone pole, evidence held insufficient to show as a matter of law that employé was negligent. *Halbrook v. Orange Ice, Light & Water Co.* (Com. App.) 221 S. W. 587, reversing judgment (Civ. App.) 191 S. W. 751.

In an action by a night watchman injured through falling into a drop pit in roundhouse, whether or not an ordinarily prudent person would go into such roundhouse without using his searchlight was a question for the jury. *Texas & P. Ry. Co. v. Duncan* (Civ. App.) 199 S. W. 1177.

Defendant in servant's action for injury from explosion of tank held not entitled to direction of verdict on mere finding that plaintiff was in the engineer's place, the evidence merely raising a question of fact whether, in such case he was a vice principal as respects inspection of the tank. *Liquid Carbonic Co. v. Dilley*, 109 Tex. 140, 202 S. W. 316.

In servant's action for injury from planing machine it could not be held as a matter of law that plaintiff was negligent because he wore a hand flap when injured. *West Lumber Co. v. Tomme* (Civ. App.) 203 S. W. 784.

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman, held, on the evidence, that his contributory negligence in stepping upon the pin lifter so as to uncouple the cars was for the jury. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

A railway repair man who was injured by a locomotive while engaged at his regular work near a track, in a train shed, was not guilty of contributory negligence, as a matter of law, where he could assume that a custom of giving warning of the approach of engines would be observed. *Texas & P. Ry. Co. v. McGraw* (Civ. App.) 207 S. W. 559.

Testimony held sufficient to require submission to jury of whether employé killed in turning on electric switch, as ordered by his foreman, had knowledge of the danger incident to turning of switch. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

In a servant's action for injuries received while pipe was being loaded into a wagon, held, under the evidence, that whether the servant was guilty of contributory negligence in getting into the wagon was for the jury. *Peden Iron & Steel Co. v. James* (Civ. App.) 208 S. W. 898.

In action for injuries sustained by switch tender thrown under train because of his stumbling over a pipe in such position as to partially obstruct a path along the track, held that issue of contributory negligence was properly submitted to the jury. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

In an action by a servant for injuries ordinarily intoxication is simply a fact for the jury to consider in connection with all the facts and attendant circumstances in determining whether an act was negligence. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

In an action by a section hand injured while helping to remove a hand car to prevent a collision, evidence held insufficient to show contributory negligence as a matter of law, though the rule requiring operation of car with persons looking both ways was violated. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 214 S. W. 699.

Contributory negligence is a question of fact to be found by the jury in a servant's action for injury. *Henry v. Kirby Lumber Co.* (Com. App.) 215 S. W. 451.

Lumber company's employé, invited to ride on a logging train, who sat on the tender of the locomotive while seeing signals to couple cars loaded with logs, a log longer than the car, being pushed against him, held not negligent as a matter of law. *Id.*

Whether a flagman, run over by a switch engine coming without warning exercised ordinary care for his own safety held a question for the jury under the evidence. *Pecos & N. T. Ry. Co. v. Suito*r, 110 Tex. 250, 218 S. W. 1034.

Evidence being insufficient to charge a railroad's servant, as matter of law with knowledge of dangers incident to defective conditions about a dirt spreader, it cannot be said such grounds of the master's negligence should not have been submitted. *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

In electric lineman's action for injuries from shock, whether plaintiff knew that the wires with which he was working were charged held for jury. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman when a car ahead of him dumped coal on the track, evidence held insufficient to require submission to the jury of issue of negligence of brakeman in having stepped on the pin lifter of a car. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

53. — Passengers.—In action by passenger wrongfully put off at station some miles from her destination, question whether passenger who suffered injuries in riding horseback to her destination was guilty of contributory negligence which was proximate cause of injury held for jury. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

In street car passenger's action for injuries, question of contributory negligence held properly submitted to the jury, though defendant's evidence was that plaintiff fell after alighting safely, as plaintiff's own testimony raised the question. *Drake v. Northern Texas Traction Co.* (Civ. App.) 197 S. W. 610.

Whether passenger was negligent in starting to alight under belief that car had stopped, held a question for the jury. *Id.*

In action for injuries sustained while riding in a caboose accompanying a shipment of hogs, question of contributory negligence held for the jury. *Yoes v. Texas & P. Ry. Co.* (Civ. App.) 211 S. W. 311.

Whether passenger, who had been deprived of passage on train by negligence of train employés in failing to stop upon signal, was negligent in not securing lodging in town where he signaled train, instead of walking 10 miles to neighboring town, or in walking to next station along the railroad tracks, instead of traveling the dirt or wagon road, held for the jury. *Nevill v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 211 S. W. 523.

Whether prospective passenger, standing at place where street car had stopped for a number of years for purpose of taking on and letting off passengers, was negligent in assuming that car would stop, and stepping on track to avoid fast approaching automobile, was for the jury. *Texas Electric Ry. v. Rowell* (Civ. App.) 211 S. W. 788.

Where plaintiff, who had assisted his mother and two children to board defendant's train, was injured while alighting after train had started, on the conductor's refusal to stop, the issue of contributory negligence was for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 212 S. W. 155.

Whether passenger standing in vestibule of train was negligent in placing hand on door jamb to steady himself after stepping aside to let porter pass held for the jury. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

In an action against a railroad for injuries to a passenger when its conductor exhibited an automatic pistol, issue of contributory negligence held for the jury, under evidence tending to show that the conductor's action was induced by passenger's request. *Texas Midland R. R. v. Monroe*, 110 Tex. 97, 216 S. W. 388.

Contributory negligence of one run over by a switch engine while on the track on which he had fallen in alighting from a train which he had boarded as a passenger's escort held a question for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Watts*, 110 Tex. 106, 216 S. W. 391.

In an action for the death of an employé killed by interurban car while crossing the track from the ticket office, where he had gone to wait for the car, although he had transportation, and going to a platform on the opposite side, preparatory to boarding an approaching car, evidence held not to show that decedent was guilty of contributory negligence as a matter of law. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

54. — Persons on railroad property in general.—In an action for injuries to warehouse employé who was run over by a car when caught by a sliver on a rail,

his contributory negligence was for the jury. *McLain v. Galveston, H. & H. R. Co.* (Civ. App.) 195 S. W. 292.

Facts held to present a question for the jury as to whether a licensee using tracks of a switchyard acted as an ordinarily prudent person. *Ft. Worth & D. C. Ry. Co. v. Gober* (Civ. App.) 211 S. W. 305.

Whether a person unloading a car was guilty of contributory negligence in remaining in the car after a switch engine had coupled on to it and moved it to the main track and had stopped before "kicking" it onto another track, held for the jury. *Schaff v. Moss* (Civ. App.) 219 S. W. 548.

Shipper's employé, crushed between cars while helping to place a flat car in position for loading when railroad employés shoved a string of cars onto same track without warning, held not contributorily negligent as a matter of law. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

55. — **Person injured at railroad crossing.**—Evidence held to present a question for the jury as to contributory negligence of one killed at a railroad crossing. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347; *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

Contributory negligence of one riding in an automobile struck by a train held a question for the jury, under the evidence. *Hines v. Wilson* (Civ. App.) 225 S. W. 275; *Texas & N. O. R. Co. v. Peveto* (Civ. App.) 224 S. W. 552.

In an action for death at crossing by one riding in automobile as guest, question of contributory negligence of deceased held for jury. *Lyon v. Phillips* (Civ. App.) 196 S. W. 995.

Whether one injured on interurban railroad crossing exercised ordinary care is question of fact for the jury, save where there is, under facts deducible from evidence, no room for ordinary minds to differ. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In an action for personal injuries due to plaintiff's horse becoming frightened by an approaching train at a crossing and upsetting the wagon, evidence of plaintiff's exercise of due care, held to raise question for the jury. *Texas Midland R. R. v. Butler* (Civ. App.) 207 S. W. 344.

In automobile driver's action against railroad for injuries at crossing, whether automobile driver was contributorily negligent in failing to look and listen before crossing track held, under the evidence, for the jury. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

In an action against a railroad for death of plaintiff's son while driving an automobile at a crossing, question of the son's contributory negligence held for the jury. *Moye v. Beaumont, S. L. & W. Ry. Co.* (Com. App.) 212 S. W. 471.

Evidence, showing that decedent, while driving an automobile along a much-traveled highway, was struck by a car, which was behind schedule and approaching without warning, and that the view at the crossing was obstructed, held to require the submission of the issue of contributory negligence to the jury. *Kirksey v. Southern Traction Co.*, 110 Tex. 190, 217 S. W. 139.

Whether a wagon driver killed at a crossing was negligent in failing to look and listen held, under the evidence a question for the jury. *Trochta v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 218 S. W. 1038.

The mere fact that automobile driver approaching crossing continued over crossing after having seen approaching train did not as a matter of law make him contributorily negligent, but such fact should be considered by jury in connection with other circumstances. *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281.

In an action by husband and wife for injuries to the wife and her automobile, evidence held sufficient to support finding either way on the issue of contributory negligence of the wife in failing to discover approaching motorcar in time to stop. *Harrell v. St. Louis & S. W. Ry. Co. of Texas* (Com. App.) 222 S. W. 221, reversing judgment (Civ. App.) *St. Louis & S. W. Ry. Co. of Texas v. Harrell*, 194 S. W. 971.

Evidence which showed that automobile driver neither looked nor listened for an approaching car, but that his view was somewhat obstructed, held not to establish contributory negligence as a matter of law. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Ordinarily, where a person is injured on a road crossing by a railroad train, the question of contributory negligence is one for the jury. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

In an action for the death of a pedestrian at a railroad crossing, contributory negligence held a question for the jury, notwithstanding evidence that he stepped on the track directly in front of the moving train without looking. *Id.*

The mere failure to look and listen before entering on a railroad track at a public crossing is not negligence as a matter of law; but whether, under the circumstances, a reasonably prudent man would have so acted is for the jury. *Id.*

In an action for the death of plaintiff's husband, where plaintiff and her husband were guests of the driver, evidence, held insufficient to establish as a matter of law negligence by plaintiff or her husband which contributed to his death. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

Negligence in failing to look for an approaching train when about to cross a railway track is not, as a matter of law, in every case, the proximate or contributing cause of an injury received when attempting to so cross a railway track. *Texas & N. O. Ry. Co. v. Wagner* (Civ. App.) 224 S. W. 377.

Where an automobile driver looked for trains when 53 feet from the track, his failure to look again at a point where he would have seen an approaching train was not contributory negligence as matter of law; the test being what an ordinarily prudent person would have done under the particular circumstances. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

Where a train was late and an automobile driver thought it had passed, and there was evidence that he looked about 50 feet from the track and saw no train and that he was comparatively a new driver and most of his attention was absorbed in management of the car, the question of contributory negligence was for the jury, though if he had again looked he would have seen an approaching train. *Id.*

Whether one killed at a railroad crossing was guilty of contributory negligence is an issue of fact under all the circumstances, not foreclosed necessarily by establishing that he did not look or listen. *Missouri, K. & T. Ry. Co. of Texas v. Merchant* (Com. App.) 231 S. W. 327.

56. — **Persons injured while walking on or near railroad track.**—The question whether one killed on a railroad track was in the exercise of such due care as would be expected of a reasonably prudent person is not a question of law for the court. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

One using railroad tracks as a licensee held not negligent as a matter of law because he might have selected a safer route by walking in mud and water between the tracks. *Ft. Worth & D. C. Ry. Co. v. Gober* (Civ. App.) 211 S. W. 305.

In a suit for the death of a pedestrian struck by an engine in defendant's railroad yards, held, that question of contributory negligence was for the jury. *Schaff v. Gooch* (Civ. App.) 218 S. W. 783.

In an action for the death of a pedestrian struck by locomotive while walking along pathway running parallel with track, contributory negligence held a question for the jury. *Schaff v. Mason* (Civ. App.) 222 S. W. 288.

Lumber company's employé, in starting ahead of train on a velocipede knowing it was about to follow him or in failing to keep a lookout therefor held not negligent as a matter of law; having told the train engineer he was going ahead and having requested and been promised that a lookout would be kept. *Kirby Lumber Co. v. Scurlock* (Civ. App.) 229 S. W. 975.

58. — **Owner of property destroyed by fire set out in operation of railroad.**—Evidence that plaintiff sacked kaffir corn about 125 feet from a railroad track, that it was of a dry and inflammable character, and not protected from sparks, requires the submission of the issue of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

59. — **Persons injured in operation of street railroad.**—See *Templeton v. Northern Texas Traction Co.* (Civ. App.) 217 S. W. 440; note 61.

The negligent failure of the driver of an automobile to yield the right of way to a street car, as required by city ordinance, resulting in a collision, is not imputable, as a matter of law, to one riding as a mere guest. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

In an action against a street railroad company for wrongful death, where there was conflicting testimony as to whether deceased was guilty of contributory negligence, such issue was for the jury. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

61. — **Person injured by defect in street or bridge.**—Where motorcyclist claims that defendant's truck forced him to turn into a depression caused by defendant street railway's failure to properly pave near its tracks, testimony held to make his contributory negligence a jury question. *Templeton v. Northern Texas Traction Co.* (Civ. App.) 217 S. W. 440.

Question of negligence of a pedestrian in walking on a sidewalk known to be obstructed, rather than in the street, held for the jury. *Butler v. City of Conroe* (Civ. App.) 218 S. W. 557.

Negligence of pedestrian, injured by falling over a known obstruction across the sidewalks, held a question for the jury. *Id.*

62. — **Last clear chance or discovered peril doctrine.**—In an action for death of plaintiff's husband, question whether defendant's motorman was guilty of negligence after discovering husband's peril held, under evidence, for jury. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

In action for death of one struck by train on trestle, evidence held to make issue of negligence after discovered peril for the jury. *Young v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1115.

In action for injury from collision between plaintiff's automobile and defendant's street car, motorman's negligence after discovery of plaintiff's peril held a jury question. *Houston Electric Co. v. Schmidt* (Civ. App.) 203 S. W. 617.

In action for death of plaintiff's decedent, struck at public crossing, whether defendants did all in their power to avoid accident after observing decedent held, under evidence, for jury. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

In an action for death of the operator of a motorcar, struck by defendant's train, it was not error to submit the issue of discovered peril, notwithstanding evidence that the engineer did not see decedent until too late was undisputed, since the jury might not have believed it. *Gulf, C. & S. F. Ry. Co. v. Whitfield* (Civ. App.) 206 S. W. 330.

In action for injuries from unexpected moving of a train while plaintiff was attempting to cross between the tender and a coal car, whether the brakeman, upon

seeing plaintiff between the cars, could have prevented injury, should have been submitted to the jury, where ordinary minds might have differed. *Freeman v. Huffman* (Com. App.) 206 S. W. 819.

Evidence, held to make a question for the jury whether, after discovering person in a position of peril, the operatives of an engine by use of the means at hand could have avoided injuring him. *Almager v. San Antonio & A. P. Ry. Co.* (Civ. App.) 215 S. W. 112.

In a suit for the death of a pedestrian struck by an engine in defendant's railroad yards, held, on the evidence, that court erred in submitting question of discovered peril. *Schaff v. Gooch* (Civ. App.) 218 S. W. 783.

In an action for death of one who negligently drove upon a crossing whether the engineer after discovery of peril exercised the degree of care which a person of ordinary prudence would have exercised held a question for the jury. *Trochta v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 218 S. W. 1038.

In an action for injuries to bicyclist who collided with a motortruck which turned at a street intersection across plaintiff's path, evidence of the truck driver and others held sufficient to warrant the submission of special issue whether driver discovered plaintiff's peril in time to have avoided the accident. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 382.

In an action for injuries to a passenger in an automobile caught between two meeting street cars, evidence held not sufficient to take to the jury the issue of the motorman's negligence after discovering plaintiff's peril. *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632.

Where the testimony warranted the inference that a railroad engineer was looking ahead and that there was no obstruction, it was a question for the jury whether he saw automobile driver's peril in time to avoid the collision, though he denied that he saw the automobile until it was on the track. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

In an action for the death of a freight brakeman struck on the main track by a passenger train while his train was on a siding, testimony as to his attempt to jump across the track when he realized the danger held not to present the issue of discovered peril. *Sorrell v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 230 S. W. 768.

In suit for injuries to buggy driver struck by a car, it is for the jury to determine what measure of diligence is necessary on the part of the motorman to constitute the required care on his part to avoid injury to plaintiff after discovering his peril. *Paris Transit Co. v. Fath* (Com. App.) 231 S. W. 1080.

63. Conversion.—In suit for conversion of ore, claimed to have been seized and sold in Mexico as a military necessity by Gen. Villa's fiscal agent, where there were circumstances showing the agent's private use of the ore, the question was for the jury. *Bartlesville Zinc Co. v. Compania Minera Ygnacio Rodriguez Ramos, S. A.* (Civ. App.) 202 S. W. 1048.

In an action against the directors of a corporation to recover the proceeds of cotton sold by the corporation as a commission merchant, which were alleged to have been misappropriated, the liability of the directors for negligence held for the jury. *McCullum v. Dollar* (Com. App.) 213 S. W. 259.

In corporation's action against liquidator for conversion of note, the question whether he had been guilty of collusion with a surety, whom he had failed to sue, and was not therefore entitled to payment for services, held an issue of fact for the jury. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

64. Custody of child.—The legal presumption that a child's welfare is best served by its custody being given its parent is not conclusive, although presumed *prima facie* from parentage, and an attempt to overcome the presumption raises a fact issue for the jury, and the presumption may be overcome by a determination that the parent is disqualified. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

66. Damages and amount of recovery.—In action of tort where it is not shown with absolute certainty that any of the damage was caused by defendant's wrongful acts, but it is shown with reasonable certainty that some of it was so sustained, plaintiff is entitled to have jury pass on the evidence, and make the most intelligent and proper estimate which the nature of the case will permit. *Gulf, C. & S. F. Ry. Co. v. Baker* (Civ. App.) 218 S. W. 7.

67. — Personal injuries in general.—The amount of pain and suffering, the diminished capacity to labor, the probable permanency of suffering, the permanency of diminished capacity to labor, the efficiency of plaintiff shown by his long service, and the probable reward for such efficiency usually manifested by increased compensation, as well as his life expectancy, were all questions for the determination of the jury. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

In suit for injuries to wife, evidence of pecuniary value of wife's services held to warrant submission, as an element of damages, of loss of ability of wife to perform her household duties. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

Conflicting testimony held to make a question for the jury whether plaintiff's skull had been injured, causing pressure on the brain. *Galveston, H. & S. A. Ry. Co. v. White* (Civ. App.) 216 S. W. 265.

In an action by passenger who claimed that he suffered la grippe and cold resulting in pneumonia and tuberculosis from waiting in a cold waiting room, held, that the submission of the questions whether pneumonia and tuberculosis resulted from the la grippe was, under the evidence, proper. *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

68. — **Wrongful death.**—The amount of damages for death rests largely in the judgment of the jury, based on facts of the particular case. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

69. — **Mental suffering.**—Where serious and permanent physical injury is shown, jury is warranted in finding that there was substantial pain, so that the submission of mental pain as element of damages is proper. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 201 S. W. 417.

In an action for delay of delivery of a message announcing mother's last illness, where addressee testified to his grief, the question of damages from his grief was for the jury, though he also testified to his anger and disappointment. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

70. — **Injuries to property.**—In an action against a railroad for destruction by fire of cotton shipped over its line, question of value of cotton held for the jury. *Sugarland Ry. Co. v. Dew Bros.* (Civ. App.) 212 S. W. 190.

In action for damages to shipment of cattle, where the evidence leaves it doubtful whether there was no market value at the place of delivery, the question becomes one for the jury. *Lancaster v. Tudor* (Civ. App.) 222 S. W. 990.

Evidence regarding the sale price of cattle transported by defendant railroad, the average excess shrinkage, etc., held to make the amount of depreciation in market value a jury question. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

72. — **Breach of contract.**—In an action on a note in part payment for an automobile, held that under this article, the question of defendant's damages for breach of warranty, etc., should have been submitted to the jury. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

In suit for breach of contract to sell stock whether there was fraud on the part of the sellers, all errors and mistakes in their failure to carry out the contract, and what accounts were included as assets, or what not owned by it or left out, held questions bearing on a proper valuation of the stock, which should have been submitted to the jury. *McKamey Bros. v. Jones* (Civ. App.) 210 S. W. 607.

74. — **Exemplary damages.**—Freedom from animosity, ill will, and malice, and consequent nonliability for exemplary damages of a defendant claimed to be a party to the conspiracy, pursuant to which plaintiff was tarred and feathered, held, under the evidence, a question for the jury. *Walker v. Kellar* (Civ. App.) 226 S. W. 796.

75. — **Mitigation of damages and reduction of loss.**—In action for breach of contract to deliver timber, issue whether buyer could have purchased such timber for profitable use of its mill from others held properly submitted. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

78. **Duress, undue influence and mental capacity.**—The question whether the testator was competent at the time he made the will held, under the evidence, for the jury. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134; *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

Evidence held insufficient to raise issue for jury as to testatrix's want of capacity to make will in question or as to undue influence. *Daley v. Whitacre* (Civ. App.) 207 S. W. 350.

Whether insured, at time of executing release to insurance company, was competent to fully comprehend the nature of the release was for the jury. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

In action to cancel deed, question of whether grantor had mental capacity to comprehend the nature and effect of the execution of the deed held for jury. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

Though, under art. 3267, a will may be proved by one of the subscribing witnesses, it is improper to direct a verdict in favor of the contestant, although the only subscribing witness who testified stated that, in her opinion, the testator did not know what he was doing; the attorney who prepared the will and others giving testimony tending to show that the testator was competent. *Day v. Henderson* (Civ. App.) 224 S. W. 248.

In suit by lessee for conversion of part of crop obtained by compelling assignment of plaintiff's lease contract by threats of prosecution, etc., case held for the jury under evidence as to plaintiff's having been actuated by defendant's illegal influence. *Grice v. Herrick Hardware Co.* (Civ. App.) 224 S. W. 533.

80. **Estoppel.**—Whether subscriber to corporation stock was estopped by delay to set up fraud in securing subscription, held for the jury. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

In trespass to try title, evidence held not to warrant submission of issue whether plaintiffs were estopped by their predecessors' acquiescence in or consent to a subsequent conveyance by his grantor to another. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

In action by a savings bank receiver to recover proceeds of drafts used in discharge of individual liability of the president of the savings bank, it being disputed whether the acts of the president were beyond his powers, the question whether the receiver was estopped by failure to pursue other assets of the president held, under the evidence, for the jury. *Harwood v. Ft. Worth Nat. Bank* (Civ. App.) 205 S. W. 484.

That plaintiff remained silent at an interview had for the purpose of determining whether she had any objection to sale of land to a defendant held not as a matter of law to estop her as to such defendant who had knowledge of the coercive methods used by the other defendants inducing her to part with title. *Heimer v. Yates* (Com. App.) 210 S. W. 680.

81. Execution and delivery of written instruments.—Whether deceased had in fact executed the will offered for probate held for the jury. *Mills v. Mills* (Com. App.) 238 S. W. 919; *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

In trespass to try title, where plaintiff alleged and testified that she did not sign deed, nor sell land to defendants, it was not error to submit to jury question whether plaintiff signed such deed in presence of a notary public, whose certificate was thereon. *Hensley v. Pena* (Civ. App.) 200 S. W. 427.

Where there was no evidence of the execution of an ancient deed against which a plea of nonest factum was interposed, the question whether title passed should not be submitted to the jury. *Kellogg v. Chapman* (Civ. App.) 201 S. W. 1096.

Where there is a material difference between the terms of a contract as testified to by plaintiff and as testified to by defendant, it was reversible error for the court to refuse to submit to jury the issue of whether contract as testified to by plaintiff was executed and delivered. *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408.

Whether a deed under which plaintiff claimed, made to his wife by her father, who was also defendants' father, was genuine or a forgery, held for the jury under the evidence. *Mynatt v. Agee* (Civ. App.) 214 S. W. 935.

Whether a life policy acknowledging payment of premium was delivered, so as to estop the insurer from asserting invalidity of the policy because of nonpayment of the first premium, held, under the evidence, for the jury. *Dunken v. Etna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

82. Exemption.—Abandonment of homestead on sale and conveyance held question of fact, though defendants remained in possession until they could obtain possession of a newly acquired homestead. *Jones v. Lanning* (Civ. App.) 201 S. W. 443.

Intention of mortgagors, with reference to abandonment as a homestead of lot mortgaged, held question for jury. *Turrentine v. Doering* (Civ. App.) 203 S. W. 802.

Though a piece of land separated from the tract on which the dwelling is situated may be so used as to make it a part of the homestead, testimony merely that land so situated was considered by owner as part of his homestead is not sufficient to establish that fact so as to justify a peremptory instruction. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

Whether a homestead in an unincorporated city or town is rural or urban is a question of fact, unless the city or town is of such size and the homestead is so situated thereon and is of such a nature that reasonable minds cannot differ. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

The question whether property was urban within the meaning of the provision of the Constitution relating to homesteads held, at least, a question for the jury. *Id.*

A statement of facts showing that there were two buildings on two lots with a stairway between them to the second story held not to show conclusively that the building was not divisible into two separate parts adapted to distinct uses, so that that question should be submitted to the jury. *Kelly v. Nowlin* (Civ. App.) 227 S. W. 373.

83. False imprisonment and malicious prosecution.—In action for malicious prosecution by one partner against another, charge against plaintiff having been that he was guilty of theft of partnership property by bailee, question of probable cause held for jury on evidence. *Stein v. Greenebaum* (Civ. App.) 203 S. W. 809.

Issue of defendant partner's good faith in placing facts before county attorney before making complaint held for jury. *Id.*

Where the facts are not contested, probable cause for a criminal charge is a question of law, but when they are disputed it is one for the jury. *Forbess v. Elliott* (Civ. App.) 230 S. W. 888.

85. Fraud.—Whether representations of plaintiff induced defendant to believe that plaintiff's churn was unusually efficient, so that defendant gave his note for the agency thereof, was for the jury. *Lang v. Bohlen* (Civ. App.) 200 S. W. 429.

Mere fact that purchaser demanded privilege of inspecting land would not, as matter of law, establish that he undertook to discover truth with regard to representations as to value. *Hahl v. Davidson* (Civ. App.) 202 S. W. 792.

Whether defendant, taking a conveyance of a wife's interest, relied on her representations that she had been forced to leave her husband because of his treatment, and was selling her interest for her necessary support and maintenance, held, on the evidence, a question for the jury. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

Evidence held to present question for jury whether Louisiana creditor as ancillary administrator in that state was guilty of fraud in purchasing land at sale to pay its claim and immediately selling it at a profit. *Vann v. Calcasieu Trust & Savings Bank* (Civ. App.) 204 S. W. 1062.

In an action to recover the value of a mule, evidence held not to justify submitting issue of fraudulent representations as to the sound condition of the mule. *Fulwiler Electric Co. v. Jinks McGee & Co.* (Civ. App.) 211 S. W. 480.

Question of whether plaintiff procured defendants' execution of trust deed, etc., by fraud held for jury. *Washington v. Giles* (Civ. App.) 220 S. W. 439.

The sufficiency of circumstantial evidence to establish fraud is for the jury under proper instruction; but, as a rule, if upon the uncontradicted evidence reasonable men can reach but one conclusion, the court may direct a verdict, and may also direct a verdict where there is no evidence to prove one or more of the essential elements. *Wortman v. Young* (Civ. App.) 221 S. W. 660.

In an action for damages for fraud in exchange of property, whether plaintiff's husband, who examined the property, was deceived by the fraudulent representations of the defendant held for the jury. *Medley v. Lamb* (Civ. App.) 223 S. W. 1048.

In a suit to cancel vendor's lien notes and for damages for fraud in connection with a contract in adjustment of differences under an earlier contract, where the evidence was in conflict as to whether the vendee had knowledge of the facts and waived the fraud when he entered into the new contract, the issue of the value of the property at the date of the new contract was properly submitted to the jury. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

In such case the question whether the vendee in making the new contract relied on representations previously made held properly submitted to the jury. *Id.*

In suit by the lessor to recover an amount paid under false representations for cancellation of an oil and gas lease, where there was a conflict in the testimony as to what representations were made by defendant, the trial court properly refused peremptorily to instruct the jury to return verdict for him. *Ware v. Campbell* (Civ. App.) 229 S. W. 593.

In a suit to set aside a deed for purchaser's misrepresentations as to value of the land, evidence held sufficient to go to the jury. *Touchstone v. Derrick* (Civ. App.) 229 S. W. 882.

86. **Fraudulent conveyances.**—In an action by a creditor of a widow who deeded property to her children, in which she had a life interest at least, receiving notes for the purchase price, which were not collected, evidence on the question whether the transaction was fraudulent as to existing creditors held sufficient to go to the jury. *Durrett v. Chenault* (Civ. App.) 230 S. W. 771.

86½. **Indemnity.**—Where there is no conflict of evidence regarding question of indemnity between joint tort-feasors, it is trial court's duty to declare law resulting therefrom. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

87. **Insurance and beneficial associations.**—In a suit on an automobile insurance policy, evidence as to whether, subsequent to the issuance of the original policy, the collision features therein had been canceled by mutual agreement between insured and insurer, held in conflict, and to make a question for the jury. *Drew v. American Automobile Ins. Co.* (Civ. App.) 207 S. W. 547.

In suit on note given for premium on life policies, question of delivery of policies through a bank to defendants held for jury under evidence. *Wittliff v. Tucker* (Civ. App.) 208 S. W. 751.

88. — **Representations and warranties.**—Evidence held to make question for jury as to whether attack of renal colic several months before application was a serious illness or disease within the meaning of a representation. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616.

Under art. 4947, providing that false statements in contracts of insurance will not constitute a defense, unless material, and a provision in policy that it would be void if insured was not sole unconditional owner, it was question of fact whether such provision was material, where insured was only a mortgagee. *National Fire Ins. Co. of Hartford, Conn., v. Carter* (Civ. App.) 199 S. W. 507.

Evidence, in a suit on benefit certificate, held not sufficient to justify peremptory instruction for defendant on theory that applicant's answer to question whether she had been under care of physician within ten years, and as to cause of illness, physician consulted, etc., was false. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

Evidence held to make a question of fact as to whether applicant in answering question as to her health and consultation with physician did so in good faith. *Id.*

Whether declaration in application as to cause of death of insured's brother and as to insured's use of alcoholic or malt liquors, was material within meaning of art. 4741, held for jury. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

In action on fire policy covering an automobile, held, it was a controverted question of fact whether any representation was made about the automobile being paid for, and also as to whether any misrepresentation, if made, was material, so that court did not err in refusing to instruct a verdict for defendant. *California Ins. Co. v. Eads* (Civ. App.) 209 S. W. 216.

In an action on an insurance policy, whether or not the insured falsely stated in the application that she had not been rejected by any other insurance company held for the jury. *American Nat. Ins. Co. v. Mayo* (Civ. App.) 220 S. W. 349.

In an action on a life policy of a benefit association, where the evidence as to whether insured had tuberculosis at the time of the delivery of the policy was conflicting the trial court would not have been warranted in giving a peremptory instruction to find for insurer as to the matter of misrepresentations by insured that he was in good health. *Security Ben. Ass'n v. Webster* (Civ. App.) 220 S. W. 219.

89. — **Compliance with conditions subsequent.**—Question whether insured complied with a stipulation of the policy requiring him to keep certain books clearly and plainly presenting a record of the business, held for the jury. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 198 S. W. 638.

In action upon an accident policy, held, on the evidence, that the refusal to give a peremptory instruction for insurer on ground of insured's failure to give written notice of accident within time prescribed by policy was proper. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

That plaintiffs in their proof of loss to defendant insurer had placed value of furniture before fire and amount of loss at higher figure than found by jury, would not, as a matter of law, show plaintiff's fraud or false swearing. *Royal Ins. Co. of Liverpool, England, v. Humphrey* (Civ. App.) 201 S. W. 426.

Whether the beneficiary in an accident policy notified the insurer of the death of insured and requested blanks required by the policy for proof of claim, and received

no reply and no blanks were sent, held a question of fact for the jury. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

In an action on a fire policy covering fixtures as well as a stock of goods, defendant's motion for direction of verdict, on the ground that plaintiff failed to make proof of any loss on fixtures which would preclude him from recovery, since the evidence showed he breached the record warranty clause, held properly denied. *Westchester Fire Ins. Co. v. Biggs* (Civ. App.) 216 S. W. 274.

Where the defense was interposed that insured carried more concurrent insurance than was allowed, and the only question was whether certain insurance policies showed concurrent insurance in excess of the stipulated amount, it was not error to refuse to submit the issue to the jury; the question being one mainly of mathematics. *Austin Fire Ins. Co. v. Adams-Childers Co.* (Civ. App.) 232 S. W. 339.

90. — Risks and causes of loss.—Whether insured's death was due to suicide, held, under the evidence, for the jury. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230; *Woodmen of the World v. Holmes* (Civ. App.) 232 S. W. 575.

If mutual insurance certificate insured only against death by accidental means, whether death of insured was caused solely and exclusively by accidental means held for jury. *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 197 S. W. 889.

It is error to direct a verdict for insured if there is evidence that the premises were vacant, sufficient to make a jury question. *Western Assur. Co. of Toronto, Canada, v. Busch* (Civ. App.) 203 S. W. 460.

Evidence, in action on fire policy, held insufficient to raise jury question as to whether premises insured were vacant at the time of the fire. *Id.*

Evidence of suicide held such that refusal to direct a verdict for defendant was error. *Texas Life Ins. Co. v. Childress* (Civ. App.) 204 S. W. 1035.

In action on accident policy, evidence held not to require court to submit issue whether death of insured was caused by his own voluntary exposure to unnecessary danger. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

Whether the injuries were effected, directly and independently of all other causes, through accidental means, or whether disease or use of alcoholic liquors caused or contributed thereto, held for the jury. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

Evidence held sufficient to carry to the jury the question whether the insured's disability resulted solely from accident and not from disease. *National Life & Accident Ins. Co. v. Weaver* (Civ. App.) 226 S. W. 754.

91. — Waiver.—Whether breach of provision invalidating fire policy if property remained vacant or unoccupied for 10 days was waived by submitting proofs of loss, etc., pursuant to request of insurer's adjuster, held a jury question. *Liverpool & London Globe Ins. Co. v. Baker* (Civ. App.) 198 S. W. 632.

Evidence, in action on benefit certificate, held to present a question of fact as to waiver or estoppel against a defense based on falsity of statement in application as to health by reason of medical examiner's approval of and local agent's acceptance and forwarding of application. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

In an action on a life policy, evidence held sufficient to go to the jury on the question of waiver of forfeiture for nonpayment of premiums. *Dunken v. Aetna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

Where it appeared that the policy had been delivered together with a bill for the first premium which had not been paid prior to the fire, evidence held to make the issue of waiver of payment by insurer a question for the jury. *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

92. Judgment.—Whether judgment foreclosing mortgage liens, etc., was intended simply to change form of security is jury question, where suit was instituted by agreement, some differences arose between parties during its progress, but judgment was finally entered pursuant to agreement. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

In suit by a wife to set aside a judgment, the court should not have instructed a verdict for defendant if jury might have found from evidence that defendant held title to land in trust for the wife and her husband, and by collusion with husband secured judgment, and that the wife had sufficient excuse for not contesting defendant's right. *Smith v. Patilio* (Civ. App.) 203 S. W. 60.

Proof that one against whom a judgment had been entered was seen alive within less than seven years of the date of the trial held to require submission to the jury of the issue as to whether he was dead when the suit was filed. *Jackson v. Wallace* (Civ. App.) 222 S. W. 676.

95. Libel and slander.—In action for slander and for wrongful interference with contractual relations, evidence held sufficient for submission to jury of whether alleged agent who made defamatory statement had authority from defendant to make statement. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In such action, evidence held to justify submission to jury of whether alleged defamatory remarks were made. *Id.*

Whether an alleged defamatory publication is privileged or not is a question of law for the determination of the court, under the definition of privileged publications given in art. 5597. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

In an action for libel by the police judge of a city against a newspaper, natural and legitimate inference to be drawn from the headlines of the publication held for the jury. *Id.*

96. Limitation and laches.—Under art. 1812, where petition was filed within period of limitations, whether plaintiff was guilty of laches because of delay in issuing and

servicing citation held a question for the jury. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Whether stock subscription contract alleged to have been secured by fraud was barred by limitations, held for the jury. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

Petition of purchaser of land for shortage in acreage held not to show on its face that the purchaser was guilty of negligence as a matter of law in failing to discover the shortage before the day when possession was delivered to him, so that it was a question for the jury whether the purchaser was guilty of negligence barring his suit by limitation. *Gillispie v. Gray* (Civ. App.) 214 S. W. 730.

96½. Marriage.—That a railroad man had a sweetheart in every town, and kept other women at intervals at other places, does not make the question of whether there was a common-law marriage one for jury, where there was otherwise positive uncontradicted evidence of a common-law marriage with the woman in question. *Walton v. Walton* (Civ. App.) 203 S. W. 133.

97. Misconduct by physician.—In an action for damages for burning in X-ray treatment, held that court did not err in submitting issue as to whether defendant was negligent in using lead blanket having opening 6½ inches in diameter, where diseased spot was only size of a dollar, where blanket was introduced by defendant in evidence for what it was worth. *Hamilton v. Harris* (Civ. App.) 223 S. W. 533.

Where merchant negligently burned between the legs by X-ray, testified to his capacity to get about, walk, and attend to his business affairs and to travel in connection with his business, and to extent the returns from his business were diminished, and it appeared the condition was permanent, the court properly submitted the question of future and permanent disability to the jury. *Id.*

98. Mistake.—That other provisions of a contract are correct, and that complaining party had ample opportunity to discover omission, is not conclusive on issue of mutual mistake, so as to warrant a peremptory instruction. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

In an action on a hail insurance policy, where defendant set up a settlement agreement, a peremptory instruction for defendant was properly refused, where there was sufficient evidence to make an issue as to whether insured had a right to set such settlement aside for mistake as to his rights. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

If the insured signed compromise because he misapprehended the provisions of the policy and his rights thereunder, whether such mistake was the result of his own negligence was a question of fact. *Id.*

Where a purchaser of land, which is described in the deed as containing 100 acres more or less, upon having a survey made, discovered that there was a deficiency of 16 acres, which was not contemplated by either party, the mistake was a material one, and so gross as to entitle such purchaser to relief as a matter of law. *Cox v. Barton* (Com. App.) 212 S. W. 652.

99. Negligence in general.—Evidence held sufficient to submit to jury question of negligence in failing to keep dry cold storage room, injuring plaintiff's meat kept therein. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918.

Evidence held sufficient to submit to jury question of driver's negligence in not stopping when signaled to do so by railway flagman, and whether it proximately caused flagman's injury. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

Question of whether driver could assume that railway crossing was safe, where he pushed flagman on track causing latter's injury, was for jury. *Id.*

In suit against abstractor for damages from negligence, whether defendant contracted only to compile abstract covering lands west of a road, and whether he performed, were issues of fact. *National Bank of Garland v. Gough* (Civ. App.) 197 S. W. 1119.

Evidence that individual warehouseman was officer of corporate warehouseman, that their financial affairs were handled together, that corporation partly paid rent of building where goods were stored, etc., held not to make corporation's liability for burning of goods a jury question. *Thornton v. Daniel* (Civ. App.) 199 S. W. 831.

In action by grantor of right of way for municipal water supply pipe line for damages for draining all the water and killing the fish, evidence held to present jury question whether draining all the water was necessary in repairing the pipe line. *Town of Jacksonville v. Ragsdale* (Civ. App.) 202 S. W. 774.

In action against warehousing company for destruction of cotton by fire, whether company was negligent held a jury question. *Exporters' & Traders' Compress & Warehouse Co. v. Wills* (Civ. App.) 204 S. W. 1056.

In suit against innkeeper for loss of grip, where it appeared that when thief was arrested part of goods were recovered, but district attorney kept them to use in evidence, whether innkeeper was liable for loss of goods recovered, or whether his liability was simply for delay in delivering them, were questions of fact. *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

Whether doing or failing to do any particular act is negligence is for the jury, unless it be one commanded or forbidden by law, or where the evidence is so conclusive that the act done or omitted was negligence that reasonable minds could come to no other conclusion. *Gulf, C. & S. F. Ry. Co. v. Whitfield* (Civ. App.) 206 S. W. 380.

While ordinarily negligence is a question for the jury, this is true only when there is substantial evidence tending to establish it. A scintilla of evidence, or such as raises a mere surmise or suspicion, is not enough. *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

In actions for personal injuries, whether the parties exercised the required care is for the jury, except in cases where the alleged negligent act is in violation of law, or when the undisputed facts disclose that it was the proximate cause of the injury. *Texas Midland R. R. v. Butler* (Civ. App.) 207 S. W. 344.

Whether or not there has been negligence in the use of dangerous instrumentalities is a question for the jury. *Missouri Iron & Metal Co. v. Cartwright* (Civ. App.) 207 S. W. 397.

It is the duty of persons engaged in dangerous operations to give notice to all persons passing within limits of possible danger, and the question of negligence in omitting to do so is for the jury. *Id.*

It is always a question of law for the court to say whether or not any care is required under a given state of facts. *Ferrell v. Beaumont Traction Co.* (Civ. App.) 207 S. W. 654.

In an action for damages by setting fire to hay through alleged negligence of defendant's employés, a peremptory instruction was properly given, where there was no evidence that the fire was caused by any negligence traceable to defendant. *Cobo v. Rodriguez* (Civ. App.) 209 S. W. 196.

To authorize the court to take from the jury the question of actionable negligence, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

In drawee's action to recover from payee amount paid on drafts before discovery that attached bills of lading were fictitious, evidence held insufficient to present issue of whether payee in forwarding drafts with bills of lading was negligent in failing to detect forgery. *Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co.* (Civ. App.) 211 S. W. 946.

Where a bank with which a check is deposited forwards it to its correspondents in due course, and the check is appropriated by the drawee bank, but not paid, the mere failure of the collecting bank to obtain the return of the check does not charge it with negligence as a matter of law. *Waggoner Bank & Trust Co. v. Gamer Co.* (Sup.) 213 S. W. 927, 6 A. L. R. 613.

Whether deceased, who fell into an unguarded pit, was rightly on the premises for the purpose of delivering a lunch to an employé of defendant, or was simply a trespasser, held a question for the jury. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

In an action for personal injury from collision upon a bridge on a highway between plaintiffs' surrey and team and defendant's automobile, whether defendant negligently caused the accident held a question for the jury. *Melton v. Manning* (Civ. App.) 216 S. W. 488.

In an action for injuries to plaintiff when the automobile in which she was riding struck an open door and an iron bar extending out from a railroad car on the tracks in a street, the question whether the railroad company was negligent in allowing the car to remain in that condition after unloading it held, under the evidence, for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Ristine* (Civ. App.) 219 S. W. 515.

In action for injuries to a bicyclist who collided with a truck which was turning at a street intersection, evidence held sufficient to authorize submission of the issue whether signal was given. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Evidence, in action for negligently furnishing gasoline instead of coal oil for an oil stove resulting in explosion whereby plaintiff was burned, held sufficient to go to the jury on question whether liquid was gasoline. *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652.

Ordinarily, negligence is a fact to be found by the jury from the testimony, yet some acts are so obviously dangerous and reckless that no court should hesitate to declare them negligent. *Baker v. Loftin* (Com. App.) 222 S. W. 195, reversing judgment (Civ. App.) 198 S. W. 159.

What distance from a public road a dangerous place must be in order to free a person from responsibility for the place, and from responsibility for injuries therein to a traveler, is a question for the jury to determine under the facts. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

It cannot be said as matter of law that it was negligence for the proprietor of a swimming pool to leave a small part of the tile flooring around the pool in a smooth condition, so that a patron slipped and was injured. *Crystal Palace Co. v. Roempke* (Civ. App.) 227 S. W. 230.

101. Injuries to passengers.—Evidence in passenger's action for injuries held to warrant direction of verdict for carrier. *Vivian v. San Antonio, U. & G. R. Co.* (Civ. App.) 196 S. W. 267.

Evidence held to make the issues of negligence in not furnishing suitable equipment for alighting, and in failure of conductor to furnish proper assistance, questions for the jury. *Williams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 196 S. W. 309.

In action for injuries on railroad station premises to which plaintiff had gone with family six hours before departure of train he intended to take, question of reasonableness of time in which plaintiff went to station held for jury. *Baker v. Williams* (Civ. App.) 198 S. W. 808.

In action against two railroads for personal injuries to a passenger, where it appeared that one had been running trains over the track of the other for 14 years, the court did not err in submitting to the jury the question as to whether there was an agreement between the roads. *Texas & N. O. R. Co. v. Jones* (Civ. App.) 201 S. W. 1085.

Where plaintiff, who had assisted his mother and two children to board defendant's

train, was injured while alighting, on the conductor's refusal to stop the train to let him off, the issue of negligence was for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 212 S. W. 155.

In passenger's action for injuries to hand from closing of car door, question of car employé's negligence in closing door after passenger had placed hand on door jamb to steady himself after stepping aside to permit employé to pass held for the jury. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

Whether the servants of the carrier, who allowed passenger to sit by an open window through which she jumped while the train was in motion, knew of her mental condition and exercised due care under the circumstances, held under the evidence for the jury. *Stewart v. Houston & T. C. Ry. Co.* (Civ. App.) 229 S. W. 577.

In a passenger's action for injuries by reason of a lurch of the train, causing her arm to fall outside the window and strike a locomotive on a sidetrack, held that it was not error to refuse an instruction to find for defendant, where trainmen's testimony as to possibility of accident so happening was contradicted by evidence that plaintiff's arm did strike a locomotive on the side track. *Lancaster v. Knighton* (Civ. App.) 230 S. W. 876.

Whether an alighting passenger was in need of assistance, and whether such need was reasonably apparent to employés, and whether failure to render such assistance constituted negligence, are questions for the jury to be determined under the facts in each case. *Wisdom v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 231 S. W. 344.

103. Injuries from defects in streets.—In action against city for negligence in maintenance of street, whether acts constitute negligence is a jury question, where there is no statutory law making such acts negligence. *City of Dallas v. Halford* (Civ. App.) 210 S. W. 725.

Whether city was negligent in failing to provide a railing or barrier along a street adjacent to a deep ravine was a question for the jury in the absence of statute making such failure negligence. *Id.*

104. Injuries to employés.—In railroad servant's action for injuries while handling timber with others, whether railroad was negligent in means and method employed in transferring timber from one car to another held for jury. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

Peremptory instruction held properly refused if there was any evidence that plaintiff was defendant's employé, was performing the duties of his employment, and that defendant's negligence proximately caused his injuries. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the death of a freight brakeman, evidence as to defendants' negligence held to make a question for the jury. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

Question whether minor's mother consented to the employment held for the jury. *Urban v. Cook* (Com. App.) 212 S. W. 160.

In an action for the death of a servant caught in an electrically driven merry-go-round, circumstantial evidence, in the light of the presumption that he did not negligently expose himself to danger, held sufficient to go to the jury on the issue of defendant's negligence. *Hutcherson v. Amarillo St. Ry. Co.* (Com. App.) 213 S. W. 931.

In the absence of a controlling statute or municipal ordinance, the question of master's negligence is one of fact, and becomes a question of law only when the facts are undisputed and reasonable minds cannot differ as to the conclusion. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

Where a shipper's employé was injured while assisting in placing a flat car in position for loading, and the shipper maintained no lookout for cars that might be moved upon same track as that on which he was working, a peremptory instruction in the shipper's favor on the ground that there was no evidence of negligence on its part was properly refused. *Id.*

In an action against a railroad by its switchman for injuries, evidence held not to present the issue of accident to call for its submission to the jury. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Com. App.) 228 S. W. 1087.

105. — Relation of parties and scope of employment.—In action against company by machinist injured while doing piece of work for company by one of its servants assisting him, issues that the machine shop sending him was his employer and undertook to do specific work; that the machinist, for it, was in control of the work, including the company's employés loaned to assist him; that the company was interested only in the result of the work, etc.—were for jury. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

In car checker's action for injuries whether, while attempting to board a moving train to return to the station plaintiff was acting without the scope of his duties held for the jury. *Houston Belt & Terminal Ry. Co. v. Stephens*, 109 Tex. 185, 203 S. W. 41.

Whether the injured employé was acting within the scope of his employment is a question for the jury, when the evidence is conflicting or when a difference of opinion may be reasonably entertained as to the proper inference to be drawn therefrom. *Galveston, H. & S. A. Ry. Co. v. Bremer* (Civ. App.) 217 S. W. 253.

In an action for the death of a foreman who climbed a ladder to superintend repairs of a flagpole on employer's shop preparatory to raising of flag purchased by employés as evidence of their loyalty to the government, the question of whether he acted within the scope of his employment held for jury. *Id.*

There being practically no dispute in the evidence, the question whether plaintiff was an employé of defendant, or an independent contractor, was not one of fact for the jury, but one of law for the court. *West Lumber Co. v. Powell* (Civ. App.) 221 S. W. 339.

Where two railroad corporations were constructing a common system, each one constructing that portion on one side of a state line, facts held not to charge an employé as a matter of law with notice of the change of employers so as to relieve the original employer of liability for injuries. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

106. — **Defective tools, appliances, and places for work.**—Where a bricklayer working in a manhole was struck by falling brick alleged to have been negligently piled too near the edge of the manhole, evidence held to make the master's negligence a jury question. *Atterbury v. Horton & Horton* (Civ. App.) 196 S. W. 235.

In servant's action for injuries when sledge hammer flew off handle, whether employer was negligent in furnishing plaintiff with hammer held for jury. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Whether a master permitting a pulley to become so out of alignment that a servant had to hold a cable to prevent its running off a wheel is bound to anticipate that a loose sleeve of a servant's jumper might be caught, resulting in injury, is for the jury. *McBride v. Hodges* (Civ. App.) 200 S. W. 877.

In action for death of employé alleged to have been caused by employer's negligence in ordering employé to turn on electric switch with knowledge of danger, and employé's ignorance thereof, employer's negligence was, under the evidence, for the jury. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

Where the evidence raises the question whether a machine was ever inspected or more than casually observed by the master, whether the defect existed for a time sufficient to be discovered upon proper inspection does not arise, and whether the defendant was free from negligence is a question for the jury. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

Whether a master operating a large shop was guilty of negligence in not covering a ditch at a dark place in shop near a forge, giving forth a glare which tended to blind one approaching, held for jury. *Lancaster v. Boudreau* (Civ. App.) 209 S. W. 780.

A master cannot, as a matter of law, be said to be exercising ordinary care merely because he uses methods and appliances customarily employed by others in the same character of work, nor yet to be without such care solely because he fails to adopt the latest and most approved devices known, but the question in such cases is for the jury. *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

In an action for death of an employé from falling into an elevator shaft in a poorly lighted room, with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the gate, evidence held sufficient to require the submission of the issue of defendant's negligence. *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

In car repairer's action for injuries from defective drainway, the question of whether defendant railroad had invited its employés to use the ground in performance of their duties, and whether it had furnished such ground as place for them to work, held, under the evidence, for the jury. *International & G. N. Ry. Co. v. Williams* (Com. App.) 213 S. W. 594.

In action for death of an employé of M. from injuries received while loading a truck on a flat car, peremptory charge in favor of M. held improper, in view of the placing by M. of deceased in a dangerous place to work. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

Where the proof showed that a sander machine without cover, over the rollers in which employé's hand was caught, was the only character of sander machine then built, that a similar machine was used by others in the same business, and that no machine was protected by a screen over the rollers, there was no inference of negligence, and submission of question of negligence was error. *Bering Mfg. Co. v. Sedita* (Civ. App.) 216 S. W. 639.

In an action by a mule team driver for injuries suffered when the mule which he was riding fell, evidence on the issue of negligence in furnishing a stiff, clumsy, and unfit animal held insufficient to go to the jury. *Hoot v. Walker County Lumber Co.* (Civ. App.) 219 S. W. 544.

In action for death of employé of an electric company from the breaking of a telephone pole, evidence held insufficient to show as a matter of law that employé had contractual duty of inspection, and that company was not negligent for failure to inspect. *Halbrook v. Orange Ice, Light & Water Co.* (Com. App.) 221 S. W. 587, reversing judgment (Civ. App.) 181 S. W. 751.

It cannot be said as a matter of law, without reference to the use made of it, that because a hammer or maul is a simple appliance a master, when furnishing it to his servant, does not owe to him the duty to use ordinary care to see it is reasonably suitable and safe to use in the work to be done. *Hines v. Fliinn* (Civ. App.) 222 S. W. 679.

In an action for injuries to a railroad section foreman, struck in the eye by a sliver from a maul or hammer, question of negligence in furnishing such hammer held for jury. *Id.*

In a foreman's action for injury by caving in of a wall in an excavation, evidence held to raise the issue as to whether the duty to see to the safety of the wall rested on plaintiff. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

107. — **Negligence in operation of railroads.**—Where injured servant's petition charged negligence in ordering him to operate locomotive turntable by hand while the electric current was turned on in the machine turner, without the servant's knowledge, there was an issue of negligence for the jury. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

On evidence in action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman, held, that defendants' negligence in not properly inspecting a foreign car before it was placed in charge of a train crew was for the jury. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

In brakeman's action for injuries from sagging telephone wires, evidence held insufficient to justify submission to jury of question whether operator of signal board had duty of looking to see if track was clear before giving signal to proceed. *Southern Kansas Ry. Co. v. Shinn* (Com. App.) 207 S. W. 87.

Railroad employé operating signal board by means of lever in projecting bay window of station was not as a matter of law required to look to see if track was clear before giving signal that operator had no orders for engineer. *Id.*

Whether railroad was negligent in maintaining a mail crane near its track, according to postal regulations, against which the engineer struck his head while looking out of his cab, held for the jury. *Southern Pac. Co. v. Berkshire* (Civ. App.) 207 S. W. 323.

In an action for injuries to railroad fireman in collision where the evidence showed that green light and green target meant clear main track and red light and red target meant open switch, it was a question for jury whether engineer was negligent in passing a green light and red target. *Lancaster v. Mays* (Civ. App.) 207 S. W. 676.

In action for death of fireman from derailment of engine, evidence that switch point was in a condition to cause wheel to climb on top of rail and cause derailment was sufficient to warrant the submission to jury of whether switch point was defective. *Lancaster & Wight v. Allen* (Civ. App.) 207 S. W. 984.

In action for injuries sustained by switch tender when thrown under a moving train, because of his stumbling over a pipe partially obstructing a patch along the track, question of negligence held, under the evidence, for the jury. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

In an action for injuries to a car inspector struck by a locomotive while he was looking under a car, evidence held to warrant the submission of the issue whether the locomotive was operated without proper lookouts. *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.) 216 S. W. 444.

Where there was evidence that the derailment of a standard make hand car purchased of a reputable manufacturer and furnished to plaintiff without inspection was the result of an improper adjustment of its cogwheels, discoverable by a reasonable inspection, a peremptory instruction for defendant railroad was properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Com. App.) 222 S. W. 198, affirming judgment (Civ. App.) 130 S. W. 300.

In an action by a railroad detective for injuries occurring when a handhold on a car gave way, whether the handhold was insecure and insufficient for the use for which it was intended, and whether such condition was due to negligence imputable to the defendant, held for the jury. *McAdoo v. Campbell* (Civ. App.) 224 S. W. 784.

In action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a freight brakeman run over by the train from which he fell when a car ahead of him dumped coal on the track, causing the air brakes to set suddenly, evidence held sufficient to take the case to the jury on the theory that the railroad was negligent in failing to provide safe fastening for the dump door on the car. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

In an action by a railroad shopman for injuries received when a switch engine suddenly pushed cars which he was chaining together, evidence held to establish conclusively that the railroad was negligent, in that a switchman gave an unauthorized signal, so as to justify a peremptory instruction for the plaintiff. *Wight v. Callicut* (Civ. App.) 226 S. W. 339.

In an action for the death of the brakeman of a work train, evidence held to make a question for the jury as to the employer's negligence in not operating a dump car by air pressure, as intended by the manufacturer, instead of permitting it to close by gravity after being dumped. *Schaff v. Morris* (Civ. App.) 227 S. W. 199.

In an action by a member of a railroad wrecking gang whose leg was broken when a cable used to pull derailed cars on the tracks was tightened, the question of the negligence of the railroad company held for the jury. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

In action for injury to railroad section hand by lifting while assisting to move motorcar from toolhouse onto the track, evidence held to make the issue of negligence, constituting a proximate cause of the injury, a question for the jury. *Olds v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 228 S. W. 336.

In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to roundhouse hostler descending from engine cab to ground, the railroad's negligence in not lighting the premises held a question for jury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

In an action for death of freight brakeman, struck by a passenger train going 25 to 30 miles an hour, evidence held not to raise the issue of negligence in failing to slacken the speed; the signals indicating that the track was clear. *Sorrell v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 230 S. W. 768.

In an action under the federal law for the death of a locomotive fireman when the engine was derailed, evidence on behalf of plaintiff held to raise the issue of defendant's negligence in using a wheel which was defective notwithstanding evidence of defendant's witnesses to the contrary. *Payne v. Allen* (Civ. App.) 231 S. W. 148.

109. — **Orders, and warning and instructing employés.**—Whether a foreman was negligent in ordering plaintiff to remove a live wire torn down by a wreck, without

warning him as to the danger, held a question for the jury. *Houston Belt & Terminal Ry. Co. v. Wolkarte* (Civ. App.) 197 S. W. 1023.

In an action for injuries to a 17 year old farm employé from contact with revolving shaft of cotton gin whether employer was negligent in directing him to work around the machine while it was in operation, without instructing him as to the danger, held a question for the jury. *Peliphyk v. Borden* (Civ. App.) 220 S. W. 383.

In an action against a city for personal injuries from the delayed explosion of a stick of dynamite in a sewer ditch where it appeared that defendant had failed to warn plaintiff against additional danger involved in the use of defective fuses, evidence held to require the submission of the question to the jury. *Dool v. City of Waco* (Civ. App.) 231 S. W. 176.

110. — **Number and competency of fellow servants.**—Whether improvised battering ram used to drive crank pin into place in upright engine was instrumentality requiring special skill in its operation held, in suit by machinist injured by its operation, jury question. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

In action by Pullman porter for injuries sustained while being ejected from his car by company's watchmen acting under express orders, contradictory to plaintiff's orders, it was proper to submit to the jury, as a ground of negligence, the watchmen's incompetence, in that they were unable to speak English. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

In an action for injury to a railroad employé, evidence as to defendant's negligence in not furnishing sufficient help for the work held sufficient to take such issue to the jury. *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 223 S. W. 490.

111. — **Negligence of fellow servants.**—Whether vice principal was guilty of negligence in lighting match to look into bughole of barrel to ascertain amount of liquid therein, causing an explosion, held for jury. *Coca-Cola Co. v. Williams* (Com. App.) 209 S. W. 396.

In an action by a foreman for injuries suffered when a loose roof fell from the top of a car being righted by a wrecking crew, whether the engineer started to pull the car over without waiting for the proper signals from plaintiff, and whether it was the duty of the crew to remove the loose roof or to notify plaintiff that it was loose, held for the jury. *Wight v. Morgan* (Civ. App.) 220 S. W. 295.

113. — **Hospital service.**—In an employé's action for hospital expenses, question whether employer's purpose in making monthly deductions from employés' pay, called "hospital fees," was to establish a hospital, or hospital plan, or to apply fees any time thereafter to the payment of hospital expenses at a hospital in case of sickness, held for jury. *Courchesne v. Brown* (Civ. App.) 216 S. W. 674.

114. **Injuries to persons on railroad tracks.**—The question of whether an engineer exercised due care in attempting to stop locomotive to avoid impending accident was for the jury. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357.

In action against interurban railroad for injuries in collision, question whether road was negligent in propelling its car toward crossing at speed of 40 miles an hour or more held for jury. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

Whether interurban railroad as to one injured on crossing exercised ordinary care is question of fact for the jury, save where there is, under facts deducible from evidence, no room for ordinary minds to differ. *Id.*

In action for injuries sustained by plaintiff, when defendant's car collided with his wagon at crossing, peremptory verdict for defendant held properly refused. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

In action for death of one run down while on defendant railroad company's tracks evidence of negligence of those in charge of company's trains held sufficient to go to the jury. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

In an action for death of one struck by railroad train, evidence held not, as matter of law, to show that deceased was a trespasser, and not at a public crossing, when struck. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

In action for injuries by moving of train while plaintiff was crossing between tender and coal car, whether defendant's brakeman saw plaintiff between the cars, was, under the evidence, for the jury. *Freeman v. Huffman* (Com. App.) 206 S. W. 819.

In an action for the death of a person killed on defendant's railroad track, whether deceased was at a crossing when struck held for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

In an action for injuries to one riding in an automobile struck by an interurban car at a street crossing, where there was evidence that the motorman saw the automobile, and that, though it showed no sign of slowing up, he did not signal the approach of his car, the question whether he was guilty of negligence was properly submitted to the jury. *Texas Electric Ry. v. Williams* (Civ. App.) 213 S. W. 730.

In an action for death on railroad track, whether trainmen saw deceased in a position of peril and realized that the object was a man at a distance within which they could stop the train held a question for the jury, notwithstanding positive testimony of trainmen in defendant's favor. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

116. — **Frightening horses.**—In an action for injuries due to plaintiff's horse becoming frightened by an approaching train at a crossing and upsetting the wagon, evidence as to defendant's negligence in failing to give warning, either by signal or by its brakeman, held to raise questions for the jury. *Texas Midland R. R. v. Butler* (Civ. App.) 207 S. W. 344.

117. — **Signboards and flagmen.**—In an action for injuries sustained by one struck by railroad train at crossing, it appearing that a freight train had been cut and that the view of the approaching passenger train was thereby obscured, evidence held insufficient to warrant submission of the issue as to whether defendant should have stationed a flagman at the crossing. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

Whether a railroad company was negligent in failing to maintain gates or a flagman at a much-traveled and obstructed crossing a short distance outside a large city held a question for the jury. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

In an action for the death of the driver of a vehicle struck by a work train backing across the main business street of a town of 1,500 people, evidence held sufficient to justify submission of the issue of defendant's negligence in not maintaining a flagman at the time of the accident, though there was no ordinance or statute requiring a flagman. *Tisdale v. Panhandle & S. F. Ry. Co.* (Com. App.) 228 S. W. 133.

If a crossing is used extensively and frequently and trains are operated over it at frequent intervals, and there are obstructions materially obstructing the view, it is a question for the jury, or for the court sitting without a jury, whether the failure to have a flagman at the crossing constitutes negligence. *Baker v. Hodges* (Civ. App.) 221 S. W. 844.

118. — **Signals and lookouts from trains.**—In action against interurban railroad whether motorman blew warning whistle as car approached crossing held for jury. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In an action for death of one on the track, evidence held to warrant a submission of the question as to habitual use of the track as bearing on duty to keep a lookout for persons on the track. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

In action for death of wagon driver struck at crossing in village, it was for the jury whether the railroad was negligent in having no lookout on the rear car of the train which backed into and upon deceased, and, in view of conflicting evidence, whether the bell of the train was rung. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

In action for death of one struck by railroad train at public crossing, evidence held to make question for jury as to whether statutory crossing signals were given. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

Evidence held insufficient to warrant submitting the issue of negligence in failing to equip interurban car with a sufficient whistle, though there was testimony that the whistle was less efficient than a locomotive whistle. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Evidence held sufficient to raise the question of the negligence of the operatives of the train, approaching a crossing, in failing to give warning signals by bell or whistle. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

Evidence in action for death of child killed by train and for injury to mother in attempting rescue of the child, held to warrant submission of the issue of train operatives having exercised ordinary care to keep a lookout. *Panhandle & S. F. Ry. Co. v. Hayward* (Civ. App.) 227 S. W. 347.

Whether the trainmen failed to sound the whistle and ring the bell at least 80 rods from the crossing, as required by art. 6564, held a question for the jury. *Hines v. Foreman* (Civ. App.) 229 S. W. 630.

In action for death of employé struck by train while riding on velocipede on company's tramroad, where the engineer had been advised by deceased that he was starting ahead of the train and the engineer had promised to keep a lookout for him, held, that the company owed deceased the duty of exercising ordinary care for his protection, and whether this duty was performed by the occasional lookout kept by its servants was for the jury, and the company was not entitled to an instructed verdict on the theory deceased was a licensee. *Kirby Lumber Co. v. Scurlock* (Civ. App.) 229 S. W. 975.

119. **Injuries to animals on or near railroad tracks.**—In action against railroad for death of mule alleged to have been struck on right of way, whether it was impossible for locomotive or cars to have inflicted such injury as animal received held for jury. *Robbins v. Bell* (Civ. App.) 195 S. W. 865.

In an action against a railroad company for killing cattle, where the evidence was conflicting as to whether the engineer and fireman were negligent or whether the killing could not have been avoided after the position of the cattle was discovered, the question was for the jury. *San Antonio & A. P. Ry. Co. v. Martin* (Civ. App.) 220 S. W. 1113.

120. **Injuries by fire set out in operation of railroad.**—Whether house situated near defendant's railroad track was set on fire by sparks from a passing engine held, under the evidence, to be a question for the jury. *Schaff v. Wilson* (Civ. App.) 204 S. W. 251.

In action against railroad for fire from locomotive involving issue of whether fire originated from locomotive spark, evidence held to require submission of case to jury. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 212 S. W. 645.

In action for burning barn from sparks from a locomotive, where plaintiff's witnesses testified to seeing a freight train pass shortly before fire was discovered, defendant's train dispatcher's records showing that no train passed at or near the time held not conclusive; the issue being for the jury. *Hines v. Jumper* (Civ. App.) 229 S. W. 350.

121. **Injuries to property from operation of railroad.**—Whether railroad in constructing roadbed across creek and valley left sufficient openings for drainage, as required by art. 6495, held properly left to jury. *San Antonio & A. P. Ry. Co. v. Behne* (Civ. App.) 198 S. W. 630.

In action against railroad company for damages to plaintiff's crops by overflow of water due to the construction of railroad, whereby water backed up a creek, thereby overflowing its banks and flooding plaintiff's lands, evidence held to require the submission of the question to the jury. *Johnson v. San Antonio & A. P. Ry. Co.* (Civ. App.) 220 S. W. 388.

122. **Injuries to persons at stations.**—Whether carrier was negligent in operating car at high rate of speed approaching station where passengers buying tickets had to cross tracks to board car, held, under the circumstances and evidence, for the jury. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

The fact that heavy freight had been moved over a railroad platform before the time of injury to a drayman thereon through fall of a tombstone was not sufficient to establish as matter of law that the railroad was not guilty of negligence in the manner in which the tombstone was placed, or that the same was not the proximate cause of the injury; such matters being issuable facts for the jury. *Hines v. Jones* (Civ. App.) 225 S. W. 412.

123. **Injuries to persons working on or about railroad cars.**—Where a railroad maintained a commercial track knowing that warehouse employes would move cars along the track for unloading, the question whether it was negligent in permitting to remain on such track a sliver from one of the rails, which was badly worn from use, was for the jury, in action by warehouse employe for injuries from such sliver. *McLain v. Galveston, H. & H. R. Co.* (Civ. App.) 195 S. W. 292.

Whether switching crew exercised ordinary care to ascertain plaintiff's presence in a car which he was unloading before coupling onto and moving same held for the jury. *Schaff v. Moss* (Civ. App.) 219 S. W. 543.

In an action for injuries to refinery company's employe requested to remedy leak in car containing gasoline, evidence held insufficient to support finding railroad's yardmaster, rather than plaintiff, instigated and directed act of unscrewing dome cap on car, which caused explosion. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

In an action for death of shipper's employe helping to place a flat car for loading, whether railroad was negligent in having shunted a string of cars on the track without warning held a question for jury under the evidence. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

In an action for death of an oilmill employe during switching operations on the mill's spur track, it was for the jury to determine whether decedent had been warned of the operations, and whether the warning was sufficient to notify him of the danger, though an employe of the railroad and another testified without contradiction that warning was given. *Jefferson & N. W. Ry. Co. v. Blair* (Civ. App.) 224 S. W. 546.

126. **Injuries in operation of street railroads.**—Where evidence shows that the collision and consequent death of plaintiff's wife was proximately caused by negligence of motorman of defendant's street car, and that deceased was not contributorily negligent, a peremptory instruction for defendant was not warranted. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

Where there was ample evidence that the motorman was negligent in not having his car under reasonable control on approaching the street crossing, where it collided with an automobile, causing death of plaintiff's wife, court properly submitted issue to jury. *Id.*

In action for injuries sustained by a child over 10 years old, struck by street car while attempting to cross a street at a place other than a street intersection, whether motorman failed to use ordinary care "to discover" and avoid injuring plaintiff, held, under the evidence, for the jury. *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739.

Whether it was negligence to operate a street car at a speed of 25 miles per hour near a crossing held to be a question of fact. *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275.

In an action by one injured while riding in an automobile which collided with a street car, whether the motorman saw the automobile in a position of danger in time to have slowed down and avoided the injury held for the jury. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 213 S. W. 827.

Plaintiff's testimony that automobile was in plain sight of motorman, and that the car did not slacken speed, but that he did not know whether the motorman was looking toward the automobile, held insufficient to take to the jury the issue of the motorman's failure to keep a proper lookout. *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632.

Whether or not defendant's motorman saw a signal to stop given by members of crew on an army truck, struck while crossing the track, held for the jury. *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644.

In an action for injuries to a soldier in a collision between defendant's street car and a truck with a trailer, evidence as to the failure of the motorman to keep a proper lookout held sufficient to justify the submission of such issue to the jury. *Id.*

In action for damages to automobile struck by a street car at a street intersection, evidence as to the motorman's negligence in operating the car at a dangerous speed and in making no effort to stop or check the speed after having discovered that the automobile was in a dangerous position held sufficient to go to the jury. *Southwestern Gas & Electric Co. v. Grant* (Civ. App.) 223 S. W. 544.

In an action for injuries to an automobile driver in collision with a street car, whether motorman used all the means at his command consistent with the safety of

the car and its passengers to avoid the collision held a question for the jury. *Northern Texas Traction Co. v. Martin* (Civ. App.) 224 S. W. 319.

In an action for negligently running a street car against plaintiff's mule tied to the rear of a wagon, held on the evidence that the question of defendant's negligence in using no means to prevent the injury, or in running the car at such speed as to be unable to stop it, after discovering the mule's peril, should have been submitted to the jury. *Northern Texas Traction Co. v. Stone* (Civ. App.) 230 S. W. 754.

127. Injuries from live electric wires.—In action by a telephone lineman for injuries resulting from defendant's high-voltage wires, question of defendant's negligence was for the jury. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

In action for death of plaintiff's intestate, due to contact with defendant's live wire, evidence held to raise issue as to defendant's negligence, with respect to failure to inspect line and discover broken wire. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

In action for damages for alleged negligent killing of deceased, who came in contact with defendant's live broken wire, whether the installation of a fuse on the switch-board would have the same effect as a circuit breaker held for the jury. *Id.*

In an action for injuries to a horseman who became entangled in an unguarded guy wire in or near a public roadway, question of power company's negligence in leaving a dangerous thing near the roadway unguarded, held for the jury under the evidence. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

130. Notice.—In action by savings bank receiver to recover proceeds of drafts applied on a claim against the president individually, evidence held to present jury question whether defendant's officers were charged with knowledge that such president had not arranged to take up the drafts and that his acts in regard thereto were unauthorized. *Harwood v. Ft. Worth Nat. Bank* (Civ. App.) 205 S. W. 484.

132. Partnership and rights and liabilities incident thereto.—In a suit to restrain defendant from operating a business under her own name in violation of an agreement, claimed by plaintiff to be one of employment, and by defendant to be one of partnership, the ascertainment of the nature of the contract was for the jury where the question was one of mutual intention and understanding not under an ambiguous instrument. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

133. Payment.—In a bank's suit on a note, where the evidence did not conclusively show bank's predecessor ever received credit for the note, but left the matter in doubt, the trial court erred in directing verdict for defendants, and should have submitted the case to the jury. *First Nat. Bank v. Berry* (Civ. App.) 223 S. W. 696.

134. Penalty for violation of statute.—In an action for penalties for failure to comply with art. 6592, whether waterclosets 524 feet from a depot in a town without sewers were within a reasonable and convenient distance held for the jury. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393.

135. Proximate cause.—Question of whether railroad's negligence in permitting gap in its right of way fence was the proximate cause of the death of a horse, which strayed onto the right of way and became caught in a bridge held for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 110 Tex. 546, 221 S. W. 929, answering certified questions (Civ. App.) 179 S. W. 1111, and answers conformed to (Civ. App.) 223 S. W. 1024; *Missouri, K. & T. Ry. Co. of Texas v. Lovell* (Civ. App.) 223 S. W. 1024, conforming to answers to certified questions, 110 Tex. 546, 221 S. W. 929.

Proximate cause is ordinarily a question of fact. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928; *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

Where a warehouse employé was caught on a sliver on a rail while helping to move cars on a commercial track for unloading at a warehouse, the question whether railroad's negligence in leaving such sliver on the rail was the proximate cause of the injury was for the jury. *McLain v. Galveston, H. & H. R. Co.* (Civ. App.) 195 S. W. 292.

Whether failure of railroad in constructing roadbed to leave sufficient openings for drainage, as required by art. 6495, was proximate cause of death of one knocked from tree by its floating trestle, held properly left to jury. *San Antonio & A. P. Ry. Co. v. Behne* (Civ. App.) 198 S. W. 680.

In an action for injuries to a jitney passenger, riding on the running board and struck by a street car whether passenger's negligence in riding on running board in violation of a city ordinance was the proximate cause of injuries held under the evidence a question for the jury. *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

The question of proximate cause is one of fact for the jury, unless the facts are such that reasonable minds might not differ as to the conclusion to be drawn therefrom. *Id.*

In an action for injuries to a soldier in a collision between defendant's street car and the trailer of a truck crossing the track, whether the motorman's failure to sound warning was the proximate cause of the injuries held for the jury. *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644.

Whether the speed of defendant's car was the proximate cause of such injuries held, under the evidence, for the jury. *Id.*

In an action against city and its street repair contractor for injuries to a woman who stepped into a hole or sink over an old catch-basin, evidence that the contractor's failure to plug a pipe might have been the cause of the sink held insufficient to take the case to the jury. *Peterson v. City of Houston* (Civ. App.) 224 S. W. 580.

136. — **Injuries to passengers.**—Whether train porter's negligence in closing door after passenger had placed his hand on door jamb to steady himself after stepping aside to permit porter to pass was direct cause of injuries to passenger's hand sustained in the closing of door held for the jury. *Schaff v. Gordon* (Civ. App.) 214 S. W. 638.

In an action for injuries to a passenger shot during an altercation between two other passengers, whether negligence in failing to eject the aggressor was the proximate cause of injury from a shot fired in self-defense by the attacked passenger, held a question for the jury. *Galveston, H. & S. A. Ry. Co. v. Bell*, 110 Tex. 104, 216 S. W. 390.

137. — **Injuries to persons at railroad crossings.**—Issue of proximate cause, in action for injuries in collision between automobile and railroad car, like issue of negligence, is nearly always a question of fact for the jury. *Robinson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 203 S. W. 395.

In action for death at railroad crossing of one driving automobile, whether or not crossing was obscured either wholly or partially held a question of fact for the jury, under the evidence, so that the court was not authorized to take the issue of proximate cause from the jury. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In an action for the death of an automobilist at a railroad crossing, whether negligence of deceased in driving upon the crossing, the view of which was obstructed, was the proximate cause of the accident, held for the jury. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

Whether failure to sound the whistle and ring the bell at least 80 rods from the crossing, as required by art. 6564, was the proximate cause of injuries in a collision with an automobile, held a question for the jury. *Hines v. Foreman* (Civ. App.) 229 S. W. 630.

141. — **Injuries to employés.**—In an action for death of a section man on the track at midnight with a motor, whether negligence of the railroad was the proximate cause of the death held a question for the jury. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

Whether negligence of deceased was the proximate cause of death held a question for the jury. *Id.*

It cannot be said as a matter of law that the wearing of a jumper sleeve unbuttoned and dangling three or four inches from the arm, the catching of which on a cable resulted in servant's injury, was the proximate cause thereof or only an intervening agency. *McBride v. Hodges* (Civ. App.) 200 S. W. 877.

Where a switchman walking along the top of a string of cars looking for his foreman fell between the cars when uncoupled by the foreman, who, without notifying the switchman, had changed the method of switching, the question as to whether the change in method was the proximate cause of the injury was for the jury. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

In action by section foreman for injury to his hands and face from handling ties wet with a poisonous mixture, whether the permanent injuries suffered were the natural and proximate result of defendant's negligence in not warning him of danger, held, on the evidence, a question for the jury. *Collins v. Pecos & N. T. Ry. Co.* (Com. App.) 212 S. W. 477.

In an action for death of an employé falling into an elevator shaft in a poorly lighted room, with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the gate, evidence held sufficient to require the submission of the issue of proximate cause. *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

In an action for the death of an inexperienced servant caught by cogwheels of an electrically driven merry-go-round, which started because of a defective switch while he was making repairs, whether the proximate cause of death was due to defendant's negligence held to be a question for the jury. *Hutcherson v. Amarillo St. Ry. Co.* (Com. App.) 213 S. W. 931.

In an action by a railroad detective, for injuries received when a handhold on a car gave way, whether negligence in furnishing an insecure and insufficient handhold was the proximate cause of the injury held for the jury. *McAdoo v. Campbell* (Civ. App.) 224 S. W. 784.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a freight brakeman, run over by the train from which he fell when a car ahead of him dumped coal on the track, causing the air brakes to set suddenly, evidence held sufficient to take the case to the jury on the theory that negligence in failing to provide safe fastening for the dump door on the car, was the proximate cause of the accident. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

In an action against railroad under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries to a roundhouse hostler who fell while descending from engine cab, question whether railroad's failure to light the premises was a proximate cause of the injuries held for the jury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

Whether he slipped on water and grease on floor of cab, held a question for the jury. *Id.*

Whether negligence in moving engine on turntable, over pit into which he fell, was a proximate cause of the injury, held a question for the jury. *Id.*

143. **Ratification.**—Whether officers of corporation ratified subscription to stock obtained by unauthorized agent held for the jury. *Lone Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

145. **Reasonable time.**—Unless the facts are clear, the question as to what is a "reasonable time" after refusal of insurer to furnish blanks for proof of loss under an accident policy, during which time limitations would not run, is a mixed question of law and fact to be submitted to the jury under proper instructions; "reasonable time" being such promptitude as the situation of the parties and the circumstances allow (citing *Words and Phrases*, vol. 4, p. 186). *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

What is a reasonable or unreasonable time is generally for the jury. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

The rule that, where there is no dispute about the material facts, the question of reasonable time in which the goods should be removed from carrier's warehouse by the consignee is one of law for the court has no application, where the consignees were bound by the custom of the railroad to make delivery at the warehouse of a compress company. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465.

A party seeking to rescind a purchase of a mare must act with promptness and within reasonable time after discovering her unsoundness, what is a reasonable time being a question of fact to be determined by the jury under the circumstances. *McDonald v. Stafford* (Civ. App.) 213 S. W. 732.

Whether a reasonable time for the removal of the goods had elapsed since notice of their arrival to the consignee varies with the circumstances of each particular case, but when the facts are undisputed the question of what length of time is reasonable becomes one of law to be determined by the court. *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

150. **Set-off and counterclaim.**—In a suit by materialmen, subcontractors, and laborers against the owner, the contractors, and the latter's sureties, there was no error in submitting to the jury the question of the amount due the owner's attorney as attorney's fees which the owner was entitled to set off against the balance due the contractors from him and assigned to the sureties. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

152. **Suretyship obligation.**—The question whether judgment should be rendered against sureties on replevin bond is exclusively for the court. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Evidence under a plea by surety that claimant had waived his right to share in an indemnity paid to other litigants examined, and held not such as to warrant the court in refusing submission to the jury. *Darrah v. Lion Bonding & Surety Co.* (Civ. App.) 200 S. W. 1101.

Evidence held to make a question for the jury whether there was an extension of time of payment of a note, discharging the surety. *Scarborough v. McKinnon* (Civ. App.) 202 S. W. 223.

152½. **Torts in general.**—Where defendant, under the guise of buying wages to be earned, charged excessive interest and, though plaintiff had paid in as interest more than enough to discharge the loan, filed an assignment with plaintiff's employer, knowing the employer's rule to discharge in such cases, held, that the question whether defendant wrongfully caused plaintiff's discharge was for the jury. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

In action for assault and battery by a creditor upon his debtor, evidence held insufficient to justify submission to jury of special issue of self-defense. *Hall v. Hayter* (Civ. App.) 209 S. W. 436.

Evidence that plaintiff secreted himself on defendant's premises after 11 at night, and when asked what he was doing made no reply, but rose up in such a way that defendant said he feared bodily injury, was sufficient to raise the question of whether defendant had reasonable apprehension of the commission of an offense when he shot plaintiff. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

153. **Title and possession.**—Evidence of a third party's claim to property levied on under execution held to take to the jury the question as to ownership. *Horn v. Price* (Civ. App.) 200 S. W. 590.

Evidence on trial of right to cotton sequestered in action by plaintiff warehouse company against a compress company which had issued receipts therefor to claimant, held sufficient to go to the jury on the issue of its being cotton which plaintiff manager had embezzled from it, and sold after destroying the marks thereon. *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.

In an action to recover the value of goats wrongfully seized as damages, where defendants claimed the goats had been stolen from them by another, testimony by plaintiff that he had raised the goats on his ranch requires the issue of ownership to be submitted to the jury. *Hernandez v. Garcia* (Civ. App.) 216 S. W. 477.

In a suit to enjoin trespasses, issues of title and right to the writ may be determined in the same case; but, when it requires facts to establish title, those questions of fact should be submitted to the jury. *Butler v. Borroum* (Civ. App.) 218 S. W. 1115.

Even as against a plea of general denial, a plaintiff in trespass to try title cannot have an instructed verdict, when by his own testimony he raises issues of fact against his title. *O'Fiel v. James* (Civ. App.) 220 S. W. 371.

Showing of plaintiff in trespass to try title of a definite interest in the land, depending on the mother of his half-brothers not having remarried and had children after

divorce from his father, held sufficient to go to the jury. *Steddum v. Kirby Lumber Co.*, 110 Tex. 513, 221 S. W. 920, reversing judgment (Civ. App.) 154 S. W. 273.

In trespass to try title, whether or not defendant entered into possession under a parol contract of sale and made improvements held for the jury. *Elder v. Craddock* (Civ. App.) 223 S. W. 314.

In an action to recover an automobile from buyer, undisputed evidence held to show that plaintiff had not parted with his title to the seller, so that the trial court should have instructed a verdict for plaintiff. *Haynes v. Howe* (Civ. App.) 230 S. W. 248.

154. Transmission of telegraph and telephone messages.—In action for delay in transmitting telegram, where evidence was conflicting as to whether sender spelled out the name of addressee, it was proper to submit the question to the jury, and, if an incorrect spelling was sanctioned, to submit the question of sender's negligence. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

In suit for damages due to negligence in transmitting and delivering two death messages, held that peremptory instruction for defendant should be sustained on the ground that no negligence was shown either in the transmission of the message or in its delivery. *Meadows v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 211.

Where husband, in leaving sick wife, promised to immediately return in case she telegraphed, and the wife, after sending a telegram: "Come home at once. Answer"—which was not delivered, became greatly disturbed and more seriously ill because of husband's failure to answer, and he not only answered a similar message sent three days later by the wife's sister, but came at once, it was error to direct a verdict for the telegraph company. *Prevolos v. Western Union Tel. Co.* (Civ. App.) 218 S. W. 812.

In an action for failure to seasonably deliver a message, the question whether delivery was made, as claimed by the telegraph company, or not, held, under the evidence, for the jury. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

In an action for failure to deliver telegram at a home in the country, evidence to show that addressee was at the home when delivery should have been made held sufficient to justify the refusal of a peremptory instruction for the telegraph company. *Western Union Telegraph v. Kilgore* (Civ. App.) 220 S. W. 593.

In an action to recover damages for mental anguish from a failure to promptly deliver a message announcing illness, negligence of defendant held a question for the trial court. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

156. Trespass.—In an action for the death of hogs which plaintiff claimed resulted from lack of water when defendant entered the premises he was occupying as lessee, cut a dam and emptied a tank of water, the submission of the issue whether the draining of the water was the proximate cause of the death of the hogs was proper; the evidence not being undisputed. *Wallace v. Prairie Oil & Gas Co.* (Civ. App.) 229 S. W. 353.

157. Trusts.—In action to recover interest in land in which plaintiff relied on agreement of half-brother made on transfer of title to him by his mother that plaintiff would receive his share, evidence held sufficient to raise an issue for the jury. *Bauss v. Bauss* (Civ. App.) 212 S. W. 965.

159. Usury.—Whether 10 per cent. payment was bona fide commission for obtaining loan or intended as additional interest, thereby rendering loan usurious, held a jury question, although alleged brokers paid part of such sum to lenders. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Whether lenders received part of money paid for negotiating loan was made jury question by evidence regarding amount with which their accounts were charged by trust company handling transaction, although there was no direct testimony that they received part of such sum. *Id.*

Whether an option for purchase of property exacted from borrower by lenders was intended to afford profitable investment or to obtain consideration in addition to interest on loan, thereby rendering it usurious, held jury question. *Id.*

Whether usury in loan contract was purged by subsequent compromise agreement yielding certain considerations to borrower is a jury question where value of such considerations is uncertain. *Id.*

Where a contract is not usurious on its face, whether or not it is in fact usurious is a question for the jury. *Hudmon v. Foster* (Civ. App.) 210 S. W. 262.

160. Waiver.—In action to cancel deed for fraud, in which it was claimed that grantor by delay waived the fraud and affirmed the sale, the question of such waiver held for the jury. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

Whether the acts of a commissioner, acting for the mayor and council, constituted a waiver of strict compliance with Houston Charter, art. 9, § 11, requiring notice of personal injury within 90 days, is a question which plaintiff was entitled to have submitted to the jury. *Cawthorn v. City of Houston* (Com. App.) 231 S. W. 701.

161½. Workmen's compensation.—Whether a hemorrhage from lifting was an "accidental injury" within the Workmen's Compensation Act is for the court. *Southwestern Surety Ins. Co. v. Owens* (Civ. App.) 198 S. W. 662.

162. Wrongful death.—Whether defendant by kicking deceased provoked difficulty, held jury question. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873.

163. Wrongful levy.—In an action for goods sold, wherein defendant claimed damages for wrongful attachment, evidence held insufficient to justify submission of issue whether affidavit for attachment, that defendant was about to dispose of his property, was false. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

Where a complaint in an action on notes, brought by a bank, alleged a conspiracy among defendants to defraud the bank by pledging worthless collateral to secure them, and defendants' property was attached, that the affidavit in attachment stated that one

of defendants was indebted on both notes, instead of on one as the fact was, held not to make the affidavit false so as to authorize a verdict for defendants as for wrongful levy; the question being for the jury. *Lancaster v. Corsicana Nat. Bank* (Civ. App.) 229 S. W. 580.

(C) *Instructions Invading Province of Jury*

165. **Comments by judge on evidence in general.**—See *American Exp. Co. v. Chandler* (Com. App.) 231 S. W. 1085; *American Exp. Co. v. Chandler* (Civ. App.) 215 S. W. 364; notes at end of ch. 12.

166. **Credibility of witnesses.**—One making claim to attached property was a party to the suit and had an interest in the result, and his credibility was for the jury to pass on, and it was error for the court to tell the jury in effect to accept his testimony as true, even though there was no conflict. *Briggs v. Briggs* (Civ. App.) 227 S. W. 511.

169. **Assumptions by judge as to facts.**—A requested instruction, assuming facts in issue, is properly refused. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614; *McCulloh v. Reynolds Mortgage Co.* (Civ. App.) 196 S. W. 565.

Refusal of a charge making an erroneous assumption of fact is proper. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625; *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

It is improper to assume as a proven fact a material issue supported only by the uncorroborated testimony of one of plaintiffs, especially where there is evidence warranting a contrary inference. *Carothers v. Finley* (Civ. App.) 209 S. W. 801.

171. — **Contracts and actions relating thereto.**—A requested instruction, in action for price of articles, assuming authority of an architect, contrary to what the evidence shows without practical contradiction, is properly refused. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.

In action for breach of marriage promise, an instruction held not erroneous as assuming that defendant had made and broken a contract. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

In an action to recover wages, and to recover for an agency business sold to defendant, where the court instructed the jury to find for plaintiff, the objection that the credibility of a witness was a question for the jury, and that the court erroneously assumed the truthfulness of plaintiff's unsupported testimony, held not well taken, in view of the fact that books and the other evidence introduced sufficiently corroborated plaintiff's testimony to warrant the instruction. *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374.

In an action against a railroad company for refusing to transport plaintiff between its depot and that of another company as required by her ticket, where the driver denied that he was the railroad's agent or that he told plaintiff he was the railroad transfer man, instruction held erroneous as assuming that he was defendant's agent. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

172. **Actions relating to property.**—In action for depreciation in value of property from excavation in street by railroad in construction of road, question submitted to jury held not subject to objection that it assumes that owner suffered the damages. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

In a lessee's action to enjoin another lessee from using water of spring for other than drilling and manufacturing purposes, where at the time of plaintiff's lease defendant was using such water and permitting its use by citizens of a town, the court properly assumed in the peremptory instruction for defendant that plaintiff was chargeable with notice of contents of defendant's lease, and was not an innocent purchaser without notice, although defendant's lease was not then of record. *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

173. — **Actions for torts in general.**—In action against city for damages from city's septic sewer tank, plaintiff's requested charge held properly refused as assuming facts and declaring they constituted nuisance. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

174. — **Negligence in general.**—In action against railroad, charge that, if jury believed consignment was roughly handled and delayed, and that delay and rough handling was proximate cause of damage, they should find for plaintiff, was erroneous as assuming rough handling was negligence as matter of law. *Panhandle & S. F. Ry. Co. v. Wright-Herndon Co.* (Civ. App.) 195 S. W. 216.

Instruction that if jury found "that through rough handling," cattle shipped were injured, shipper could recover, was erroneous for assuming rough handling, being on the weight of the evidence. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

Where plaintiff alleged negligence in failure to properly bed a car for shipping cattle, a charge on negligence as the proximate cause, held not objectionable as assuming defendant's negligence in failing to bed the car. *Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

In an action for damages to a shipment of cattle which were loaded by the shipper, a requested charge not to consider damage caused by loading cows and calves in the same cars was properly refused as assuming that it was negligence to load the cattle in that manner. *Panhandle & S. F. Ry. Co. v. Vaughn* (Com. App.) 222 S. W. 206, affirming judgment (Civ. App.) 191 S. W. 142.

175. — **Personal injuries in general.**—Refused instruction as to right of pedestrian to go upon highways and to assume that automobile drivers would not negligent-

ly injure him held to assume that plaintiff was exercising ordinary care and that defendant was negligent. *Magee v. Cavins* (Civ. App.) 197 S. W. 1015.

176. — **Personal injuries in operation of railroads in general.**—In action against interurban railroad for injuries at crossing road's requested charge on issue of discovered peril which assumed material facts in dispute was properly refused. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

Where an employé of a third person was injured while blocking a coal car moving by gravity after plaintiff had released a defective brake, it was not error to refuse an instruction for defendant, erroneously assuming that plaintiff knew, or ought to have known, of the defective brake, and that he moved the car without inspection. *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340.

An instruction, assuming contributory negligence on plaintiff's part in going in front of the car, was properly refused; evidence showing that plaintiff thought it necessary to act as he did to prevent accident to others on the track. *Id.*

177. — **Injuries to passengers.**—Instruction, in action for injury to passenger in alighting at station platform, that if she stepped on the edge of a plank, partly under the car step, and between it and the platform and slipped, and there was room on it for her to have placed her foot without slipping, she could not recover, held erroneous as assuming this was contributory negligence. *Williams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 196 S. W. 309.

In street car passenger's action for injuries, instruction held not to assume that plaintiff was negligent per se in alighting from moving car, thinking that it had stopped. *Drake v. Northern Texas Traction Co.* (Civ. App.) 197 S. W. 610.

178. — **Injuries to servants.**—Charge on measure of damages in servant's action for injuries, held erroneous as assuming master's liability. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256; *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

In servant's action for injuries, a charge that as a guide in answering special issue jury should assess plaintiff's damages, if any they find he has sustained, at such sum, etc., held improper as assuming negligence. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

A charge submitting issues of negligence causing injury to servant which prefaced such issues with the words "if you find," etc., did not assume that defendant was guilty of the negligence submitted. *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.) 216 S. W. 444.

Where plaintiff was injured by the fall of a plank when the end opposite the one he was carrying was dropped by coworkers to enable them to avoid a falling lumber pile which the foreman had promised to hold up while they were working under it, requested charges, for defendant if the coworkers dropped the plank to escape danger, were properly refused as assuming as a matter of law that the foreman's act was not the proximate cause. *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

179. — **Damages and amount of recovery.**—In a servant's action for injuries, a charge assuming decrease in the servant's earning capacity as a proven fact from statement of a physician that plaintiff would always have a weak arm was erroneous, since the weakened condition of the arm need not necessarily decrease plaintiff's earning capacity. *Texas & Pacific Coal Co. v. Ervin* (Civ. App.) 212 S. W. 234.

Where a city condemned a portion of a lot on which a building was erected and left the owner an insufficient area to accommodate the building as then constructed, an instruction authorizing consideration of cost of removal or reconstruction of the building was not on the weight of evidence as assuming without conclusive proof that such removal or reconstruction would be made. *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911.

180. — **Uncontroverted facts or evidence.**—Authority of agent being undisputed, it is not error for court to assume such authority in his charge. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

Where plaintiff testified that there was breach of contract, which was not denied, but defendant claimed there was no contract, and all the evidence showed a breach if there was a contract, the court could assume the breach as a fact. *New Fenfield Townsite Co. v. King* (Civ. App.) 204 S. W. 788.

Ordinarily it is improper for the court to assume as a fact a matter proven only by the uncorroborated testimony of an interested witness. *Brown v. McKinney* (Civ. App.) 208 S. W. 565.

Where petition to cancel an oil lease alleged that certain defendants claimed an interest in the land under a sale or transfer, in view of further fact that the plaintiff testified he received checks from such persons to cover rentals, there was no error in assuming as an admitted fact that such persons were in privity with the lessee as assignees of his interest. *Broyles v. Gilman* (Civ. App.) 222 S. W. 685.

181. **Opinion or belief of judge as to facts.**—Burden of proof being a legal principle, not a fact issue, the repetition of such principle in instructions cannot mislead the jury into the belief that the court entertained views on fact issues adverse to plaintiff. *Dallas Waste Mills v. Texas Cake & Linter Co.* (Civ. App.) 204 S. W. 868.

In a passenger's action for injuries from exposure after car was derailed, instructions as to plaintiff's contributory negligence, in walking four miles in the rain, instead of staying at a nearby farmhouse, held erroneous as intimating that in the court's opinion plaintiff was guilty of contributory negligence and placing undue stress on such issue. *Dowdy v. Southern Traction Co.* (Com. App.) 219 S. W. 1092.

182. Weight and sufficiency of evidence.—Requested instructions which would violate statute prohibiting comment on the weight of the evidence are properly refused. *Smith v. Bryan* (Civ. App.) 204 S. W. 359; *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482; *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679; *Land v. Dunn* (Civ. App.) 226 S. W. 801; *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

A charge which would have had tendency to create in minds of the jury the impression that certain facts should, in opinion of the court, be given controlling effect in their determination is bad as on weight of evidence. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

183. — Nature of instruction in general.—Instruction not to consider plea in intervention, filed in former suit and admitted in evidence, as statement of any fact, was not charge upon weight of evidence. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Instruction that the jury could consider the fact that plaintiff read all the interrogations before making his answers thereto was properly refused as on the weight of the evidence. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

In view of this article, court properly refused to instruct upon relative importance of surrounding circumstances and inferences, or to call attention to evidence thereof. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Where plaintiff relied on circumstantial evidence and defendant on direct, an instruction that the facts might be shown by the circumstances, etc., held on the weight of the evidence. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

The word "casual" meaning something by chance without being foreseen or expected, an instruction referring to a conversation as casual when the evidence tended to show it to have been material and sought by one of the parties was on the weight of the evidence. *Cotulla State Bank v. Herron* (Civ. App.) 202 S. W. 797.

A charge stating what the law was upon certain facts submitted for consideration of the jury was not a charge upon the weight of the evidence. *Etter v. Stampf & Elcheberger* (Civ. App.) 204 S. W. 143.

Requested instruction to effect that declarations made by a party with reference to making testimony in his favor or subserving his interests should be rejected, held a comment on weight of evidence and properly refused. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

186. — Uncontroverted evidence.—Objection to charge as on weight of evidence is not tenable where there is no dispute as to fact. *Hegman v. Roberts* (Civ. App.) 201 S. W. 268.

A charge, in an action for personal injuries, that the undisputed evidence showed that an electric light was at a certain point, is not a charge on the weight of the evidence. *Athens Electric Light & Power Co. v. Tanner* (Civ. App.) 225 S. W. 421.

188. — Nature of action or issue in general.—The court in its charge could not assume as untrue proof sufficient to support allegations as to actual application of payments. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

While exhibition of high temper, eccentricities, and unreasonable prejudices would not, in the absence of other evidence, establish a want of testamentary capacity, yet in a will contest case an instruction that such exhibitions were not alone proof of incompetency or testamentary incapacity was properly refused, being on the weight of the evidence. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

In action against railroad for penalties for failure to comply with art. 6592, where the real issue was whether water closets were in a reasonable distance from the station, and the uncontradicted evidence showed that the railway did not have any closets within its passenger depot; instruction held erroneous as virtually an instruction to find for the state, regardless of how the real issue in the case might be determined. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393.

In contest of 79 year old testatrix's will on ground of mental incompetence, requested charge on testamentary capacity as affected by old age and sickness held properly refused as on the weight of the evidence. *Bradshaw v. Brown* (Civ. App.) 213 S. W. 1071.

In an action by an administrator, an instruction that, if the jury found from the evidence, taking into consideration the long lapse of time, the friendly relations between deceased and defendant, and the other circumstances, that there was a full settlement, they should find for defendant, was erroneous as on the weight of the evidence. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

Requested charge that a partnership is not to be determined by the fact that parties or witnesses called the relation such, but by the facts testified to as to the arrangement and contract, and that a mere interest in profits does not make parties partners, is argumentative and on the weight of the evidence. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

Instruction that every influence operating on testator's mind will not invalidate the will, that influence to invalidate will must be undue influence, and that a mere request, entreaty, persuasion, or argument does not necessarily amount to undue influence, even though it affects the testator's mind, unless it overcomes his will, held not erroneous as on the weight of the evidence. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

189. — Actions relating to property.—In trespass to try title, instruction as to sufficiency of plaintiff's record title and right of recovery held not objectionable as on the weight of the evidence. *Paire v. Goff* (Civ. App.) 202 S. W. 813.

In a boundary dispute an instruction that surveyor is presumed to have surveyed on

the ground all lines called for, etc., held, under the facts on the weight of the evidence, in effect calling for a peremptory instruction. *Kerr v. State* (Civ. App.) 205 S. W. 474.

In action involving boundary dispute, an instruction as to recitals of distance in deeds, patents, surveys, or other instruments subsequent to original survey, and effect thereof upon location by original surveyor, held not on weight of evidence. *Oates v. Maxcy* (Civ. App.) 206 S. W. 535.

In action against railroad for depreciation of property, resulting from excavation in street in constructing road, instruction as to duty of receivers to restore street to its original condition held not erroneous, as a comment on the evidence as to damage resulting from excavation. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

In trespass to try title, a requested special charge to find against defendant if he stated to plaintiff that he knew her father's heirs owned the land, or if defendant made any statement to the effect that he did not claim the land adversely, was improperly refused, being correct and not open to attack as on the weight of the evidence. *Collins v. Megason* (Civ. App.) 228 S. W. 583.

190. — **Contracts and actions relating thereto in general.**—Instruction that application for employment and agreement as to plaintiff's seniority on list of conductors was not an employment, held properly refused as an instruction on the weight of the evidence, prohibited by this article. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In broker's action for commission, instruction that if plaintiff had contract with defendant to sell land, and no contract of exchange, and if third person was procured as one who would trade for defendant's land, and was introduced for that purpose, jury should find for defendant, held properly refused as on weight of evidence. *Buck v. Woodson* (Civ. App.) 209 S. W. 244.

A requested instruction, in an action to cancel an oil lease for fraud, that, if the jury found that defendant did not invite plaintiff to investigate the truth or falsity of verbal representations, then a failure to make any investigation would not bar him from canceling the contract, and he owed no duty to investigate, was properly refused as being on the weight of the evidence and argumentative. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Instruction that if jury should find from evidence policies sued on were in force at time of destruction of property, if it was destroyed, and, if they should find property was destroyed by fire while policies were in force, they would find for plaintiff in amount of his damage, held not on weight of evidence. *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796.

In an action by a husband's residuary legatees to cancel deed to his wife, instruction that the burden of proof rested on plaintiffs to show by a preponderance of the evidence that the instrument was not delivered held not on the weight of the evidence. *Earl v. Mundy* (Civ. App.) 227 S. W. 970.

In such action, instruction that, if a husband executes to his wife a conveyance, though he retains the manual possession thereof, unless a contrary intention is shown, his possession is the possession of the wife, and delivery is presumed, held not on the weight of the evidence. *Id.*

In a suit to recover the purchase price of land for vendor's failure to sink a well before given time, it was not error to refuse to instruct what would be a reasonable time within which to perform the contract within the meaning of the law; such charge constituting an invasion of the province of the jury, and being on the weight of the evidence. *McDonald v. Whaley* (Civ. App.) 228 S. W. 313.

In action by broker for commissions for furnishing purchaser for oil and gas lease, court did not err in submitting special issues as to whether defendant had revised the price of the lease at the time the plaintiff brought the prospective purchaser to his office, and whether he did not revise the price after plaintiff brought the purchaser there, as against an objection that the said issue was a comment by the court upon the weight of the testimony. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

In an action to cancel an oil lease on the ground of fraudulent representations, a requested charge, stating as a matter of law that a certain fact was material and a certain other fact, taken alone, was not material, held erroneous as on the weight of the evidence. *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

192. — **Sales.**—In action for failure to deliver goods according to sample, a charge that it appeared that a sufficient amount had been tendered held not erroneous as upon the weight of the evidence. *Dallas Waste Mills v. Texas Cake & Linter Co.* (Civ. App.) 204 S. W. 868.

193. — **Carriage of goods and live stock.**—In an action for delay in shipment of live stock, where plaintiff relies on negligent condition of switch track, preventing loading, an instruction that the degree of diligence required in construction of main track is not the diligence required in construction of switch track held properly refused, as on the weight of the evidence. *Kansas City, M. & O. Ry. Co. of Texas v. Bomar* (Civ. App.) 207 S. W. 570.

Refusal of instruction requested by initial carrier as to time of shipment required from S. in Texas to S. in Missouri was proper; such charge being directly upon the weight of the evidence. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son* (Civ. App.) 212 S. W. 530.

195. — **Torts in general.**—In action for securing writ of sequestration without probable cause, instruction that original proceedings were not conclusive of issues on

trial, but that jury should determine damages without regard to result of such proceedings, was properly refused, being on weight of evidence, and discrediting undisputed fact as to outcome of such proceedings. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

In an action by plaintiff who claimed that he had been fraudulently induced to lease oil lands, and that defendants had not paid him the entire bonus as agreed, a general charge submitting the issues held not on the weight of the evidence. *Moorman v. Small* (Civ. App.) 220 S. W. 127.

In a suit for an injunction, an instruction that the operation and maintenance of a cotton gin was not a nuisance as a matter of law was not a comment on the weight of the testimony. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

Where defendants had sequestered and replevied certain goats in an action for conversion by plaintiff, it was not error to refuse to instruct for defendant if the jury believed that the goats were unlawfully taken from a certain ranch by plaintiff's brother; such instruction being upon the weight of the evidence, as intimating that the goats were unlawfully taken. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

196. — **Negligence in general.**—Instruction held not a charge on evidence that plaintiff was not guilty of contributory negligence at the time he was injured. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

197. — **Personal injuries in general.**—Refused instruction as to right of pedestrian to go upon highways and to assume that automobile drivers would not negligently injure him held on the weight of the evidence. *Magee v. Cavins* (Civ. App.) 197 S. W. 1015.

198. — **Personal injuries in operation of railroads in general.**—A requested instruction that if one drives in front of a street car approaching at a high rate of speed, and is thereby injured, he cannot recover, was properly refused as being upon the weight of the evidence, there being evidence that such act was not negligent. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In an action for injuries sustained by plaintiff, struck by train while riding in an automobile driven by another, an instruction that the failure of another passenger to observe the approaching train was contributory negligence imputable to plaintiff held properly refused as being on the weight of the evidence. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

Instruction in action for death of an oilmill employé killed by a railroad's car during switching operations on the mill's spur track held not erroneous as on the weight of the evidence. *Jefferson & N. W. Ry. Co. v. Blair* (Civ. App.) 224 S. W. 546.

In an action for injuries to a drayman whose ankle was crushed by a tombstone on a station platform, which fell on him as he, with others, was moving a cooking range to a car, instruction, after defining ordinary care and negligence, as to the duty of defendant, his servants and employés, to exercise ordinary care, etc., held not on the weight of the evidence. *Hines v. Jones* (Civ. App.) 225 S. W. 412.

Though a railroad may under certain circumstances be required as a person of ordinary prudence, to exercise "great care and prudence," this should not be given in a charge to the jury; but the quantum of care and diligence that a person of ordinary prudence would have exercised under the circumstances should be left for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Com. App.) 228 S. W. 159.

In suit against a street railroad for injuries to person struck by a car, the trial court should not have instructed the jury that it was the duty of the motorman to have done any particular thing to avoid the injury after discovering plaintiff's peril, but should have left the jury free to decide whether he exercised the requisite care to avert injury after discovering him. *Paris Transit Co. v. Fath* (Com. App.) 231 S. W. 1080.

199. — **Injuries to passengers.**—In an action by a passenger injured by a fall suffered when entering defendant's train, a special charge on defendant's duty to prevent other passengers from descending on those steps held on the weight of the evidence and properly refused. *Bird v. Schaff* (Civ. App.) 206 S. W. 711.

In action for injuries sustained when leaving train by person accompanying passengers, charge submitting special issue held not upon weight of evidence. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 268 S. W. 714.

It was not error to refuse a special charge, which violated the statute prohibiting judges from commenting on the weight of the testimony, in that it stated that it is negligence for a passenger, intending to board a car, to get too close to the track on its approach. *Texas Electric Ry. v. Hooks* (Civ. App.) 211 S. W. 654.

In an action for death of a passenger struck by a rapidly moving car while crossing the track to board it, an instruction as to defendant's authority to run the car upon its track held properly refused, as being on the weight of the evidence. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

200. — **Injuries to servants.**—In an employé's action for injuries, an instruction, grouping the facts relied on by plaintiff as constituting negligence, and directing the jury to find for plaintiff if such facts constituted negligence, was not objectionable as on the weight of evidence. *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708.

In an action for death of a fireman killed by reason of a derailing switch being left open, instruction held properly refused, as being on the weight of the evidence. *Hines v. Mills* (Civ. App.) 218 S. W. 777.

Where it was claimed that plaintiff, a blacksmith riding on a gasoline motor on railroad track, was guilty of contributory negligence in remaining on the car, which was being operated in the dark without lights, a requested instruction on contributory negligence, in effect a peremptory charge, was properly refused. *Hines v. Parsons* (Civ. App.) 221 S. W. 1027.

In a lineman's action for injuries from shock, special charges requested by defendant held properly refused as argumentative and on the weight of the evidence. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

201. — Damages or amount of recovery.—Charge in a female passenger's personal injury action that jury might consider a second miscarriage in determining the extent of first held not on weight of evidence. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

In action for damage to mules in transit, instruction as to measure of damage held on weight of evidence as making railroad liable if mules were injured without reference as to whether or not through road's negligence. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 211 S. W. 597.

A charge that, if the injuries were inflicted in such manner as to render defendant liable and if plaintiff was suffering from disease, defendant would be liable for any aggravation of the disease, but not liable for its natural progress, was not objectionable as argumentative or on the weight of the evidence. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113.

204. Determination of questions of law—Duty of judge.—Charges interpreting or declaring the effect of written instruments are within the province of the court, and not objectionable as taking the facts from the jury. *Sherman Slaughtering & Rendering Co. v. Texas Nursery Co.* (Civ. App.) 224 S. W. 478.

205. — Submission to jury.—Requested instruction calling for finding whether the contract was breached calls for answer to a question of law, rather than of fact; many and various breaches being alleged. *McCulloh v. Reynolds Mortgage Co.* (Civ. App.) 196 S. W. 565.

The charge must submit questions of fact solely to the decision of the jury, and should not include questions of law, which the court only is authorized to determine. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

II. FORM, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS

(A) *In General*

211. Written instructions—Signing.—The failure of the trial judge to sign the charge is not reversible error. *McDonald v. Axtell* (Civ. App.) 218 S. W. 563.

212½. Instructions prepared by party.—It was not improper for the court to adopt as its main charge a charge prepared by plaintiff's counsel. *Kansas City, M. & O. Ry. Co. of Texas v. Harral* (Civ. App.) 199 S. W. 659.

213. Form and language in general.—In a personal injury action against a railroad, a bus company, and others, the court, after instructing a verdict as to other defendants, did not err in instructing the jury to direct their inquiry against the railroad and the bus company, as against the bus company's contention that it was prejudiced by jury's attention having been directed to the fact that it was a joint defendant with the railroad. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

217. — Conjunctive and disjunctive charges.—Where the facts constituting the alleged contributory negligence are pleaded conjunctively, no affirmative error will arise in submitting the issues in that form. *Ft. Worth & R. G. Ry. Co. v. Keith* (Com. App.) 208 S. W. 891.

In a personal injury action, it is not error to submit the different items of damage conjunctively in the main charge. *Melton v. Manning* (Civ. App.) 216 S. W. 488.

218. Repetition.—An instruction that the findings of an arbitrator would be binding unless he acted fraudulently and in bad faith, given in response to a question by the jury as to the effect of interest and partiality, held not erroneous, although a repetition of the main charge. *Smith v. Bryan* (Civ. App.) 204 S. W. 359.

In action to ingraft parol trust upon deed absolute in form, where court has instructed jury as to the presumption in favor of deed in its general charge, the repetition of the statement in a special charge was objectionable in giving undue prominence to such presumption. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

221. Sufficiency as to subject-matter in general—Definition of terms.—Instruction defining nuisance as "the use of one's property for the conducting of one's own business in such an unreasonable manner as will, under all the circumstances, unfairly cause real or material damage to another," is not incorrect. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

Definition of "serious illness or disease," as one calculated to or tending to impair the general health or constitution, or produce a vice in the constitution or death unless arrested, and not including slight temporary ailments, held slightly, if at all, imperfect, and amply sufficient to guide the jury. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616.

Instruction that: " 'Negligence' means that failure to exercise ordinary care. 'Ordinary care' means the doing of that which an ordinarily prudent man would do under the same or similar circumstances or not doing that which under the same or similar circumstances an ordinarily prudent man would not do"—as applied to handling of stock, held substantially correct. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

An instruction defining proximate cause as not necessarily the cause nearest in time or physical sequence, but a cause without which the injury would not have happened, and from which the injury or a like injury might reasonably have been anticipated, is substantially correct. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Instruction that a common-law marriage is consummated where the parties actually agree and consent together to become husband and wife, and thereafter carry out the agreement and cohabit together openly and professedly as husband and wife, was sufficient and equivalent to a statement that the parties must hold themselves out publicly as man and wife; the word "publicly" being defined as "openly." *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

224. **Statement of issues.**—While the court is not required ordinarily to state the issues made by the pleadings in the preliminary part of the charge, if he attempts to do so, the issues should be correctly stated. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

227. **Evidence and matters of fact in general.**—In an action for damages to a shipment of cattle, though evidence that the cattle were shipped for range feeding and that the cattle recovered their normal condition soon after being placed on the range was admissible, it was not error, after properly charging the measure of damages, to refuse a requested charge to consider the temporary nature of the injuries. *Panhandle & S. F. Ry. Co. v. Vaughn* (Com. App.) 222 S. W. 206, affirming judgment (Civ. App.) 191 S. W. 142.

228. — **Stating, grouping or summarizing facts or evidence.**—In action against railway for injuries, instruction which grouped facts under which verdict might be returned for defendant held not erroneous as requiring jury to believe before finding for plaintiff that defendant's servants were guilty of negligence in several respects. *Shipley v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 199 S. W. 661.

Where defendant railroad pleaded contributory negligence on the part of decedent killed at a crossing while driving an automobile, on request, the trial court should have grouped the facts, if any, constituting contributory negligence, and submitted them to the jury. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

A defendant is entitled to a charge, when properly requested, requiring the jury to find whether the evidence establishes the existence of any specified group of facts which, if true, would establish a defense properly pleaded and made an issue by the evidence, and instructing them, if they find such facts, to find for defendant. *Hannes v. Raube* (Civ. App.) 210 S. W. 985.

A defendant in case submitted on general charge, is entitled to have the facts constituting his defense grouped, and pointedly and affirmatively submitted to the jury. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

233. — **Presumptions and burden of proof.**—In action for death at crossing, instruction that defendants had burden of proof on defensive matters pleaded held erroneous as susceptible of construction of imposing upon them burden of proving contributory negligence by evidence offered by them alone. *Lyon v. Phillips* (Civ. App.) 196 S. W. 995.

Though defendant relied on plaintiff's own evidence to sustain its claim of contributory negligence, held that charge that burden was on defendant was not misleading. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

Instruction that negligence could not be presumed, held not erroneous on theory that jury could presume negligence from facts shown, as the jury does not presume negligence, but finds that the facts constitute negligence. *Drake v. Northern Texas Traction Co.* (Civ. App.) 197 S. W. 610.

In passenger's action for injuries, an instruction that negligence would not be presumed, but must be proved, correctly presented the issue of burden of proof, and, not being included in the general charge, was properly given as a special charge. *Id.*

Instruction that burden of proof was on defendant to make out his allegation of fraud in a conveyance by a preponderance of the evidence was sufficient on the burden of proof. *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

In suit for commission on exchange of land, charge held not subject to objection that it placed burden of proof "upon the defendant to establish that he did not list his land with plaintiffs." *Blaschke v. Ferguson & Dyess* (Civ. App.) 208 S. W. 727.

In suit for injuries, due to cover of manhole tilting, instructing that burden of showing contributory negligence was on defendant, and that in determining the issue the jury should consider all the facts and circumstances in evidence, held not erroneous, though plaintiff's evidence tended to show such negligence. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

In an architect's action to recover for plans and specifications furnished defendant upon order of its agent, an instruction undertaking to inform the jury that the burden of proof was upon plaintiff as to matters alleged by him and on defendant as to special matters pleaded by it held unobjectionable. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In a suit on a note which defendant maker admitted signing in blank, seeking to avoid his admission by pleading a fraudulent filling in of the amount of the note, charge that, where the maker denies execution under oath, plaintiff has the burden of proof, but, where the maker admits the signature in a plea of non est factum, the burden to prove it was fraudulently filled out is on him, was sufficient. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

An instruction that the jury should return a verdict for defendant if from all the evidence they were uncertain as to the true location of the boundary line was correct, since the burden was on plaintiff to prove the location of such lines. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment *Goodrich v. West Lumber Co.* (Civ. App.) 182 S. W. 341.

A charge requested by plaintiffs that, having established the beginning corner, jury are not required to find on the ground any of the other corners or the bearing trees, but that the burden was on defendant to prove affirmatively that the original surveyor did not run out his full course and distance, was properly refused, because the burden of establishing the boundaries was on the plaintiff, and remained so throughout. *Id.*

Where there was an issue under the pleading and evidence whether cattle were in good condition when delivered to the carrier for shipment, it was not error to refuse a requested charge that the burden was on the carrier to show that the injury was caused by inherent vice and defect of the cattle. *Leon v. Hines (Civ. App.) 223 S. W. 239.*

The burden of proof as to the defense of assumed risk was on the employer, and it is error to refuse a request to so charge. *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas (Civ. App.) 223 S. W. 490.*

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman when a defective car ahead of him dumped coal on the track, instruction on burden of proof held erroneous as putting on defendant the burden of showing that the car was in a reasonably safe condition. *Colorado & S. Ry. Co. v. Rowe (Civ. App.) 224 S. W. 928.*

In such action instruction that the burden of proof on each special issue was on the party having the affirmative, coupled with the refusal of the trial court to give requested instructions informing the jury specifically that the burden was on plaintiff as to certain issues, held not confusing. *Id.*

In an action by an administrator on written instruments found in possession of decedent, whose execution was not denied by defendant, where the only defense was in the nature of confession and avoidance, an instruction that the burden was on plaintiff to establish his right to recover by a preponderance of the evidence was misleading and erroneous. *Dodson v. Watson (Civ. App.) 225 S. W. 586.*

235. Weight and effect of evidence.—The court properly charged the jury that they were the exclusive judges of the credibility of witnesses and the weight to be given the testimony, and was not required to add, as requested by defendants, "and of all the facts proven." *Galveston, H. & S. A. Ry. Co. v. Blumberg (Civ. App.) 227 S. W. 734.*

240. Preponderance of evidence.—Instruction that burden of proof was on plaintiff to prove case by preponderance of evidence, and on defendants to prove defense by preponderance of evidence, held confusing to jury. *Quannah, A. & P. Ry. Co. v. Novit (Civ. App.) 199 S. W. 496.*

In physician's action for hospital services rendered boy injured by defendant, court's special charge held clearly to have instructed jury that only in event they should find from preponderance of evidence that plaintiff had proven his cause of action could they render verdict for him. *Banfield v. Davidson (Civ. App.) 201 S. W. 442.*

Instruction that plaintiff must "establish" the claimed trust by a preponderance of the evidence to the satisfaction of the jury was not open to the objection that it required certain and indisputable proof; the word "establish" being synonymous with the word "prove." *Carl v. Settegast (Civ. App.) 211 S. W. 506.*

242. — Degree of proof required in general.—An instruction that the burden was on plaintiff to establish facts necessary to recovery by a preponderance of the evidence, and that the burden was on the master to establish to the jury's satisfaction the servant's contributory negligence, is erroneous, being equivalent to a charge calling for a finding beyond a reasonable doubt on the issue of contributory negligence. *Peden Iron & Steel Co. v. Jaimes (Com. App.) 208 S. W. 898.*

To require proof of a fact by "full and satisfactory evidence" is equivalent to a requirement that the fact must be proved beyond a reasonable doubt. *Carleton-Ferguson Dry Goods Co. v. McFarland (Civ. App.) 230 S. W. 208.*

244. — Requiring matters to be proved to the satisfaction of the jury.—In a suit to restrain the operation of a cotton gin as a nuisance, an instruction to find for defendant unless the jury should "find and be satisfied" that the evils complained of are imminent and certain to occur was properly refused, since a preponderance of the evidence only was required. *Moore v. Coleman (Civ. App.) 195 S. W. 212.*

245. Argumentative instructions.—Refusal of argumentative instructions is not error. *Hart-Parr Co. v. Paine (Civ. App.) 199 S. W. 822; Gulf, C. & S. F. Ry. Co. v. Gentry (Civ. App.) 197 S. W. 482; El Paso Electric Ry. Co. v. Benjamin (Civ. App.) 202 S. W. 996; Smith v. Bryan (Civ. App.) 204 S. W. 359; Kirby Lumber Co. v. Lewis (Civ. App.) 222 S. W. 332; Southern Traction Co. v. Kirksey (Civ. App.) 222 S. W. 702.*

Instruction as to belief in truth of grounds set out in affidavit for attachment not affecting right to recovery for wrongful attachment, held argumentative. *Hegman v. Roberts (Civ. App.) 201 S. W. 268.*

In a boundary dispute an instruction that surveyor is presumed to have surveyed on the ground all lines called for and ran to all of the artificial objects or lines called for in his field notes, and that original east lines of league of land were marked lines, an artificial boundary, held, argumentative. *Kerr v. State (Civ. App.) 205 S. W. 474.*

In an action for delay in shipment of live stock, where plaintiff relies on negligent condition of switch track preventing loading, an instruction that the degree of diligence required in construction of main track is not same diligence required as to switch track held properly refused as argumentative in form. *Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Civ. App.) 207 S. W. 570.*

A requested instruction, containing a correct proposition of law, but also con-

taining matters strongly argumentative, and being a very partisan presentation of the issue, was properly refused. *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

While art. 7855, gives every person of sound mind absolute power of disposition over his property, yet, where unnatural disposition was shown as evidence of want of testamentary capacity, instruction that, if the testator was not incapable, he might dispose of his property as he saw fit, though dictated by unreasonable prejudice or overwhelming love, was properly refused, as argumentative. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

An instruction, in an action to cancel an oil lease for that if the jury found that defendant did not invite plaintiff to investigate the truth or falsity of verbal representations, then a failure to make any investigation would not bar him from canceling the contract, and he owed no duty to investigate, was properly refused, as argumentative. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

In a lineman's action for injuries from shock, special charges held properly refused as argumentative. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

A charge that, if the injuries were inflicted in such manner as to render defendant liable and if plaintiff was suffering from disease, defendant would be liable for any aggravation of the disease, but not liable for its natural progress, was not objectionable as argumentative. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113.

Requested charge, that a partnership is not to be determined by the fact that parties or witnesses called the relation such, but by the facts testified to as to the arrangement and contract, and that a mere interest in profits does not make parties partners, is argumentative. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

Instruction that every influence operating on testator's mind will not invalidate the will, that influence to invalidate will must be undue influence, and that a mere request, entreaty, persuasion, or argument does not necessarily amount to undue influence, even though it affects the testator's mind, unless it overcomes his will, held not erroneous as argumentative, and confusing. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Charge that "no one is required to anticipate that another will fail to obey the law, and you are therefore charged that in passing on the issue" whether deceased "exercised ordinary care in approaching the crossing, he had the right to expect that defendant's" trainmen would give the required crossing signals, is argumentative. *Missouri, K. & T. Ry. Co. of Texas v. Merchant* (Com. App.) 231 S. W. 327.

246. Confused or misleading instructions.—In action for death on crossing, instruction that deceased had equal right to travel with automobile on road at intersection with railroad as railroad had to run trains at point, was improper as confusing and misleading. *Baker v. Collins* (Civ. App.) 199 S. W. 519.

Where words of message and other facts were admitted, except date of delivery to telegraph company, court should have submitted question whether it was delivered on one day or other without including in instruction words of message which tended only to confuse. *Western Union Telegraph Co. v. Goodson* (Civ. App.) 202 S. W. 766.

The principal issue being whether plaintiff was the procuring cause of sale of defendant's cattle, an instruction that, if defendant assisted another broker in the sale, etc., plaintiff was the procuring cause, held misleading. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

In action by vendee for fraud, a requested charge that even though jury believed particular representation made, they should not consider same as element of plaintiff's damages because such representations did not increase the damages, held properly refused as misleading. *Sims v. Ford* (Civ. App.) 209 S. W. 699.

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, an instruction on proximate cause held not misleading. *St. Louis, S. F. & T. Ry. Co. v. Whatley* (Civ. App.) 212 S. W. 968.

In an action for the death of a passenger struck by car while crossing the track to board it, an instruction as to decedent's duty to look and listen for the approaching car was properly refused as misleading. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

Where the facts raised the issue of appointing defendants as agents or trustees to invest money deposited with them, which partakes more of the nature of a trust, an instruction defining a trust was not erroneous, as calculated to mislead the jury. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

In mother's action for injury to minor son, instruction submitting as measure of recovery such sum "as, paid now will be reasonable compensation to the plaintiff for the loss of the services, if any," of the son "until he becomes 21 years of age," held not misleading. *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

In an action to have land deeded by father to daughter applied in payment of debts of father, where daughter claimed a prior parol gift, a requested instruction that an understanding that the land was given to her "on condition that she and her husband remain in Texas or upon any other condition would not be sufficient" to constitute a gift was properly refused because misleading. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

A charge submitting the issue whether defendant's motorman, in passing and overtaking plaintiff's mule tied to the rear of a wagon, gave "such assistance to plaintiff as was reasonably demanded by the circumstances to obtain clearance and avoid the accident," followed by language that might lead the jury to believe that the street car should have steered around the mule, as an automobile would do, in observing the

Motor Vehicle Law of 1917, art. 820k, was misleading. *Northern Texas Traction Co. v. Stone* (Civ. App.) 230 S. W. 754.

Argumentative charge that "no one is required to anticipate that another will fail to obey the law," and that in passing on the issue whether deceased "exercised ordinary care in approaching the crossing, he had the right to expect that defendant's" trainmen would give the required crossing signals held misleading and its effect not necessarily counteracted by the fact that the case was submitted on special issues, or that the jury found that deceased looked and listened for the train. *Missouri, K. & T. Ry. Co. of Texas v. Merchant* (Com. App.) 231 S. W. 327.

247. Inconsistent or contradictory instructions.—In servant's action for injuries, where court, in submitting affirmative liability, stated grounds of negligence conjunctively, but, in submission of issue of concurrent negligence, jury was instructed to apply doctrine of comparative negligence, charge was inconsistent. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

An instruction allowing recovery for passenger's injuries on a finding of negligence based either on a quick and sudden lurch of the train in stopping or on the place and manner and means provided for alighting is inconsistent with another instruction requiring the jury to find for defendant unless its servants stopped the train with a quick and sudden jerk and were negligent in carrying plaintiff's wife past the station and having her alight where they did. *Shipley v. Missouri, K. & T. Ry. Co. of Texas*, 110 Tex. 194, 217 S. W. 137.

In an action by plaintiff who asserted that he had been fraudulently induced to execute a lease to oil lands, and that defendants did not, as they had agreed, pay him the entire bonus, held that the charge was not objectionable as contradictory. *Moorman v. Small* (Civ. App.) 220 S. W. 127.

Whatever is inserted in the instructions of the court which is misleading, or whatever contradicts, extends, or limits the terms of the charge correctly defining the acts, conduct, or omission from which the liability in law springs, is erroneous, because inconsistent with or contradictory of such other parts of the charge. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

248. Undue prominence of particular matters.—Though either side is entitled to affirmative presentation of case or defense, and special grouping of facts in certain cases, repetition or emphasis that essentially gives case, issue, or defense prominence, is erroneous. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

Where the court gave all the material issues in its charge, it was not error to refuse a special charge that sought to single out and submit a question to the jury that was not controlling. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

A requested instruction, which gives undue prominence to a matter of defense by repeating it, is properly refused. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

Instruction to include in amount due plaintiff specified amounts due on specified accounts, "and any other amount you find chargeable to such accounts," where there was evidence of other amounts due on such accounts, was misleading, and calculated to cause jury to attach too much weight to specified amounts. *McFarland v. Ray McDonald Co.* (Civ. App.) 213 S. W. 946.

249. — Evidence and matters of fact in general.—See *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

It is improper for court to select certain portion of testimony giving undue prominence thereto. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

A requested instruction, singling out certain portions of the testimony relating to an issue properly submitted to the jury in the main charge, was properly refused. *McDonald v. Stafford* (Civ. App.) 213 S. W. 732.

Every statement made by the court in discussing and passing on the sufficiency or insufficiency of certain evidence to justify a particular finding in a given case need not be incorporated in the instructions as result would be to give undue prominence to such matters. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

In broker's action for commissions, special issues held not erroneous, as unduly emphasizing a particular part of defendant's testimony. *Priddy v. Childers* (Civ. App.) 231 S. W. 172.

250. — Nature of action or issue in general.—The language "living in the same house in like manner as marks the intercourse between husband and wife" in an instruction on evidence of common-law marriage held not erroneous as laying undue stress on the occupancy of the same house and detracting from the importance of their holding themselves out to the public as husband and wife, in view of other parts of the instructions. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In an action for failure to deliver bales of cotton linters where the main charge stated that the burden of proof was on the plaintiff to make out its case by a preponderance of the evidence, a special charge that the burden was on plaintiff to show by a preponderance of the evidence, the number of bales, if any, that defendant failed to deliver was error as singling out a particular issue and giving it undue prominence. *Dallas Waste Mills v. Texas Cake & Linter Co.* (Com. App.) 228 S. W. 118.

251. — Negligence and personal injuries.—In a passenger's action for injuries sustained in alighting from street car, special charges, though correct, held to give undue prominence to the claim of contributory negligence. *Drake v. Northern Texas Traction Co.* (Civ. App.) 197 S. W. 610.

In railroad servant's action for injuries from a defective dirt spreader, paragraph of charge authorizing recovery for one or all alleged acts of negligence which singly

or combined were a direct and proximate cause of plaintiff's injuries, held erroneous, as undue emphasis of such grounds of negligence previously submitted separately. *Hines v. Bannon* (Civ. App.) 221 S. W. 634.

252. — **Matters of law and amount of recovery.**—A typewritten instruction on measure of damages for injury to crops having a written interlineation as to issue of actual value held not thereby to give undue prominence to that issue. *W. R. Pickering Lumber Co. v. Childress* (Civ. App.) 206 S. W. 573.

(B) *Particular Actions or Issues*

256. **In general.**—In suit for breach of marriage promise, instruction held not objectionable as telling jury that it is legitimate for unmarried woman to have illicit intercourse with man to whom she is engaged and as authorizing damages from illicit intercourse during engagement whether she was seduced by reliance upon alleged promise of marriage. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

Where the only relief sought against the original grantor who recovered the land for the fraud of his grantee was foreclosure of the lien securing a note given to the original grantee by a subsequent grantee and transferred to plaintiff, an instruction that, if the notes given the original grantor secured on other land were void, there could be no recovery against that grantor, was manifestly erroneous. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

An instruction as to cooling time, in an action for tarring and feathering plaintiff, held, even if authorized by any evidence, not to make it clear, as it should, that time for cooling should be computed from the last act of provocation. *Walker v. Kellar* (Civ. App.) 226 S. W. 796.

257. **Adverse possession.**—An instruction that an attempt by the person in possession to buy the claim or interest of another in the land was not a recognition of the other's ownership held sufficient to cover the issue of the possessor's attempt to buy his peace. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

Instruction that by the term "hostile" is meant an occupancy of the premises under a holding by the possessor as owner and against all other claimants is not erroneous, as requiring a finding of possession hostile to others than plaintiffs. *Id.*

A requested charge that, if jury found from all the facts and circumstances it was more reasonably probable that the patentee sold the certificate to the predecessor of defendant than that he did not make such sale, it could find for defendant, and that prior to 1840 it was not necessary for a sale of the certificate to have been in writing, was correct. *Id.*

A party claiming by limitations, was entitled to have such issue, as raised by the pleadings and evidence, clearly, distinctly, and affirmatively submitted to the jury, and the court erred in not giving at such party's request more than a general instruction as to limitations. *Cass v. Green* (Civ. App.) 224 S. W. 938, opinion supplemented 227 S. W. 238.

259. **Assumption of risk.**—Charges that if plaintiff by ordinary care could have known of danger or insufficiency of number of men to perform work, he assumed risk, held incorrect as imposing too great burden on plaintiff. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

An instruction, on assumption of risk, that makes knowledge of patent defects a defense, where the danger therefrom was latent and beyond the knowledge of the injured servant, was properly refused. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

An instruction that an injured servant assumed the risk of such defects, as were open to his inspection was improper, where the evidence showed that the servant did not know such defects would cause an explosion. *Id.*

In railroad servant's action for injuries while working on defective dirt spreader, special charge affirmatively presenting defense of assumed risk, pleaded and raised by evidence, should have been given; defense not having been presented affirmatively in court's main charge. *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

Instruction held defective in not clearly stating that employé assumed risk of known or obvious dangers, though arising from defendant's negligence. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), instruction held erroneous, in that it assumed that employee would not be guilty of assumed risk if with knowledge of railroad's negligence he exercised ordinary care to avoid injury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

262. **Bona fide purchase.**—In suit to try title, charge as to rights and duties of one purchasing land without record or other notice of adverse claim held to contain no error. *Houston Oil Co. of Texas v. Ragley-Saner Lumber Co.* (Civ. App.) 196 S. W. 338.

262½. **Boundaries.**—In boundary suit, where plaintiffs claimed corner at tree marked P. and defendants claimed the corner at a different tree, alleged to be so marked, but on which the letter was indistinct, instruction describing plaintiffs' claimed tree, and requiring verdict for plaintiffs, if such was the corner, held proper. *Jackson v. Graham* (Civ. App.) 205 S. W. 755.

264. **Carriage of goods and live stock.**—An instruction that consignee could recover for injuries to automobile occurring while in carrier's possession after its agreement to repair machine, held erroneous in view of evidence. *Houston & T. C. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

In action for damages to shipment of cattle from delay in transit, charge that responsibility of railroad ceased when cattle were delivered to stockyards company at destination and unloaded into pens held as favorable as defendant railroads could ask. *Panhandle & S. F. Ry. Co. v. Crawford* (Civ. App.) 198 S. W. 1079.

In action for damages to shipment of peanuts from contamination with coal oil and from furnishing of unventilated car, instructions that plaintiff was entitled to recover only if peanuts were delivered to carrier in dried and cured condition and could not recover if delivered in green and uncured condition, though they were thereafter damaged through carrier's negligence, held erroneous. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070.

In action against carrier for injuries to mules in transit carrier was entitled to charge that a common carrier is not an insurer of live stock received for transportation, but liable only for injuries caused by its own negligence. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853.

But instruction that common carrier is not an insurer of live stock received by it for transportation, but responsible only if careless and negligent, etc., held improper, on account of the use of the word "careless." *Id.*

267. Conspiracy.—In an action against fire insurance companies for conspiracy in refusing plaintiff insurance, an instruction that defendants had a legal right to refuse to write insurance for plaintiff, limiting such right to individual action of the party exercising it was erroneous where the jury were required to find whether a conspiracy had been formed to injure plaintiff by any of the means alleged in his petition. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

An instruction requiring the jury to specifically find when and where the conspiracy was entered into, held properly refused. *Id.*

268. Contracts.—In action for breach of agreement to transfer notes and accounts of a bankrupt purchased by defendant at judicial sale, requested charges on validity of agreement between plaintiff and defendant relative to plaintiff's refraining from bidding at sale held properly refused. *Taylor v. Lafevers* (Civ. App.) 198 S. W. 651.

In action against cotton factors for sale of cotton contrary to selling instructions, where defense was that sale was necessary to give factors sufficient margin for their protection, instruction held not subject to objection that it permitted factors to demand unreasonable additional security. *Robinson v. William D. Cleveland & Sons* (Civ. App.) 217 S. W. 171.

In action by son's creditor against father refusal of special requested charge as to whether the son directed third person to convey land to father for the purpose of paying off son's indebtedness held proper, since father's liability could not be made to depend merely upon directions from son to third party. *Bell v. Swim* (Com. App.) 229 S. W. 470.

In a contractor's action against an irrigation district for a balance due for construction work, it was proper to submit the issue as one of substantial rather than of exact and strict performance of the contract by plaintiff, and it was not error to so charge. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

269. — Sales.—In action on note which defendant alleged was given for agency of churn under false representations as to agency of churn and its especial qualities, instruction that plaintiff could recover if the churn would make butter was error. *Lang v. Bohlen* (Civ. App.) 200 S. W. 429.

In an action for damages for seller's breach of sale contract by failure to deliver, held under the evidence, that it was not error to refuse a special charge on the doctrine of offer and acceptance to complete a contract. *Russell v. Saffold* (Civ. App.) 225 S. W. 281.

272. Contributory negligence.—Defendant's right to have the full effect of its pleas of contributory negligence should be safeguarded in connection with each issue of alleged negligence submitted by the court. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457.

275. — Acts in emergencies.—In an action by a section hand hurt while removing a hand car to prevent collision with a fast passenger train, a charge on contributory negligence which adverted to plaintiff's claim that he was attempting to remove the car to save life, held not objectionable. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 214 S. W. 699.

276. — Employés.—In action against railroad for injuries to servant while lowering pipe into well, in view of evidence, instruction that if plaintiff himself slackened rope and threw it from around drum, and the foreman did not do so, plaintiff could not recover, held properly refused. *Stephenville, N. & S. T. Ry. Co. v. Shelton* (Com. App.) 208 S. W. 915.

In car repairer's action for injuries from defective drainway involving issue of whether the ground was furnished as a place to work, and whether car repairer in performance of his duties properly walked over such land, court's charge held to properly present issue to jury. *International & G. N. Ry. Co. v. Williams* (Com. App.) 213 S. W. 594.

An instruction that the fault or negligence precluding recovery is not the least degree of fault or negligence, but must be of such degree as to amount to want of ordinary care, held no ground for complaint. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 214 S. W. 699.

279. — **Shipper of stock.**—In live stock shipper's action for damages in transit, instruction submitting issue of shipper's negligence in care of stock en route held insufficient. *Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

280. — **Persons at railroad crossings.**—Instructions as to whether a railway crossing flagman, injured by being pushed on to track by approaching vehicle, was negligent, held proper. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

In an action for the death of one struck at a crossing by an electric car, refusal of an instruction that if deceased saw the car, or could have seen it, and yet permitted his automobile to come in contact with the car, there could be no recovery, was improper, though the request did not submit the issue of proximate cause. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

In an action for death of one riding in an automobile, it is error to refuse defendant's request to charge that if decedent approached the crossing without looking or listening, and if by so doing he could have seen or heard the train in time, and if a man of ordinary prudence would have looked or listened, the jury should find decedent was guilty of contributory negligence proximately causing his death. *Texas & N. O. R. Co. v. Peveto* (Civ. App.) 224 S. W. 552.

In an action for injuries through the negligent operation of a train running without signals as it approached a crossing not guarded by a flagman or gates the refusal of the railroad's requested charge that there could be no recovery if the person injured by listening or looking could have discovered the approach of the train, and the omission to do so was a failure to exercise the care of an ordinarily prudent person under the circumstances, held error. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708; *Same v. Skinner* (Civ. App.) 224 S. W. 713.

281. — **Persons on railroad tracks.**—In action for injury from escaping steam to one who drove between depot platform and track for purpose of unloading lumber, an instruction on contributory negligence, making it the duty of plaintiff to exercise ordinary care held to sufficiently cover the issue as raised by the evidence. *St. Louis, S. F. & T. Ry. Co. v. Whatley* (Civ. App.) 212 S. W. 908.

283. — **Persons injured in operation of street railroads.**—Instruction that deceased was not guilty of contributory negligence, if she was a mere guest and in no control over the automobile, unless she failed to keep a lookout for street car and failed to warn the driver of its approach, or negligently rode with the curtains as they were, held fair to defendant. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

In an action for injuries to the driver of a buggy struck by a street car when the horse became unmanageable, a charge requiring the jury to find that the motorman "actually discovered" the driver's peril before the latter would be entitled to a verdict was not erroneous as failing to require finding that the motorman "realized" and "appreciated" the peril. *Paris Transit Co. v. Fath* (Civ. App.) 216 S. W. 482.

284. — **Discovered peril or last clear chance rule.**—A requested charge that jury must find the motorman actually discovered and realized the peril, and knew that plaintiff's decedent would go on the crossing ahead of the approaching car and be injured, before any duty would arise to stop the interurban car or check its speed, was incorrect. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

A charge that it is the duty of the engineer and fireman to use all reasonable means at their command consistent with safety to avoid injury is not objectionable, as requiring more than the use of ordinary care as to a person discovered in a perilous position at a crossing. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

287. **Conversion.**—In action by tenant against purchaser from his landlord for money received for pasturage, instruction on conversion of crops held erroneous. *Cooke v. Ellis* (Civ. App.) 196 S. W. 642.

292. **Fraud and undue influence.**—In will contest, requested charge, referring to acts of proponent and requiring finding of undue influence if she by false representations procured testator to make no bequest to contestants, held properly refused. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

In an action for fraud in sale of land, an instruction requiring the jury, in order to find for plaintiff, to find that the defendant represented to the plaintiff that he was a true and tried friend of the plaintiff and had superior knowledge of property values, etc., was erroneous, as submitting to the jury as issues merely evidential facts. *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

298. **Libel and slander.**—In an action for libel by the police judge of a city against a newspaper on account of article, privileged under art. 5597, an instruction in relation to the defense of privilege, which, instead of speaking of actual or express malice as a condition to defendant newspaper's liability spoke of gross negligence, and predicated liability thereon, was erroneous. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

300½. **Mental incapacity.**—Instruction that if testator had sufficient mind and memory to know and appreciate what he was doing the extent and nature of the property, and the persons he wished to make the objects of his bounty, he had sufficient mental capacity to execute a will was sufficient. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

302. **Negligence in general.**—In action by county against tax collector for moneys unlawfully retained refusal of defendants' requested instruction defining negligence and submitting issues whether the county commissioners were negligent in failing to discover the fraud before certain dates held not error. *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

303. **Injuries to employés.**—Defendant in servant's action for injury held properly refused an instruction that it could not be guilty of negligence, unless a certain fact be

found, other facts which could be found under the evidence warranting a finding of negligence. *Liquid Carbonic Co. v. Dille*, 109 Tex. 140, 202 S. W. 316.

In servant's action for injuries instruction requiring as prerequisite to recovery that in boarding moving car plaintiff was performing his duty in manner expected of him by defendant, and that switch stand which struck plaintiff was negligently located was not objectionable as permitting recovery on facts constituting plaintiff a mere licensee. *Houston Belt & Terminal Ry. Co. v. Stephens*, 109 Tex. 185, 203 S. W. 41.

304. — **Appliances and places for work.**—Instruction that railroad's duty was to have its cars equipped with couplers which worked automatically without going between them "to arrange the coupling appliances" was not improper, as confusing preparation of coupler for impact and actual coupling since both acts were part of a larger act regulated by the federal Safety Appliance Act of March 2, 1893. *Texas & P. Ry. Co. v. Sprole* (Civ. App.) 202 S. W. 985.

305. — **Knowledge of defect or danger and duty as to inspection.**—Where the foreman of a switching crew knew plaintiff was attempting to couple cars not equipped with automatic couplers, necessitating going between the cars when the foreman gave "kick-back signal" a requested special charge, submitting the question whether the foreman when he gave the signal knew that plaintiff was between cars "and attempting to make the coupling," was properly refused, as making right of recovery dependent upon knowledge of foreman at very instant of time when it was negligence for him not to know. *Baker v. Bell* (Civ. App.) 219 S. W. 245.

306. — **Operation of locomotives, trains, or cars.**—In an action by an employé against a railroad company for injuries caused by sudden increase of engine's speed while plaintiff was attempting to board it, held, defendant was entitled to an unqualified instruction that, if the engineer did not see plaintiff at such time they would return a verdict for defendant. *Texas & P. Ry. Co. v. Wiley* (Com. App.) 206 S. W. 833.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for a brakeman's death by falling under his train when a defective car ahead of him dumped coal on the track, evidence held not to render the submission of negligence in general terms erroneous, and to warrant a special charge excluding from consideration the facts as to the uncoupling of the train and the air hose and the bouncing of the coal. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

311. **Injuries to passengers.**—Where railroad servants called passenger's station before she reached it and induced her to alight, charge that railroad company must have its stations properly announced which required a finding that miscalling of station was negligence before verdict for plaintiff could be authorized, was correct. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

In an action for injuries received by a passenger who alighted before reaching her destination, wrong station being called, a charge held not to submit railroad company's theory of defense. *Id.*

Where the carrier and the express company pleaded that plaintiff negligently walked into an express truck and received the injuries complained of, a charge that, if plaintiff's alleged negligence was established and was the proximate cause of the injury, the jury should find for defendants, properly protected the rights of the defendants. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

Instructions submitting question whether an ordinarily prudent person would have alighted from street car under the facts related held equivalent to submission of question whether one exercising ordinary care would have done so. *Drake v. Northern Texas Traction Co.* (Civ. App.) 197 S. W. 610.

In action for injury to passenger in collision between two interurban cars instruction that jury must believe that reasonably prudent person would have anticipated injury as alleged was erroneous. *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983.

In an action by passenger for claim that as result of exposure in cold waiting room he contracted la grippe resulting in pneumonia and tuberculosis, instructions submitting those issues held correct. *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

A charge, authorizing a verdict for a stock caretaker on a finding that he contracted serious sickness from exposure in leaving the caboose at a place which was unusual or unreasonable, required the jury to consider all the facts and circumstances in evidence, and was not erroneous. *Roberts v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 229 S. W. 954.

312. **Injuries in operation of railroads in general.**—In an action for the death of an oil mill employé killed by a railroad's car during switching operations on the mill's spur track, instruction held not erroneous as inapplicable to the facts. *Jefferson & N. W. Ry. Co. v. Blair* (Civ. App.) 224 S. W. 546.

313. **Injuries at railroad crossings.**—In action for injuries to person at crossing when struck by coal falling from tender, an instruction held not erroneous as making road absolutely liable for falling of coal instead of liable only for failure to use ordinary care. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 195 S. W. 1169.

In a suit for injuries to plaintiff at a crossing in the process of being repaired, due to his horses becoming frightened on account of piles of lumber and a hand car, an instruction for plaintiff held not affirmatively erroneous. *Texas Midland R. R. v. Combs* (Civ. App.) 195 S. W. 1178.

Law not fixing limitations as to speed at crossings and court having submitted the issue as to negligent speed of defendant's car, held it was error to refuse instruction that if the car was operated as persons of ordinary care, caution and prudence would operate it under similar circumstances defendant would not be liable. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

In action for death of plaintiff's decedent struck by defendant's train, instruction as to care in operating trains held not misleading. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

Instruction submitting question of railroad's negligence in failing to maintain watchman at a crossing held properly refused because the question of contributory negligence was improperly injected into it. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

Instruction in language of art. 6485, providing that a "railroad shall keep such crossing in repair," with an instruction that railroad was required to use ordinary care to maintain crossing did not impose an absolute duty on the railroad. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

317. Injuries in operation of street railroads.—An instruction that if the jury believed that plaintiff was on the street car tracks in a position of peril due to the balking or fright of his horse and the motorman actually discovered him in that position in time to have stopped the car before the collision, but failed to do so, then to find for plaintiff, was not erroneous as imposing a greater duty than the law required. *Paris Transit Co. v. Fath* (Civ. App.) 216 S. W. 482.

319½. Injuries on streets and highways.—In an action for injury sustained in a collision with defendant's automobile which he alleged was being operated in violation of *Vernon's Ann. Pen. Code Supp.* 1918, arts. §20a-§20yy, an instruction that such statute had no application, and that the jury should not consider it in arriving at their verdict, was properly refused. *Flores v. Garcia* (Civ. App.) 226 S. W. 743.

325. Partnership.—In action for partnership accounting, where the partnership articles gave defendant the sole right to demand dissolution, it was not error to refuse to instruct that for plaintiffs to legally demand dissolution on the ground of disagreement the disagreement must have been such as to make a continuance of the partnership unprofitable. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

326. Proximate cause.—Instruction on negligence in a servant's action for injury held not misleading because not in terms requiring finding that the acts of negligence were proximate cause." *Liquid Carbonic Co. v. Dilley*, 109 Tex. 140, 202 S. W. 316.

In action for death at crossing of one driving automobile, special charge on contributory negligence and proximate cause requested by defendant held properly refused, facts grouped therein not necessarily being proximate cause of accident. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In a servant's action for injuries by the slipping of a defective pipe wrench, causing him to be caught in exposed cogwheels, instructions held erroneous in failing to instruct the jury to find whether the defective wrench or the exposed cogwheels, or both, was the proximate cause of the injuries. *Texas & Pacific Coal Co. v. Ervin* (Civ. App.) 212 S. W. 234.

329. Rescission and cancellation.—In action by lessors of oil lands to cancel leases and for damages, instruction held improper as calculated to prejudice right asserted by lessors to forfeit leases by conveying suggestion that right of forfeiture is regarded unfavorably. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

In action to cancel oil leases, instruction limiting jury's consideration to circumstances tending to establish forfeiture by abandonment arising after plaintiffs' purchase of land from original lessors held erroneous. *Id.*

In an action to set aside transfer of plaintiff's interest in an oil and gas lease because of fraudulent misrepresentations, an instruction that the seller must know "all of the facts with reference to the transaction" was not erroneous by omitting the word "material"; such qualification being implied. *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598.

In an action to cancel an oil lease for fraud, the court in its instructions should have separated for the jury invitation as to form of the lease from an invitation by the defendants to investigate representations made and relied on for cancellation. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

In such action, an instruction requiring the jury, in order to find for plaintiff, to find that plaintiff exercised diligence to ascertain the falsity of representations relied on by him, was erroneous. *Id.*

Where, in a suit to cancel an oil lease, an amended petition was filed on the day the trial was commenced, evidence was admissible as to whether the drilling of a well had been prosecuted with due diligence up to the date of the amendment, and an instruction submitting that question properly referred to such date instead of the date of filing of the original petition. *Sunshine Oil Corporation v. Randals* (Civ. App.) 226 S. W. 1090.

In a suit to rescind an assignment of interest in an oil lease, for false representations to obtain an option on such interest, an instruction to find for defendants if plaintiff discovered falsity of representations before he signed, and, knowing thereof, executed the transfer was not erroneous, if none of the misrepresentations involved an opinion, but were all statements of actual facts. *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

In such action, a special charge that plaintiff did not waive the fraud by signing the transfer after discovering the falsity of representations, unless he knew of defendant's bad faith, was properly refused for failing to submit the question as to whether or not the knowledge he had was sufficient to put him on inquiry. *Id.*

A charge that, unless the plaintiff, before he executed the transfer, knew all the facts with reference thereto, the representations were false, and that the defendant at the time knew the facts and failed to communicate the same, was erroneous, as not confining the necessity of the plaintiff's knowledge of bad faith to the one opinion representation that a well being drilled on nearby land was to be a dry hole. *Id.*

333. **Title, ownership, and possession.**—In trespass to try title by one who took by inheritance from his mother and gift from his father, instruction that he could not recover unless his father could was not erroneous as instructing to find for defendant because the father was making no claim. *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

337. **Wrongful death.**—In action for wrongful death, charge held to materially abridge defendant's right of self-defense. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873.

(C) *Damages and Amount of Recovery*

339. **Double recovery.**—An instruction as to measure of damages in action for breach of marriage promise held not erroneous as allowing recovery of double damages. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

In such action, jury could not have been misled into allowing double damages, although court, after having embraced in one paragraph all elements which jury should consider, gave a second paragraph, calling attention to fact that jury could consider seduction, not before mentioned. *Id.*

An instruction that the jury in assessing damages for the death of plaintiff's daughter could consider everything that could reasonably be estimated in money, labor, service, kindness, and attention from a child to its parents held not erroneous as authorizing double recovery, in that several of the terms meant the same thing. *Houston Electric Co. v. Flattery* (Civ. App.) 217 S. W. 950.

342. **Mitigation of damages and reduction of loss.**—Where facts were admitted showing that employer was within the purview of the Employers' Liability Act held that instruction to diminish damages in proportion employé's negligence bore to that of defendant was correct. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003.

In railroad servant's action for injuries while working on defective dirt spreader, special charge held properly refused, on ground facts detailed related, not to contributory negligence, but to absolute defense of assumed risk while charge, in concluding, predicated reduction of damages on any contributory negligence. *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

An instruction as to cooling time, in an action for tarring and feathering plaintiff, in which there was shown, in mitigation of damages, a series of unpatriotic acts by plaintiff, held even if authorized by any evidence, not to make it clear that time for cooling should be computed from the last act of provocation. *Walker v. Kellar* (Civ. App.) 236 S. W. 796.

A charge, practically in the language of the statute, as to diminution of plaintiff's damages if he be found guilty of contributory negligence, held unobjectionable. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

343. **Injuries to the person.**—In minor's action for injuries at crossing, charge on damages held correct, and not objectionable as not permitting jury to award plaintiff sum, paid presently, less than he would be entitled to when 21. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In action for personal injury, instruction not limiting time for which damages might be allowed for plaintiff's lessened earning capacity, in view of evidence failing to show permanent lessening of earning capacity, held erroneous. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

In a servant's action for injury, where there was evidence of permanent injury, but none of diminished future earning capacity, the charge should be so framed as to definitely submit the different elements of damages to jury, and to exclude all improper elements tested by the pleadings and evidence. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

Where injured passenger sought general damages, but not damages for loss of time or diminished earning capacity, and testified he could no longer work because of injuries received, instruction, submitting what amount would compensate him should have been followed by limitation, precluding consideration of whether plaintiff sustained damages by loss of time or diminished earning capacity; the evidence being insufficient to sustain recovery for damages for loss of time. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

347. **Injuries resulting in death.**—In an action by minor children for the death of their mother, an instruction on the measure of damages for loss of nurture, care, and education held proper. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

An instruction on the measure of damages for the death of child, allowing the jury to assess a fair compensation for the pecuniary loss sustained, held not improper because it did not specifically authorize a deduction for his maintenance during minority. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

In a mother's suit for death of a minor daughter, an instruction defining pecuniary benefits as including kindness and attention of deceased held not erroneous as permitting the assessment of damages of a sentimental nature. *Houston Electric Co. v. Flattery* (Civ. App.) 217 S. W. 950.

Omission of the words "and did expect" from the instruction as to damages for death of plaintiff's son, that the jury might consider the pecuniary benefit that plaintiff had a reasonable right to expect, and did expect, would eliminate a possibility of misconstruction by the jury. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

348. **Injuries to property.**—It was proper in a suit for damages resulting from street improvement to instruct the jury to find the reasonable market value of the property prior to the beginning of the improvements and also just after their completion, leaving the jury to an unlimited field of inquiry and the correct standard of values to work a verdict. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

In action for damages to automobile, where there was no prayer for damages for depreciation, an instruction, stating the cost of repairs, and not the depreciation, was the measure of damages, held proper. *W. F. Norman & Sons v. Clark* (Civ. App.) 221 S. W. 235.

In an action for injuries to a shipment of cattle where there was testimony that the railroad company refused to allow the owner's agents to care for animals down in the cars, and that at another point three cars were roughly handled in switching, a requested charge restricting recovery to the three cars was properly refused; there being further testimony that other cars were roughly handled. *Ft. Worth & R. G. Ry. Co. v. Ellis* (Civ. App.) 225 S. W. 409.

In shipper's action, where the railway's right to have the jury exclude from the amount of damages found the usual and ordinary losses from shipment or those resulting from the condition of the cattle was safeguarded by the general charge, the carrier was not entitled to a specific instruction, which required the jury to find no damages whatever if they should believe that the injuries were caused in part by impoverished condition of the cattle unless they could separate such damages from those accruing from the negligence of the carrier; for the requested instruction was incorrect and misleading. *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891.

If plaintiff's crops had not matured and were not ready for harvesting at the time of their overflow, the charge should be so framed that the expense of cultivation should be taken into consideration, as well as that of harvesting; also the charge should guard against assessment of any damages for permanent injuries for any period barred by limitation. *Payne v. Cummins* (Civ. App.) 232 S. W. 1118.

349. Breach of contract.—In action for balance under contract where defendant made unconditional tender of a smaller sum, instructions precluding recovery of anything except the amount sued for was error. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

350. — Contract of carriage.—In action for delay in shipment of cattle, court properly submitted shrinkage in weight as an element of damage, where there was evidence as to what the weight should have been on the market had they been transported at the usual time, and as to what the cattle actually weighed when sold on the market. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

In an action against a transfer company for damages to household goods, an instruction held erroneous as in effect authorizing a recovery for the value of the goods plus the difference between the market value before the damage and after the repair. *Empire Transfer & Storage Co. v. Botto* (Civ. App.) 232 S. W. 347.

361. Exemplary damages.—Plaintiff's requested special charge relative to exemplary damages obligating the jury to assess the amount at not less than would be reasonably proportionate to the amount of actual damages, was properly refused. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

III. APPLICABILITY TO PLEADINGS AND EVIDENCE.

362. Abstract instructions in general.—Abstract instructions are properly refused. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

Trial courts are required to so instruct juries that the juries may exercise their judgment of cases on the facts under the law, and not independent of the law, and so as to create in their minds a proper conception of the law applicable to the particular case, and shut out of their minds, so far as possible, whatever is calculated to import a misconception of legal requirements as to liability. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

It is not error to refuse requested charges which are clearly on the weight of the evidence, or are abstract and would confuse rather than assist the jury. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

363. Application of instructions to case in general.—In action for damage to cattle in transit, evidence and issues having no reference to depreciation by crowded condition of pens at destination, instruction that jury should not consider any damage so resulting was properly refused. *Panhandle & S. F. Ry. Co. v. Crawford* (Civ. App.) 198 S. W. 1079.

In an action for rent, where defendant alleged that he had surrendered the premises to the plaintiff and that plaintiff had taken possession thereof and there was evidence pro and con, court properly gave an instruction stating what would constitute a resumption of possession and control. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

In an action on a fire policy, where there was no pleading or evidence concerning the matter, the court did not err in refusing a charge upon the question of friendly or hostile fire. *Northwestern Nat. Ins. Co. v. Westmoreland* (Civ. App.) 215 S. W. 471.

In action on fire policy, in absence of pleading and proof to support charges as to whether fire was friendly or hostile, they were properly refused. *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796.

Where plaintiffs, seeking cancellation of oil and gas lease, did not present issue of want of mental capacity as independent ground for cancellation, while evidence was insufficient to raise such issue, trial court erred in charging that, if plaintiff husband was mentally incapable, the contract was void from the beginning, and the jury should find for plaintiffs. *Turner v. Robertson* (Civ. App.) 224 S. W. 252.

In an action for assault and battery, court did not err in refusing the plaintiff's request to charge that, if plaintiff by his words and acts merely provoked the difficulty,

and under such provocation defendants injured plaintiff, the defendants would not be justified, and they should find for the plaintiff, where under the pleading and evidence verbal provocation was alone in issue. *Haverbekken v. Johnson* (Civ. App.) 228 S. W. 256.

364. Pleadings and issues.—Trial court is not warranted in charging upon affirmative defense not specially pleaded. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918. Instructions relating to issues not presented by the pleadings are properly refused. *Smith v. Bryan* (Civ. App.) 204 S. W. 359.

Refusal to give special instructions was not error, where they were not appropriate in connection with the issues, and would have tended only to confusion in the consideration of those issues. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

A litigant is entitled to have his defense or cause of action affirmatively submitted, and a general denial is sufficient to require the submission of any defensive issue raised by the evidence which is not required to be specifically pleaded. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

366. — Nature of action or issue in general.—An instruction that slander or defamation is a defamation expressed by spoken words by one to another, tending to injure the reputation of the one spoken of, and thereby expose him to public hatred, contempt, or ridicule or financial injury, or to impeach the honesty, integrity or reputation of the party spoken of, held not broader than the petition. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

In contest of will making testator's wife principal beneficiary, on ground of undue influence and mental incompetency, court's refusal to define the part of testator's property which was community property held proper; such matter being foreign to the issues. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

368. — Actions relating to property and for injuries thereto.—Where cold storage warehouseman based defense upon negligent manner in which plaintiff hung his meat, claimed to have been injured, in the room, there was no error in submitting it to jury as pleaded. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918.

In suit against railroad to recover for horse killed by its motorcar within city limits, an instruction submitting question whether city was incorporated as required by law, an issue not raised, was misleading. *Texas City Terminal Co. v. McGee* (Civ. App.) 201 S. W. 673.

Defendant's requested charge that it was not required to operate its plant to suit the extraordinary habits, tastes, or sensibilities of others was properly refused, claim to the contrary not being made by plaintiff's pleading or evidence. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

369. — Contracts and actions relating thereto in general.—Where plaintiff pleaded contract consummated by correspondence, etc., court did not err in refusing defendant's requested charge that there could be no recovery unless contract was made in certain telephone conversation. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

In action for balance alleged to be due under contract, instruction that, if defendants defaulted in payment before cancellation of the contract, to find for plaintiff was error in the absence of a pleading to support it. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

In suit for services rendered deceased, refusal of requested instruction as to promise of deceased to compensate plaintiff by provision in will, matter not in issue, was not error. *Jones v. Schnaufer* (Civ. App.) 202 S. W. 367.

Where oil and gas lessee in the lessors' suit for cancellation did not allege correspondence between him and lessor, which preceded execution of the lease, the trial court did not err in refusing to declare the legal effect of such correspondence, and to submit the issue to the jury. *Turner v. Robertson* (Civ. App.) 224 S. W. 252.

In an action for procuring an exchange of lands a petition answered by general denial, held sufficient basis to invoke submission of a special charge presenting defendant owner's theory that he effected an exchange of the land himself. *McElroy v. Dobbs* (Civ. App.) 229 S. W. 674.

370. — Contracts of carriage.—In consignee's action for damage to bananas in transit, defended on ground that conductor obeyed instructions of messenger accompanying shipment, it was error to fail to submit issue raised by such defense. *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606.

In action for delay in live stock shipment, where, under issues submitted, no damage arising after the delivery of the shipment to certain stock yards, could have been considered, it was proper to refuse carrier's requested charges that its liability terminated upon delivery to stockyards. *Gulf, C. & S. F. Ry. Co. v. Gross* (Civ. App.) 204 S. W. 693.

In an action for damage to a shipment of cattle, an instruction on detention of cattle in cars without food, water, or rest was error, where there was no such issue raised by the pleadings. *Schaff v. Holmes* (Civ. App.) 215 S. W. 864.

In action against receivers and railroads for damage to a shipment of cattle, charge not requesting finding as to whether either receiver was guilty of the acts charged, and whether such acts were negligence and the proximate cause of the injuries complained of, held erroneous, under this article, as too broad, as permitting the jury to consider elements of negligence not pleaded, and as not confining issues to specific negligence charged. *Lancaster v. Tudor* (Civ. App.) 222 S. W. 990.

372. — Contracts of sale and actions relating thereto.—An instruction, in action for price of goods, authorizing the jury to find that there was no contract, on the ground that there was no meeting of minds as to how the price should be fixed, is properly refused, plaintiff by his petition alleging in the alternative that, if it be found the contract was not as claimed by him, then he seeks a recovery on the contract as claimed by defendant. *Smith v. Duncan* (Com. App.) 209 S. W. 140.

374. — Actions on notes.—In suit on promissory note and to foreclose vendor's lien, in view of pleadings, held that court properly submitted to jury issue whether it was understood between plaintiff and defendant, at time of execution and delivery of deed and note, that defendant should assume payment of taxes. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

In suit on note, where defendant pleaded that plaintiff had bought realty from him, and that he was entitled to additional credit, and asked that the note be canceled, and plaintiff alleged that deed was a mortgage, and it was shown that plaintiff had reconveyed to defendant who had recorded the deed, the issue whether deed was absolute or a mortgage was not in the case, and it was error to submit it to the jury. *Emerson-Brantingham Implement Co. v. Gartin* (Civ. App.) 200 S. W. 604.

376. — Injuries in operation of railroads in general.—A complaint, in an action for death alleging that deceased was rightfully upon the track in the night, justified an instruction suggesting that deceased "was on the motorcar, or standing or lying down near." *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

Refusal of an instruction drawing distinction as to whether defendant's street car ran into the automobile or the automobile ran into the street car was not error, where the petition was broad enough to cover either phase of the case. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

In an action by one injured while riding in an automobile which collided with a street car, an instruction submitting negligence of defendant held within the pleadings. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

Plaintiff shipper having alleged his injuries were caused by a certain negligent act of "one of the train crew," it was improper to submit the issue whether or not some other employé of defendant was guilty of the act of negligence charged. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In action against street railroad for injuries to jitney passenger riding on running board, when jitney collided with street car, the pleading held to have justified charge submitting issue of jitney driver's negligence, where court directed finding that passenger was negligent in riding on running board, since jury could not have understood such charge to have reference to violation of ordinance by driver. *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

378. — Injuries to employés.—In employé's action for injuries caused by railway motorcar running into open switch, instruction as to defects or insufficiency of appliances, etc., though inapplicable, held not misleading. *St. Louis Southwestern Ry. Co. of Texas v. McCallister* (Civ. App.) 198 S. W. 1082.

In servant's action for injuries occasioned by the improper turning of a switch by another servant, in submitting the question of negligence as to turning a switch the charge should be confined to such single servant, and submission of question whether defendant, "through its employés or agents," was guilty of "negligence" in turning the switch, etc., was improper. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

379. — Contributory negligence.—In an action against a street railroad for wrongful death in crossing accident, it was proper to refuse an instruction that deceased was guilty of contributory negligence if he failed to look and listen for the approaching street car, where such act of contributory negligence was not pleaded. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In an action for injuries by driving over an unsafe place between railroad tracks, an instruction that, if plaintiff failed to use ordinary care, she would be guilty of negligence was properly refused where the contributory negligence pleaded was that she did not drive in a place of safety. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

In such action, an instruction that plaintiff was guilty of contributory negligence if she paid no attention to where she was driving was properly refused as not within the issue. *Id.*

Refusal of instructions, submitting contributory negligence not pleaded, held proper. *Northern Texas Traction Co. v. Martin* (Civ. App.) 224 S. W. 319.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman when a defective car ahead of him dumped coal on the track, his negligence in stepping or falling on the pin lifter between cars held not insufficiently pleaded to require submission of his negligence in doing so. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

381. — Assumption of risk.—In action for injuries sustained when motorcar ran into open switch, instruction as to when defense of assumption of risk was not available, though correct, held erroneous, because inapplicable under the pleadings. *St. Louis Southwestern Ry. Co. of Texas v. McCallister* (Civ. App.) 198 S. W. 1082.

In a railway employé's action for injuries sustained while alighting from a moving train, assumed risk as an extraordinary incident to the employment was properly withheld from the jury where not pleaded. *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708.

In a servant's action against a master for personal injury, where the defense of assumed risk was not pleaded, the court was not in error in failing to submit that issue. *Texas & Pacific Coal Co. v. Ervin* (Civ. App.) 212 S. W. 234.

Where there was no question submitted by the court requiring a definition of assumed risk or a charge on that subject, a special charge, directing the jury that if they believed plaintiff assumed the risk by sawing without a guide they should return a verdict for the defendant on the "issues submitted in reference thereto," was misleading and erroneous. *Worden v. Kroeger* (Com. App.) 219 S. W. 1094.

382. — **Amount of recovery.**—Where shipper claims damages to stock for time confined in pens because carrier did not ship them on certain train, it was error to instruct generally that plaintiff's measure of damages would be difference in market value in condition they were when they reached the pens and condition they should have been in had there been no delay, where shipper had put stock in pens days before they were to be shipped. *St. Louis Southwestern Ry. Co. of Texas v. Stinson* (Civ. App.) 204 S. W. 476.

In an action by one tarred and feathered and chased out of the county, where the damage alleged was loss of profits caused by inability to give his personal services to his business, a charge, authorizing the jury to allow him the "loss sustained in his business as the direct result of his so being driven from his home and business," was erroneous, as authorizing recovery of losses not pleaded. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

383. **Facts and evidence.**—It is error to submit an issue which finds no basis in the evidence. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 211 S. W. 597; *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

The court was not warranted in submitting requested charges upon issues not raised by evidence. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

The refusal of a request based on a theory in conflict with the uncontradicted testimony is proper. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

A requested instruction was properly refused, where there was no proof upon which to base it. *Missouri Iron & Metal Co. v. Cartwright* (Civ. App.) 207 S. W. 397.

It is error to submit an issue to the jury in reference to which there is no evidence, or to withdraw an issue from the jury raised by the evidence, if in the first case the jury were probably misled, or if the issue withdrawn was material. *Crawford v. Thos. Goggan & Bros.* (Civ. App.) 217 S. W. 1106.

Charge need not on request be given on an issue as to which there is not sufficient evidence to require its submission. *Hines v. Parry* (Civ. App.) 227 S. W. 339.

385. — **Evidence excluded or withdrawn or improperly admitted.**—The admission of evidence inadmissible under the pleadings did not authorize the court to submit the issue raised by such evidence. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

386. — **Nature of action or issue in general.**—Judgment for defendant will be reversed where the case was submitted to jury on the theory of estoppel, while the evidence raised the issue of novation. *Grosman Co. v. F. De Witt & Son* (Civ. App.) 198 S. W. 332.

Where trial judge sought to leave to the jury, not only the findings of facts, but also whether in law they were sufficient to render further relation of husband and wife insupportable, he should have carefully applied the law to the facts, and not simply announced abstract propositions of law in his charge. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

387. — **Actions relating to property in general.**—In action for diverting surface water upon plaintiff's land, held that court should submit issue as to injury being caused by other parties when evidence tends to show such fact. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

Instruction defining a trust held not inapplicable to the facts which raised issue of appointing defendants as agents or trustees to invest money deposited with them. *Murphy-Bolanz Land & Loan Co. v. McKibben* (Civ. App.) 221 S. W. 650.

A requested instruction that the course and distance from a located corner should control rather than marked trees, not called for by the field notes, was properly refused, where the only evidence locating the beginning point was the testimony of an interested witness, which the jury might have disbelieved. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

Where the defense to trespass to try title was adverse possession, and there was no evidence that defendants entered on the land expecting to acquire it from the state, it was not error to refuse to submit the latter issue. *Padgett v. Hines* (Civ. App.) 224 S. W. 558.

388. — **Actions for torts in general.**—Evidence held to warrant charge that, if there was no contract by which mule was turned over by plaintiff to defendant, there was want of probable cause on part of defendant. *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

Evidence held not to warrant charge that, if contract by which defendant claimed to have acquired mule was made, it would constitute probable cause for prosecution for theft of mule. *Id.*

In lessee's action for wrongful dispossession, there being nothing to show whether he could under his lease sublet the premises, it was not error to refuse to submit whether he had arranged to sublet the premises. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

Where defendants had sequestered and replevied goats in an action for conversion, it was not error to refuse to instruct for defendants if the jury believed that the goats were taken from a certain range in Mexico by plaintiff's brother by unlawful means as against an assignment that the undisputed testimony showed that the goats were so taken. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

389. — **Negligence in general.**—Where negligence was shown beyond dispute, and defendants did not concede same, thereby eliminating such issue, they cannot complain that instructions submitted too many issues, where there was evidence justifying their submission. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

390. — **Personal injuries in general.**—In action for injuries sustained by pedestrian run down by an automobile, held, under the evidence, that court did not err in refusing to give special charge submitting issue whether chauffeur was an employé or servant of defendant. *Burnett v. Anderson* (Civ. App.) 207 S. W. 540.

392. — **Injuries to passengers.**—In action for injuries while attempting to board street car, it was error to refuse instruction, reciting that minor "attempted to catch" car, where evidence showed that she had actually seized handholds and put her foot on step. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

In an action by a passenger, who, when struck by an alighting passenger, fell as she was mounting the step of the car, a special charge on the duty of carrier to assist passengers held properly refused under the evidence, as the act of the other passenger was an unexpected occurrence. *Eird v. Schaff* (Civ. App.) 206 S. W. 711.

In action for injuries sustained when leaving train by person accompanying passengers, instruction on effect of ignorance of brakeman of plaintiff's intention to alight held properly refused, in absence of evidence on which to base it. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

393. — **Injuries to servants.**—In a servant's action for injuries sustained while attempting to board a switch engine, an instruction, if the engineer increased speed upon observance of semaphore and did not see plaintiff, to find for defendant, was erroneous; there being no testimony that the speed was increased because of the semaphore. *Texas & P. Ry. Co. v. Wiley* (Com. App.) 206 S. W. 833.

394. — **Assumption of risk.**—In action for injuries sustained when motorcar ran into open switch, instruction as to when defense of assumption of risk was not available, though correct, held erroneous, because inapplicable to the evidence. *St. Louis Southwestern Ry. Co. of Texas v. McCalister* (Civ. App.) 198 S. W. 1082.

An instruction that a servant is presumed to understand the risks incident to his riding on top of the tender or tank of an oil-burning locomotive held improper, under the evidence. *Southern Pac. Co. v. Hazelbusch* (Civ. App.) 200 S. W. 268.

Where injured servant's testimony disclosed that he was legally chargeable with knowledge of some of the dangerous conditions, requested instruction that he did not assume the risk if he acted under orders without time to appreciate the danger was improper. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

In an employé's action for personal injury, a charge on assumed risk should not be given, where there was no evidence on which to base it. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

In a railway employé's action for injuries sustained while alighting from a moving train which failed to stop as was customary, it was not necessary to submit the law of assumed risk as an ordinary incident to the employment, where there was no evidence thereof. *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708.

395. — **Contributory negligence.**—Refusal of instruction on contributory negligence of servant injured was not error where there was no evidence of such negligence. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967; *Gulf, C. & S. F. Ry. Co. v. Carpenter* (Civ. App.) 201 S. W. 270.

Where, if plaintiff was guilty of contributory negligence, it occurred from his action in approaching a railroad crossing, charge on imminent peril in reference to plaintiff urging his mules, in trying to cross the track just ahead of the car held error. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

A charge that it was the duty of the servant to have acquainted himself with the general duties of his position, etc., held improper, where there was no evidence as to any neglect of his duties, he being an electrician and under no duty to guard the premises against explosions. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

In action for injuries sustained by being struck by interurban car, while endeavoring to signal it to stop, a requested instruction, that plaintiff could not recover if she knew that the car was a special car and did not make local stops, was properly refused, where there was no evidence that plaintiff had such knowledge. *Texas Electric Ry. v. Hooks* (Civ. App.) 211 S. W. 654.

Instructions in a negligence case need not refer to contributory negligence, where there is no evidence raising the issue. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

In an action for injuries sustained by plaintiff, struck by train at a crossing while riding in an automobile driven by another, an instruction that the failure of another passenger to observe the approaching train was contributory negligence imputable to plaintiff held properly refused, as placing upon such other passenger the duty of stopping the car, when it was not shown that he had any control thereof. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

Such instruction held properly refused as not based upon evidence sufficient to raise the issue of joint enterprise. *Id.*

In an action for the death of an automobile driver at an interurban crossing, where there was no contention that the driver did not have a right to be where he was and the evidence barely supported an inference of freedom from contributory negligence, it was misleading to give a correct charge that the driver had a right equal to the interurban company to use the street. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

396. — Discovered peril.—In action for injuries sustained by pedestrian run down by an automobile, special requested charge on discovered peril held not erroneous, as against objection that there was no evidence that chauffeur saw plaintiff. *Burnett v. Anderson* (Civ. App.) 207 S. W. 540.

In an action by a motorist struck at a crossing, the submission of issue of discovered peril held justified, the fireman testifying that he saw the automobile approaching the crossing. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

397. — Contracts and actions relating thereto in general.—Evidence showing that agent had no express authority to agree to deliver threshing machine parts within specified time, court should have given a special charge submitting question of implied authority. *J. I. Case Threshing Mach. Co. v. Morgan* (Civ. App.) 195 S. W. 922.

Where there was no evidence of ratification of an agent's act, it was error to instruct the jury as to such issue. *Id.*

Instruction on question of brokers' agent being the agent of tenant in procuring a lease for landlord was properly refused, where there was no evidence on such question. *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170.

The jury may not be authorized to find that there was no meeting of minds, but should be left to find, under all the evidence, what the real contract was, there being no contention that a contract was not made, especially where the contract has been executed by one party, and the controversy is as to a particular term of the contract. *Smith v. Duncan* (Com. App.) 209 S. W. 140.

A general charge purporting to instruct particularly on question of abstract law cannot be challenged on the ground that the evidence as to the issue, which was one relating to the existence of an alleged lost deed, was insufficient to take the matter to the jury. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

398. — Contracts of carriage.—In action for injuries to cattle from delay in transit and bedding of car with cinders, held, under the evidence, court properly refused to charge that jury should not consider shrinkage in weight because no damage was shown by shrinkage for which defendant was liable. *Panhandle & S. F. Ry. Co. v. Brown* (Civ. App.) 198 S. W. 172.

Evidence held to warrant instruction on issue of whether railroad company exercised ordinary care to avoid unusual and unreasonable delay in live stock shipment. *Baker v. Brown* (Civ. App.) 210 S. W. 312.

In action against carrier for injuries to mules in transit, instruction presenting issue of carrier's negligence in not preventing injury to mules caused by proper vice or propensities of animals held unsupported by evidence. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853.

Refusal of instruction as to the act of God in destroying the cabbage shipped was not error, where the decayed condition of the cabbage was not traced to low temperature, and there was no fact sustaining such a theory. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son* (Civ. App.) 212 S. W. 530.

Refusal of instruction asked by initial carrier as to the freezing of the cabbage was not error, where there was no evidence tending to show that the cabbage had frozen. *Id.*

In action for delay in delivery of live stock shipment, where there was no testimony of any contract to transport the shipment to place of its destination, the court erred in submitting that issue and authorizing a recovery thereon. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In a shipper's action for injuries to live stock, it was not error to refuse to instruct that there was no evidence of the kind or character of the animals killed, and in no event to find value in excess of the cheapest grade of animals in the shipment, where there was evidence that the dead animals were an average of the shipment. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Civ. App.) 212 S. W. 981.

In a shipper's action for injuries to live stock, it was not error to refuse to instruct that defendant was not liable for injuries occurring while the cattle were being switched by another road at destination, where such road was not acting as a connecting carrier, but as defendant's agent to do the switching. *Id.*

In an action against initial carrier and connecting carriers for loss of cattle, the court erred in submitting an issue as to the liability of the connecting carriers, where the evidence was undisputed that the cattle were lost while in the hands of the initial carrier. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

In a shipper's action for damages to a shipment of hogs, submission of negligence on the carrier's part in failing to water the hogs held erroneous in view of the shipping contract which required the caretaker to look after that matter. *Panhandle & S. F. Ry. Co. v. Griffith* (Civ. App.) 226 S. W. 638.

400. — Contracts of sale and actions relating thereto.—In action on note defended on ground of breach of warranty, in the absence of evidence that alleged warranty was mere statement of opinion, instruction that defendant was not liable if

the alleged warranty was mere statement of opinion was erroneous. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

In an action for the removal of fixtures, it was error to submit to the jury the question of fraud, accident, and mutual mistake in omitting reference to the fixtures from the contract of sale of the land, where there was no evidence raising such issue. *Alexander v. Anderson* (Civ. App.) 207 S. W. 205.

An instruction that an exhibit on billhead of seller amounted to an offer to sell, and that, if it was communicated to defendant and accepted and the acceptance was communicated to the seller, then the seller became bound to deliver and defendant to accept, held erroneous; defendant's agent having denied receiving any offer to sell or communicated any acceptance, and the exhibit tending to show on its face that the sale was made to a third person. *El Paso Grain & Milling Co. v. Lawrence* (Civ. App.) 214 S. W. 512.

Where defendant had sequestered and replevied goats for which plaintiff sued in conversion, it was not error to refuse to instruct as to reservation of title as security for purchase money, under art. 5654, the evidence showing a delivery to vendee on the understanding that title should not pass until payment made. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

401. — **Actions on insurance policies.**—An instruction concerning an understanding that a premium note should not be paid in any event, and that the execution of the note would keep alive a life insurance policy, and as to insurers making insured believe it would waive its contract other than as therein provided, was erroneously given where there was no testimony of such matters. *Ætna Life Ins. Co. v. Dunken* (Civ. App.) 204 S. W. 241.

Absence of evidence by a fire insurer as to value of remnant of building and cost of reconstruction did not preclude the insurer's right to a correct charge on total loss, and submission of the issue whether a reasonably prudent owner, uninsured, desiring to reconstruct, would utilize the remnant as a basis therefor. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

In action on fire policy, where there was no evidence that plaintiff procured the destruction of the property, refusal of requested special charge, submitting such question, was proper. *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796.

407. — **Extent of injury and amount of recovery.**—Where evidence showed that automobile injured in shipment was not valueless after being repaired by carrier, instruction based on value "in the event of total destruction," held erroneous. *Houston & T. C. Ry. Co. v. Iversen* (Civ. App.) 196 S. W. 908.

In railroad's condemnation proceedings the court properly refused a requested charge that the jury should not consider injuries, if any, which the owners sustained in common with the community in general, where there was no evidence that the community generally sustained injury. *Gulf & Interstate Ry. Co. of Texas v. Stephenson* (Civ. App.) 212 S. W. 215.

In an action for breach of a contract of lease, it was error to instruct that plaintiff was entitled to the reasonable market value of two-thirds of the grain and three-fourths of the cotton which plaintiff would in reasonable probability have grown, where there was no evidence that plaintiff was to pay a part of the crops, and no evidence showing the kind of crops the plaintiff expected to plant and grow, or the price or value of farm products during the year. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

The words "physical pain" do not include mental distress, but mean bodily suffering, although a strong mental emotion may produce bodily injury and cause bodily suffering, so that an instruction allowing recovery for physical pain and also mental distress was error, where there was evidence of mental distress, but not of physical pain. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

In an action for seller's breach of sale contract, it was not error to refuse to submit the issue of buyer's diligence to minimize and lessen the damages, where the evidence made no such issue; the contract being for immediate delivery and the evidence showing prompt purchasing at best obtainable price immediately after breach. *Russell v. Saffold* (Civ. App.) 225 S. W. 381.

In action involving damages for loss of use of personalty for over two years, court should have given requested charge that the jury should not base their estimate on the daily, weekly, or monthly value of the use, but determine the value of the use for the entire period, though testimony as to monthly value had been admitted without objection, and refusal was not justified, because charge was on weight of evidence. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

408. **Instructions excluding or ignoring issues, defenses, or evidence.**—A special charge ignoring an issue of fact clearly presented by the evidence is properly refused. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

410. — **Nature of action or issue in general.**—In trespass to try title, court erred in not giving an instruction requested by a party claiming by limitations merely because it omitted to require a finding of cultivation, use, or enjoyment of the property, shown by undisputed testimony; the only issue being whether or not the use was adverse. *Cass v. Green* (Civ. App.) 224 S. W. 938, opinion supplemented 227 S. W. 238.

413. — **Personal injuries in general.**—In action against interurban railroad for injuries at crossing, road's requested charge, which would have eliminated every issue save that of discovered peril, was properly refused. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In action for injuries in collision, where plaintiff alleged defendant was violating Pen. Code 1911, arts. 815, and 816, held error to submit only recovery under article 815. *Figueroa v. Madero* (Civ. App.) 201 S. W. 271.

Instructions in action for the death of one run down by a train held erroneous in depriving jury of consideration of fact that engineer sounded alarm signals on discovering deceased's presence on the tracks. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

In action for death of plaintiff's decedent struck by train, it was not error to refuse special charge that, unless jury believed that decedent was struck while upon road crossing, they could not find for plaintiff; such instruction ignoring issue of discovered peril, and requiring finding for defendant, unless decedent was at crossing when struck. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

In action for injuries from being run over by defendant's automobile, a charge on plaintiff's contributory negligence held not affirmatively erroneous, as taking from the jury's consideration the defense that the accident was unavoidable. *Thomas v. Corbett* (Civ. App.) 211 S. W. 806.

It was not error to refuse instructions ignoring plaintiff's claim of mental incapacity urged against settlement for injuries as defense to action for such injuries. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

In action for death of jitney car passenger in collision with train at crossing, where there was evidence raising issue of railroad's negligence in failing to maintain watchman at crossing, requested charge, eliminating such issue, held properly refused. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

In action for death of jitney car passenger in collision with train, instruction on damages held objectionable in eliminating issues of negligence and contributory negligence, and authorizing recovery on mere proof of damage sustained. *Id.*

In an action for the death of an oilmill employe, killed by a railroad's car during switching operations on the mill's spur track, instruction held not erroneous, as ignoring the fact that the railroad's employes had been instructed to proceed with the switching, or as ignoring the effect which the information, given by a brakeman to decedent when the operations were begun, had upon the railroad's liability. *Jefferson & N. W. Ry. Co. v. Blair* (Civ. App.) 224 S. W. 546.

In an action for damages for assault and battery, a charge that, if, after the original demonstration ceased, defendants or any of them assaulted plaintiff, it would not be justified, was properly refused as being too broad, where there was evidence that plaintiff attempted to attack some of the defendants after the original alleged hostile demonstration. *Haverbekken v. Johnson* (Civ. App.) 228 S. W. 256.

414. — **Contributory negligence and assumption of risk.**—A charge that, if plaintiff knew of the defects in the machinery and appliances and failed to notify the master and continued in the service, he assumed the risk held properly refused, because it ignored defendant's negligence in furnishing a dangerous place to work, the danger being unknown to plaintiff. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

An instruction that a servant assumed the risks and dangers usually and naturally incident from his employment, but which ignores the rule that he does not assume risks due to the master's negligence, is improper. *Id.*

In action by employe injured in handling heavy barrel unaided, plaintiff's requested charge that he did not assume the risk by remaining in defendant's employ if his superiors knew of the manner of doing and danger from the work was faulty in ignoring the defense that the injury resulted from a danger ordinarily incident to the business. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

Where injured servant's testimony disclosed that he was legally chargeable with knowledge of some of the dangerous conditions, it was error to charge that he could recover if the master was negligent. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

In action for death in collision at crossing, instruction on railroad's negligence in failing to keep watchmen at crossing was erroneous, where it authorized recovery upon a finding of such negligence as the proximate cause of the accident, irrespective of a finding of contributory negligence. *Chicago, R. I. & G. Ry. Co. v. Shockey* (Civ. App.) 214 S. W. 716.

In an action for negligence in failing to provide an adequate force for the work, defended on the ground of assumed risk, it was reversible error to give a charge ignoring the elements of article 6645, that the defense of assumed risk could not be available where plaintiff's foreman knew of the defect or danger prior to the injury. *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 223 S. W. 490.

415. — **Discovered peril.**—In action for death at crossing special charge on contributory negligence as proximate cause of injury, which ignored issue of discovered peril and inability to exercise ordinary care because of terror, was not erroneous, where such issues were not pleaded in answer to plea of contributory negligence. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

416. — **Injuries to passengers.**—An instruction predicating liability on failure to stop a train to let plaintiff off, without taking into consideration whether failure to stop was proximate cause of injury, was erroneous. *Panhandle & S. F. Ry. Co. v. Kornegay* (Com. App.) 227 S. W. 1100.

417. — **Injuries to servants.**—In an action by a switchman to recover for personal injuries, requested charges which ignored the issue of negligence of a fellow

switchman held properly excluded. *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283.

In a railway employé's personal injury action, requested charges, ignoring the negligence of plaintiff's assistants were properly refused. *Payne v. Harris* (Civ. App.) 228 S. W. 350.

418. — Contracts and actions relating thereto in general.—Failure to submit issues relating to validity of release set up by defendants held not to destroy plaintiff's right to have such issues submitted and warrant special charges ignoring them. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

In a suit to recover on notes given in purchase of a silo, it was not error to submit the question whether the silo complied with the written guaranty, ignoring a verbal guaranty relied on by defendant, where there was no material difference between the two guaranties. *Dark v. Indiana Silo Co. of Texas* (Civ. App.) 204 S. W. 245.

Instruction that, if seller sent bill of lading and draft to bank other than agreed on, causing delay in delivery and accrual of demurrage, buyer could refuse to accept carload unless plaintiff paid demurrage was error, where there was evidence, ignored by such instruction, that buyer agreed to accept and pay demurrage upon a rebate in price. *Lillard Milling Co. v. Brooks & Few* (Civ. App.) 204 S. W. 686.

In action on fire policies, where pleadings and evidence raised issues whether adjuster's agreement covered only property inventoried or all property insured, court properly refused insurer's charge that, if jury found for plaintiff, they should fix amount of his recovery in accordance with adjuster's agreement. *Westchester Fire Ins. Co. v. Goodman* (Civ. App.) 205 S. W. 142.

In an action for rescission of a conveyance of land which plaintiff exchanged for an interest in an oil and gas lease, where plaintiff asserted defendant's failure to grant an oil and gas lease was fraudulent, a charge which ignored the right of plaintiff to rescind, etc., and presented only defendant's claim that he was to receive an additional consideration for the lease, was properly refused. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

Where fraternal insurer defended on the ground that member met his death while in violation of law, etc., a charge that, if it could not be determined whether the member had made or attempted to make an unlawful assault, and in consequence thereof met his death, verdict should be for plaintiff, was erroneous, authorizing a verdict for plaintiff without requiring a finding on the defensive issue. *Sovereign Camp, Woodmen of the World, v. Bailey* (Com. App.) 222 S. W. 550, reversing judgment (Civ. App.) 183 S. W. 107.

Where there was evidence that insurer's agent had waived tender of the premium by declining an offer to pay it unless an unauthorized bonus was also paid, a requested charge that plaintiff could not recover unless the money was actually tendered and refused by an authorized agent was properly refused as omitting the issue of waiver. *American Nat. Ins. Co. v. Allen* (Civ. App.) 226 S. W. 823.

A requested special charge defining tender as an actual production of the money and offer of it was properly refused as ignoring the issue of waiver of the actual production of the money, where there was evidence to support a finding of such waiver. *American Nat. Ins. Co. v. Allen* (Civ. App.) 226 S. W. 823.

420. — Damages and amount of recovery.—In action for death of plaintiff's son, instruction that jury might consider net value of his services during minority, without requiring consideration of plaintiff's expenses on his account during minority, held erroneous. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

In action by tenant for landlord's failure to permit him to cultivate rented lands, instruction allowing as damages reasonable cash market value of plaintiff's share of crops he might have raised thereon held to erroneously pretermitt consideration of expense of making and gathering crops. *Butler v. Perdue* (Civ. App.) 199 S. W. 1176.

IV. CONSTRUCTION AND OPERATION.

422. Construction of particular instructions.—Instruction not to consider testimony of witness in determining issue of plaintiff's right to recover, but only on issue of amount of plaintiff's recovery, if any, held not to forbid consideration of witness' testimony on issue of credibility of plaintiff or a witness. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

In action for personal injuries sustained by plaintiff pedestrian when run down by an automobile, driven by defendant's chauffeur, held, that court's main charge was not subject to objection that it submitted issue of discovered peril. *Burnett v. Anderson* (Civ. App.) 207 S. W. 540.

In an action by a wife and her husband for personal injuries sustained by the wife, an instruction permitting recovery for "the reasonable value of lost services to plaintiff in the performance of her household duties," could not be construed to have authorized any recovery in behalf of husband for the value to him for the lost services of his wife. *Ayo v. Robertson* (Civ. App.) 207 S. W. 979.

In action to ingraft parol trust upon deed, instruction as to the effect of the failure of consideration held not to withdraw the question of whether consideration mentioned in deed was in fact paid upon the issue of existence of the trust, but merely instructed jury that, if trust was not intended, the failure to pay the consideration could not in itself have the effect to constitute the transaction one of trust. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

In an instruction as to justification for burial of a body without consent of the widow which stated in the alternative several situations indicating abandonment by the widow and then stated, "and if you further believe" that the burial was made by plaintiff without intending to deprive the widow of her privileges, the last clause qualifies all preceding ones so that the instruction does not deny recovery in certain cases without requiring finding of good faith. *Foster v. Foster* (Civ. App.) 220 S. W. 215.

In action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries to roundhouse hostler, instruction held not to submit question of whether railroad failed to install the ash pan required by Ash Pan Act (U. S. Comp. St. § 8624), as against objection that there was no evidence of such failure, but merely to submit issue as to whether the ash pan was in proper repair. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

424. **Construction and effect of charge as a whole.**—Charge of court should be considered and construed as whole. *Shipley v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 199 S. W. 661.

427. — **Nature of error or omission in general.**—In an action to enjoin the maintenance and operation of a hog ranch and for damages, an instruction defining nuisance as "anything that works hurt, inconvenience, or damage to another, either in his person or in his property," in place of a fuller and correct requested instruction, held not prejudicial error, when considering charge as a whole. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

428. — **Issues and theories of case in general.**—The charge as a whole predicating plaintiff's right to recover on operation of defendant's mill in such manner as to constitute a nuisance, adding to defendant's requested charge, that erection of the building gave no cause of action, the words, "unless in the operation thereof a nuisance was created," was not misleading. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

In seller's action for price, where buyer, in cross-action, sued for damages because of inferior quality of goods, an instruction authorizing a recovery for plaintiff upon finding that goods were delivered as alleged and not paid for, "unless you find for defendant on his cross-action," held not to preclude a recovery for seller, when viewed together with charge as a whole. *Padgett Bros. Co. v. Dorsey* (Civ. App.) 206 S. W. 851.

Objections that an instruction on evidence of a common-law marriage omitted the requirements that the agreement must be for life, and that the cohabiting must be public, are not well founded, where instructions as a whole properly cover such matters. *Bob-bitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

429. — **Negligence in general.**—In an electric lineman's action for injuries, instruction that defendant's foreman informed plaintiff that certain wires were not charged, held not erroneous, in view of the whole charge and in connection with the issues raised by the evidence, as suggesting the existence of a circumstance which the proof showed did not exist. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

430. — **Contributory negligence and assumption of risk.**—In an action for death of a person who, after having alighted from defendant's train, boarded it again, and immediately tried to get off to get to another train, whereby he was killed, instructions construed as a whole held not erroneous as requiring as a prerequisite to a verdict for defendant that the jury find both that deceased left the train without being induced to do so by the porter and that he was guilty of contributory negligence in so doing. *Ft. Worth & R. G. Ry. Co. v. Keith* (Com. App.) 208 S. W. 891.

In a crossing accident case, though the jury in previous paragraphs of the charge were directed to find for plaintiff if defendant was guilty of negligence specified, yet as subsequent paragraphs declared there should be no recovery if plaintiff was guilty of contributory negligence, the charge as a whole was not objectionable. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

435. **Error in instructions cured by withdrawal or giving other instructions.**—Erroneous main charge was not cured by correct special charge in conflict therewith. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

A special charge which is antagonistic upon a material issue to some other portion of the charge is reversible error, although the instruction given in the other portion of the charge is correct. *Lillard Milling Co. v. Brooks & Few* (Civ. App.) 204 S. W. 686.

Erroneous parts of court's charge, complained of, which were rendered harmless by the giving of special charges requested by defendants, appellants, do not require reversal. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

Where, though trial court quoted pleadings, he instructed jury not to consider them as evidence, there was no error. *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796.

436. — **Issues and theories of case in general.**—In action to recover penalties for failure of railway to comply with art. 6592, an instruction to find for the state in either of two alternative contingencies held not cured by a contradictory instruction to find for defendant in one of such contingencies. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393.

Error in a charge denying right of recovery on finding of fact insufficient to bar recovery is not cured by subsequent portions of the charge authorizing recovery without requiring an opposite finding on those facts, since that merely made the charge contradictory. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

A charge which does not embody correct standards by which to determine liability generally vitiates the whole charge, even though the correct standards are elsewhere contained in the charge. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

437. — **Negligence in general.**—In employé's action for injuries caused by railway motorcar running into open switch, instruction as to defects or insufficiency of appliances, etc., though inapplicable, held not misleading, in view of the evidence and the other instructions. *St. Louis Southwestern Ry. Co. of Texas v. McCalister* (Civ. App.) 198 S. W. 1082.

In action against railway for injuries to plaintiff's wife while alighting, submission conjunctively of separate issues of negligence held not to have misled jury to prejudice of plaintiff, in view of disjunctive submission of issues in preceding paragraph. *Shipley v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 199 S. W. 661.

In an employé's action for injuries sustained while alighting from a train, an instruction for plaintiff if the facts relied on by him constituted negligence was not erroneous, as directing a verdict without a finding of proximate cause, in view of other instructions given. *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708.

Instruction that automobile driver was not negligent if he was not driving "at a rate of speed that was dangerous and improper under the circumstances" held erroneous, in that it permitted jury to establish its own standards as to what constituted "dangerous" and "improper" driving, notwithstanding that court in other portion of the charge correctly instructed jury as to what constituted liability. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

In action for death of pedestrian struck at crossing, error in charging jury that the railroad was required to use great care and prudence in operating trains held not cured by subsequent instructions. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Com. App.) 228 S. W. 159.

438. — **Contributory negligence.**—A portion of a charge in a negligence case that omitted the duty of plaintiff to use ordinary care to avoid being injured was not error, where the charge in another paragraph correctly stated the ordinary care required of plaintiff. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

In action for death in collision between train and automobile at crossing, erroneous charge that traveler at crossing had equal rights with train held not cured by charge that if he failed to exercise reasonable care he could not recover. *Baker v. Collins* (Civ. App.) 199 S. W. 519.

Error, if any, in failing to submit in main charge issue of contributory negligence was cured by the giving of two requested instructions on such issue. *Gulf, C. & S. F. Ry. Co. v. Carpenter* (Civ. App.) 201 S. W. 270.

Contention that from special instruction given jury might have believed that railroad company owed plaintiff employé no duty even after discovering his peril, is not tenable, in view of instruction that duty of operators of train to use ordinary care was not diminished or dispensed with because plaintiff might have been wrongfully upon the track. *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

An instruction to find for plaintiff if they believed defendant was guilty of negligence in the particular specified, without reference to contributory negligence, of which there was evidence, was not rendered harmless by another instruction to find for defendant if they believed plaintiff was guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Roach-Manigan Paving Co.* (Civ. App.) 209 S. W. 182.

In action for injuries to jitney car passenger in collision with train, an instruction on discovered peril, erroneous in requiring trainmen to anticipate danger to deceased though it resulted from her negligence, was not cured by instruction requiring jury to find that deceased and other occupants of car were not conscious of the near approach of train. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

439. — **Assumption of risk.**—In a servant's action for injuries, an instruction in effect that, if plaintiff's injury was not the result of a risk ordinarily incident to his employment, he was entitled to recover, was not objectionable as ignoring the issues of negligence and contributory negligence, where other instructions preceding and following it fully and properly presented the issues claimed to be omitted; the situation not presenting a case of conflicting instructions. *Texas Electric Ry. v. Jones* (Civ. App.) 231 S. W. 823.

440. — **Evidence and matters of fact in general.**—In action against bank for negligence in collecting draft, in which defendant admitted plaintiff's right to recover except in so far as its demand might be defeated by facts pleaded by defendant, any error in instructing that burden was on plaintiff to show negligence in failing to collect the drafts held harmless, in view of the other instructions given. *Central Exch. Nat. Bank of Waco v. First Nat. Bank* (Civ. App.) 214 S. W. 660.

In slander action any error in not charging on burden of proof in main charge was cured by giving of request of defendant that qualified privilege was claimed, and that burden of proof of malice was on plaintiff. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

In will contest, error, if any, in instructing the jury not to consider evidence introduced by proponent tending to show undue influence was cured by other instruction requiring jury to consider "all the facts and circumstances in evidence before you" on such issue. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

442. — **Invasion of province of jury.**—In an action for a balance due for the cutting of hay, a charge stating that plaintiff sued defendant for the sum of \$181.65, the balance due upon a sworn account for cutting and baling hay, held, in view of the rest of the charge, not erroneous as on the weight of the evidence. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

In an action against a carrier for damages to live stock, instructions submitting special issues held not prejudicial to defendant because assuming the existence of facts

stated therein in view of another instruction given at defendant's request. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

In a will contest, instruction that ordinarily less mental capacity is requisite to enable a person to make a will, or a codicil to a will, than is necessary for the same person to make a contract or to engage in an intricate or complex business matter, held not on the weight of the evidence, in view of other instructions. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

444. — **Definition or explanation of terms.**—In a suit to restrain defendant from operating a hog ranch and for damages, an instruction on the word "unreasonable," as applied to use of such ranch, and an instruction on "nuisance," held, in view of other instructions, not such as to mislead the jury. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

V. OBJECTIONS.

445½. **Right to object.**—Where defendant, not standing on its objection to charge, undertook, at court's request, to prepare special charges on issue of contributory negligence, part of which were given by court, it could not complain that they were not full and specific. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

446. **Necessity and time for making objections.**—See *Baker v. Williams* (Civ. App.) 198 S. W. 808; notes to art. 1973; *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Com. App.) 227 S. W. 945.

Under arts. 1971 and 2061, an appellant who at the trial fails to object to an instruction given has waived his right to object on appeal. *Texas Midland R. R. v. Combs* (Civ. App.) 195 S. W. 1178.

An objection that a special charge is on the weight of evidence cannot be raised in the Court of Appeals for the first time, in view of Acts 1913, c. 59. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099; *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870; *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043; *Hines v. Jones* (Civ. App.) 225 S. W. 412.

Objection to instruction not urged at time of trial was waived, and constitutes no ground for reversal and cannot be considered. *Baker v. Williams* (Civ. App.) 198 S. W. 808; *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343; *Lion Bonding & Surety Co. v. O'Kelly* (Civ. App.) 221 S. W. 1115.

Where ground of objection to a part of the charge was not the ground taken in the trial court, the assigned error, if any, must be considered as waived, under this article, as amended. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Com. App.) 222 S. W. 198, affirming judgment (Civ. App.) 180 S. W. 300; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

Under this article, as amended, errors in the charge, though apparent on the face of the record, are waived when objections are not presented in the trial court. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171; *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

Where appellants have failed to object to instructions before they were read to jury, they must be held to have approved them and waived their objections. *Shumaker v. Byrd* (Civ. App.) 203 S. W. 461; *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

Although by express provision of art. 1972, complaining litigant need not take any formal "bill of exceptions" to error in the main charge, yet by the terms of arts. 1970, 1971, as amended, due "objection" must be made and presented to the court before the charge is read to the jury; otherwise, it is waived. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; *Denman v. Pyle* (Civ. App.) 210 S. W. 335.

Under this article, an error in a charge submitting issues made by the pleadings and the testimony cannot be reviewed as fundamental error, where not objected to below. *Parsons v. Hubbard* (Civ. App.) 226 S. W. 441; *Mynatt v. Agee* (Civ. App.) 214 S. W. 935.

Where no objection was made at trial to giving of special charge as required by the amendatory act, assignment of error relating thereto will be overruled. *Jones v. Wichita Valley Ry. Co.* (Civ. App.) 195 S. W. 890.

Failure to reduce to writing an instruction directing verdict is not a fundamental error which can be reviewed in absence of objection in trial court. *Meyer-Forster Realty Co. v. Read* (Civ. App.) 195 S. W. 987.

Where no objection was made at trial to an instruction submitting issue regarding true meaning of written contract in light of surrounding circumstances, defendants are in no position to complain on appeal. *Langford v. Power* (Civ. App.) 196 S. W. 662.

Assignment that court erred in refusing special instruction will not be considered, where general charge in effect contrary thereto was not objected to on grounds urged in support of assignment. *City of Ft. Worth v. Ashley* (Civ. App.) 197 S. W. 307.

Assignment that award of certain damages was unauthorized will be overruled, where charge submitting such element of damages was not objected to on such ground. *Id.*

Under this article, as amended, objections to the court's charge will be regarded as waived, where the record does not show that they were called to the attention of the trial court. *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886.

Where there was no objection to submission of issue of conversion, instruction defining conversion is no ground for objection. *Taylor v. Lafavers* (Civ. App.) 198 S. W. 651.

Under Rev. Civ. St. art. 1971, as amended in 1913, even an error apparent on the face of the record when resulting from an improper charge is waived, and the right of revision on appeal is lost when no objections are presented in the court below. *Hendrick v. Blount-Decker Lumber Co.* (Civ. App.) 200 S. W. 171.

Complaint cannot be made for the first time on appeal that a charge was inconsistent, conflicting, contradictory, confusing, and misleading. *Corpus Christi Street & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 201 S. W. 1032.

While a formal bill of exceptions is not necessary, it is essential to show that objections to the general charge were made in writing, presented to opposing counsel and the court, before submission of the charge to the jury, and that the court did actually overrule them. *Id.*

Error as to court's charge upon burden of proof, not being presented as required by this article, court on appeal is without authority to review question. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

This article requires that the particular grounds of objection shall be presented below to secure review on appeal. *Harlan v. Acme Sanitary Flooring Co.* (Civ. App.) 203 S. W. 412.

Alleged error in a special charge invited and acquiesced in by the appellant could not be complained of on appeal in view of this article. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

In March, 1912, it was not necessary, under arts. 1970-1975, to raise objection to the court's charge in a motion for new trial. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

Under this article, plaintiff's failure, in a suit against a carrier for damages to an interstate shipment, to object to a charge submitting the issue of negligence, waived any errors committed in such submission. *Nabors v. Colorado & S. Ry. Co.* (Civ. App.) 210 S. W. 276.

Failure to comply with this article, as amended, waives all errors in a charge or instruction given to the jury, including fundamental as well as lesser errors. *Denman v. Pyle* (Civ. App.) 210 S. W. 335.

On appeal, objections to a charge not embodying fundamental error cannot be considered, where error in the charge was not called to the notice of the court below by any objection. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 210 S. W. 737.

Error in charge is waived by appellant, when he fails to properly and timely object and except to the charge before it is given to the jury. *Thomas v. Corbett* (Civ. App.) 211 S. W. 806.

Under the act amending this article, in trespass to try title to former free school lands, if definitions in the charge of "actual settler" and "continuous residence" were erroneous, the error was waived by defendants' failure to object at proper time. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

Complaint cannot be made that a charge submitted the issue of negligence generally, and did not specifically submit the acts of negligence pleaded for the first time on motion for new trial, where it was not objected to on that particular ground on the trial. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

Objection that trial court erred in submitting question of interurban railroad's failure to fence its right of way under art. 6603, was an objection to the charge, and where not made in court below is waived, by force of this article. *Texas Electric Ry. v. Barton* (Civ. App.) 213 S. W. 689.

This article includes every error, fundamental and otherwise, which can be waived, though there are some errors, including jurisdiction of the subject-matter, which cannot be waived. *Id.*

Failure to give instructions will not be considered on appeal, where no objection to main charge was made on ground that it did not contain such instruction, and no special charge was tendered. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Defendant appellant's failure to present a particular objection to a charge waives his right to urge such objection on appeal, and commits him to an approval of the language thereof so that he is in no position to complain of the refusal of a requested instruction drawn to cover the particular objection. *Graves v. Haynes* (Civ. App.) 214 S. W. 665.

In view of Act 1913, c. 59, a party cannot complain that court failed to submit an issue raised by the pleadings and evidence, where no objection was made to the court's charge. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

In a broker's action for commission, where the charge submitted only three issues and the controlling issues were few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled. *Varn v. Moeller* (Civ. App.) 216 S. W. 234.

Arts. 1970, 1971, as amended by Acts 1913, c. 59, § 3, and article 1972, are mutually complementary, and when the main charge submits the cause upon special issues, those articles and art. 1984a (Acts 1913, c. 59, § 1) form a consistent scheme of procedure, and the provisions of art. 1971, apply as well when the case is submitted "on special issues" as when submitted to the jury by an ordinary charge presenting the general issue; the special issues contemplated being only those of fact "raised by the pleadings and the evidence in the case," under art. 1984a. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Arts. 1973, 1974, 2061, as amended by Acts 1913, c. 59, § 3, relate exclusively to special requested instructions or charges, and not to special issues submitted in the main charge of the court, while arts. 1970 and 1971, as amended by section 3, and also art. 1972, which was neither repealed nor amended by the act of 1913, are applicable to main charges submitting cases on special issues under art. 1984a, which was enacted by section 1 of the act of 1913. *Id.*

Where there was no exception to a general charge, it will be presumed that defendants acquiesced therein, and special charges in conflict therewith were properly refused. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

To authorize review, objections to the charge of the court must be called to the attention of the court, before the charge is read to the jury. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Absence of defendant's attorney from the courtroom when the court defined good faith in its charge, under the circumstances, held insufficient to justify the Court of Civil Appeals in considering, in the absence of objection, assignment of error complaining of such charge. *Lion Bonding & Surety Co. v. O'Kelly* (Civ. App.) 221 S. W. 1115.

Appellant cannot complain of the refusal of special charges requested by him which were inconsistent with instructions given in the main charge, to which he interposed only a general objection insufficient to entitle him to a review of the charge. *Isbell v. Lennox* (Civ. App.) 224 S. W. 524.

Where no fundamental errors are shown, appellate court is confined to the objections to the charge taken at the time. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

In will contest, objection that charge on proponent's burden of proving testamentary capacity was a violation of art. 271, was not available on review, where not urged in lower court, in view of Acts 33d Leg. (1913) c. 59. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Where no objection was urged to the court's charge in submitting either of two issues, in the absence of objection made and presented to the court before the charge was read to the jury, such objections as could have been made must be considered on appeal as having been waived. *Ball v. Henderson* (Civ. App.) 228 S. W. 361.

Assignments of error attacking an instruction as erroneous on grounds not urged in the court below will not be considered in view of this article. *City of Greenville v. McAfee* (Civ. App.) 230 S. W. 752.

In an action for injuries, an objection to an instruction on the ground that contributory negligence appeared as a matter of law was waived when defendants did not present that objection in the trial court, as required by this article. *Lancaster v. Knighton* (Civ. App.) 230 S. W. 876.

Where, in an action based on alleged false representation, most of which appeared to be not merely matters of opinion, an instruction, proper as applying to misrepresentations as to facts, must be held correct on appeal, in absence of objection that it did not distinguish between kinds of misrepresentations and apply the law accordingly. *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

446¼. — **Peremptory instructions and sufficiency of evidence.**—Acts 33d Leg. c. 59, providing that objections to "the charge" shall be made before charge is given jury, refers only to charge applying law for jury's guidance, and not to a peremptory instruction. *Walker v. Haley*, 110 Tex. 50, 214 S. W. 295; *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687; *Shumaker v. Byrd*, 110 Tex. 146, 216 S. W. 862; *Harlan v. Acme Sanitary Flooring Co.* (Com. App.) 231 S. W. 348. Contra. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155; *Byrne v. Texas Lumber & Loan Co.* (Civ. App.) 198 S. W. 600; *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Mosher v. Dingee* (Civ. App.) 203 S. W. 102.

The peremptory direction of a verdict was subject to challenge on appeal, though not objected to in the trial court before read to the jury. *Decker v. Kirlicks*, 110 Tex. 90, 216 S. W. 385; *Almager v. San Antonio & A. P. Ry. Co.* (Civ. App.) 215 S. W. 112.

Under arts. 1607 and 1971, as amended, giving of peremptory instruction cannot be reviewed without objection or assignment of error if its propriety is doubtful, and a critical examination of the evidence is necessary. *Hendrick v. Blount-Decker Lumber Co.*, 200 S. W. 171.

Where peremptory instruction was not requested by plaintiff at proper time, and its refusal excepted to, and plaintiff did not object to court's charge, he cannot complain of such charge or refusal. *Old Faithful Oil Co. v. McGiveran* (Civ. App.) 200 S. W. 249.

Appellants having failed to object to the charge of the court, cannot contend on appeal that there is no evidence to support verdict and judgment. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

The giving of a peremptory instruction is not fundamental error so apparent on record that it will be reviewed despite failure to object to such instruction as required by Acts 33d Leg. c. 59. *Harlan v. Acme Sanitary Flooring Co.* (Civ. App.) 203 S. W. 412.

Where defendant in error presented in writing a request for a peremptory instruction, which was given without objection, plaintiffs in error cannot complain. *Toole v. Moore* (Civ. App.) 203 S. W. 429.

Sufficiency of evidence to justify submission of issue to jury will not be reviewed on appeal, where no objection to sufficiency of such evidence was made at time of submission of issue, and where appellant asked for charge on burden of proof. *Schallert v. Boyd* (Civ. App.) 203 S. W. 940.

Even were the articles of the statute (arts. 1970-1974, 2061) relating to the filing of objections and exceptions to giving and refusing of charges applicable when case is submitted on special issues, sufficiency of evidence to support a finding is an open question on appeal, not waived by submission without objection, having been made ground of motion for new trial. *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

All error in giving peremptory instruction for appellee, as well as refusing peremptory instruction for appellant, is waived by appellant's failure to object in the trial court to such charge or such refusal before the charge is read to the jury, as required by arts. 1971, 2061, as amended by Acts 33d Leg. c. 59. *McDonald v. Wilson* (Civ. App.) 209 S. W. 440.

Treating a document found in the transcript as an objection to the charge, directing a verdict for one of defendants, plaintiffs, appellants, are not entitled to have such act of the court reviewed, where it does not appear the objections filed were ever presented to the judge. *Denman v. Pyle* (Civ. App.) 210 S. W. 335.

In view of arts. 1970, 1971, as amended by Acts 1913, c. 59, § 3, the fact that plaintiff waived his right to make statutory objection to any submission to the jury of the special issue of contributory negligence in the main charge, did not legally prevent him from complaining in his motion for a new trial that the evidence was insufficient to support such special issue. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Under arts. 1970, 1971, as amended by Acts 1913, c. 59, § 3, a party may complain in a case submitted on special issues of an adverse verdict on a particular issue, because of the evidence being insufficient to sustain the verdict thereon; though there was no objection in the first instance to the court's submission of the issue. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

446½. — Showing objection in record.—Where the record failed to show that objections to the charge were presented before it was read to the jury as required by art. 1971, as amended, and art. 1973, in view of art. 2061, Court of Civil Appeals need not consider the objections. *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602; *Stephens v. Miller* (Civ. App.) 202 S. W. 1051; *Midkiff v. Benson* (Civ. App.) 225 S. W. 186; *Payne v. Harris* (Civ. App.) 228 S. W. 350.

Record failing to disclose objection to giving of peremptory instruction or exception to refusal of requested charges, assignments relating to sufficiency of evidence to support verdict and judgment would be overruled. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

In view of arts. 1971, 1972, 2061, 2062, where the record fails to disclose, either by bill of exceptions or filed objections to the charge, that any objections were made thereto, the court on appeal is justified in disregarding an assignment of error to the failure of the court to direct a verdict. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

Objections to general charge and to submission of special issues will not be considered, unless by proper authentication the record discloses that the objections were presented in the court below within the time prescribed. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1155.

Compliance with Acts 33d Leg. c. 59, requires that particular grounds of objection be specified in the record, and a failure to do so is fatal to a review of such objection on appeal. *Harlan v. Acme Sanitary Flooring Co.* (Civ. App.) 203 S. W. 412.

An assignment of error based on objections to the charge will not be considered, where there is no authentic record that objections were presented to trial court before main charge was read to jury, as required by this article, though it is not necessary to show by formal bill of exceptions that objections were presented. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 213 S. W. 253.

A purported bill of exceptions showing that objections were presented to the court before the charge was read to the jury, which is not approved by the judge or authenticated in any manner, but merely filed by the clerk, is not sufficient under this article, to present objections to instructions for review. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

447. Sufficiency of objections.—In action for damage to shipment, objection to charge which complained that in submitting issue of rough handling language placed higher duty on defendant than law required in not requiring finding of negligence sufficiently indicated to trial court vice in charge. *Panhandle & S. F. Ry. Co. v. Wright Herndon Co.* (Civ. App.) 195 S. W. 216.

Requested instructions made a part of the bill of exceptions held sufficient, under arts. 1971, 2061, to indicate the objections to the peremptory charge given. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 358.

Objection that charge is otherwise involved and uncertain is too general to be of any assistance to trial court, and cannot be aided by making specific objections in appellate court. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

General objection when trial court announced it would instruct verdict for plaintiff, held no objection at all to charge before reading to jury within this article, so that objection to instruction cannot be considered. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

An objection urged in the court below, that "because paragraph 6 of said charge upon the subject of assumed risk is erroneous," is too general for consideration upon appeal. *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283.

Where it appeared affirmatively that a request for a special charge embodying correct instructions was made after the giving of the main charge, it could not operate as an objection thereto under art. 1971, as amended, and art. 1973, in view of art. 2061. *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602.

In a trial governed by this article, defendant may not complain of failure to charge that plaintiff servant's personal injury must be found to be the proximate result of the alleged negligent violation of a statute, where the objection below was that the evidence was insufficient to support a finding for plaintiff on ground stated in charge. *Waterman Lumber Co. v. Beatty*, 110 Tex. 225, 218 S. W. 363.

In a divorce case, defendant's requested special charge that the evidence was insufficient to establish plaintiff's allegation of adultery shows a substantial objection to such submission at the proper time, although the method adopted was perhaps not strictly in accord with the rules. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

A request for the submission of a special issue requiring a finding as to the same matters referred to in a special issue submitted cannot be used by plaintiff in error as an attack on the manner of submitting the issue as contained in the charge of the court; no such objection having been taken at the trial. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

Where, though mortgagee's formal motion for a peremptory instruction was filed at completion of mortgagor's testimony, objection was later repeatedly made to charge as a whole, and separately to every fact question submitted as tending irrelevant and immaterial issues, no waiver by defendant of his previously asserted right to complaint of submission to jury is shown. *Lipper v. McClain* (Civ. App.) 223 S. W. 349.

A general objection to the instructions given by the court does not comply with the requirement of this article, the purpose of which is to give the court an opportunity to correct instructions before they are given, and such objection not only does not entitle appellants to a consideration of the instructions, but does not give the appellate court the right to consider them. *Isbell v. Lennox* (Civ. App.) 224 S. W. 524.

In action for death of brakeman when a car ahead of him dumped coal on the track, neither objection to the charge on burden of proof nor the proposition thereunder held sufficient to raise the point that the charge was erroneous as putting on defendant the burden to prove that the car ahead was in a reasonably safe condition. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

Objection to the "whole" of the charge on the ground that "it is so framed that, when taken as a whole and considering each of the paragraphs and questions therein together, it is on the weight of the evidence," was too general. *Hines v. Jones* (Civ. App.) 225 S. W. 412.

Where only objection to instruction was that it took from consideration of jury and decided issues that were raised, and assumed that facts were proved that were not proved, plaintiffs on appeal could not raise objection that instruction was on the weight of the evidence, since particular vice in instruction was not pointed out in trial court, as required by this article, and that a requested instruction offered by plaintiffs would have cured the vice would not aid them. *Hart Bros. & Hamm v. Angus* (Civ. App.) 225 S. W. 813.

Where court, following special issues, advised jury that burden of proof was on plaintiffs to establish their case by a preponderance of the evidence, objection on ground that the charge might cause the jury to believe that burden of proof rested on plaintiffs with reference to all of the special issues, held to entitle plaintiffs to insist on the error on appeal; the rule that the burden of proof rests on party alleging facts constituting issue being fundamental. *Cotten v. Willingham* (Civ. App.) 232 S. W. 572.

An assignment of error that verdict is unsupported in that answer to special issue had no evidence to sustain it considered, though no objection to special issue was made before charge was read to jury, where objection was made in motion for new trial. *Deport Hardware Co. v. First Nat. Bank of Paris* (Civ. App.) 232 S. W. 902.

448. **Necessity of rulings on objections.**—Where the record shows that appellant filed with the record written objections to the court's charge, but fails to show that such objections were presented to the trial judge as required by the amendatory act of 1913, such objections cannot be presented on appeal. *Lowery v. McCrary Transfer & Storage Co.* (Civ. App.) 213 S. W. 736.

Assignment of error based on objections to the charge cannot be considered; the record failing to disclose that the objections were timely and properly presented to the trial court, and its action thereon. Arts. 1971, 1973. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

449. **Necessity of requesting instructions.**—See *Oliver v. Forney Cotton Oil & Gin-ning Co.* (Civ. App.) 226 S. W. 1094; *Patterson v. Williams*, 225 S. W. 89; notes to art. 1973.

453. **Exceptions.**—See *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203; *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636; notes to arts. 1972, 2061.

Art. 1972. [1318] [1318] Charge need not be excepted to.

See *Mason v. Olds* (Civ. App.) 198 S. W. 1040; *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717; *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145; *Smith v. Belding* (Civ. App.) 224 S. W. 562; *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

Application in general.—Arts. 1973, 1974, 2061, as amended by Acts 1913, c. 59, § 3, relate exclusively to special requested instructions or charges, and not to special issues submitted in the main charge of the court, while arts. 1970 and 1971, as amended by section 3, and also art. 1972, which was neither repealed nor amended by the act of 1913, are applicable to main charges submitting cases on special issues under art. 1984a, which was enacted by section 1 of the act of 1913. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Effect of failure to object or except.—See, also, notes to arts. 1971, 2061.

Under Rev. St. 1879, art. 1318, an instruction on a matter not in issue is ground for reversal, when it was assigned below on motion for new trial, though it was not excepted to, nor a countercharge requested. *Atchison, T. & S. F. R. Co. v. Click*, 5 Civ. App. 224, 23 S. W. 833.

Under Arts. 1971, 1972, 1973, appellant's failure to except to charge for appellee does not preclude consideration of his objections to refusal of his requested charge on same issue. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

Although by express provision of this article, complaining litigant need not take any formal "bill of exception" to error in the main charge, yet by the terms of arts. 1970, 1971, as amended, due "objection" to such erroneous charge must be made by such litigant and presented to the court before the charge is read to the jury; otherwise, it is waived. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Submission of a special issue may be reviewed on appeal where objections thereto have been submitted to the court notwithstanding exceptions to the submission of such issue had not been taken in view of this article. *Cobb & Gregory v. Lanier* (Civ. App.) 221 S. W. 990.

Instruction that defendant was not negligent unless he drove automobile at a "dangerous and improper" rate of speed, without defining the words "improper" and "dangerous," held reversible error, notwithstanding defendant's failure to request a special charge defining such terms, where art. 1971 was complied with, since the charge is deemed excepted to under this article. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

Art. 1973. [1319] [1319] Parties may ask instructions; time for examination and objection.

See *Benavides v. State*, 31 Cr. R. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717; *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753; *Smith v. Belding* (Civ. App.) 224 S. W. 562; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

Cited, *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

½. Application in general.—Arts. 1973, 1974, 2061, as amended by Acts 1913, c. 59, § 3, relate exclusively to special requested instructions or charges, and not to special issues submitted in the main charge of the court, while arts. 1970 and 1971, as amended by section 3, and also art. 1972, which was neither repealed nor amended by the act of 1913, are applicable to main charges submitting cases on special issues under art. 1984a, which was enacted by section 1 of the act of 1913. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

1. Necessity and propriety of requests in general.—In the absence of record showing objections to the charge given or requests for other charges, assignments of error to peremptory instruction will not be considered. *Stevens v. Gustine Mercantile Co.* (Civ. App.) 197 S. W. 1126.

Where peremptory instruction was not requested by plaintiff at proper time, and its refusal excepted to, and plaintiff did not object to court's charge, he cannot complain of such charge or refusal. *Old Faithful Oil Co. v. McGiveran* (Civ. App.) 200 S. W. 249.

The court's refusal to make certain special findings of fact should have been raised by request for special charges to be given to the jury. *Wofford v. Herndon* (Civ. App.) 204 S. W. 353.

Assignment of error complaining that court did not give special instructions cannot be considered, where the court was not requested to give them. *Wille v. Hays* (Civ. App.) 207 S. W. 427.

Failure to give instructions will not be considered on appeal, where no objection to main charge was made on ground that it did not contain such instruction, and no special charge was tendered. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

A party failing to request a submission of the issue to the jury cannot complain of an unfavorable finding by the court based on contradictory and confusing evidence. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

It is the duty of the court in the first instance to submit all the issues raised by the pleadings and evidence, and on its failure so to do it is then the duty of the complaining party to present the matter to it and request proper instructions, which, if material, it must give or submit in some form. *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

3. Evidence and matters of fact in general.—An assignment of error attacking the verdict and judgment cannot be sustained, where appellant did not except to the general charge, and did not request special charge covering the particular phase of the case covered by the assignment. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

An instruction that burden of proof was on defendant to show contributory negligence without instructing jury to look to the entire evidence in determining the issue held not reversible error, in absence of request for instruction advising jury to consider the entire evidence. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

Where there was no request for an order as to burden of proof at the time of trial, no complaint can be made on appeal that the trial court failed to make an order with reference to the matter. *McLendon Hardware Co. v. J. A. Hill & Son* (Civ. App.) 226 S. W. 825.

Failure to charge as to burden of proof held not error, in absence of a request for an instruction covering the omission. *Holden v. Evans* (Civ. App.) 231 S. W. 146.

Failure to charge jurors that they were the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given to their testimony, held not reversible error, in absence of request for such instruction, since it will be presumed that the charge as given was satisfactory. *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

4. Purpose and effect of evidence.—Where defendant failed to except to charge on account of its failure to limit testimony, and submitted no special charge thereon,

he could not complain; the testimony being admissible for some purpose. Mackey Telegraph & Cable Co. v. Kelly (Civ. App.) 200 S. W. 225.

Evidence being admissible for a certain purpose, the other party, if desiring it be considered for that purpose alone, should request the court to limit it thereto. King-Collie Co. v. Wichita Falls Warehouse Co. (Civ. App.) 205 S. W. 748.

Although the party objecting to the introduction of evidence admissible for a particular purpose should ordinarily request an instruction limiting it, where the effect of the objection amounted to such request and the court admitted it "in evidence for whatever it proves," it was not necessary to make formal motion to limit such evidence. Texas Employers' Ins. Ass'n v. Downing (Civ. App.) 218 S. W. 112.

Where evidence, admissible as against one person, is introduced, no complaint can be made by other persons of its admission, where no instructions as to the conditions or limits upon which the evidence might be considered were requested. Dendinger v. Martin (Civ. App.) 221 S. W. 1095.

A party who objected to the admission of testimony, admissible for certain purposes, but did not ask the trial court to place any limitation thereon by special charge or otherwise, is not entitled to have the judgment of the trial court reversed for failure to limit the testimony. Massie v. Hutchison, 110 Tex. 558, 222 S. W. 962, reversing judgment (Civ. App.) Hutchison v. Massie, 159 S. W. 315, and opinion of Supreme Court conformed to (Civ. App.) Hutchison v. Same, 225 S. W. 695.

In an action against partners, an objection by one that statements by the other partners in his absence were placed in evidence held untenable, since if he wished to protect himself, he should have requested an instruction limiting such testimony. Steger v. Greer (Civ. App.) 228 S. W. 304.

Where evidence was admissible as between plaintiffs and a defendant, and no request was made to limit it to such extent, defendant's assignment to its admission must be overruled. Johnson v. Frost (Civ. App.) 229 S. W. 558.

6. Arguments and conduct of counsel.—Defendants setting up adverse possession in predecessor, action of court in permitting counsel to read statute which had no application, in effect authorizing jury to exclude time defendants' predecessor occupied premises as homestead held available error, though no request was made for instruction to disregard the matter. Tompkins v. Hooker (Civ. App.) 200 S. W. 193.

An objection to the argument of an attorney without a request that the court repress the argument or instruct the jury to disregard it is sufficient to authorize review of the argument on appeal. Wilson Co. v. Gordon (Civ. App.) 224 S. W. 703.

Argument of defendants' counsel held reversible error, though plaintiff did not request the court to withdraw the remarks from the consideration of the jury by a charge to such effect. Morris v. McGough (Civ. App.) 230 S. W. 1092.

7. Nature of action or issue in general.—Mere failure of instruction to define a party's duties requires a request for an instruction covering the omission. McCulloh v. Reynolds Mortgage Co. (Civ. App.) 196 S. W. 565.

In father's habeas corpus proceeding to procure custody of children from maternal grandparents, who had adopted the children, father should have requested instruction that adoption did not confer the right of custody, if he had desired such instruction. State v. Jackson (Civ. App.) 212 S. W. 718.

8. Actions relating to property in general.—In trespass to try title to property which plaintiff claimed his wife purchased with community funds, it appearing that thereafter the wife disposed of her interest and defendant took under conveyance from the original source of title, plaintiff cannot complain of the failure to instruct as to the effect of a deed to the wife, etc., where such matter was not embraced in any of his requested charges. Moss v. Ingram (Civ. App.) 224 S. W. 258.

10. Actions for negligence in general.—Defendant waived right to have question of negligence submitted, when he did not request instruction upon subject and except to action of court in refusing to instruct. Southern Traction Co. v. Ellis (Civ. App.) 198 S. W. 983.

Where defendant traction company pleaded contributory negligence, and supported it by evidence, court should have presented a proper charge thereon, and its failure to do so would have been ground for reversal without presenting charges. Southern Traction Co. v. Dillon (Civ. App.) 199 S. W. 698.

The error of the trial court in failing to submit the issue of proximate cause is one of omission and to be available as reversible error appellant must have presented a special charge curing the omission. Texas & Pacific Coal Co. v. Ervin (Civ. App.) 212 S. W. 234.

11. Actions for personal injuries.—In railroad employé's action for injuries, defendant held not in position to complain of failure to charge specifically on assumed risk in absence of request for special instruction. Gulf, C. & S. F. Ry. Co. v. Hall (Civ. App.) 196 S. W. 613.

In action for injuries in collision, instruction that defendant was not negligent unless he drove automobile at a "dangerous and improper" rate of speed, without defining the words "improper" and "dangerous," held reversible error, notwithstanding defendant's failure to request a special charge defining such terms where art. 1971 was complied with. Patterson v. Williams (Civ. App.) 225 S. W. 89.

12. Contracts and actions relating thereto.—In an action for rent, where the court instructs the jury to find for plaintiff in the amount specified in the lease, it was the duty of the lessee to request special instructions concerning a claimed modification whereby he was to pay less rent. Foster v. Dunn (Civ. App.) 198 S. W. 374.

Where guarantor of rent did not request instruction to find value of goods levied

on under distress warrant, other than those covered by a chattel mortgage, the failure to so charge was not error. *Meacham v. O'Keefe* (Civ. App.) 198 S. W. 1000.

Where plaintiff sought to recover a balance due for cutting and baling hay under a contract whereby defendant was to pay \$3 per ton for the first cutting and more for the second, held that where no special charge that independent of plaintiff's right to recover for the first cutting, he could not recover the amount claimed on the second cutting, was requested, and there was no assignment of error presenting that matter, the question of the sufficiency of the evidence to authorize a recovery for the second cutting was not presented. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

In action for commissions for sale of land listed with agent of plaintiff, not known to be such by landowner, if defendant did not want plaintiff to have any of the commissions, or anything to do with it, that was a matter of defense, to be submitted at defendant's request, even if the fact was provable under the general issue; defendant claiming that the agent fraudulently stated that plaintiff was not interested and would obtain none of the commissions. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

13. Definition or explanation of terms.—Where defendant failed to ask special charge supplying omission in instruction, he cannot complain of omission, though definition omitted was necessary. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

In suit for commission on exchange of lands, if defendant desired charge as to what was meant by listing land for sale, he should have requested the same. *Blaschke v. Ferguson & Dyess* (Civ. App.) 208 S. W. 727.

14. Damages and amount of recovery.—Where defendant requested no charge advising jury as to measure of damages, and his objection to omission was not made until after case was tried and verdict returned, he is not entitled to reversal for omission to charge. *Baker v. Williams* (Civ. App.) 198 S. W. 803.

In an action in which defendant filed a cross-action for damages, where the charge made no reference to interest as an element of damage, and defendant did not object to the charge as given, nor request a special charge embodying interest as an element of damage, it waived its right to interest. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Com. App.) 227 S. W. 945.

16. Further or more specific instructions.—Where the defect in an instruction is one of omission, the case will not be reversed in the absence of a request below for an instruction supplying such omission. *Ft. Worth & R. G. Ry. Co. v. Keith* (Com. App.) 208 S. W. 891; *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665; *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233; *Long v. Calloway* (Civ. App.) 220 S. W. 414; *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

A case will not be reversed for an omission to state the law with more fullness and accuracy, unless the party complaining of such omission seeks to have it supplied by a requested instruction. *Welge v. Jenkins* (Civ. App.) 195 S. W. 272.

Where general charge was correct as far as it went, though defendant was entitled to additional instruction defendant is bound to request such additional instructions, and cannot raise point by objections to general charge. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

A party cannot complain that an instruction was not as full and complete as might be desired, where he did not prepare and request one in proper form. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

If defendant desired an addition to the charge, such further charge should have been requested. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

Defendant could not complain that a charge was too general and left it to the jury to search out the important issues, where he did not suggest any better charge. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

17. — Erroneous or misleading instructions.—Where instruction embraces substantially the proper rule, but is not verbally correct, the adverse party is required to submit a correct instruction. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

Where the court charges on an issue incorrectly, if the charge is not objected to, the aggrieved party is required to request a correct charge on that issue, in order to prevent error in the court's charge and in the refusal of the requested charge. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), a charge that if plaintiff was injured, and if the proximate cause thereof was concurring negligence, then you will diminish your findings on this issue in proportion to the amount of negligence attributable to plaintiff," cannot be complained of, in absence of a special charge suggesting corrections. *Chicago, R. I. & G. Ry. Co. v. Smith* (Com. App.) 222 S. W. 1099, affirming judgment (Civ. App.) 197 S. W. 614.

23. — Actions for torts in general.—Where defendant's requested charge does not apply the law to the facts developed, but is merely that the conditions as to annoying persons must have been worse after than before the addition to defendant's mill, and the court so charges as to noises, defendant, if desiring such a charge as to odors, should specifically request it. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

In an action for slander where the court gave the correct general definition of malice, if that was not sufficient as applied to the facts the defendant should have asked for an additional charge, otherwise he cannot complain, where the facts were sufficient to raise the issue of his ill will toward plaintiff. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

26. — Contracts and actions relating thereto.—Objection to an instruction on false representations, because it gave jury no criterion for determining what was a mis-

representation of fact and what was a statement of opinion and what were mere promissory representations, will not be noticed on appeal; no request for explanatory charge having been made. *Texas Co-operative Inv. Co. v. Clark* (Civ. App.) 216 S. W. 220.

27. — Definition or explanation of terms.—While under art. 1971, it is sufficient to call the court's attention to a positive error in the charge as therein provided, and it then stands as excepted to, a party thinking an expression in the charge requires explanation must request a special instruction defining it, and a mere objection is not sufficient. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

28. — Damages and amount of recovery.—Where in a shipper's action against connecting carriers a proper instruction is not sufficiently clear that damages are to be assessed separately, a special charge to that effect must be requested. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Civ. App.) 212 S. W. 981.

In an action for damages through sale of a concrete mixer defective under the seller's guaranty, charge that the measure of damages was the difference, between the increased cost, actually and necessarily incurred, of preparing concrete with the machine as furnished, and what would have been the cost had the machine met representations, held to afford seller no ground of complaint; no special instructions having been requested. *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645.

Where the court submitted the question whether plaintiff was guilty of any negligence while under treatment which aggravated his injury, and charged that, in case he was, the recovery should be limited, defendant, if desiring a more explicit presentation of the issue, should have requested additional instructions. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

29. Time for asking instructions.—Where it appeared affirmatively that a request for a special charge embodying correct instructions was made after the giving of the main charge, it could not operate as an objection thereto under art. 1971, as amended by Acts 33d Leg. c. 59, and art. 1973, in view of art. 2061. *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602.

30. Form and requisites of requests in general.—Where tenant filed a cross-action for damages caused by numerous writs of sequestration, a requested charge as to the circumstances under which plaintiff was entitled to sequester the crops, if intended to define the terms "malice," "want of probable cause," "and want and disregard of defendant's rights," was not sufficiently specific to call the court's attention to such purpose. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

Defendant's requested charge in a passenger's action for injury that, if derailment was from defect in the road unknown to defendant, and which could not be discovered by reasonable observation, etc., defendant would not be guilty of "negligence" as defined, held requested by way of supplement, rather than for correction of the court's charge on negligence. *Hines v. Parry* (Civ. App.) 227 S. W. 339.

31. Written requests or prayers.—Under art. 1985, failure to charge as to effect of verbal agreement was an omission which could not be complained of, in the absence of a request in writing. *Heidritter v. Keith Lumber Co.* (Civ. App.) 197 S. W. 885.

33. Instructions already given.—It was not error to refuse instructions sufficiently covered by other charges. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918; *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555; *Missouri Iron & Metal Co. v. Cartwright* (Civ. App.) 207 S. W. 397; *Lancaster v. Snider* (Civ. App.) 207 S. W. 560; *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935; *Ft. Worth & D. C. Ry. Co. v. Courtney* (Civ. App.) 214 S. W. 839; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497; *Isbell v. Lennox* (Civ. App.) 224 S. W. 524; *Midkiff v. Benson* (Civ. App.) 225 S. W. 186; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099; *Hart-Parr Co. v. Paine* (Civ. App.) 230 S. W. 779.

Refusal of requests covered by charge given is not error. *Andrews v. Rice* (Civ. App.) 198 S. W. 666; *Hudson v. Salley* (Civ. App.) 201 S. W. 665; *Corpus Christie Street & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 201 S. W. 1032; *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138; *Schaub v. Rucker & Heartsill* (Civ. App.) 203 S. W. 939; *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134; *Schaff v. Wilson* (Civ. App.) 204 S. W. 251; *Wofford v. Herndon* (Civ. App.) 204 S. W. 353; *Carvel v. Kusel* (Civ. App.) 205 S. W. 941; *Quanah, A. & P. Ry. Co. v. Stearns* (Civ. App.) 206 S. W. 857; *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827; *Schaff v. Hollin* (Civ. App.) 213 S. W. 279; *Moye v. Park* (Civ. App.) 216 S. W. 205; *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268; *Buchanan v. Gribble* (Civ. App.) 216 S. W. 899; *Lancaster v. Keebler* (Civ. App.) 217 S. W. 1117; *Wight v. Bell* (Civ. App.) 218 S. W. 532; *W. F. Norman & Sons v. Clark* (Civ. App.) 221 S. W. 235; *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

It is not error to refuse special charge covering substantially same issue embraced in other charges given. *Texas & P. Ry. Co. v. Mercer* (Civ. App.) 195 S. W. 263; *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553; *Lancaster v. Knighton* (Civ. App.) 230 S. W. 876; *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

When defendant requests a number of special charges on an issue, and one of them is given, he cannot complain that the others are not given. *St. Louis Southwestern Ry. Co. of Texas v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 221 S. W. 1017; *Gulf, C. & S. F. Ry. Co. v. Crow* (Civ. App.) 220 S. W. 237; *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

A requested charge on an issue which the court correctly covered in its main charge need not be given. *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911; *Padgett v. Hines* (Civ. App.) 224 S. W. 558; *Fire Ass'n of Philadelphia v. Thompson* (Civ. App.) 220 S. W. 795; *National Ben Franklin Fire Ins. Co. v. Same* (Civ. App.) 220 S. W. 796.

There was no error in refusing requested charge, where charge given covered various features of case. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 528; *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 203 S. W. 90.

Refusal to submit affirmatively one of appellant's defenses in personal injury action was not ground for reversal, where such defense was substantially presented in court's general charge. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 200 S. W. 1120.

Trial court is not required to give general charge, independent of special charges given, where such special charges fairly cover all issues called for by pleadings and evidence. *Banfield v. Davidson* (Civ. App.) 201 S. W. 442.

Court did not err in refusing to give requested special charges, where charge given covered same subject-matter more favorably to party who had made request therefor. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

Where the court at plaintiff's request gave an instruction on a particular issue, the refusal of a similar instruction covered by the one given was not error. *Texas Electric Ry. v. Williams* (Civ. App.) 213 S. W. 730.

It was not error to refuse requested charges which were, in effect, the same as given in the main charge, which corresponded to the allegations in the petition. *Melton v. Manning* (Civ. App.) 216 S. W. 488.

The court did not err in refusing to give a requested charge embracing more than one subject, where each one of such subjects was covered by the general charge. *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

34. — Issues in general.—The refusal of requested instructions properly framed, and which, if given, would have submitted defendant's theory more fully and clearly than did the charge of the court, was error. *Kuehn v. Neugebauer* (Civ. App.) 204 S. W. 369.

35. — Evidence and matters of fact.—Requested instruction as to matters that must be shown by preponderance of evidence to authorize recovery on the theory of operation of defendant's mill being a nuisance causing plaintiff's ill health, held covered by general charge. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

In an action on a fire policy, where defendant's contention was that building fell before the fire broke out, and that the company was not liable, a correct charge upon the law governing liability was not equivalent to a correct charge upon the burden of proof; defendant being entitled to an affirmative charge thereon. *Northwestern Nat. Ins. Co. v. Westmoreland* (Civ. App.) 215 S. W. 471.

Where, in personal injury action, the trial court placed the burden of proof on plaintiffs as to every material allegation it was unnecessary to repeat that instruction at defendant's request; there being no showing that the jury were misled as to the burden of proof as to defendant's negligence and amount of damages, which is the test. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

Where the jury were told that the burden was on the plaintiff to make out her case by a preponderance of the evidence, and that if she failed to discharge that burden verdict should be returned for the city, there was no reversible error in refusing to further charge that each particular fact relied on by plaintiff must be established by a preponderance of the evidence. *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 125.

In action for injuries to passenger, refusal to follow the submission of the issue of negligence by a charge on the burden of proof, where the court gave a correct charge on the burden of proof on the whole case, held not error. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

37. — Affirmative and negative of issues.—An affirmative instruction held to sufficiently present same issue as that requested, although requested instruction was in the negative form. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

38. — Nature of action or issue in general.—There was no error in a will contest in refusing special requested instructions fully covered by the general charge. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

Where, in a will contest, the court, in addition to giving in its main charge a definition of mental capacity which was not objected to, gave a special charge for plaintiffs, again explaining the meaning of mental capacity, it properly refused an additional charge for plaintiffs on mental capacity, even though correct. *Leahy v. Timon* (Civ. App.) 204 S. W. 1029.

Where the only issue was whether a lost will had been revoked by destruction, and such issue was submitted in appropriate language, a requested charge that a will could be revoked only by "subsequent will, codicil, declaration in writing, or by the testator destroying, canceling, or obliterating same or causing it to be done in his or her presence," was properly refused as unnecessary and confusing. *Rape v. Cochran* (Civ. App.) 217 S. W. 250.

Where plaintiff asserted that defendants fraudulently induced him to execute a lease and did not pay him the entire bonus as agreed, a charge held to submit the true issue so a special charge submitting the issue of agreement as to payment was properly refused. *Moorman v. Small* (Civ. App.) 220 S. W. 127.

Requested instruction that, if the jury believed the surveyor could be more certainly followed from the course and distance than by stopping short of the distance because of marked trees, not called for, they should find for plaintiff held properly refused, as fully covered by the court's general charge. *West Lumber Co. v. Goodrich*, (Com. App.) 223 S. W. 133, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

40. — **Actions for torts in general.**—Refusing requested instruction that plaintiff could not recover for damages to his crops by defendant landlord if he was a subtenant without defendant's consent is not erroneous, where an instruction submitted question whether plaintiff leased from defendant. *Anderson v. McCain* (Civ. App.) 155 S. W. 921.

In an action to restrain and for damages for using adjoining land for raising and slaughtering hogs, an instruction that the jury must look to "the facts and circumstances in evidence to determine whether the manner" of operation by defendants was such an "unreasonable use" as to cause injury and discomfort to plaintiff or his family, together with defendant's similar requested charge given, held to substantially cover a refused charge on the reasonableness of use of such premises. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

Refused instructions as to odors, noises, and incidents held sufficiently covered by others, so that defendant, appellant, was not injured. *Id.*

41. — **Actions for negligence in general.**—Since certain facts establish prima facie negligence by a railroad in causing a fire, the court should submit the defense of proper equipment and operation of the engine, notwithstanding it had already submitted generally the issues of negligence and contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

In an action for the killing of cattle struck by an electric car, an instruction which defined pure accident as an unavoidable accident, was properly refused, in view of the fact that the court defined negligence, and the jury found defendant guilty of negligence (citing Words and Phrases, Second Series, Unavoidable Accident). *Eastern Texas Electric Co. v. Hunsucker* (Civ. App.) 230 S. W. 817.

42. — **Personal injuries in general.**—In action for injuries caused by a member of the train crew flashing his lantern before horses and mules on loading chute, causing them to rush back and trample plaintiff, a requested charge that, if plaintiff was injured as the "sole proximate cause" of the wild and unruly nature and disposition of the mules and horses, verdict should be for defendant, even though defendant was guilty of negligence held sufficiently presented by another charge. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

43. — **Injuries in operation of railroads in general.**—The refusal of a requested charge, authorizing a verdict for plaintiff upon a finding of negligence of railway employees in requiring plaintiff to leave the caboose in a rain, was not erroneous, where the main charge submitted that issue to the jury even more favorably to plaintiff. *Roberts v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 229 S. W. 954.

44. — **Injuries to passengers.**—In an action by a passenger injured when entering a train, the refusal of a special request on the carrier's duty towards passengers, etc., held proper; it being covered by the main charge. *Bird v. Schaff* (Civ. App.) 206 S. W. 711.

The general charge in an action for injuries to passenger in alighting having restricted the jury to injuries proximately caused by the defendant's negligence, there was no reversible error for refusing a special charge to that effect limited to a claimed injury of an ovary. *Schaff v. Wright* (Civ. App.) 214 S. W. 945.

Where an instruction given did not authorize the jury to find a carrier guilty of negligence if it failed to bar or screen a window, it was not reversible error to refuse instructions that the carrier was not negligent in failing to take such precautions. *Lancaster v. Knighton* (Civ. App.) 230 S. W. 876.

45. — **Injuries to employés.**—Where charge given in suit by employé for injuries was correct, it was unnecessary to single out issue relating to injuries and consequences resulting therefrom, as that could be done by counsel in argument. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

Where under the instructions the jury could find for plaintiff, a railroad fireman, only if engineer was negligent in failing to discover open switch, etc., held, that the refusal of further instructions that the engineer was not negligent in doing no more than he did to stop the train after discovering the open switch, that negligence could not be based on the fact the switch was open, etc., was proper. *Lancaster v. Mays* (Civ. App.) 207 S. W. 676.

A charge that, though foreman failed to take proper precautions, the jury should find for defendant if they believed a person of ordinary care under the same circumstances would have acted as the foreman did, furnished the proper test, and was sufficient to justify the refusal of a requested charge covering the same idea. *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

In an action against a railroad company for the death of a servant caused by derailment the court did not err in refusing a special charge on the matter of unavoidable accident, where such matter was placed before the jury in the court's charge. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

46. — **Contributory negligence and assumption of risk.**—It is not error to refuse to give a requested instruction as to contributory negligence, which is sufficiently covered by the court's general charge. *Texas Electric Ry. v. Hooks* (Civ. App.) 211 S. W. 654; *City of Ft. Worth v. Nelson* (Civ. App.) 220 S. W. 123.

Refusing instruction to find for defendant railroad if plaintiff was negligent in not stopping his team at safe distance from tracks is not erroneous, where jury were told to find for defendant if plaintiff negligently stopped within few feet of track. *Missouri, K. & T. Ry. Co. of Texas v. Hart* (Civ. App.) 196 S. W. 960.

In action for injuries while attempting to board street car, refusal of instruction

as to contributory negligence held proper, in view of another instruction given. *North-ern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

It was not error to refuse an instruction that railroad was not liable if plaintiff's horse was more readily frightened than an ordinary horse, where the issue of contributory negligence was sufficiently covered by an instruction given. *Texas Midland R. R. v. Butler* (Civ. App.) 207 S. W. 344.

In an action for killing of mules and damage to harness and wagon, in collision at crossing, an instruction requested by defendant to find for it, if the driver was guilty of "negligence in the manner in which he drove or attempted to drive over said crossing," held sufficient to require the jury to find whether the evidence established facts on the subject embraced in refused special charges. *St. Louis Southwestern Ry. Co. of Texas v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 221 S. W. 1017.

A requested charge that plaintiff, in accepting employment, assumed dangers commonly encountered therein was sufficiently covered by charge that, if the injury was caused by one of the dangers commonly encountered in the employment, they should find for defendants. *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

A request for a charge that plaintiff's contributory negligence bars recovery even if defendant was negligent was sufficiently covered by charge that contributory negligence barred recovery, and that the jury should find for defendant if they believed he was negligent, but did not believe that his negligence was the proximate cause of the injury. *Schaff v. Brasher* (Civ. App.) 224 S. W. 1117.

48. — **Contracts and actions relating thereto.**—In a suit for breach of marriage promise, court's charge held to sufficiently define seduction, and hence refusal of requested charges containing such definition was not error. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

Effect of charge, which did not use word "mutual," held the same as refused requested instruction that omission in contract must have been due to mutual mistake of parties. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

Where issue whether plaintiff was precluded from foreclosing mortgage, because of having authorized or ratified sale of mortgaged property in open market, was presented by given instructions as one of waiver, defendant was not entitled to have the issue presented as one of estoppel. *Perkins v. Alexander* (Civ. App.) 209 S. W. 789.

Instruction that, if mortgagee authorized or knowingly permitted mortgagor to sell mortgaged property in open market, there would be a waiver of mortgage, though mortgagor failed to properly apply proceeds, held substantially covered by the more favorable charge given. *Id.*

Where trial court, on plaintiff's request, charged that, it was not necessary that jury should find all of the alleged grounds for canceling oil lease to be false or material, but, if they found any one or more of them to be so, to find for plaintiff, it was not necessary to give separate requested charges regarding each false statement relied on. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Court did not err in refusing a special requested charge defining the elements of a contract where the general charge correctly covered the subject-matter of the requested charge and in a manner not objected to. *Elmendorf v. Mulliken* (Civ. App.) 231 S. W. 164.

49. — **Contracts of carriage or for telegraphic or telephonic service.**—Where general charge fairly submitted carrier's theory that damage to rice was caused by initial wetting at time of threshing, requested instruction, embodying such theory, was properly refused. *Gulf Coast Transp. Co. v. Standard Milling Co.* (Civ. App.) 197 S. W. 874.

In action for failure to furnish car, refusal of requested instruction permitting jury to take surrounding conditions into consideration on question of reasonable diligence in furnishing car was not error, where main charge defined reasonable diligence correctly, and told jury to consider railroad's situation and its ability to furnish particular car requested. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

In action for defendant's failure to seasonably deliver shipments to connecting carrier, held, as instructions as a whole properly submitted the case, that refusal of requests that no penalty could be recovered for defendant's failure to deliver in shorter time than that fixed by Railroad Commission was not error. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

51. — **Amount of recovery.**—Refused instruction not to allow plaintiff anything for biliousness or cold, some time after injury, held sufficiently covered by instruction given. *St. Louis Southwestern Ry. Co. of Texas v. McCalister* (Civ. App.) 198 S. W. 1082.

Instruction that if plaintiff, at time of trial, was in bad condition, and this was due to former illness, damages could not be allowed on account of such former illness, is equivalent to defendant's requested charge, that, if plaintiff's then condition was due to former illness, she could recover, nothing on account of her health. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

In suit for breach of contract to sell majority stock of company, and all its property, including notes and accounts, instruction on damages was insufficient, where it stated no rule for admeasurement, so that seller's requested charge eliminating damages for failure to comply with agreement to put notes and accounts in collectible shape should have been given, in view of their pleadings. *McKamey Bros. v. Jones* (Civ. App.) 210 S. W. 607.

52. **Erroneous requests.**—A requested special charge, though incorrect, requires the court in a proper case to submit a correct charge on the issue to which the incorrect

charge was directed. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 232; *Rounds v. Coleman* (Civ. App.) 214 S. W. 496; *Hines v. Parry* (Civ. App.) 227 S. W. 339.

A special charge should be refused unless correct in all its parts; the trial court being under no obligation to separate the correct from the incorrect portions. *Wagoner v. Zundelowitz* (Com. App.) 231 S. W. 721; *Quannah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332; *Pullman Co. v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 741.

Under Rev. St. 1879, arts. 1319 and 1321, the court may refuse to give requested instructions on the ground that the good are written with the bad, on the same piece of paper, so that they cannot be separated; such ground of refusal being stated at the time of the refusal. *Missouri Pac. Ry. Co. v. King*, 2 Civ. App. 122, 23 S. W. 917.

Where instructions are requested as a whole, some of which are inconsistent with each other and others obviously improper, the court need not separate the good from the bad and is justified in refusing them all. *St. Paul Fire & Marine Ins. Co. v. Pip-kin* (Civ. App.) 207 S. W. 360.

Where improper instruction is objected to, it is the court's duty to submit a correct charge, though the charge tendered by the party objecting is objectionable. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

A request for a further instruction relative to portion of court's charge is properly refused, where the request is not on an issue presented by that portion of the charge, but rather contradictory of it. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

If an instruction is desired on a particular issue, a correct one should be requested. *Hines v. Parsons* (Civ. App.) 221 S. W. 1027.

A requested instruction, though defective, is sufficient to require the submission of a correct charge on an issue made by the pleadings and evidence which has not been submitted at all; but, if the issue has been submitted generally, the party wishing a more specific charge must submit a correct instruction in order to be entitled to complain on appeal. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

When the court instructs the jury with reference to an issue, and the instruction is correct so far as it goes, it is not error to refuse an incorrect requested special charge, intended to instruct them fully with reference to such issue. *Collins v. Megason* (Civ. App.) 228 S. W. 533.

In an action against seller for losses resulting from cattle being diseased, defended on the ground that defendant acted, merely as plaintiff's agent, a requested instruction presenting such defense, while not technically correct in every particular, held so nearly so as to require the court to give a proper charge on such defense. *Graves v. Haynes* (Com. App.) 231 S. W. 333.

53. — On issue omitted from charge as given.—Requested charge that acts or quarrels, the result of sudden outbursts of temper, are not grounds for divorce, where not correct in its entirety, was properly refused, but sufficiently called court's attention to omission. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

55. Presentation in general.—Where counsel requested the court to prepare an instruction on a certain issue, but the court indicated that it would not do so, counsel's failure to submit a proper instruction did not waive the right to present the issue. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

That requested charges were prepared, filed, and marked, "Given," the evening before they were read to the jury, held not error, where ample opportunity was afforded to file objections before they were read. *Kansas City, M. & O. Ry. Co. of Texas, v. Harral* (Civ. App.) 199 S. W. 659.

The action of the trial court in refusing a special instruction cannot be reviewed in the absence of a showing that the charge was requested in the manner prescribed by Acts 33d Leg. c. 59, requiring presentation in reasonable time after main charge is submitted for examination. *Stephens v. Miller* (Civ. App.) 202 S. W. 1051.

56. Withdrawal of requests.—Where defendant's objection to improper instruction, error in which it had invited by request, was made after defendant made request, objection should have been accompanied by withdrawal of request. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 196 S. W. 230.

58. Examination and inspection of requested instructions.—Under Acts 33d Leg. c. 59, refusal of special requested charge will not be reviewed on appeal where record fails to show it was presented to opposing counsel for examination and objection as required. *Shipley v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 199 S. W. 661; *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194; *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

Refusal of special issues will not be reviewed on appeal, where record fails to show they were presented to opposing counsel for examination and objection, as required by Acts 33d Leg. c. 59, § 3. *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

Assignments, complaining of refusal to give special instructions, cannot be considered, where it does not appear that they were requested after inspection by opposite counsel, or were signed or filed, refused or given. *Lotto v. State* (Civ. App.) 208 S. W. 563.

Acts 33d Leg. 1913, c. 59, § 3, makes it the duty of the trial judge, and not of counsel, to submit special charges to opposing counsel. *Shipley v. Missouri, K. & T. Ry. Co. of Texas*, 110 Tex. 194, 217 S. W. 137.

Where on writ of error it is objected that special charges are not to be considered because not submitted to opposing counsel as required by Acts 33d Leg. 1913, c. 59, § 3, it will be presumed, in the absence of a showing to the contrary, that the trial judge performed his duty as to such submission. *Id.*

59. **Manner of giving instructions asked.**—Where question of assumed risk was submitted by a special charge, fact that a paragraph of general charge required jury to find for plaintiff, unless they should find for defendant upon some other paragraph of that charge, does not necessitate a reversal, although it is preferable practice to incorporate such special charges within the general one. *Southern Pac. Co. v. Stephens* (Civ. App.) 201 S. W. 1076.

61. **Modification or substitution by court.**—Though requested instructions are correct, court need not give them verbatim. *Western Union Telegraph Co. v. Goodson* (Civ. App.) 202 S. W. 766.

63. **Objections and exceptions.**—See *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602; *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636; *Mansfield v. Gerding* (Civ. App.) 203 S. W. 462; notes to arts. 1971, 1974, 2061.

Art. 1974. [1320] [1320] Endorsement by judge on special instructions refused; as bill of exceptions; presumption on appeal; endorsement when instruction given or modified.

See *Morales v. Ciine* (Civ. App.) 202 S. W. 754; *Delano v. Delano* (Civ. App.) 203 S. W. 1145; *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717; *Lotto v. State* (Civ. App.) 208 S. W. 563; *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753; *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

Cited, *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

Application in general.—See *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Acts 35th Leg. c. 177, applies to case tried before its passage, and appealed about time the act went into effect. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

Under specific provision of art. 2061, as amended by Acts 33d Leg. c. 59, § 3, failure to except to refusal to submit special issues waives objection thereto, and the alleged error cannot be considered on appeal, notwithstanding Acts 35th Leg. c. 177, § 1, which was not effective at the time of trial. *Robinson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 203 S. W. 395.

Acts 35th Leg. c. 177, does not amend procedure in criminal cases which is embodied in Acts 33d Leg. c. 138 (Vernon's Ann. Code Cr. Proc. 1916, arts. 735, 737, 737a, 743), and special charges refused and not brought up for review by bills of exceptions cannot be considered. *Barríos v. State*, 83 Cr. R. 548, 204 S. W. 326.

Acts 35th Leg. c. 177, nullifies the amendment of 1913, so that in a case tried in February, 1918, it was the court's duty to indorse the word "Refused" on requested instructions, or the words "Modified as follows," if modified and given; such indorsements constituting a bill of exceptions so that appellant need save no formal bill of exceptions. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

Decisions prior to amendment of April 2, 1917.—Prior to amendment by Acts 35th Leg. c. 177, giving and refusal of special issues held not reviewable where exceptions were not embodied in bill of exceptions. *Schraub v. Uhr* (Civ. App.) 198 S. W. 415.

In case tried before Acts 35th Leg. c. 177, went into effect, where there are no bills of exception disclosing special charges were presented at time and in manner required, and refusal to give excepted to, assignments as to such charges must be overruled. *Dixon v. Winters* (Civ. App.) 201 S. W. 1103.

In a cause tried prior to amendment of this article, by Acts 35th Leg. c. 177, assignment complaining of refusal of requested charges will not be reviewed, unless statement shows exception at proper time with proper bill of exceptions and reference to page of record where the exception may be found, in view of court rule 31 (142 S. W. xliii). *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779.

Filing.—A special charge requested by a party should be filed before it is read to the jury. *Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

Where a special requested charge was read before being filed, but on objection was ordered filed, there was at most an irregularity and not error. *Id.*

Art. 1975. [1321] [1321] Jury may carry charge, etc., with them.

See *Missouri Pac. Ry. Co. v. King*, 2 Civ. App. 122, 23 S. W. 917; *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

Additional charge.—On a trial for horse theft, the court could of its own motion, under Rev. St. 1879, art. 1321, recall the jury after their retirement, and instruct them as to the law of circumstantial evidence, if the defendant was present. *Benavides v. State*, 31 Cr. R. 173, 20 S. W. 369, 37 Am. St. Rep. 799.

CHAPTER FOURTEEN

THE VERDICT

Art. 1977.	Must be in writing and signed.	Art. 1988.	Verdict to comprehend whole issues or all issues submitted.
1980.	Defective or mistaken verdict.	1989.	Judge, on request, to state conclusions of fact and law separately, statement to be filed.
1981.	Not responsive to the issues.	1990.	Court to render judgment on special verdict or conclusions, unless set aside, etc.
1982.	Verdicts either general or special.	1991.	Exceptions to conclusions or judgment noted in judgment; appeal, etc.; transcript.
1983.	General verdict.	1992.	No submission of special issues unless requested.
1984.	Special verdict defined.		
1984a.	Submission of special issues.		
1985.	Special verdict, requisites of; failure to submit issue not reversible error unless request, etc.		
1986.	Special verdict conclusive.		
1987.	Jury to render general or special verdict as directed.		

Article 1977. [1323] [1323] Must be in writing and signed.

Signature.—It is not essential to the validity of a verdict that it be signed by the foreman. *Aycock v. Paraffine Oil Co.* (Civ. App.) 210 S. W. 851.

Where all members of jury declared the verdict to be the one agreed to by them, the formality of signing verdict was waived; the verdict not being affected by fact that foreman was afterwards required to sign it. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

Art. 1980. [1326] [1326] Defective or mistaken verdict.

Defective or informal verdicts in general.—Judgment should conform to verdict, whether it be correct or not, and whether the error therein, if any, arose from erroneous instructions, or from misinterpretation of the evidence by the jury. *Turner Cummings Hardwood Co. v. Phillip A. Ryan Lumber Co.* (Civ. App.) 201 S. W. 431.

Certainty in general.—Where under the charge the only theory on which verdict could be rendered against defendant for injuries to railroad fireman was negligent lookout, a verdict for plaintiff could not be indefinite in that it could not be known whether jury found on some other acts of negligence. *Lancaster v. Mays* (Civ. App.) 207 S. W. 676.

In an action for the price of lumber sold, special verdicts held sufficiently certain on which to base judgment. *Adamson Lumber Co. v. J. E. King Lumber Co.* (Civ. App.) 227 S. W. 702.

A verdict of a jury is sufficient if it can be ascertained with reasonable certainty what the jury's intention was, and any uncertainty can be explained by reference to the record. *Crenweige v. Ponder* (Com. App.) 228 S. W. 145.

Alder by pleadings and evidence.—In trespass to try title to establish boundary, where line claimed by plaintiff was definitely described in petition, general verdict for plaintiff established line as described, and was sufficiently definite to support judgment establishing line as claimed. *Grawunder v. Gotoskey* (Civ. App.) 204 S. W. 705.

Verdict, in being construed, should be viewed in the light of the testimony. *South-ern Gas & Gasoline Engine Co. v. Richolson* (Com. App.) 216 S. W. 158.

A general verdict for plaintiff, which can be made certain by a reference to the petition, will be sustained, and will form sufficient basis for a judgment. *Lopez v. Garcia* (Civ. App.) 221 S. W. 665.

Amount of recovery.—Where sequestration was sued out and levied on cotton claimed by third person, verdict for plaintiff held not to support judgment for him because failing to find value of property, or to specify any sum he was entitled to recover; case not having been submitted on special issues to render applicable art. 1985. *Wheeler v. Moore* (Civ. App.) 208 S. W. 678.

Interest.—Where an architect sued for breach of contract to pay a specific sum for plans and specifications, it was not necessary for the verdict to find the interest; interest being recovered as a matter of law when prayed for from the date when the plans and specifications were delivered. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

Designation of parties.—In action against several defendants, verdict for plaintiff against "defendant" apportioning the damages against named defendants held a finding against all the named defendants. *Crenweige v. Ponder* (Com. App.) 228 S. W. 145.

In action against receivers of railroads, verdict for plaintiff against "defendant" apportioning damages against the railroads without reference to the receiver of a railroad held sufficient to support a judgment against the receiver; the verdict being against all the defendants. *Id.*

Severance as to parties.—In action for damages to shipment of cattle against receivers of one railroad and against another road, the fact that the jury wrote a separate verdict as to each defendant did not render it unintelligible. *Lancaster v. Tudor* (Civ. App.) 222 S. W. 990.

Apportionment of amount of recovery.—Where jury in action under federal Employers' Liability Act found lump sum verdict for the administratrix, its apportionment of damages among her and five children, if error, is surplusage. *Gulf, C. & S. F. Ry. Co. v. Carpenter* (Civ. App.) 201 S. W. 270.

In action involving liability of initial and connecting carriers, held evidence which wholly failed to show damages which occurred on each line afforded no basis for an apportionment of damages by jury. *Ponder v. Crenwelge* (Civ. App.) 203 S. W. 1125.

Objections to verdict.—In an action for loss under a contract wherein connecting carriers were only liable for their own negligence, connecting carriers did not waive an objection to entry of a joint judgment by failing to object to the reception of verdict holding them jointly liable. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

Amendment or correction.—See *North American Dredging Co. v. Pugh* (Civ. App.) 196 S. W. 255; notes to art. 1981.

Arts. 1980, 1981, does not permit reassembling of jury after separation of four days and allowing it to reverse its findings upon vital issues of fact. *Hughes-Buie Co. v. Vasquez* (Civ. App.) 202 S. W. 525.

Art. 1981. [1327] [1327] Not responsive to the issues.

Responsiveness in general.—If correct elements of damage are defined by court, jury are restricted thereto. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In action against interurban railroad for injuries in collision with wagon, answer of jury to special issue, inquiring whether those in charge of car failed to sound whistle as it approached crossing, that they failed to sound it at proper time was proper and responsive. *Id.*

Where plaintiff was entitled to judgment for \$294.74, the difference between contract and market prices of cotton on date defendant breached delivery, or nothing, a verdict for plaintiff for \$50, presumably based upon a compromise offer before suit, is not responsive to either issues or evidence, and must be set aside. *Smith v. Hoffman* (Civ. App.) 201 S. W. 204.

Where there was really but one issue, which party was right as to the terms of the contract, and each could not have verdict, a finding for defendant was effective as disposing of issue against plaintiff, though issue was submitted in a double form. *Reed v. Hunter* (Civ. App.) 201 S. W. 207.

Where pursuant to agreement between Q. and E. for exchange of lands, Q. conveyed by direction of E. a tract to plaintiff, and plaintiff was forced to pay for improvements, and brought suit against E. and Q., in which suit E. set up a counterclaim that he was entitled to recoup from Q., a verdict against E. was responsive to issues. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

In action against railroad for loss of cattle through openings left in plaintiff's fence, where special issue submitted question of whether the 17 head of cattle alleged in plaintiff's petition escaped through opening, with the requirement that jury answer yes or no, answer of "Yes; at least 10 head," held sufficiently responsive. *Gulf, C. & S. F. Ry. Co. v. Baker* (Civ. App.) 218 S. W. 7.

In an action for specific performance of a contract to convey land, executed by a broker, the jury's answer to the question as to whether the owner listed the property that the owner did list land for sale, subject to his approval, held responsive to the issue; the jury being admonished to answer as the facts might be. *Brown v. Musgrave* (Civ. App.) 222 S. W. 606.

Where there was no controversy as to the price of property sold, and the court in the judgment expressly found that it sold for \$7,000, an answer by the jury to a special issue as to a reasonable broker's commission that 5 per cent. was a reasonable commission is responsive, and defendant vendors cannot complain that the question of the price realized was not submitted, etc. *Sutton v. Morehead* (Civ. App.) 227 S. W. 558.

In action by son's creditor against father on the ground that father assumed payment of son's debts, answer of, "This land was deeded to pay the P. (son's) debts," held sufficiently responsive to special issue as to whether land had been conveyed to the father to pay off son's debt to plaintiff. *Bell v. Swim* (Com. App.) 229 S. W. 470.

An answer to special issue as to what induced defendant to sign note, that the note was signed, for the consideration therein expressed is responsive, being equivalent to a statement that the consideration recited was true. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

Disregard of instructions.—It is the province of the jury to receive and follow instructions as to law applicable to the facts. *Lillard Milling Co. v. Brooks & Few* (Civ. App.) 204 S. W. 686.

Where court instructed jury to assess damages separately against connecting carriers, a verdict assessing damages jointly was not responsive to the issues, and it was the duty of the court to call the jury's attention thereto, and send them back for further deliberation, and, having failed to do so, no judgment could be rendered, in view of this article. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

Where the court charged that, if defendant proposed to marry plaintiff if she would have sexual intercourse with him, the verdict should be for defendant, and the uncontradicted evidence showed there was no other consideration for the promise, a verdict for plaintiff, was contrary to both the law and the facts. *Olguin v. Apodaca* (Com. App.) 228 S. W. 166.

Sending the jury back for further deliberation.—In view of arts. 1980, 1981, as to re-submission of issues where the verdict is not responsive, the court's action in with-

drawing certain issues submitted held not prejudicial error. *North American Dredging Co. v. Pugh* (Civ. App.) 196 S. W. 255.

Arts. 1980, 1981, do not permit reassembling of jury after separation of four days and allowing it to reverse its findings upon vital issues of fact. *Hughes-Buile Co. v. Vasquez* (Civ. App.) 202 S. W. 525.

Where verdict was incomplete and not responsive to charge, jury should have been sent back for further deliberation, as required by this article. *Wheeler v. Moore* (Civ. App.) 208 S. W. 678.

Submission of special issues.—See *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646; notes to arts. 1984a, 1985, 1987.

Art. 1982. [1328] [1328] Verdicts either general or special.

Cited, *Dwyer v. Kaltayer*, 68 Tex. 554, 5 S. W. 75.

General and special verdict.—Rev. St. 1879, arts. 1328, 1333, authorizing either a general or a special verdict of a jury, does not contemplate the rendering of both. (*Dwyer v. Kaltayer*, 5 S. W. 80, followed.) *Cole v. Estell* (Sup.) 6 S. W. 175.

As defendant does not have privilege of requiring jury to append to its verdict list of injuries found to have been sustained, where case is submitted on charge calling for general verdict it cannot be said that such privilege is essential. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

Where the court submitted a case on special issues, it did not err in refusing to give a charge which would make the verdict one partly general and partly on special issues. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

Where jury, the case being submitted on special issues, returns a general verdict without any instructions from the court, in addition to answering the questions submitted, and the court copies into its judgment the general verdict and unsigned special verdict, the judgment is not void on the ground that it cannot be determined whether it is on the special or general verdict, as court could ignore general verdict. *Aycock v. Paraffine Oil Co.* (Civ. App.) 210 S. W. 851.

In a suit to restrain cutting of timber, in view of the pleadings and verdict, special verdict on the issue whether short-leaf pine timber was merchantable at the date of the timber deed, held not improper, on ground jury cannot return a general and special verdict. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

Submission of special issues.—See *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646; notes to arts. 1984a, 1985, 1987.

Art. 1983. [1329] [1329] General verdict.

See *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646; notes to art. 1987.

Implied findings.—In a personal injury case, after instruction as to contributory negligence, and that verdict for plaintiff should be diminished in proportion to the amount of his negligence, under art. 5246h, a verdict for the plaintiff finds defendant's negligence was the proximate cause of plaintiff's injury. *McBride v. Hodges* (Civ. App.) 200 S. W. 877.

Where the court submitted the issues, including that of defect in machinery, in a general charge so framed that, unless the jury found the machine defective, its verdict would be for the defendant, verdict for plaintiff necessitated the conclusion that they found the machine defective. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

Where the court submitted the question of plaintiff's contributory negligence, as well as defendant's negligence, a verdict for plaintiff involved a finding that plaintiff was not contributorily negligent. *Texas Electric Ry. v. Scott* (Civ. App.) 220 S. W. 1112.

Art. 1984. [1330] [1330] Special verdict defined.

See *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753.

Art. 1984a. Submission of special issues.

Constitutionality and construction in general.—In a jury trial it was reversible error to refuse to submit the case on special issues, on request therefor before the general charge had been submitted, and after objections thereto had been overruled, in view of this article; the statute being mandatory. *Jackson v. Martin* (Civ. App.) 218 S. W. 4; *Panhandle & S. F. R. Co. v. Cowan* (Civ. App.) 225 S. W. 185.

This article is mandatory, the court having discretion, subject to review, as to whether the cause can be determined on special issues. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858.

It was not the purpose of the Legislature, in providing for special verdicts, to deprive litigants of any substantial and valuable right necessary for the protection of their interests, as the same existed before the passage of the act. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

This article is mandatory, and failure to submit special issues is excusable only in cases that cannot be determined upon such submission. *Dorsey v. Cogdell* (Civ. App.) 210 S. W. 303.

When special issues should be submitted.—Where the evidence on an issue was conflicting and irreconcilable, there was an issue for the jury and failure to submit on

special issue as requested under this article, is reversible error. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858.

Where facts are undisputed, no special issues relative thereto should be submitted, but motion should be made, asking the court to pronounce judgment required by law upon such undisputed facts. *Lasater v. Lopez* (Civ. App.) 203 S. W. 1039.

In an action for breach of contract, plaintiff's request for peremptory instruction and for special issues which may not have been raised by evidence in the judgment of the court did not relieve the trial court of the duty to submit the case upon special issues, in view of this article. *Dorsey v. Cogdell* (Civ. App.) 210 S. W. 303.

Where the court charged that the burden was upon plaintiff servant, suing to set aside an award of the Industrial Accident Board, to show that his total and permanent incapacity resulted from the accidental injury, and also gave defendant's special charge on proximate cause, there was no error in refusing the submission of a special issue as to whether plaintiff received any of the injuries alleged, and whether such injuries resulted in total and permanent incapacity. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

In landlord's action against tenant, the overruling of defendant's request to submit the cause on special issues raised by pleadings and evidence, was error, since the case was determinable on special issues, in view of this article. *Watson v. Corley* (Civ. App.) 226 S. W. 481.

Under this article, it was not error to submit a suit to enjoin a cotton gin as a nuisance on special issues, without request of either party. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

Necessity of request.—Notwithstanding art. 1992, the trial court may, under this article, submit a case upon special issues without request by either party. *Penelope Real Estate Co. v. Dawson* (Civ. App.) 206 S. W. 702; *Ellis v. Haynes* (Civ. App.) 216 S. W. 249.

Under this article, in action on fire policy, if defendant desired finding of jury upon cash value of building, it should have requested special issue, and by not so requesting left question to court. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 374.

If the defendant wanted the special issue as to the injury suffered by plaintiff submitted to the jury, it was incumbent upon it to so request in writing. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

Where the court submitted an issue whether a landlord's eviction of the tenant damaged the tenant by depriving him of pasturage lands, the tenant, if he desired a fuller statement of the law in connection with the submitted issue, should have requested it. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

Appellant cannot complain of the failure to submit the issue as to the extent by which improvements made by him had increased the value of the land, where he made no request for the submission of such issue and did not object to the issues submitted because they did not require the jury to consider such increase. *Fabra v. Fabra* (Civ. App.) 221 S. W. 1008.

Parties having failed to request a submission of certain issues cannot complain of the failure of the court to submit the same. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Where there is no request by either party for submission on special issues, the court may submit on special issues or upon a general charge at his discretion. *Panhandle & S. F. Ry. Co. v. Cowan* (Civ. App.) 225 S. W. 185.

See, also, notes to art. 1985.

Submitting special issues separately.—A special issue should not contain several distinct matters. *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793; *Texas & N. O. R. Co. v. Turner* (Civ. App.) 199 S. W. 868; *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

In an action for wrongful death, it was error under this article, to submit the question of contributory negligence without also submitting special issues thereon requested by defendant separately. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

Submitting special issue whether defendant railroad negligently permitted its fence to be removed and negligently failed to prevent stock coming upon its right of way, held erroneous because embracing distinct issues capable of different answers. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 199 S. W. 868.

Submitting special issue whether defendant railroad negligently permitted its right of way to be unfenced and negligently ran down plaintiff's mules, held erroneous because embracing distinct issues admitting different answers. *Id.*

Special issue as to whether box car at time of accident was being moved by defendant in the operation of its railroad or in work incidental to such operation, held not objectionable as submitting two issues in one. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In personal injury suit, court as general rule is not required to submit separate issue as to each injury. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

The several grounds of negligence which plaintiff pleads and supports by evidence should be submitted separately. *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

In action on note where transfer was disputed, issue whether payee transferred the notes to plaintiff in good faith before due should have been divided; one issue being whether there was a transfer, and the other whether it was in good faith before the due date. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

In an action for injuries to live stock from delay in loading, where plaintiff relies, both on the negligent condition of a switch preventing loading and the muddy condition of the loading pens as distinct acts of negligence, they require submission as distinct and separate special issues, unless the pens' condition is proved merely to show effect of delay. *Kansas City, M. & O. Ry. Co. of Texas v. Bomar* (Civ. App.) 207 S. W. 570.

The issue as to whether a berth was requested by passenger and refused by sleeping car company held not objectionable as submitting two issues. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

On appeal in eminent domain cases by a city it is best to submit on issues: First, as to the market value of the land taken; second, whether the remaining land has depreciated in value by the taking; and, third, if there has been such depreciation, its amount; and it would be proper to give instructions concerning the elements to be considered, in view of the proof, in deciding the issues, but to submit each element separately does not furnish a practical way to decide them. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

Financial injury and mental suffering are both elements of actual damages, the first being classified as special and the second as general damages, and hence a special issue inquiring of the jury whether plaintiff sustained "any financial injury or mental suffering" was not erroneous on ground that financial injury and mental suffering were distinct elements of damages and should have been separately submitted. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In suit on accident policy to recover both indemnity for disability and for death, the submission, of a special issue whether the claimed injuries to insured did "continuously and wholly disable" insured, "and result in his death," held erroneous, as combining distinct issues, which might be answered differently. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

In action on accident policy, the submission in one issue of whether plaintiffs had proved that neither the use of liquor nor either of two diseases caused, or contributed to cause, the injury which resulted in insured's death, was erroneous, involving several issues of fact, which insurer was entitled to have separately submitted. *Id.*

The issue of unavoidable accident is comprehended within issues as to negligence as the proximate cause of the injury, being the negative thereof, and defendant is not entitled to have it separately submitted. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

In attorneys' action to recover fee, where answer alleged fraud in procuring employment and also in obtaining abandonment of original contract and the making of contract sued on, special issue as to whether attorney made fraudulent representations to procure employment and the contract sued on was not erroneous for intermingling original and subsequent contracts. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

Though this article contemplates that each issue of fact be submitted separately, where two matters are combined in one issue, and one of them is not in reality an issue of fact, on account of the undisputed testimony thereon, there is no reversible error. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

In a servant's action to set aside award of the Industrial Accident Board and for lump sum settlement, the court should separate the issues of the extent of plaintiff's incapacity and of the duration thereof. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

An interrogatory, "Now, if you have found in answer to the issues heretofore submitted that the defendant, S. L. R. Co., was negligent in any or all of the following respects, that is, etc., then was such negligence, if any, the proximate cause of the collision," held not erroneous as embracing several questions in one. *St. Louis Southwestern Ry. Co. of Texas v. Lamkin* (Civ. App.) 220 S. W. 179.

Single issue of negligence of railroad in inducing refinery company's employé to expose himself to danger of explosion in repairing leaky car of gasoline stated to contain unrefined naphtha could not be split so as to make separate issue of each circumstance pertinent to main issue. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

Trial court was not required to separate issues one from another so as to isolate a requested charge, coupled with and made dependent on the issue immediately preceding it. *Gregory v. Corpus Christi Nat. Bank* (Civ. App.) 221 S. W. 305.

In grantee's action to enjoin sale on execution against grantor, court's refusal to submit separately special issues as to the market value of the pieces of property held error. *Slaton v. Citizens' Nat. Bank* (Com. App.) 221 S. W. 955, affirming judgment (Civ. App.) *Citizens' Nat. Bank of Plainview v. Slayton*, 189 S. W. 742.

In action against mortgagee for wrongful sequestration special issue as to whether mortgagee's agent acted in good faith and with reasonable grounds for believing that mortgagee felt itself insecure or unsafe or feared that storage company would injure the automobile during pendency of suit, held an erroneous combination of two separate and distinct issues which the jury should have been permitted to pass upon separately. *Central Transfer & Storage Co. v. Wichita Falls Motor Co.* (Civ. App.) 222 S. W. 688.

Under this article, the several grounds of negligence alleged should be submitted separately, rather than, Was defendant negligent in any of the respects claimed in the petition? *Hines v. Parry* (Civ. App.) 227 S. W. 339.

In an action by a broker for commissions, special issues, submitting whether the land was sold to a purchaser procured by the broker, whether the land was sold by the owners, and whether it was sold to a third person, and, if so, for the purpose of avoiding payment of commissions, held not objectionable on the theory that the latter question should have been submitted independently, notwithstanding the rule that a defendant is entitled to have his defenses affirmatively submitted. *Sutton v. Morehead* (Civ. App.) 227 S. W. 558.

Where a shipper of hogs contended that they were injured by negligent delay, rough handling, and failure to feed, special issue, held improper, because not separating the issues of delay and failure to feed and water, and also in suggesting improper handling in the absence of any evidence thereof. *Hines v. Whiteman* (Civ. App.) 228 S. W. 979.

In an action for injuries to jitney car passenger sustained in a collision with a truck, special issue submitting whether jitney car driver was negligent in different respects specified, held multifarious in violation of this article. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

Questions to be submitted.—See *Munes v. J. I. Case Threshing Mach. Co.* (Civ. App.) 204 S. W. 235; *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; notes to art. 1985.

Form of special issues.—See *Steele v. Steele* (Civ. App.) 218 S. W. 161; notes to art. 1985.

Explanations and definitions.—Instruction defining "employer" and "employé" held properly refused where the special issues did not use these words, though they asked whether plaintiff was in defendant's employ. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Under this article, instruction that a person was an independent contractor, and that defendant was not liable for his negligence, held properly refused where it did not explain or define anything in the special issues. *Id.*

In an action for injury to a switchman, it was not error to refuse to submit a special issue as to whether the injury was the result of an accident, which defined "accident" as a thing which occurs without fault of any person, but not defining the word "fault." *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

In action for balance due on contracts, where court submitted special issue of whether there was bona fide dispute as to amount due plaintiff when he accepted defendant's voucher stating that it was for balance in full, court's refusal to give special charges defining "bona fide controversy" held not error. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

Instruction that plaintiff was a trespasser, and that railroad owed him no duty until his position of peril was discovered, although erroneous, and not in compliance with this article, cannot be said to have contributed to result where jury found in answer to only issue submitted that operators of train did not discover plaintiff's peril in time to have prevented injury. *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

In submitting a case upon special issues it is proper for the court to give all necessary definitions and explanations, but not to charge generally on the law of the case. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

In an action by shippers of live stock for delay in transit, the shippers' case being founded on negligence, the railroad was entitled to have it properly defined to the jury, and the requested charge, defining negligence and fault as used in an issue submitted, should have been given. *Quannah, A. & P. Ry. Co. v. Collier* (Com. App.) 215 S. W. 838.

Charges in cases submitted on special issues—In general.—Where case is submitted on special issues, general instructions to find for party, if certain facts be found, are improper. *City of Sweetwater v. Biard Development Co.* (Civ. App.) 203 S. W. 801; *Moore v. Coleman* (Civ. App.) 195 S. W. 212; *Garrett v. Dodson* (Civ. App.) 199 S. W. 675; *Grimm v. Williams* (Civ. App.) 200 S. W. 1119; *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842; *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630; *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270; *Worden v. Kroeger* (Com. App.) 219 S. W. 1094; *Buchanan v. Williams* (Civ. App.) 225 S. W. 59.

Trial court, in submission of special issues, should give proper charge on burden of proof in connection therewith. *Levy v. Jarrett* (Civ. App.) 198 S. W. 333.

In action for injuries sustained at railroad crossing, special charge held, in effect, general charge, and improperly given, special issues having been submitted. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

Where cause was submitted on special issues, refusal of requested instructions which would not have aided jury in answering questions is not error. *Grimm v. Williams* (Civ. App.) 200 S. W. 1119.

Where a case is submitted on special issues, a party is entitled to an affirmative presentation of an issue raised by the pleadings and evidence. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

Where case was submitted on special issues, a requested charge, applicable only if the case had been submitted on a general charge, was properly refused. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

Requested instructions, merely general and without reference or not directing the jury's attention to any particular special issues submitted in the court's charge, are properly refused. *Id.*

Where the case was submitted upon special issues and in each instance the jury was instructed to return an answer in accordance with the preponderance of the evi-

dence, there was a sufficient charge as to the burden of proof. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

Where a case is submitted on special issues, it is not error to refuse a general charge. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

Where the only issue was submitted specially and was clearly defined, special instruction to the jury to determine what their answer would be to a following question by what they believed to be the truth from a preponderance of the evidence submitted before them held not erroneous as misleading and confusing. *Veltmann v. Slator* (Civ. App.) 219 S. W. 530.

Where plaintiff agreed that the cause should be submitted on special issues, he cannot complain of the refusal of a requested charge directing verdict in his favor. *Master-son v. Turnley* (Civ. App.) 220 S. W. 428.

Where the case was submitted on special issues, a special requested instruction in the nature of a general charge on those issues was properly refused. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

Rule that a request to give a special charge which is incorrect if sufficient to direct the attention of the judge to the issue, requires the court to submit this issue by a correct charge, does not apply in a case submitted on special issues; there having been no request for submission of a special issue on the matter to which the requested charge applies. *Hines v. Parry* (Civ. App.) 227 S. W. 339.

Where a case is submitted under a general charge, the defendant is entitled to have facts pleaded as a defense and supported by testimony grouped and affirmatively submitted to the jury; but, where the case is submitted by special issues, a special charge grouping the evidentiary facts is erroneous. *Jordan v. El Paso Electric Ry. Co.* (Civ. App.) 227 S. W. 1117.

Where the case was submitted to the jury on special issues, so that they were not told what facts were necessary to entitle plaintiff to recover, a requested charge that the burden of proof was on the plaintiff to show by a preponderance of the evidence such facts as would entitle him to recover was properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

When a case is submitted upon a general charge, it is proper for the trial judge to state the issues made by the pleadings; but such a statement is rarely ever necessary or appropriate in submitting a case upon special issues. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

— **Nature of action or issue in general.**—In trespass to try title wherein defendants' only claim was by limitation, where a special issue submitted such claim, plaintiffs' requested charge that if former husband of a defendant purchased the land and gave it to the mother of plaintiff's grantors, before he could hold adversely to those holding under her, there would have to be some act on his part repudiating her claim, should have been given. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

A requested peremptory charge not to find for the interveners for certain of the land involved in trespass to try title was objectionable in form where the case was submitted on special issues, as the jury was not authorized to find for or against interveners for any land. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

In a partition suit, in which defendant claimed title by adverse possession, the action of the court in stating in detail the issues made by the pleadings, though the case was submitted to the jury on special issues, held not reversible error. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

— **Actions and issues relating to contracts.**—In action by lessor to forfeit lease for nonpayment of rent, where the jury expressed a desire that tenant keep his lease but pay all back rents, costs, etc., court properly refused to instruct them how to answer special issues submitted to arrive at that verdict. *Crawford v. Texas Improvement Co.* (Civ. App.) 196 S. W. 195.

In an action on notes in view of wording of submission of special issue of consideration for an agreement to forbear refusal of requested charge held error. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

In action on fire policy in which defense was an award, and case was submitted on special issues, and on face of proceedings award was at least irregular, refusal of instruction that in absence of fraud, etc., award was binding held not error. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

In action for commission for selling land special issues as to the commission contract and its performance, and peremptory instruction for plaintiff for a certain sum, regardless of answers to special issues, were irreconcilable. *Pryor v. Scott* (Civ. App.) 200 S. W. 909.

Where court submitted cause on sole issue whether deed was intended as a mortgage or security, a charge on burden of proof, and question whether defendant after conveying the land remained in possession and attorned to plaintiff as his landlord for such time as would be a bar under statute of limitations, held necessary. *Ellis v. Haynes* (Civ. App.) 216 S. W. 249.

In an action on a fraternal benefit certificate, an instruction, erroneous in requiring the jury to say whether the applicant for insurance was affected by any of certain prohibited complaints as a group, was cured by the submission of each separately. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

Where suit against a bank, its directors, and liquidating agent, to recover deposits made by plaintiff, was submitted on special issues general charge to control the disposition of at least half the amount sued for was properly refused to plaintiff. *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

— **Negligence in general.**—Where the court in an action for wrongful death submits special issues to the jury, it should not submit charges either general or special in connection therewith, except for the purpose of explanation or definition. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

Personal injury case being submitted on special issues, defendant was not entitled to general charge. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

As regards the special issue, in an employé's injury case. Was the place furnished a reasonably safe one to work? the general charge, requiring the affirmative of any special issue to be proved by a preponderance of the evidence, erroneously places the burden of proof on defendant. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

In an action for the negligent killing of a borrowed mule, the failure to extend an instruction placing the burden of proof on plaintiff to a special issue requested by defendant as to whether the mule died as the result of any act of negligence of defendant held not error. *Shook v. Newsome* (Civ. App.) 228 S. W. 1118.

In an action for the killing of cattle, the refusal of a special requested charge that if motorman was operating car at a rate of speed that an ordinarily prudent person would have operated the same they would answer in the negative the special issue submitting the question of negligent speed, held harmless; the court having in its main charge defined negligence, and having given defendant's special charges defining proximate cause and directing a finding on whether the speed was the proximate cause. *Eastern Texas Electric Co. v. Hunsucker* (Civ. App.) 230 S. W. 817.

In action for injuries to passenger, refusal of defendants' request to instruct the jury that plaintiff had the burden to establish the affirmative of certain special issues submitted to them held not error, in view of the court's charge on the burden of proof. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

— **Contributory negligence and assumption of risk.**—A statement in charge that if plaintiff assumed the risks he could not recover for injuries was properly refused, where the case was being submitted on special issues. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

In action for injuries, case being submitted on special issues, instruction that burden was on plaintiff to make out case by preponderance of evidence held sufficient, and instruction that burden was on him to show want of contributory negligence properly refused. *Rick Furniture Co. v. Smith* (Civ. App.) 202 S. W. 99.

The court did not err in refusing to give defendant's special requested charge with reference to contributory negligence of deceased where the same was substantially given in the questions submitted. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

In a railroad brakeman's action for injuries, the refusal of special charges denying recovery to plaintiff on the finding of contributory negligence on his part was not erroneous, where the court's question on the point directly included every phase of the evidence and the matters contained in the special charges. *Lancaster v. Hynes* (Civ. App.) 214 S. W. 957.

Where requested special charge on discovered peril was sufficiently embraced in the court's charge and the special issues correctly submitted that issue it was not error to refuse the request. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Where an action for injuries to a passenger was submitted on special issues, and there was no issue submitted or requested as to contributory negligence, if injury occurred in the manner he claimed it was not error for the trial court to refuse special charges relating to contributory negligence, even though sustained by the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

— **Damages and amount of recovery.**—Refusal of instruction not to include, in any amount found in answer to certain issue, doctor's bills, etc., was proper where such issue did not include such bills same being specifically inquired into in other issues. *Fisheseries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

In action against a carrier for damages to hogs, it was not necessary to give a charge upon the measure of damages, where the cause was submitted upon special issues. *Lancaster v. Pitzer* (Civ. App.) 211 S. W. 313.

In a personal injury action, an instruction accompanying a special issue submitting the question of the amount of damage, held not improper as influencing the jury to allow a double recovery for disability to earn money. *Texas Electric Ry. v. Williams* (Civ. App.) 213 S. W. 730.

In condemnation proceedings, where the court submitted special issues as to the items of damage, it was not improper for the court to give a general charge as to the elements to be considered by the jury in determining the damages. *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911.

In action involving damages for loss of use of personalty for over two years, in which issue as to the value of the use was submitted, defendant was entitled to an instruction which would have furnished them a guide concerning their duty in arriving at such value. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

The evidence in action for injury to land being conflicting as to whether the injury, if any, was permanent or temporary, an issue should have been submitted as to what was its nature, with an instruction as to the difference in the measure of damages in the two cases. *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

In action for injuries to passenger, instruction as to taking into consideration miscarriage, or abortion, or any suffering therefrom or any expenses incurred because thereof in assessing damages, held proper, as against contention that it was on the burden of proof in a case submitted on special issues, and unduly emphasized the facts of the miscarriage and the suffering therefrom. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

— **Objections to charge.**—See *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099; notes to art. 1971.

Implied findings.—See *Litchfield v. Fitzpatrick* (Civ. App.) 224 S. W. 926; notes to art. 1985.

Art. 1985. [1331] [1331] Special verdict, requisites of; failure to submit issue not reversible error unless request, etc.

See *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Cited. *Heidritter v. Keith Lumber Co.* (Civ. App.) 197 S. W. 885; *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

Questions on issue to be submitted.—The rule in cases submitted by a general charge that each group of facts pleaded and supported by testimony should be affirmatively submitted does not apply when the case is submitted upon special issues. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247; *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

Under this article, undisputed facts should not be submitted in special issues. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

When a case is submitted on a general charge, issues of each party should be affirmatively submitted, but such is not the case if the submission is on special issues. *Jackson v. Graham* (Civ. App.) 205 S. W. 755.

Arts. 1984a, and 1985, require the court to submit only the ultimate controlling issues necessary to a judgment on the pleading, and not subordinate issues necessarily embraced in the finding of the ultimate issue, so that, if answers in a special verdict dispose of the controlling issues judgment may be rendered thereon although all issues are not answered. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

If under the evidence an answer requiring a different judgment from that rendered might have been made by the jury to questions refused to be presented, refusal of court to submit such issue was error; but in determining what the jury might have answered it cannot be assumed that they would have found a fact in conflict with what the record shows they did find in response to questions which court submitted. *Lancaster v. Campbell* (Civ. App.) 218 S. W. 550.

Trial courts should submit issues so as to conform to the particular facts in the case under trial. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

— **Evidentiary or ultimate facts.**—The refusal to submit requested issues which were evidentiary, not ultimate issues, and not controlling was not error. *Dark v. Indiana Silo Co. of Texas* (Civ. App.) 204 S. W. 245; *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271; *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

In view of this article, the trial court should submit questions upon controlling issues only, and should avoid propounding questions calling simply for finding of an evidentiary fact. *Manes v. J. I. Case Threshing Mach. Co.* (Civ. App.) 204 S. W. 235; *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

Under Rev. St. 1879, art. 1331, it is proper to refuse to submit as a special issue the question whether plaintiff by looking westward could have seen the train in time to avoid the accident as, upon an affirmative finding it would still be a question for the jury whether his failure to look in that direction was negligence. *Gulf, C. & S. F. Ry. Co. v. Anderson*, 76 Tex. 244, 13 S. W. 196.

Under this article, special issue as to who gave plaintiff instructions to do work at which he was injured and issues requiring finding of evidence of fact of employment held properly refused. *San Antonio U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Submission of special issues to determine whether a conspiracy had been formed by defendants by any of the means alleged in plaintiff's petition was erroneous, where allegations of the petition, if true, standing alone, do not show wrongful conduct; it being proper to submit issues only as to ultimate, and not evidentiary, facts. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

In an action for conversion of cotton in which the controlling issue was whether plaintiff or plaintiff's father owned the cotton, the question of who rented the land upon which it was grown was a mere evidentiary fact upon the ultimate issue and should not have been submitted. *Douglass v. Wallace* (Civ. App.) 211 S. W. 530.

In action for wrongful death, requested issues relating to evidentiary matters held properly refused. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

Where a case is submitted on special issues, the trial court is not required to submit questions which involve merely a decision upon evidentiary facts, or issue merely incidental to the material issues by which the controversy must be determined. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

Where question of possession had been fully and clearly submitted, the court did not err in refusing to submit special issues as to whether either of the parties had held exclusive or joint possession of the land in question; the statute on submission of special issues not contemplating that evidentiary matters be submitted. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

In action by lessors to remove cloud from title by reason of lessee's record of escrow agreement covering lease, refusal of special charge requested by defendant lessee whether lessors by reasonable diligence before they signed and delivered could have discovered words "limitation" or "limitation title" were not in agreement held proper; court being required to submit only ultimate issue of facts, which it did. *Mackenzie v. Pugh* (Civ. App.) 221 S. W. 1010.

No complaint can be made of the refusal of the court to submit certain special issues, where it submitted the ultimate controlling issues, and the answers necessarily an-

swered the more detailed subordinate issues requested. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

In action against railroad for death of shipper's employé crushed between cars, refusal to submit issue of whether railroad in shoving cars upon track without warning knew that deceased employé was on the track held not error, since such issue was evidentiary and a negative answer would not necessarily have relieved railroad of liability. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

Every issue of fact presented by the pleadings and supported by evidence must be submitted to the jury, where requested by either party; "issues of fact" meaning, not the various controverted specific facts which may enter into the main issues of fact but only the independent ultimate facts which go to make up plaintiff's cause of action and defendant's ground of defense. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

In an action for death of plaintiff's husband a special issue as to the earning capacity of deceased was properly refused, since it was only as to an evidentiary fact. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

In an action by a purchaser of a share of an oil company based on the misrepresentations of the seller, it was error to refuse special issue whether purchaser had been informed that a named person sent a telegram concerning the bringing in of an oil well, and this is so, even though the jury ordinarily are required only to find as to the ultimate facts. *Philpott v. Edge* (Civ. App.) 224 S. W. 263.

In jitney bus passenger's action on operator's indemnity bond for injuries sustained in collision, refusal to submit issue as to the motor number of car in which she was injured held proper; such fact being merely an evidentiary fact. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

— All issues to be submitted.—Failure to submit question of defendant's negligence constituted no ground of objection to a special issue as to damages. *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983.

— Immaterial issues and issues not warranted by evidence.—A special issue need not be submitted, there being no evidence in support of it. *Schaff v. Scoggin* (Civ. App.) 202 S. W. 753; *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

An immaterial issue should not be submitted, and a finding thereon cannot be made the basis of a judgment. *National Equitable Soc. v. Reveire* (Civ. App.) 209 S. W. 799; *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

It is improper to submit an issue of fact when the uncontradicted testimony establishes such fact. *National Equitable Soc. v. Reveire* (Civ. App.) 209 S. W. 799; *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726.

Special issue in trespass to try title, which, if affirmatively answered would show prior possession for plaintiff, held not immaterial where neither party derails title from sovereignty. *Crafts v. McAllen* (Civ. App.) 196 S. W. 729.

In action on fire policy refused issue as to whether adjuster told insured she might remove all her furniture held immaterial. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Presentation of special issues to jury is permitted to have issues clearly found, that law may be applied to them, not to find multitude of facts neither establishing nor destroying an issue. *Baker v. East* (Civ. App.) 197 S. W. 1123.

In an action for damages for delayed telegram, it was not error to refuse an issue relative to negligence of the sender, where there was no evidence of such negligence. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

Where jury found that defendant warehouseman was entitled to restore plaintiffs' goods in another warehouse, refusing to submit immaterial issue whether plaintiff understood goods would be stored in defendant's warehouse is not erroneous. *Thornton v. Dan-*

In action against city for flooding land, there being no evidence as to injury from particular floods, refusal of special issues as to damages therefrom was proper. *Moore v. City of Dallas* (Civ. App.) 200 S. W. 870.

Where both parties to an action admit that certain goods were sold at an agreed price, court's refusal to submit special issue as to whether such goods were sold at an agreed price is not error. *Gass v. Sweeney* (Civ. App.) 204 S. W. 249.

was really an issue as to such contract, though it is treated as though it sought to pre-
 (Civ. App.) 199 S. W. 831.

Where evidence was insufficient to raise issue of whether brakeman, an employé of defendant railroad, knew, upon seeing plaintiff between coal car and tender, that train was likely to move and whether if he had so known he could have prevented train from moving, court was not authorized to submit issue of discovered peril. *Freeman v. Huffman* (Com. App.) 206 S. W. 819.

In suit on guardianship bond where undisputed evidence showed that guardian had failed to account for guardianship fund, there was no necessity of submitting issue as to amount which had been lost by guardian as executor and trustee. *Davis v. White* (Civ. App.) 207 S. W. 679.

Where probate court never authorized guardian to expend any part of guardianship fund, and guardian had ample funds as executor and trustee to educate and maintain wards as he was directed to do under will, question as to amount expended by guardian for maintenance and education was immaterial, in suit on the guardianship bond and was properly not submitted. *Id.*

Only where there is a dispute in evidence touching some material issue is the trial court required to submit such issue for the jury's determination. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

In action for injuries sustained when leaving train by person accompanying passengers a special issue or instruction requested by the railroad which would have been decisive of no issue in the case, however it might have been answered, was properly refused. *Id.*

Plaintiff being an innocent purchaser for value before maturity of the note sued on, issue whether original payee insurance company, which was not a party, had obtained a permit to do business within the state was immaterial. *National Equitable Soc. v. Revere* (Civ. App.) 209 S. W. 799.

A requested special issue embracing question not applicable to evidence is properly refused as a whole. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

An action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, where there was no evidence tending to show creation of station at such place otherwise than by designation of depot grounds, court properly refused to submit issue of whether railroad established a siding or stopping place at such place or nearby stations. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

In action for delay in shipment of cattle so that a market was lost in the absence of evidence that another railroad, which handled the shipment after defendant railroad, was guilty of negligence in failing to transport with reasonable care and dispatch, the issue whether the cattle could have reached the market in time had the second road transported them promptly, was properly not submitted. *Quanah, A. & P. Ry. Co. v. Collier* (Com. App.) 215 S. W. 838.

Where defendant who relied on the 10-year statute of limitations, did not hold under any memorandum of title other than deed, the submission of the issue of holding under memorandum of title other than a deed, which was in no wise raised by the evidence, was improper. *Crawford v. Thos. Goggan & Bros.* (Civ. App.) 217 S. W. 1106.

In trespass to try title, the action of the court in submitting an issue under the 10-year statute was improper, where the evidence raised no such issue. *Id.*

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the death of a fireman, the court properly refused to submit the inquiry, whether deceased saw or should have seen derail open in time to have requested the engineer to stop the train or so lessened its speed that the engine would not have been derailed, or tank would not have been overturned, there being no evidence that the open switch could have been seen in time to have stopped the train. *Hines v. Mills* (Civ. App.) 218 S. W. 777.

In an action for the death of an automobile driver at an interurban railroad crossing, the submission of a special issue raised by the pleadings and evidence whether it was negligence not to have the car under control after the motorman discovered the automobile approaching the crossing was not error, though there was no evidence to sustain an issue of discovered peril. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Evidence held not to show conclusively that the car which caused the death of defendant railroad's brakeman was a foreign car, though it was called the car of another road, so as to require submission of defendant's special issue of liability for injury by a foreign car. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

In action to recover on express or implied contract to pay for services, in the absence of evidence of an express contract, the trial court properly refused to submit what sent an issue as to an implied contract. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

In a minor's action to recover back money paid a college for tuition, etc., where defendant pleaded a contract with plaintiff's father and relied on a catalogue sent the father to establish it, but the evidence showed that the father did not order the catalogue and failed to show that he received it, an issue as to whether the college president knew plaintiff was acting for himself was immaterial. *Peacock Military College v. Hughes* (Civ. App.) 225 S. W. 221.

In a suit to recover the purchase money for land because of vendor's default in sinking a well, submission of a special issue as to whether plaintiff made a tender of performance held not erroneous as not being supported by evidence. *McDonald v. Whaley* (Civ. App.) 228 S. W. 313.

— **Conformity to pleadings and issues.**—It is not error to refuse to submit special issues, when such issues are not raised by the pleadings. *Conlisk v. Collins* (Civ. App.) 203 S. W. 462; *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

To determine applicability of special issue, all reasonable inferences from the facts alleged in the pleadings as a whole should be made in aid thereof. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

In suit on promissory note and to foreclose vendor's lien, where whole issue was whether plaintiff's deed to defendant was quitclaim deed or conveyance, court properly refused to submit defendant's special issue whether defendant knew when he purchased from plaintiff that plaintiff's grantor was insane and in insane asylum when he conveyed to plaintiff. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

In action for death of wagon driver on crossing in village under allegations that a temporary depot and a crossing track not ordinarily occupied by cars obstructed the view, held error to submit the issue of negligence in failing to have a crossing flagman. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

In absence of sworn denial nondelivery of instrument upon which suit was based should not have been submitted to jury, as it was not an issue. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

In action for breach of contract of employment, where defendants did not plead as mitigation earnings by employé after termination of contract, it is improper to submit that special issue to jury. *Mindes Millinery Co. v. Wellborn* (Civ. App.) 201 S. W. 1059.

Where complaint in an action under federal Employers' Liability Act for injury to railroad employé alleged cause of injury as handhold breaking loose from side of car, it is error to submit issue that handhold may have been loose and insecure, though not broken off. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

In action against railroad for injury to land caused by overflow, allegations that railroad, having raised its roadway, failed to construct sufficient culverts or sluiceways to drain water, held sufficient to authorize submission of special issue as to whether maintenance of roadbed caused damage. *San Antonio & A. P. Ry. Co. v. Pemberton* (Civ. App.) 204 S. W. 253.

Where the bill alleged that two defendants on reorganization of a corporation agreed through a specific agent to pay the pre-existing debts of the corporation, submission of issues whether they or any one authorized to speak for them agreed to pay such indebtedness was erroneous. *Lockett v. Farmers' State Bank of Vernon* (Civ. App.) 205 S. W. 526.

A special issue, whether defendants were guilty of negligence, should not be submitted over timely exception to it as not confined to negligence pleaded as well as shown by evidence. *Jamison Gin Co. v. Measels* (Civ. App.) 207 S. W. 365.

In an action for damages resulting only from delay in loading cattle, requiring them to remain in the carrier's muddy pens, there was no error in not submitting the negligent condition of the pens upon which no independent damage was sought, as special issue where the jury were instructed to determine if such condition caused the delay. *Kansas City, M. & O. Ry. Co. of Texas v. Bomar* (Civ. App.) 207 S. W. 570.

In action for injuries sustained when leaving train by person accompanying passengers, special issues or instructions requested by railroad held properly refused, where no such issues were presented by the pleadings. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

In action against railroad for injuries to man leaving train, court erred in refusing to submit special issue as to contributory negligence requested by railroad, which issue hypothesized specific facts requiring finding of contributory negligence, though road had interposed only general plea of contributory negligence. *Id.*

Where plaintiff, struck at a railroad crossing, pleaded that engine was carelessly operated and engineer failed to use brakes, a finding on the issue of discovered peril was within the pleading. *Baker v. Shafter* (Civ. App.) 208 S. W. 961.

Issues of railroad's liability for violation of art. 6495, by failure to provide necessary culverts and sluices, held not to conform with petition, which did not following wording of statute. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

In action by widow for death of husband from injuries received while engaged in loading a truck on a flat car, it was error to submit to the jury the question of defendant railroad company's negligence not pleaded in placing cars on the track where deceased was working. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

The court in submitting to the jury the issue of negligence should confine them to concrete acts of negligence pleaded and the evidence in support thereof, and questions too general in character and based upon grounds of negligence not pleaded should not be submitted. *Id.*

In trespass to try title, where the question was one of disputed boundaries and the issue for determination was as to the construction of the fence on an agreed line and the establishment of a boundary line by acquiescence, the submission of a special issue as to whether fence was upon the original division line held error. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

In action by a rice company, where defendant set up a counterclaim for flooding of corn, plaintiff was not entitled to have submitted as a special issue the question of whether defendant was negligent in not building a levee to protect his corn, where it did not specially plead such defense. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

In action for commissions on sale of property by broker, requested special issue, embracing making of agreement not germane to real issue in the case, held properly refused. *Varn v. Moeller* (Civ. App.) 216 S. W. 234.

In trespass to try title, where plaintiff sought to recover lands in one tract which defendants claimed had been conveyed to their ancestor by lost deed, the refusal of the court to submit a special issue as to conveyance of another tract was proper. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

In a landlord's action to recover interest in the crops in which the tenant filed a cross-action for damages caused by numerous writs of sequestration levied on kaffir corn and maize, special issues as to whether the tenant had refused to divide the kaffir corn on the place and the value of the maize and kaffir corn were within the pleadings. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

In an action between an insurance company and the beneficiary, where the company claimed a bank to which the renewal premium was paid was not authorized to receive it, and the beneficiary relied on waiver and estoppel, it was improper to submit an issue whether the insurance company would have accepted payment of the premium through the bank if the bank had remitted in the usual manner instead of by certificate of deposit. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

When acts are uncontroverted, or there is no issue as to such facts, the court should so charge, and not submit it as an issue to be found by the jury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

An issue whether lessee represented to lessor that lease was only for a period of six months held without basis in the pleading, and should not have been submitted in an action to cancel the lease. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

In an action against carriers for injuries to passenger, plaintiffs were entitled to the submission of the issue of negligence as the plaintiffs had pleaded it. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

In jitney bus passenger's action for injuries sustained in collision with a truck, special issue held reversible error in submitting alternative grounds of recovery, whereas plaintiff alleged such negligent acts as acts which concurring constituted negligence. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

— **Questions of law or fact.**—In action on a fire policy an issue whether an award introduced by defendant was valid held properly refused, as it involved a question of law and fact. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Special issue, Did employer have "in force" employers' liability insurance with defendant? clearly submitted question of fact as to whether insurance contract had been canceled; quoted words not presenting question of law. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

A special issue as to whether plaintiff at the time he was injured was engaged in the discharge of his duties as defendant's employé was not objectionable as submitting a question of law. *San Antonio U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Submission of special issue whether land described in deed was conveyed to son as advancement held not erroneous as submission of question of law, in view of court's definition of an advancement. *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

Refusal to submit special issue, "was there a difference in defendant's favor between the scale and compress weights," was not error; such issue submitting question of law. *Gass v. Sweeney* (Civ. App.) 204 S. W. 249.

Issues submitting question as to amount of loss sustained by plaintiffs against D. as guardian, and as executor and trustee, held properly refused, as calling for a conclusion upon a mixed question of law and fact. *Davis v. White* (Civ. App.) 207 S. W. 679.

Special issue whether the act of a sheriff in entering defendant's home and taking property therefrom was a trespass, being a question of law, was properly refused. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

In action by seller of logs against buyer, the purchaser from buyer, and assignee of buyer's claim for price, trial court erred in submitting so-called special issue whether party was entitled to amount as credit on proceeds of car as against plaintiff; same being merely issue of law on pleadings and evidence. *Hickory Jones Co. v. Mettaufer* (Civ. App.) 208 S. W. 745.

In action to recover secret profits made by stockholder in selling property of corporation after getting corporation to give option to his dummy, special issue as to whether option was executed on account of deceit held not objectionable as presenting a question of law. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

In an action for divorce, special question as to the custody of a child, which was involved, is objectionable, where it was a mere legal conclusion, and did not furnish any proper rule or standard to determine the proper person to have custody of the child. *Steele v. Steele* (Civ. App.) 218 S. W. 161.

In action involving the ownership of crop claimed by plaintiff as foreclosure sale purchaser and by defendant by reason of alleged conspiracy between his partner and plaintiff, the special issue of the ownership of the crop presented a mixed question of law and fact which should not have been presented to the jury. *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

Refusal to submit issues relating to mixed questions of law and fact was not erroneous. *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726.

In a suit to recover the purchase money for land for vendor's default in sinking a well, submission of a special issue as to whether it was defendant's "duty" to sink the well prior to a given date held not erroneous as involving a conclusion of law. *McDonald v. Whaley* (Civ. App.) 228 S. W. 313.

In such suit, special issue as to whether defendants had performed their part of the undertaking of sinking the well before certain date or within a reasonable time thereafter held not to call for a legal conclusion; question of reasonable time being an issue of fact, and not of law, under the evidence. *Id.*

Issue as to whether lease as executed contained the essentials of the written agreement previously entered into was erroneous, as it contained a mixed question of law and fact where no direction was given in the charge as to what were the essentials of the written agreement alleged to have been made. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

— **Nature of action or issue in general.**—Where the amount of back taxes could have been mathematically ascertained, court properly refused to submit special issue as to amount. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

In action against railroad and watchman for shooting plaintiff in railroad's yard, question whether defendant watchman shot plaintiff intentionally presented pertinent and material issue. *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105.

In suit for state school surveys claimed by defendant under a deed from the wife alone on her representation that she had been forced to leave her husband and to sell it for her support, submission of issue as to whether she was justified in leaving her husband held erroneous. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

Refusal to submit special issue as to difference in defendants' favor between scale and compress weights held not error; such issue improperly presenting question whether compress weights were to govern, instead of scale weights. *Gass v. Sweeney* (Civ. App.) 204 S. W. 249.

In suit to set aside constable's sale of realty to foreclose lien for street improvements, though property was heavily incumbered at time of sale and defendant's purchase, its reasonable value was a proper issue for submission. *Dubois v. Lowery* (Civ. App.) 205 S. W. 853.

In such suit, court properly submitted, at plaintiff's request, issue whether defendant purchaser at time of making improvements possessed in good faith, an issue raised by pleadings and evidence. *Id.*

Court's action in submitting issue of defendant's right to compensation for improvements, and judgment denying defendant compensation for his improvements, held not reversible error. *Id.*

In action for slander resulting in tie-up of plaintiff's shipment, because of alleged statements that certificates covering shipment were unauthorized and insurance had not been reinsured, evidence held to justify submission of special issue whether financial backer refused to accept certificates regardless of alleged statements. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In suit on guardianship bond, held, that court properly refused questions submitting in substance whether money collected by guardian as such had been turned over to plaintiffs, in accounting suit brought against him as executor and trustee. *Davis v. White* (Civ. App.) 207 S. W. 679.

In trespass to try title, evidence held sufficient to require submission to the jury of the special issue as to defendant's ownership of the land from continued privity of possession under claim of right, under the ten-year statute of limitations. *Brady v. McCouston* (Civ. App.) 210 S. W. 815.

In action to set aside a judgment based on trustee's sale of land, on ground that land was homestead and that sale was simulated, held error, in view of the evidence, to refuse to submit issues concerning defendant's actual or constructive notice that the land was a homestead, and that sale was simulated, defendant being a purchaser of secured vendor's lien note. *Brooker v. Wright* (Civ. App.) 216 S. W. 196.

Where defendants relied on lost deed, and the only admissible testimony showed that the grantor had conveyed all of her interest in one tract except one league, while inadmissible testimony was that the lost instrument included all the grantor's interest in another tract except one league, it was proper to exclude a special issue relating to conveyance of "all her interest" in the second tract. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

In property owner's action against railroad for depreciation of property from excavation in street in front of property, made by railroad in construction of road, question held sufficient to submit issue as to whether plaintiff's property was depreciated by the excavation in front of property. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

In an action on notes wherein limitations was pleaded, in the absence of evidence that plaintiff undertook in person to have citation issued, he having done what an ordinarily prudent person would have done who wished to bring suit, that is, simply employed an attorney, special issue permitting the jury to find that reasonable diligence was used if plaintiff in person used such diligence to have citation and prosecution issued and served was erroneous. *Puig v. Rodriguez* (Civ. App.) 219 S. W. 291.

In an action to enjoin operation of a hog ranch near plaintiff's home and for damages, it was not error to submit a special issue permitting recovery for annoyance and discomfort to plaintiff and his family. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

In action involving ownership of wheat crop on land, whether at time of trustee's sale the wheat crop had been severed by mortgage or conveyance, or by harvesting, or had matured on such date, held a material issue. *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

In trespass to try title to land conveyed by unrecorded deed to A., who conveyed the timber thereon to persons subsequently purchasing the land from one claiming under a subsequent conveyance by A.'s grantor, the court properly refused to submit a question as to whether A. would have told defendants of his interest on inquiry, though he testified that he had forgotten he owned the land, as he did not lose the land by forgetting that he owned it. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

The evidence in action for injury to land being conflicting as to whether the injury, if any, was permanent or temporary, an issue should have been submitted as to its nature. *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

— **Actions and issues relating to contracts.**—In suit for breach of marriage promise, evidence held not to justify submission of special issue requested by defendant, instructing jury to find for him if they believed plaintiff submitted to him because she loved him, and not because she relied on his promise to marry her. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

In action on note, held, under evidence, that court properly refused to withdraw from jury special issue of payment, although plaintiff testified that note had not been paid. *Thomas & Sons v. Folmar* (Civ. App.) 195 S. W. 379.

In action for breach of contract to deliver timber, issue whether buyer could have purchased such timber for profitable use of its mill from others held properly submitted. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Fact that insured under fire policy instituted suit and does not rely on award, but assails it, etc., held sufficient to show that she objected to it, and there was no necessity of submitting issue whether she objected. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Where proof was conflicting as to whether insurer was afforded opportunity to examine insured, pursuant to policy, held, that requested issue should have been submitted. *National Fire Ins. Co. of Hartford, Conn. v. Humphrey* (Civ. App.) 199 S. W. 865.

Where existence of contract to pay compensation sued for was sufficiently proved by secondary evidence and defendant's admissions, it was not error to submit issue as to whether contract had been canceled, although contract had not been introduced. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

In action by manufacturer of water-closets against jobber, court properly submitted issue whether jobber, at or before he ordered goods from manufacturer, knew latter had fixed price to customers, contractors to erect schoolhouse. *Sanitary Mfg. Co. v. Gamer* (Civ. App.) 201 S. W. 1068.

In such action, court properly submitted issue as to whether moving consideration to jobber to make order of manufacturer's goods, without which he would not have handled it, was belief he could fix higher price with contractors, his customers, and make larger profit. *Id.*

In action for fraudulent representations by vendor, special issue whether purchaser could, by ordinary prudence, discover value of land sold to him was improper, unless, as matter of law, purchaser undertook to discover truth with regard to such value. *Hahl v. Davidson* (Civ. App.) 202 S. W. 792.

In an action for the purchase price of cotton sold, under agreement to pay 12 cents if the market price advanced, it was not error to submit the case on the issue whether the contract was to be governed by the Hillsboro or New York market, where that was the only material issue in dispute. *Smith v. McBroom* (Civ. App.) 203 S. W. 1130.

In landlord's action for rent and to foreclose lien, defendants bringing cross-actions for damages, alleging a sale of the business, etc., the special issue whether the bill of sale made by a tenant to another was in good faith was material. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

In action against lumber company for balance due on piling contracts, refusal to submit special issue as to whether defendant's agent acted for protection of company when he refused to settle with plaintiff until claim of third party, which he claimed could be set off, was settled, held no error. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

In such action, refusal to submit requested special issue as to whether the piling plaintiff agreed to furnish by a certain contract was the piling described in a certain letter held no error. *Id.*

In suit for specific performance of verbal contract to sell land, trial court properly refused defendant's requested instruction requiring jury to find rental value of land while plaintiff was in possession. *Williams v. Sweatt* (Civ. App.) 208 S. W. 230.

In action for rent, tenant having vacated by reason of leaks in roof, court properly refused to submit question whether leak was caused by downspouts being stopped by refuse thrown on roof by persons in adjoining building, where no proof was offered that it was impracticable to avoid such stopping of downspouts. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

In action on fire policy, where insurer pleaded it had been deprived of right of arbitration through refusal of insured in refusing to arbitrate, trial court properly submitted question whether defense was sustained by determining whether the appraiser selected by the insurer was disinterested. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

In an action for fraudulent representations in sale of interest in a stock of groceries and for a balance due under a contract whereby such groceries were exchanged for defendant's interest in a drug business, it was error to submit an issue as to the amount paid by defendant to a third party on plaintiff's account pleaded as an offset, in view of the evidence. *Richardson v. Wilson* (Com. App.) 213 S. W. 613.

In a suit by a daughter to cancel a deed given to her father because the deed was secured by false statement, statement by the father proved by the daughter, held evidence requiring the submission of a special issue as to the falsity of his statement that the land belonged to him. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In an architect's action to recover for plans and specifications furnished defendant on the order of its general local agent, if a finding upon the question of the agent's authority to procure a sketch had been requested in the form of a special issue, the court should have submitted it. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In an action to set aside a mortgage foreclosure by one who purchased the land before foreclosure, court erred in refusing to submit questions as to whether or not the mortgagees knew of the sale of the land by the mortgagor before its consummation, and stood by and acquiesced therein, etc. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

In broker's action for commission, where evidence raised issue of fact as to whether plaintiff or a third party was procuring cause of sale, refusal to submit such issue to jury on defendant owner's request therefor held reversible error under this article. *Moye v. Park* (Civ. App.) 216 S. W. 205.

Refusal to submit defense that shipper failed to unload cattle after sudden stop in an effort to diminish or mitigate the damages was not error, where there was no definite evidence that to have so unloaded the cattle would have resulted in any material benefit to them, nor that any definite injury which could be measured by delays properly resulted by failure to so unload. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

In a bank's suit on a renewal note, defendant maker, claiming that he had signed the note in blank, and that the cashier of the bank had fraudulently filled in the amount without authority, the issues submitted whether the note was delivered as a renewal, and whether it was fraudulently filled out without authority, were plain and sufficient. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

In a bank's suit on a note, where the trial court had sufficiently defined where the

burden of proof rested, it did not err in refusing special issue, whether the bank had shown by a preponderance of evidence that the note renewed by that in suit was executed by defendant or by his authority. *Id.*

In action to cancel deed for mental incompetency and undue influence, court did not err in submitting the issues of mental capacity and undue influence at the same time. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

Refusal to submit the issue, raised by the evidence, whether defendant's alleged agent was authorized to make the contract sued on, could not be justified by the claim that all the evidence showed that defendant ratified the acts and conduct of such agent, where ratification was not pleaded. *Kirby Lumber Co. v. Lewis* (Civ. App.) 222 S. W. 332.

In suit against a bank, its directors, and liquidating agent for deposits made by plaintiff, refusal of trial court to place before jury issue whether bank's cashier had converted any money of plaintiff to his own use held proper in view of the evidence. *Holmes v. Uvalde Nat. Bank* (Civ. App.) 222 S. W. 640.

In action by purchaser of a share of an oil company, who claimed that the seller had falsely stated that a named person had sent a certain telegram, the refusal of a special issue submitting the question of that misrepresentation cannot be justified, on the ground that the issue requested did not present the question whether the telegram had in fact been sent, there being no evidence that such telegram had been sent, and that being a matter of defense, which should be called to the court's attention. *Philpott v. Edge* (Civ. App.) 224 S. W. 263.

In action to cancel deed for fraud, court should submit special issue as to what was the fair and reasonable market value of the land conveyed and other land conveyed in exchange therefor. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

In such action, submission of issue whether grantee informed grantor that it would be necessary to get an order from the probate court to sell a lot which the grantee had agreed to convey to the grantor's wife, held error in view of undisputed evidence that the grantor and his wife afterwards accepted the deed to the lot from the grantee as guardian. *Id.*

Where it appeared from other findings that shipper's agent directed delivery to the consignee in care of a third person but such direction was omitted from the bill of lading through mutual mistake, an issue requested by the shipper as to whether it relied on the bill of lading as expressing the true contract was not controlling, so that it was not reversible error to refuse to submit it to the jury. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

In a shipper's action for failure to transport live stock wherein special damages were claimed depending on whether such live stock would have passed government inspection, it was error to refuse a special charge submitting the issue as to whether the stock would have passed inspection had it arrived, notwithstanding testimony only raising the question of part of the stock being below government requirements. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

Where the beneficiary of an insurance policy relied upon payment of a premium to an agent which did not have the receipt furnished by the company, an issue requested by the insurance company whether another bank to which the receipt had been sent was the sole agent to collect that premium was proper and should have been submitted. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

A requested issue as to whether the bank to which payment was made was authorized by the insurance company to accept payment of the premium without having the receipt was proper and should have been submitted. *Id.*

— **Proximate cause of injury.**—In an action by a master mechanic in charge of tramroad engines for death of his son on an engine with defective axles, the trial court at employer's request should have submitted a special issue whether the death was proximately caused by plaintiff's own negligence. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

In such action, unauthorized or improper submission of issue of son's contributory negligence in absence of plea, its existence being negated by jury's answer, did not deprive defendant of its right to have submitted issue as to whether plaintiff's own negligence was proximate cause of son's death. *Id.*

In an action by one injured in a collision between a street car and defendant's train where the jury found that defendant's engineer discovered the perilous situation of the occupants of the street car in time to have avoided the collision and did not use all the means at command to prevent the collision, held, that the court might have assumed that such negligence was the proximate cause of the collision without submitting the question to the jury. *St. Louis Southwestern Ry. Co. of Texas v. Lamkin* (Civ. App.) 220 S. W. 179.

In employé's action for personal injuries sustained by caving in of wall of excavation, a special issue as to whether the failure of the master's engineer to warn plaintiff of the dangerous condition of the wall was the proximate cause of the injury held improperly refused, where sustained by evidence. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, rehearing denied (Com. App.) 224 S. W. 1087.

— **Negligence in general.**—Special issue as to whether box car which plaintiff was boarding when injured belonged to defendant at the time held to submit a question of fact, within this article. *San Antonio U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In an action for damages to live stock from negligent delay in loading, it was proper to refuse to require a finding whether the delay was caused by the weakened condition of defendant's roadbed from excessive rains, since it might be found that the carrier

should have been provided against such rains. *Kansas City, M. & O. Ry. Co. of Texas v. Bomar* (Civ. App.) 207 S. W. 570.

A special issue as to whether the cause of the injury was inevitable accident was properly refused where defendant's train was admittedly running at a speed forbidden by ordinance. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Where the question of proximate cause was otherwise submitted, a special issue as to whether an interurban car was operated at a negligent rate of speed, was not objectionable, on the ground that the speed may not have been the proximate cause. *Eastern Texas Electric Co. v. Hunsucker* (Civ. App.) 230 S. W. 817.

— **Personal injuries in general.**—In action for death in crossing accident, where issue of discovered peril became only one applicable to developed facts, court properly submitted it alone, and would have been in error had it done anything else. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

In a servant's action for injuries submission of issue whether other roads maintained interlocking plants in the same condition held not necessary. *Missouri, K. & T. Ry. Co. of Texas v. Grimes* (Civ. App.) 196 S. W. 691.

In action for personal injury when struck by defendant's car when running at usual speed, with nothing to indicate that its speed would be lessened, until plaintiff drove upon crossing, held, that speed was not in issue, and that its submission was erroneous. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

Where, in action for wrongful death, evidence failed to raise issue of apparent danger save from knife held by deceased, and court submitted such issue, it properly refused to submit special issue whether it reasonably appeared to defendant that he was in danger of losing his life at time he shot deceased. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873.

Where defendant introduced testimony that plaintiff worked intermittently for it and an independent contractor, special issue as to whether at the time he was injured he was engaged in doing any service for defendant held material. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In railway conductor's action for injuries in which defendant denied that plaintiff was working for it, special issue as to whether he was in defendant's employ when injured held proper. *Id.*

In actions for injuries to passengers in automobile struck by car with gong and whistle sufficient to give reasonable warning, court properly refused to submit issue whether accident would have happened had car been equipped with different bell and whistle, as required in certain cases by art. 6564. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397.

In action by widow against railroad company for death of her husband from injuries received in loading truck upon a flat car, issue ignoring evidence showing that defendant's switching crew may have known that deceased was in a dangerous position held properly refused. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

In action by the station agent for injuries received from a fall of heavy iron bundles he was steadying, refusal to submit the issue whether plaintiff volunteered his services in unloading freight held proper; it not being disputed that what he did was voluntary, in the sense that he was not requested to help. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

In such action, where it was not contended by plaintiff that the weight of the iron, or the mode of its placing constituted negligence which proximately caused his injuries, the trial court properly refused to submit the issue whether plaintiff knew the weight of the iron and the mode of the placing. *Id.*

In an action for injuries caused by an explosion of gas, special findings held not to state facts constituting negligence per se, so as to justify the failure to submit the issue of negligence. *North Texas Gas Co. v. Young* (Civ. App.) 220 S. W. 254.

In an employé's action for injuries sustained by the caving in of an excavation, a special issue as to whether the duty rested on the master to place in the excavation material for curbing the wall, and, if so, whether he failed in that duty, and, if so, whether employé in the exercise of ordinary care could have obtained the material, was improperly refused, where sustained by evidence. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

— **Contributory negligence.**—Submission of issue whether plaintiff was guilty of contributory negligence is insufficient to submit issue whether plaintiff could have reached place of safety after he saw or could have seen or heard approaching motor by ordinary care. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256.

Where defendant pleaded and introduced evidence tending to show contributory negligence, failure to submit a special issue as to such negligence when properly called to the court's attention, held error. *Mumme v. Sutherland* (Civ. App.) 198 S. W. 395.

Evidence as to contributory negligence, in that plaintiff failed to have his team under control when approaching crossing, held sufficient to call for submission of such issue. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

A question to the jury. Did the plaintiff fail to use ordinary care in failing to procure, or in failing to attempt to procure, a postponement of the funeral? was proper, where plaintiff left it to her son who was to be governed by the preservation of the body, and she would have gone anyway to see the casket if defendants had not been negligent in transmitting a telegram. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

In action for injuries sustained when leaving train by person accompanying passengers, special issue as to contributory negligence, submission of which was requested by road, held not correctly refused as taking from jury issue of proximate cause. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

An issue whether plaintiff discovered that the floor was as unsafe as the jury found it is not erroneous as misleading the jury to believe that plaintiff was not contributorily negligent unless she discovered the floor was as unsafe as they found it. *Pollack v. Perry* (Civ. App.) 217 S. W. 967.

Requested special issue whether a reasonably prudent person in the exercise of ordinary care under the same circumstances would have driven across track, held to have correctly presented the issue of contributory negligence. *Harrell v. St. Louis & S. W. Ry. Co. of Texas* (Com. App.) 222 S. W. 221, reversing judgment (Civ. App.) *St. Louis & S. W. Ry. Co. of Texas v. Harrell*, 194 S. W. 971.

In an action for damages in a crossing collision, the refusal to submit requested issues as to whether plaintiff could have seen the train, whether his failure to see it was negligence, and whether such negligence caused or contributed to the collision, held not reversible error. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

— **Damages and amount of recovery.**—In action for personal injuries due to sidewalk made defective by sewer construction, special issue as to damages held not erroneous. *Houston Belt & Terminal Ry. Co. v. Scheppelman* (Civ. App.) 203 S. W. 167.

In action on note for price of automobile, defense being breach of warranty, the court should have submitted the special issue as to the difference between the reasonable market value of the automobile in its defective condition and its reasonable market value if it had been as represented. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

In shipper's action for damages to live stock by delay, it was proper to submit issue as to the relative market value on the day when they should have arrived and on the day on which they did arrive at the market, so that in the event of a finding of negligence there would be a basis upon which to determine damages. *Panhandle & S. F. Ry. Co. v. Matsler* (Civ. App.) 205 S. W. 155.

On appeal in eminent domain cases by a city, it is best to submit on issues: First, as to the market value of the land taken; second, whether the remaining land has depreciated in value by the taking; and, third, if so, its amount; and it would be proper to give instructions concerning the elements to be considered, in view of the proof, in deciding the issues, but to submit each element separately does not furnish a practical way to decide them. *City of San Antonio v. Flike* (Civ. App.) 211 S. W. 639.

Where there was no evidence that an injured servant ever had tuberculosis, refusal of special instruction submitting to the jury the question whether the injury, which assumed the form of a pronounced curvature of the spine, was the result of tuberculosis, was proper, though there was medical testimony that it was possible for tuberculosis to cause such curvature. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 214 S. W. 699.

Though evidence raised issue whether condition of plaintiff's legs was caused by injury sustained in alighting from defendant's train, there was no error in refusing to submit such issue where condition of plaintiff's legs was not the only injury complained of. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

In action for unlawful eviction, where tenant alleged and proved incidental items of expense, but the court refused to submit such items as recoverable damages, and submitted only the value of tenant's property detained by landlord and the amount of exemplary damages if malice were found, the landlord's rights were not prejudiced. *Evans v. Caldwell* (Civ. App.) 219 S. W. 512.

A special question as to what sum would compensate plaintiff for damages sustained on account of injuries, which allowed the jury to take into consideration, in case they should believe the injuries permanent, any loss of time or incapacity or any pain or suffering she might sustain in the future, is not objectionable as allowing the jury to consider such elements of damage without regard to whether they would result from the injuries suffered. *St. Louis Southwestern Ry. Co. of Texas v. Ristine* (Civ. App.) 219 S. W. 515.

Defendant, having without controversy discharged his burden to prove that plaintiff's attachment was wrongful, was entitled to finding on the question of how much, if any, damage he had sustained, a right precluded by an unsupported finding of the jury that there was no falsity in the affidavit for attachment, rendered on an issue which under the proofs should not have been submitted. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

In an action for breach of a contract for the sale of trucks purchased for resale, a special issue as to the amount of damages, in which it was stated that the damages would be the difference between the contract price and the net price for which the trucks would have been sold if plaintiff would have sold them, was substantially correct. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

The issue of minimizing damages having been raised by the pleading and evidence, the court should, on request, have submitted whether plaintiff could have saved part of the hay which was destroyed, and not merely whether he could have saved all of it. *Gulf Pipe Line Co. v. Hurst* (Civ. App.) 230 S. W. 1024.

The evidence in action for injury to land being conflicting as to whether the injury, if any, was permanent or temporary, an issue should have been submitted as to what was its nature, with an instruction as to the difference in the measure of damages in the two cases. *Id.*

Effect of failure to submit.—Even if the addressee in a telegram is improperly named, a refusal to submit the question of whether the sender gave a wrong name is immaterial, where the jury found that defendant was negligent in transmission and delivery of the message as sent. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

Requests for special findings.—Under this article, requests for special issues need not embody correct propositions of law on the issue to constitute such a request as will require the court to submit the issue. *Brady v. McCuiston* (Civ. App.) 210 S. W. 815; *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

There was no error in refusing special issues where they were requested and written on a single piece of paper with a number of other issues, some of which were not correct or were covered by those submitted by the general charge. *Ater v. Ellis* (Civ. App.) 227 S. W. 232; *Waurika Oil Ass'n No. 1 v. Ellis* (Civ. App.) 232 S. W. 364.

Refusal of special issues will not be reviewed on appeal, where record fails to show they were presented to opposing counsel for examination and objection, as required by Acts 33d Leg. c. 59, § 3. *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

A requested special charge which was incomplete in failing to designate what question the jury should answer "No" was properly refused. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In action for breach of marriage promise, objection that a charge assumed that plaintiff had sustained injuries, made at time charge was submitted to attorneys for examination, was not equivalent to request that issue be submitted to jury, under this article. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

Where defendant asked the submission in bulk of 23 issues, on different matters, they were properly refused, when at least a portion thereof had been embodied in the charge of the court. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

In view of art. 1612, a requested special issue as to proximate cause of injury to cattle in transportation was improperly refused, though request was insufficient, where defendant by special exceptions to main charge called court's attention to omission to charge on that issue, and stated that it should be specially submitted. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

Filing before charge was read to jury of written objections to issues submitted on ground that case was submitted on wrong theory as to measure of damages, and framing and incorporating in objections an issue on measure of damages with request that it be submitted, was a sufficient request to submit issue within this article. *Foster v. Atilir* (Com. App.) 215 S. W. 955.

Where there is a material issue which the court does not submit, a party desiring the submission of such issue is entitled to request its submission in writing, and although the requested issue may not be strictly correct, yet, if it be sufficient to call the trial court's attention to its failure to charge on the issue, it should frame one and correctly submit the issue to the jury; but, where the trial court charges on or submits a material issue which is not correct or full enough, the complaining party should frame a charge or special issue that is correct, and, if the court then refuses to give such correct charge or special issue, its refusal would be reversible error. *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

Where seven special charges or issues were requested by defendant in one instrument, it was not the duty of the trial judge to sever and separate the good from the bad, nor to send to the jury portions marked "Given" with those refused. *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645.

In action for death of plaintiff's son, defendant's request for submission of issue whether death was proximately caused by plaintiff's own negligence held sufficient to call attention to issue so that, pleading and evidence justifying submission, it became duty of court either to submit it properly in his own charge or to reframe issue as requested, if erroneous, and then submit it. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

A special issue, requested by defendant, as to whether its truck driver discovered the approach of plaintiff, was inaccurate, since he might have discovered the approach without discovering the peril. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Though defendant's request for submission of numerous issues was by a single paper, and he was not entitled to submission of some of them, he may complain of another not being submitted, the record showing that the judge held that neither of the issues concerning which he made findings should have been submitted, and his erroneous statement that the facts found by him were proved by the uncontradicted testimony indicating with reasonable certainty his reason for the refusal. *Gaylor v. Monroe* (Civ. App.) 221 S. W. 330.

In a shipper's action for special damages due to failure to transport certain live stock wherein the issue arose as to whether the live stock would have passed government inspection at destination a requested special charge to submit such question held sufficient to call the court's attention to his failure to submit the issue. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

Requested issues should be submitted to the trial judge separately, and not altogether as a complete charge. *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

If any of requested special issues were appropriate, the duty did not devolve on the trial court to separate the wheat from the chaff, but he properly rejected the whole charge. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

Where the case is submitted to the jury on special issues, requests by defendant for charges on a particular issue are not equivalent to a request for the submission of that issue to the jury. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

— Requests for issues covered by issues given.—Refusal to submit special issues covered by those submitted is not error. *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271; *Rowse v. Woody* (Civ. App.) 197 S. W. 362; *Gass v. Sweeney* (Civ. App.) 204 S. W. 249; *San Antonio & A. P. Ry. Co. v. Pemberton* (Civ. App.) 204 S. W. 253; *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

There was no error in refusing to submit special issues in the form in which they were requested, where they were substantially submitted in the court's charge or in other issues. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616; *Western Union Telegraph Co. v. McLaughy* (Civ. App.) 198 S. W. 1084; *Anderson v. Wilson* (Civ. App.) 204 S. W. 784; *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

Requested special issue is properly refused where issue therein is submitted to jury in other issues in nearly identical language and favorably to requesting party. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

A requested issue "Did the employé stop the train for the usual length of time, and was the station duly called," held sufficiently covered by the issue given. *Houston E. & W. T. Ry. Co. v. Thorn* (Civ. App.) 197 S. W. 778.

Where court submitted issue whether servant suffered damages by reason of sledge hammer coming off handle, and instructed no damages could be allowed for prior injury or sickness, it properly refused to submit issue whether injuries resulted from hammer slipping, from prior disease, or both. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

In servant's action for injuries, court properly refused to submit defendant's special issue, accompanied by incomplete instructions, where jury would not have been any better informed had defendant's issue been submitted than they already were. *Id.*

Where court submitted special issue as to whether plaintiff when injured was in defendant's employ, refusal of issue as to whether he was in the employ of an independent contractor held proper. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Refusal of special issue as to whether box car belonged to independent contractor at time of injury held proper, where court submitted an issue as to whether it belonged to defendant. *Id.*

Refusal to submit issue of whether foreman informed employé of danger incident to work was not error, where issue of whether employé comprehended danger had previously been submitted, such issue completely covering that refused. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

The refusal of the court to submit special issues, where such issues had already been submitted in substance, though the form of such special issues was different, is not error. *Lanham v. West* (Civ. App.) 209 S. W. 258.

Refusal to submit special issues requested was not error where, while their verbiage was different, their substance was covered by those submitted by the court, and the jury found all the facts essential to sustain the judgment. *Polk v. Inman* (Civ. App.) 211 S. W. 261.

In an action for injuries due to an explosion of gasoline sold as coal oil, where the issue whether defendant sold gasoline representing it to be oil was submitted, it was not error to refuse to submit a special issue as to what kind of oil defendant sold. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

Refusal to give certain issues to the jury in a special charge is not error, where such issues were sufficiently given in the general charge. *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703.

In an action for damages from increased overflow caused by the negligent construction of a railroad bridge, the refusal to submit the special issue, "were the overflows and damage complained of by plaintiff caused by heavy rains, such as would overflow and inundate plaintiff's said lands irrespective of the presence and condition of defendant's railroad track and bridge in question," held error, even though the matter was covered in a general way by the court's charge. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

Special issues, properly submitted in the main charge, were properly refused. *McDonald v. Stafford* (Civ. App.) 213 S. W. 732.

In attorneys' action to recover fee defended upon ground of fraud in procuring the contract, refusal to submit issues as to whether attorneys, in making contract, concealed facts from client and failed to exercise good faith, held not error in view of issues submitted and instructions given. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

In an action for injuries to a shipment of cattle, it was error to refuse to submit affirmatively the issue whether the damage complained of was the sole result of the cattle being too poor or weak to stand ordinary transportation, though it was submitted inferentially and in a negative form in other issues. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

In a broker's action for commission, where the court had submitted to the jury in the first two issues in his general charge, the ultimate and controlling issues of the case held not error to refuse to submit any one of the requested special issues. *Varn v. Moeller* (Civ. App.) 216 S. W. 234.

Where trial court submitted issue whether defendant turned to the left before reaching center of street intersection, it was unnecessary to further ask jury whether defendant went straight ahead across the intersecting street on the right-hand side of the street he was on. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

Where issue of contributory negligence was properly submitted, it would have

served no useful purpose to submit either question whether plaintiff, after discovering defect in coupling, notified foreman, or question whether plaintiff's knowledge of defect was sufficient to put a reasonably prudent person on notice that it was dangerous to go in behind car and attempt to couple, and there was no error in refusal to submit. *Baker v. Bell* (Civ. App.) 219 S. W. 245.

Refusal to submit further special issues was proper, where those submitted fully covered all the issues raised by the pleadings and evidence. *Gordon v. Beaton* (Civ. App.) 220 S. W. 242.

In action involving the question whether employé had misappropriated funds, refusal to submit special issue whether checks were drawn on employer and money paid thereon without the authority, knowledge, or consent of employer, was not error, where court submitted issue of whether employé had misappropriated employer's money. *Nordmeyer v. McAllen State Bonded Warehouse Co.* (Civ. App.) 220 S. W. 1112.

In bank's suit on notes, where jury's answers in response to questions fully met issues of payment of one note and lack of consideration for another made by defendant, refusal of certain other issues held not erroneous. *Gregory v. Corpus Christi Nat. Bank* (Civ. App.) 221 S. W. 305.

Special issues requested which were sufficiently covered by a special issue already submitted need not be given. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

The refusal of an issue whether the enginemen were unable to avoid striking plaintiff's car after they knew he was not going to stop was not error; the court having submitted the question whether the operators discovered and realized plaintiff's position of peril in time to avoid the accident. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

Where special issues submitted by the trial court fully and fairly presented the issues involved, the trial court was not required to ask of the jury additional questions presented by defendant. *Kirby Lumber Co. v. Henry* (Civ. App.) 224 S. W. 814.

In an action for death of brakeman, when a car ahead of him dumped coal on the track, held that failure to submit an issue of accident requested by defendant railroad, was not error; the affirmative answer to the issues of negligence and proximate cause involving necessarily a negative of the issue of accident. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

In an action for the price of rags the court having sufficiently submitted the issue whether the rags were stored in warehouse at the request of any of the buyers, it was not error to refuse to submit an issue as to whether defendant buyers merely suggested the rags could be stored in the warehouse to save demurrage. *Ehrenberg v. Guerrero* (Civ. App.) 225 S. W. 86.

In an action by a depositor, who asserted that a bank had paid and charged his account with forged checks, where it was neither asserted in the pleadings or evidence that the depositor was entitled to recover any other balance, the refusal to submit the issue whether the bank had repaid all of the moneys deposited was not error; it being covered by the issue of forgery. *Texas State Bank of Ft. Worth v. Scott* (Civ. App.) 225 S. W. 571.

In an action for injuries suffered by member of a railroad wrecking gang, whose leg was broken by the tightening of a wire cable, where the issues were whether defendant was guilty of negligence in moving an engine and whether it was the proximate cause of the injuries, the refusal of a special issue as to whether the engine was being moved in the usual and customary way was not error; the issues being correctly submitted. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

In an action for specific performance where the court submitted the question whether the alleged purchaser had executed any contract, etc., that special issue sufficiently submitted the question whether the parties had executed a contract independent of the deed and check placed in escrow, so a special issue whether the vendor had executed a written contract was properly refused. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

In an action against agent and sureties on such agent's bond, where a special issue was submitted to require the jury to find the net balance due on the agency account after allowing all credits, payments, and offsets properly pleaded and proven, there was no material error in the refusal of a special issue requested by a surety as to whether any portion of the account sued on was satisfied as between plaintiff manager and the agent. *Chapman v. Gross R. Scruggs & Co.* (Civ. App.) 230 S. W. 471.

Refusal of special issue, "At the time defendant entered into the contract to sell to plaintiff the rooming house and property in question, did defendant have authority from the owners of said property to sell the same?" held proper, in view of submitted special issue as to "whether defendant had authority from the owners to sell upon the particular terms of the contract made by him with E. (plaintiff)." *Holden v. Evans* (Civ. App.) 231 S. W. 146.

In action for injuries to passenger of bus sustained when automobile backed into one of the horses of the bus, special issue held to sufficiently submit question of bus driver's negligence in leaving the horses unfastened and refusal of requested issue proper. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

Preparation, form and construction of interrogatories or findings.—In action for death, instead of requiring the jury to find whether or not the employer and its agents, servants, and employé were guilty of negligence, the charge should require a finding whether the employer or its agents, servants, or employé were guilty of negligence. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

Where defendant claimed that all of partners agreed to and did turn back restaurant, in action by partnership lessees to recover damages for eviction by lessor, held, that the court did not err in submitting special issue whether all members voluntarily returned restaurant and not whether one did. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Form of special issue held not bad because whether G. or her husband took possession of land, though plaintiff claims under G. alone, whatever possession the husband took being under claim of ownership in G. *Crafts v. McAllen* (Civ. App.) 196 S. W. 729.

In action on fire policy in which defense was award, special issue held to sufficiently submit fraud on part of arbitrators and to ask finding in what it consisted. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

In action for damage to shipment of cattle through delay in transit, special issues held not erroneous as imposing absolute duty to transport shipment within reasonable time. *Panhandle & S. F. Ry. Co. v. Crawford* (Civ. App.) 198 S. W. 1079.

In an action for damages for delayed telegram, a requested issue, "Did sender send the message sued on to Josh McGoy or to Josh McGaughey?" was properly refused, where the real question was as to how the sender pronounced the name "McGaughey." *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

A special issue, "Did the plaintiff fail to use ordinary care, as that term has been hereinbefore defined?" when she failed to take a buggy to D. and there take a train to N. G., fully and affirmatively covered the issue of contributory negligence in not getting to a funeral at N. G. *Id.*

A special issue as to whether defendant and plaintiff did not understand that a guaranty contract was only for \$1,000 was not a repetition of an issue as to whether defendant relied on such a representation by plaintiff, both fraud and mutual mistake having been alleged. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

In trespass to try title, a question whether a certain tract was located as claimed by defendants and interveners was not objectionable as ambiguous. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 203 S. W. 612.

A request to find specially whether the deceased upon reaching Latta street did or failed to do any of a number of acts specified—held sufficiently intelligible to be answered by "Yes" or "No," particularly where aided by subsequent answer to another special question. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In action for death at crossing of one driving automobile, court should have submitted issue of negligence in approaching an obscured crossing at more than six miles an hour, in language of Acts 35th Leg. c. 207, § 17 (Vernon's Ann. Pen. Code Supp. 1918, art. 8207). *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In an action to recover land, the objection to the submission of an issue on the statute of limitations that it would include land not subject thereto would not justify refusal to submit the issue, since the jury were to find the facts and the court to declare the law thereon. *Brady v. McCuiston* (Civ. App.) 210 S. W. 815.

In action for death of plaintiff's intestate due to contact with live wire, special issue, as to negligence in failing to make inspection, held not subject to objection that it left the jury to conclude that it was negligence for defendant to permit the accident, and that it placed a greater burden on defendant in the matter of inspecting its line than the law required. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

In such action special issue, submitting question whether defendant could have discovered and remedied danger, held not subject to objection that it induced jury to believe that it was defendant's duty to prevent the accident at all hazards. *Id.*

In action to enjoin enforcement of Railroad Commission's order requiring railroad to construct depot building at certain point, where special issue was whether railroad had designated depot grounds at such point, requested addition to issue that designation once made could not afterwards be changed by railroad was properly refused, since it would have been regarded as an intimation by court of abandonment, and since issue could not have been answered in negative upon ground of abandonment. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

A special issue whether one C. filed notice with plaintiff's employer claiming that defendant had an assignment of plaintiff's wages was not erroneous as depriving defendant of the right to have the jury decide whether C. was the authorized agent of defendant, as it did not prevent defendant from requesting the court to submit the question of C.'s agency. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In attorney's action to recover fee, defended upon ground of attorneys' fraud in procuring employment contract and their lack of good faith in their relations to client, held, that special issue did not require client to prove actual fraud. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

An issue submitted which refers the jury to a pleading to determine the nature of such issue is objectionable. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

In a divorce suit, special issues under arts. 1984a, 1985, should distinctly and specifically state the questions made by the pleadings and evidence, and should not refer the jury to the pleadings for a narration of the facts. *Steele v. Steele* (Civ. App.) 218 S. W. 161.

In an action on notes wherein limitations was pleaded, special issue, submitting matter of reasonable diligence on plaintiff's part in having citation or process issued and served, thus instituting suit, held objectionable, as so worded that if the jury found that plaintiff in person used reasonable diligence, or that her attorney used such diligence, etc., they must find in the affirmative. *Puig v. Rodriguez* (Civ. App.) 219 S. W. 291.

Issue submitted in servant's action for injury, Did the door which fell have any fastening by which it could be safely held in place? held not objectionable in form, at least in connection with other issues. *West Lumber Co. v. Powell* (Civ. App.) 221 S. W. 339.

An issue, "Do you believe from the evidence that the plaintiff C. has been in peaceful and adverse possession of the land described in plaintiff's petition for a period of 10 years next after the year 1896?" was not erroneous, as limiting the jury in their answer to the 10 years immediately following 1896. *Kirby Lumber Co. v. Conn* (Civ. App.) 222 S. W. 342.

If ultimate issues of fact are fairly presented to the jury, the mode of presenting them by the trial court is discretionary and will not be reviewed. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

The substance of the issue relative to special damages being whether the seller at the time of wrongful refusal to deliver had sufficient notice of the probable consequences of its refusal, it is enough that the evidence showed such notice after the making of the contract, though the special issue, answered in the affirmative, was in form whether the seller was informed at or before the making of the contract. *Brooks Supply Co. v. Hines* (Civ. App.) 223 S. W. 709.

Though a mistake by the parties to the written contract must be established with reasonable certainty to entitle either to a reformation of the contract, it is proper to submit to the jury a special issue as to such mistake in the ordinary form and with the ordinary tests, and affirmative answer establishes the mistake. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

In an action to recover cattle sold by an alleged authorized agent, where such agent testified that he had authority to sell any cattle to pay the bills any time necessary, court held to have erred in view of other issues in submitting the issue, "Did the plaintiff, C., authorize F. to sell the cattle in controversy in this suit?" since the jury may have come to the conclusion that the court was inquiring for the specific authority for the sale of the particular cattle in suit. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

The special issue in action for death of an employé, Did he assume the risk of being injured or killed? was not objectionable by reason of the words "or killed," though it would be sufficient without them. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

Where a shipper of hogs contended that they were injured by negligent delay, rough handling, and failure to feed, the following special issue, held improper, being so worded as to confuse the jury, because not separating the issues of delay and failure to feed and water, and also in suggesting improper handling in the absence of any evidence thereof. *Hines v. Whiteman* (Civ. App.) 228 S. W. 979.

In an action for breach of contract to drill an oil well, a special issue submitting what amount would reasonably compensate plaintiff for the expense of moving its apparatus and drilling the well, in view of the answer, held not to have submitted the question of the value of the well. *Osage Oil & Refining Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 518.

A special question whether the flange on a wheel had a flat vertical surface, when tested by the rule prescribed by the Interstate Commerce Commission, required the jury to find that the measurement of the flange was made by the metal gauge required by the rule of the commission, and was not erroneous as permitting recovery based on opinions of witnesses notwithstanding the wheel conformed to the standard. *Payne v. Allen* (Civ. App.) 231 S. W. 148.

Submission of whether an act of negligence was "a" proximate cause, instead of "the proximate cause," held not error, since an act of negligence is actionable though it is merely one of a number of proximate causes. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

On a submission of special issues, questions should not be so framed as to become traps for the jury, and thereby lead them into giving conflicting answers. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

Generality and indefiniteness.—In lessee's action for damages by wrongful dispossession by third parties, question submitted to jury "what expense was he put to by reason of his failure to get possession of the land" was too general. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

In an action for failure to deliver a telegram by telephone, defendant claiming that the telephones were out of order, and plaintiff that they were only out of order for a short time, a special issue, "Was the defendant guilty of negligence in failing to deliver said telegram to the plaintiff after the same was received by its agent at D.?" was too general. *Western Union Tel. Co. v. Goodson* (Civ. App.) 217 S. W. 183.

In action against automobile driver for injuries in collision, special issue as to whether the driver was "guilty of any act of negligence without respect to the speed at which he was traveling, and in the manner in which he operated said car. * * *" held sufficient, as against contention that it was indefinite, and did not confine jury to the issues made by the pleadings and the evidence. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

Defendant, having alleged deceased was guilty of contributory negligence in doing several enumerated things, had a right to have these facts affirmatively presented to the jury for their finding, and so a special issue, Was deceased guilty of contributory

negligence just before and at the time he was injured? was too general. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

— **Assuming facts.**—In action against city for damages from discharge from city's septic sewer tank, requested special issue assuming existence in and around plaintiff's residence of filth, offensive odors, etc., as result of operation of defendant's plant, was properly refused. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

In action for damage to cattle from delay in transit, submission of issues, whether cattle lost more in weight than they would have lost had they been transported within reasonable time, held not erroneous on ground issues assumed cattle were not transported within reasonable time. *Panhandle & S. F. Ry. Co. v. Crawford* (Civ. App.) 198 S. W. 1079.

Special issues as to market value of cattle which died held technically subject to the objection that they assumed that the cattle were not transported by defendants with ordinary care. *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521.

Special issue held not misleading, as assuming defendant's ownership of a car and that plaintiff was in its employ, in connection with preceding issues. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

It is not error for the court in submission of questions to assume as a fact a matter not contested. *American Metal Co. v. San Roberto Mining Co.* (Civ. App.) 202 S. W. 360.

In action for damages to live stock shipped under contract by which all were to be shipped at one time, submission of issue whether cattle in second shipment lost more than they would have lost if shipped in the first shipment held not to erroneously assume that the failure to ship all of the cattle together was negligence in view of instructions. *Panhandle & S. F. Ry. Co. v. Matsler* (Civ. App.) 205 S. W. 155.

A submission of the question of plaintiffs' adverse possession through certain named persons as tenants would be objectionable as assuming that such persons were plaintiff's tenants, and therefore on the weight of evidence, were the facts not sufficient to warrant such assumption. *Stark v. Brown* (Civ. App.) 210 S. W. 811.

In an action against a carrier for damages to cattle, a special issue as to whether the cattle died as a proximate result "of such negligence" was not erroneous in assuming negligence, where the jury were told not to answer the question unless they had found the carrier guilty of negligence in answering a previous question. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

In action to recover secret profits made by stockholder in selling property of corporation after getting corporation to give option to his paid dummy, special issue as to whether option was executed on account of deceit held not objectionable as assuming that stockholder was guilty of deceit. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

In suit involving validity of release, it would have been error to have submitted issue "did the plaintiff believe and rely upon the statement made by defendant's attorney Lumpkin," etc., since it assumed that the statements therein referred to were made when the evidence was not conclusive as to such matter. *Anders v. California State Life Ins. Co.* (Civ. App.) 214 S. W. 497.

In an action against a railroad for damage to a shipment of sheep by delay, in view of the charge as a whole, special issue whether the sheep sustained damage as a proximate result of delays, which defendant railroad or any of its connecting carriers could have avoided by ordinary care, held not erroneous as assuming delays were caused by defendant's negligence. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

— **Issues on weight of evidence.**—A question to the jury held not on the weight of the evidence or objectionable as delegating to the jury the right to pass upon the legality of evidence. *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183.

In a special issue, "Do you find * * * that defendant allowed fine dust and coal to escape from its conveyers and elevators and accumulate in the coalhouse?" etc., the word "accumulate" was used in the sense of allowing the dust to "remain," and was not a comment on the weight of the evidence, suggesting that the mere presence of dust created a dangerous condition. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

Contention, in action on guard's bond, that charge was upon the weight of the evidence, because it failed to submit value of certain items of property turned over on prior accounting, will be overruled, where appellants point out no evidence showing that such items were of any greater value than that at which they were accepted by plaintiffs. *Davis v. White* (Civ. App.) 207 S. W. 679.

An interrogatory, "Now, if you have found that the defendant * * * was negligent in any or all of the following respects, that is, etc., then was such negligence, if any, the proximate cause of the collision and injuries to the plaintiff," held not on the weight of the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Lamkin* (Civ. App.) 220 S. W. 179.

In an action for breach of marriage promise, defendant having breached his agreement at a time when he thought plaintiff was guilty of theft, special issue that, if the jury found that defendant had breached the contract, and that plaintiff had not stolen the money, they should then state the amount of actual damages, was not on the weight of the evidence, because, if the jury found a breach and the worthiness of the woman, actual damages followed inevitably. *Vogt v. Guidry* (Civ. App.) 220 S. W. 343.

In an action for injuries in a crossing collision, special issue whether plaintiff by the exercise of ordinary care would have seen the approaching train in time to have stopped before collision had she been keeping a lookout held erroneous as misleading and confusing, and as assuming that plaintiff was not keeping a lookout. *Harrell v.*

St. Louis & S. W. Ry. Co. of Texas (Com. App.) 222 S. W. 221, reversing judgment (Civ. App.) St. Louis & S. W. Ry. Co. of Texas v. Harrell, 194 S. W. 971.

In a suit for an injunction, a special issue as to whether a cotton gin was within that part of the town set aside to gins and like industries "or in unreasonable proximity thereto," was not a comment on the weight of the evidence. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

Special issues as to whether porter opened the vestibule on the wrong side of the car for a passenger, whether he negligently pushed plaintiff's box against plaintiff, knocking the latter from the car while it was in motion, whether his act was the proximate cause of plaintiff's injury, whether the plaintiff opened the vestibule himself and negligently undertook to alight from the moving train, held not upon the weight of evidence, confusing, or misleading. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Com. App.) 228 S. W. 928.

Special issue whether jitney car driver was negligent in any of a number of ways, held objectionable as on the weight of the testimony. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

— **Leading or suggestive issues.**—It is proper in submitting the case on special issues to ask leading questions, if not so framed as to suggest the answer. *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

In a broker's action for commission, a special issue, following one as to whether sale was to a purchaser procured by the broker, submitting whether the sale was to a third person, and, if so, whether it was to avoid payment of the commission, was not objectionable as leading or suggestive. *Sutton v. Morehead* (Civ. App.) 227 S. W. 558.

Issue whether grantors relied on certain statements and representations of the grantee (involved in the preceding issue), and whether they were thereby induced to issue the instrument in controversy, directing the jury to answer the same "Yes" or "No," held not improper considered as a whole, as suggesting the way it should be answered. *Walker v. Ames* (Civ. App.) 229 S. W. 365.

— **Undue emphasis.**—In an action for injury to a servant by an explosion, the use of a phrase in several questions to jury held not to have laid such undue stress upon the mere creation of coal dust as to suggest that the court believed such to be actionable negligence. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

In suit by child for injuries from collision with street car, a question submitted, which grouped special issues of negligence, held not to render the verdict part general and part special, or place undue emphasis on any one or more of the issues assigned as negligence. *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739.

Sufficiency of verdict or findings in general.—A case being submitted on special issues, the court should not accept a general verdict not responsive thereto. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Judgment for defendant must be affirmed, where plaintiff in his brief assailed only the answer to one special issue; the answers to other issues being sufficient to support the judgment. *Magee v. Cavins* (Civ. App.) 197 S. W. 1015.

Where court submitted special issue as to whether defendant was negligent in any of a number of ways, judgment for defendant held to be sustained, if the evidence showed that plaintiff was guilty of any of such acts of negligence. *Id.*

Finding that speed of defendant's car or the holes in crossing were the "indirect" cause of collision held insufficient to support verdict for plaintiff. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

If what plaintiff would have realized from sale of apples damaged in transit was proper measure of damages, no judgment could have been entered on jury's answer to issue as to what plaintiff would have realized, because expense which should have been deducted was unknown. *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

Jury's answers to special issues in action on life policy, involving payment of premium and giving note for part of it, held to leave the actual findings in such doubt that judgment could not be entered thereon. *Kansas City Life Ins. Co. v. Jinkens* (Civ. App.) 202 S. W. 772.

Where the special issues submitted, together with the answers of the jury thereto, authorize a verdict for either party, such verdict is too contradictory to be the basis of a judgment. *Manes v. J. I. Case Threshing Mach. Co.* (Civ. App.) 204 S. W. 235.

In an action on a note, where without objection the court charged that, if jury answered a question as to a waiver of the landlord's lien and the acceptance of cotton to settle the note in the affirmative, then they should answer issue No. 4, and the jury answered such issue in the negative, it was unnecessary to repeat under the fourth issue that the cotton was not delivered as indicated. *McKelvy v. Gugenheim* (Civ. App.) 208 S. W. 757.

Although execution of chattel mortgage was undisputed, where court directed jury to find for its foreclosure if they found for plaintiff on the other issues, foreclosure could not be had without an express finding for foreclosure. *Perkins v. Alexander* (Civ. App.) 209 S. W. 739.

In an action by a passenger for personal injuries received while alighting from car, a verdict and findings held not to warrant a judgment for plaintiff in view of findings showing plaintiff's failure to exercise ordinary care. *St. Louis, S. F. & T. Ry. Co. v. Gibson* (Civ. App.) 211 S. W. 263.

The finding by a jury of a fact not alleged and not supported by any evidence, though submitted by the court, is a nullity, and can form no basis or support for a

judgment. *National Fire Ins. Co. of Hartford, Conn., v. Humphreys* (Civ. App.) 211 S. W. 811.

A finding that defendant's logging train, on which plaintiff was permitted to ride, was negligently operated, held to warrant judgment in plaintiff's favor, though the jury had answered that the speed of the train was not excessive. *Kirby Lumber Co. v. Davis* (Civ. App.) 212 S. W. 831.

Where each special issue was divided by letter into several questions, jury's answer numbered to correspond with number of issue, and not by the divisions by letter, held sufficiently intelligible for rendition of judgment. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

In action for value of accessories in an automobile, delivered to defendants for repairing the jury's affirmative answer to question whether the defendants or any one else removed the accessories from the car does not sustain a judgment for plaintiff. *J. C. Killgore & Co. v. Whitaker* (Civ. App.) 217 S. W. 445.

In a servant's action for injuries from exposure to cold while lost on the prairie, findings held sufficient to form a basis for a judgment for plaintiff. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

In action against railroad for loss of cattle through openings in fence on railroad's right of way, where jury, in answer to special issue as to whether 17 head of cattle had escaped through openings complained of, had answered "Yes; at least 10 head," answer as to reasonable value of "said cattle," without specifying whether such amount was for 10 or 17 head of cattle, held sufficient on which to base judgment, in view of the pleadings, evidence, and instructions. *Gulf, C. & S. F. Ry. Co. v. Baker* (Civ. App.) 218 S. W. 7.

Where a jury is demanded in a divorce case there must be a verdict affirming the material facts alleged in the petition; but the court does not proceed upon the verdict, for his own judgment must be satisfied. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

In an action for personal injuries caused by an explosion of gas, special findings held not to entitle the gas company to judgment. *North Texas Gas Co. v. Young* (Civ. App.) 220 S. W. 254.

In action against railroad for injury to shipper, in absence of affirmative finding that injury in car, and not a subsequent injury, was proximate cause of death, or of finding that injury in car and subsequent injury occurred as cause of death, there was no basis for judgment against the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Com. App.) 222 S. W. 1097, reversing judgment (Civ. App.) 184 S. W. 261.

In suit to enjoin erection of a live stock barn, judgment for plaintiffs held not erroneous for absence of any affirmative issue raised by their petition submitted to the jury and absence of findings of the jury in response to such affirmative issue submitted. *Jacobs & Wright v. Brigham* (Civ. App.) 227 S. W. 249.

Where the jury, having found that the hogs of plaintiff, died for want of water after defendant cut a dam and emptied the tank, further findings that defendant lessor reserved the right to lease portions of the land and that the death of the animals was not the direct result of draining the water from the tank warranted a judgment for defendant. *Wallace v. Prairie Oil & Gas Co.* (Civ. App.) 229 S. W. 353.

In a tenant's action to enjoin another tenant under a prior lease from the use of water except for certain purposes, in which lessor intervened, seeking cancellation, findings held sufficient to support lessor's suit for cancellation on the ground of fraud. *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

In an action for the death of a locomotive fireman, answer to special question, stating that the reason for the flange on a locomotive wheel being worn was that the truck was out of tram, is a finding that the truck was out of tram, which, when sustained by the evidence, is sufficient to show the master's negligence, under the rule of the Interstate Commerce Commission, requiring trucks to be maintained in a safe and suitable condition. *Payne v. Allen* (Civ. App.) 231 S. W. 148.

Failure to answer interrogatories or make findings.—If answers in a special verdict dispose of the controlling issues, judgment may be rendered thereon, although all issues are not answered. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Inconsistent findings.—If material findings in answer to special issues are contradictory and in conflict with each other, no judgment can be properly entered. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574; *Wisdom v. Peek* (Civ. App.) 220 S. W. 210; *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

Inconsistency in findings held not to prevent recovery for employé's injuries. *Chicago, R. I. & G. R. Co. v. Smith* (Com. App.) 222 S. W. 1099, affirming judgment (Civ. App.) 197 S. W. 614; *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625; *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

For inconsistent findings preventing judgment, see *Baker v. Beattie* (Civ. App.) 222 S. W. 658.

In suit for death in crossing collision, findings held in irreconcilable conflict. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

In action by lessor to forfeit lease for nonpayment of rent, jury findings held not in conflict with findings upon controlling issue that lessor was willful and persistent in his failure to comply with his contractual obligations, and did not raise any equity in lessee's favor. *Crawford v. Texas Improvement Co.* (Civ. App.) 196 S. W. 195.

In buyer's action for breach of contract, special findings as to whether plaintiffs had notice of damaged condition of goods when they paid for them, held not inconsistent. *Robinson v. S. Samuels & Co.* (Civ. App.) 196 S. W. 893.

Affirmative answer to issue whether plaintiff was contributorily negligent, with negative answer to issue whether said negligence proximately caused or contributed to cause his injury, under the court's definition of proximate cause, held contradictory, requiring verdict for plaintiff to be set aside. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

In action for fraud in exchange of dry goods for land, findings that parties finally effected exchange under terms in written instrument, and that, though plaintiff finally took dry goods at price marked, he did not know goods had been re-marked, held not in conflict. *Searls v. Brown* (Civ. App.) 204 S. W. 495.

Findings that husband did not intend to make a lot the wife's separate property, and did not know that deed had that effect, but intended to put title in her to protect it from claims of his creditors, were contradictory, and would not support a judgment for husband. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

In a passenger's action for injuries received while alighting, where the jury found plaintiff negligent in failing to look to see the position of the step box, such negligence was the proximate cause of the injury suffered, and a contrary finding must have been the result of misapprehension. *St. Louis, S. F. & T. Ry. Co. v. Gibson* (Civ. App.) 211 S. W. 263.

Where, in a personal injury suit, the answers indicated that the jury was confused by the multifarious and unnecessary issues submitted, and as a result rendered inconsistent and irreconcilable answers upon which no intelligent judgment could be based, a new trial should have been ordered. *Bowdoin v. Houston & T. C. R. Co.* (Civ. App.) 211 S. W. 538.

A judgment for plaintiff should not be rendered, where the jury found that plaintiff did not exercise due care, and in answer to another special issue found that he did exercise due care. *Texas & N. O. R. Co. v. Houston Undertaking Co.* (Civ. App.) 213 S. W. 84.

In an action on a policy insuring an automobile, unconnected findings of \$1,300 as the total damage, and also in such amount as the amount of damage done before the automobile slipped off the sunken ferry, held not necessarily in conflict, in view of the charge. *American Automobile Ins. Co. v. Fox* (Civ. App.) 218 S. W. 92.

In an action by landowners who had released purchaser on faith of agreement by defendant bank to furnish funds so that they could stock their ranch, special finding as to the making of the agreement held not inconsistent with other findings. *Sutherland v. Citizens' State Bank* (Civ. App.) 220 S. W. 115.

In action to cancel deed, finding that grantor did not have sufficient mental capacity to comprehend the nature and effect of his act held not inconsistent with a finding that he was unduly influenced. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

It is the duty of the trial court to determine, if reasonably possible, what the jury meant by special findings, and to reconcile apparent conflicts between the findings. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

Answers by the jury, in an action to cancel a deed, to questions whether or not there was a delivery of land notes as consideration, held not in any real conflict. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

In an action for death at a railroad crossing, a finding that deceased automobilist failed to exercise such care in looking for an approaching train as would have been exercised by a person of ordinary prudence was not in irreconcilable conflict with findings that deceased was not guilty of contributory negligence, and that his negligence was not the proximate cause of the accident. *Texas & N. O. Ry. Co. v. Wagner* (Civ. App.) 224 S. W. 377.

Special findings as to contributory negligence of one killed at crossing held not in conflict. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

When a separate and distinct finding of negligence is made in conformity with the pleadings and proof, although a different and additional finding of negligence is unwarrantedly made under a wrong but distinctly submitted issue, the valid finding should be upheld and the improper one be disregarded; the liability being the same if the improper finding be eliminated. *Schaff v. Morris* (Civ. App.) 227 S. W. 199.

In an action against a railroad for diverting surface water and causing it to flow upon and injure plaintiff's crops, where the jury in response to special issue found that the injury was caused solely by water which fell upon land other than that of railroad's right of way, and not by water which had been diverted by the railroad, and in response to other special issue made an inconsistent finding that, if the railroad had not constructed its railroad in the manner complained of, the plaintiff's crops would not have been injured, it was error for court to render judgment for plaintiff; such findings being in irreconcilable conflict. *Houston & T. C. R. Co. v. Hanson* (Civ. App.) 227 S. W. 375.

In trespass to try title where plaintiff rested his claim on limitation, and it was agreed that plaintiff was entitled to recover unless he entered on the land under a claim asserted by a certain other person, answers held in conflict. *Dow v. Horne* (Civ. App.) 229 S. W. 582.

A finding that automobilist could have crossed a railroad in safety, if he had reduced the speed of his car to 6 miles per hour, was not irreconcilable with a finding acquitting him of contributory negligence; the crossing not being obscured and Acts 35th Leg. (1917) c. 207, § 17 (Vernon's Ann. Pen. Code Supp. 1918, art. 820i), not applying. *Hines v. Richardson* (Civ. App.) 232 S. W. 889.

Construction and operation.—In lessor's action to forfeit lease for nonpayment of rent, jury finding that lessee was negligent in believing that lessor would not, without notice, forfeit lease for failure to pay rent, was equivalent to saying that such belief was unjustified. *Crawford v. Texas Improvement Co.* (Civ. App.) 196 S. W. 195.

In an action for damages caused by having to walk back after being carried past

a station, a finding held a finding that plaintiff would have suffered the same damage if she had hired a team. *Houston E. & W. T. Ry. Co. v. Thorn* (Civ. App.) 197 S. W. 778.

Where jury found upon special issues that speed of defendant's car and holes in crossing were indirect cause of collision with plaintiff's wagon, and that plaintiff was negligent in not looking while approaching crossing, held judgment for plaintiff was unwarranted. *Southern Traction Co. v. Gee* (Civ. App.) 193 S. W. 992.

In action for damages by wrongful dispossession of lessee, finding of jury that lessor had not conspired with dispossessors did not require judgment for all defendants. *McCaulley v. McElroy* (Civ. App.) 199 S. W. 317.

In suit to recover on note of president of corporation, finding construed as finding that note was executed in consideration of plaintiffs' forbearance to sue company on its contract to repurchase stock. *Bass v. Wallace* (Civ. App.) 199 S. W. 506.

A jury answer to question whether parties agreed that defendant warehouseman might store plaintiff's goods elsewhere, that defendant had privilege of restoring furniture, covers both office and household goods, where pleadings and evidence treated them as one. *Thornton v. Daniel* (Civ. App.) 199 S. W. 831.

In determining jury's findings on issues, their answer to one, though in disregard of instruction that it be answered only if another be answered in the affirmative, must be considered, having been accepted and filed. *Kansas City Life Ins. Co. v. Jinkens* (Civ. App.) 203 S. W. 772.

In action for injuries in collision, jury's finding that railroad was guilty of no negligence which was the proximate cause of the accident was conclusive, irrespective of finding on issue of contributory negligence, unless the findings were in irreconcilable conflict. *Robinson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 203 S. W. 395.

In wife's suit for divorce, any inference, from parties' living together after husband's cruel treatment, that they cohabited during such time held rebutted by finding in response to special issue that they did not cohabit. *Mahurin v. Mahurin* (Civ. App.) 208 S. W. 558.

Where jury did not find any mistake in conveyance, and found that husband did not intend to make it wife's separate property, and did not know that deed would have that effect, but that it was delivered with his knowledge that title was in her name, and that he intended to put title in her to protect it from his creditors, there was no finding that separate property clause was inserted by mistake. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

In view of the trial court's instruction as to when sale was made, a jury's finding that property was the homestead when sold meant no more than that it was such homestead on or about the time when the exchange deal was agreed on and the deed prepared. *Henderson v. Texas Moline Plow Co.*, 109 Tex. 466, 211 S. W. 973.

In an action by a purchaser of land for deficiency in acreage, findings on special issues held not to be interpreted as findings that the vendor's agent made false representations as to acreage, or that there was fraud. *Cox v. Barton* (Com. App.) 212 S. W. 652.

In attorneys' action for compensation, special issues as to whether attorneys made and breached agreement not to accept employment from, or be under influence of, party being sued by client, held submitted on pleadings of client setting up breach of contract, and not to refer to issue setting up fraud and violation of fiduciary relationship. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

A finding by the jury that defendant employer was not guilty of negligence is not overthrown by a finding as to the extent of the injured employe's damages; the latter finding being mere surplusage. *Fults v. Waterman Lumber Co.* (Civ. App.) 217 S. W. 1105.

In a suit by the successor of the grantee of timber against the successors of the grantor, to restrain cutting, verdict, including a special finding that short-leaf pine timber was merchantable at the date of deed, held, in view of pleadings and issue not to have given buyers all of the short-leaf pine timber regardless of size. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

A finding must be construed in connection with the issues made by the pleadings and testimony. *Id.*

Where the jury in answer to issues submitted found that defendant in action under vendor's lien note did not "have any notice from any source" that payee in note was not owner at time of releasing all claims against the land, and that defendant could "by the exercise of reasonable diligence have ascertained" that such payee did not own the note, the court could not render judgment for the defendant, because the jury must have meant in the first issue only that the defendant did not have actual knowledge. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

In an action on a contract to share the profits of a sale of land, findings that plaintiff did nothing toward effecting the sale subsequent to a given date, and that defendants alone made the sale, indicate that the term "sale" was restricted to negotiations subsequent to the named date and do not show that plaintiff performed no services under the contract. *Bauer v. Crow*, 110 Tex. 538, 221 S. W. 936, answering certified questions (Civ. App.) 171 S. W. 296.

Special findings that a train was moving when deceased stepped on the track without stating whether the track referred to was the one on which the train was, and that deceased entered the track from a safe place, do not entitle the railroad company to judgment, notwithstanding a finding that deceased was not contributorily negligent. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

Where the jury found facts showing that the construction and operation of sewer-

age system was a nuisance, an answer to another special issue that they did not believe that the construction and operation constituted a nuisance, was a mere expression of opinion. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

A finding by a jury that land was damaged \$10 per acre by the construction and operation of a sewerage system was a finding that such construction and operation constituted a nuisance. *Id.*

It is the duty of the court to accept a finding of the jury with the interpretation that will support the judgment, if possible, where such finding has several interpretations. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

In an action for the death of an automobilist at a railroad crossing, a finding that deceased was negligent, was not a finding that such negligence was the proximate cause of the injury resulting in his death. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

In an action for death, answer in the negative to a special issue, "Do you believe from the evidence that the deceased, W., did any act or failed to do any act that contributed to the injury causing his death?" had the inevitable effect to acquit deceased of contributory negligence. *Id.*

Where the jury found that the purchaser procured by broker was ready, able, and willing to purchase on the terms stated to the broker, a subsequent finding that he refused to purchase on terms agreed on with the owner evidently referred to additional terms subsequently agreed on and does not prevent recovery by the broker of his commission. *Gilliam v. Jones* (Civ. App.) 225 S. W. 417.

Special findings on sufficient evidence that the operation of defendant's cotton gin materially interfered with plaintiffs in the use and enjoyment of their homes, and that no equipment could be provided to eliminate such injury, held not to require a judgment enjoining the gin as a nuisance in view of other findings. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

Trial court held warranted in construing answer to a special interrogatory as dealing with lumber already sold and delivered, and not applicable to the purchase price of lumber thereafter sold, and hence the denial of credit was not error. *Adamson Lumber Co. v. J. E. King Lumber Co.* (Civ. App.) 227 S. W. 702.

In an action for a nuisance, a finding that the disposition of the contents of a septic tank by burial on the premises, to which plaintiff had objected, was the proper method of disposing of the contents, does not establish that it was the only practicable method, where the evidence justified a conclusion that the contents could have been hauled away. *Town of Gilmer v. Pickett* (Civ. App.) 228 S. W. 347.

In a switchman's action, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), finding that the foreman in failing to notify switchman of a change of method in switching and uncoupling cars proximately caused, or contributed to cause, plaintiff switchman's injuries, held to necessarily embrace the element essential to proximate cause that the foreman should have anticipated injury. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 228 S. W. 1087.

The findings being unambiguous and responsive to the questions propounded by the trial court, neither the trial court nor the Court of Civil Appeals had a right to say their meaning was different from that evidenced by the language used. *Tompkins v. Hooker* (Civ. App.) 229 S. W. 351.

The findings being unambiguous and responsive to the questions propounded, neither the trial court nor the Court of Civil Appeals had a right to say their meaning was different from that evidenced by the language used. *Id.*

In an action for injuries in the absence of any objection to the issues or request for special charges, those submitted will be presumed to conform with the pleadings and evidence, and treating the issues submitted as embracing the only theory relied upon, it follows that, the jury having found plaintiff guilty of negligence, such negligence bars recovery unless the pleadings or evidence raise the issue of discovered peril, so that, under this article, all facts necessary to support the judgment can be deemed found. *Baker v. Shafter* (Com. App.) 231 S. W. 349.

In an action for deceit in the sale of an undivided interest in an oil and gas lease, an answer to a special issue as to the reasonable market value of the lease and the wells held to refer to the value of the lease as an entirety, and not limited to the interest in controversy. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

A special verdict rendered by the jury must, like many other instruments, be construed in the light of the surrounding circumstances. *Id.*

In action for injuries to jitney bus passenger in collision with a truck, a finding that the driver of the jitney was negligent and that such negligence was the proximate cause of the accident necessarily involved the finding that the negligence of the driver of the truck was not the sole cause of the injury. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

Review by appellate court in general—Submission or refusal to submit findings.—Where appellants took no bill of exception and made no objection of any character in trial court to refusal to submit issue, they waived right to complain, in Court of Appeals, of refusal of their request for submission. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

Sufficiency of evidence to support findings.—The sufficiency of evidence to support a finding will not be considered on appeal, where the submission of the issue was not objected to in lower court on the ground of insufficiency of evidence. *Gillespie v. Williams* (Civ. App.) 207 S. W. 975.

Though defendant did not object to submission of an issue to the jury, it had the right to complain in its motion for new trial and on appeal of the sufficiency of the evidence to support the jury's finding on such issue. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

Under arts. 1970, 1971, as amended by Acts 1913, c. 59, § 3, a party may complain in a case submitted on special issues of an adverse verdict on a particular issue, because of the evidence being insufficient to sustain the verdict thereon, though there was no objection in the first instance to the court's submission of the issue. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

Issues not submitted found or deemed found by trial court.—In view of this article, it must be deemed on appeal that the trial court found on an issue not submitted or requested in support of its judgment; there being evidence to support such a finding. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742; *Quaries v. Hardin* (Civ. App.) 197 S. W. 1112; *Gass v. Sweeney* (Civ. App.) 204 S. W. 249; *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852; *Hickory Jones Co. v. Mettauer* (Civ. App.) 208 S. W. 745; *Armstrong v. Tubeville* (Civ. App.) 216 S. W. 1101; *Lancaster v. Campbell* (Civ. App.) 218 S. W. 550; *Litchfield v. Fitzpatrick* (Civ. App.) 224 S. W. 926; *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928; *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106; *American Nat. Bank of Houston v. American Loan & Mortgage Co.* (Com. App.) 228 S. W. 169; *Leyhe v. McNamara* (Civ. App.) 230 S. W. 450; *Maier v. Langerhans* (Civ. App.) 231 S. W. 145.

Under this article, it is the province of the court to determine a matter as to which no special issue was requested, and as to which the jury made no special finding. *Walker v. Irby* (Civ. App.) 229 S. W. 331; *Brod v. Luce* (Civ. App.) 225 S. W. 553; *Hines v. Parry* (Civ. App.) 227 S. W. 339.

Court may make specific finding for item and render judgment therefor without finding by jury when issue is not submitted to jury and none requested; there being evidence supporting finding. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where no charges were requested by defendants as to either of issues referred to in counter propositions, if finding for plaintiff was necessary to sustain judgment, under this article, it will be presumed trial court made such finding. *Westchester Fire Ins. Co. v. Goodman* (Civ. App.) 205 S. W. 142.

Where defendant did not request special finding of certain issue raised by supplemental petition in reply to defendant's cross-action, it will be presumed on appeal that court found against defendant on such issue. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

Where answers to special interrogatories are in themselves an incomplete verdict, it will be presumed on appeal that the trial court made the necessary findings to support the judgment, if there is evidence justifying such findings. *Baker v. Shafter* (Civ. App.) 208 S. W. 961.

Whatever may be state of evidence, a judge cannot base a judgment upon a finding of fact contrary to verdict of jury upon the issue. *Vineyard v. Miller Land Co.* (Civ. App.) 209 S. W. 693.

The rule that every issue, whether submitted or not, necessary to support judgment, should be deemed to have been found by the court in such manner as to support a judgment is inapplicable to an issue in support of which there is no evidence. *Fuller v. Cameron* (Civ. App.) 209 S. W. 711.

This article did not relieve the court from the duty to comply with art. 1970, providing that the judge shall, unless expressly waived by the parties, deliver written charges, or submit special issues, where the latter were requested in due time. *Dorsey v. Cogdell* (Civ. App.) 210 S. W. 303.

Under this article, the Court of Civil Appeals will presume a finding of the trial judge necessary to sustain the judgment. *Rupert v. Swindle* (Civ. App.) 212 S. W. 671.

Under Rev. St. 1911, art. 1985, it is the duty of the Supreme Court to dispose of a case as though conclusions had been found warranted by evidence and supporting the trial court's judgment. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

A judgment entered after finding on special issues will be sustained, though all issues of fact were not submitted, as it must be presumed that the court found on necessary facts, under this article. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

Although it was the court's duty to submit all issues of fact to the jury, under this article, yet, if there was no request for a submission of the issues, the court itself could make a finding on it. *Id.*

Under this article, in absence of a statement of facts, Court of Civil Appeals must presume evidence sustained trial court in finding all issues necessary to support judgment for plaintiff, if not in conflict with any issues submitted to the jury, and warranted by plaintiff's pleadings. *Bartlett Lumber Co. v. Chaney* (Civ. App.) 219 S. W. 837.

Where the case was submitted on special issues, the court could not find issue so submitted as to which the jury disagreed, so that it could not be presumed on appeal, even in the absence of a statement of facts, that the court made findings on such issue supported by the evidence as were necessary to sustain the judgment. *Lakewood Heights Co. v. McCuiston* (Civ. App.) 226 S. W. 1109.

When the court has sought a finding of a jury on an issue, or has been requested in writing to submit an issue, it will not be presumed that the judge has so found the issue as to support a judgment, certainly not if the judgment should be contrary to the findings of the jury, even if the issue submitted or requested is not as clear or as accurate as it should be. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

Under this article, held that, though the special verdict was insufficient, yet where the court rendered judgment for plaintiff thereon the judgment must be upheld, being

supported by the testimony; it being assumed that the court found facts necessary to support the judgment. *Adamson Lumber Co. v. J. E. King Lumber Co.* (Civ. App.) 227 S. W. 702.

Where only one issue was submitted, and no request was made for the submission of any other issue, but there was evidence to support a finding upon every other issue presented by the pleadings, the verdict was a sufficient basis for the judgment for plaintiff, in view of this article. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

It is not necessary for plaintiff to require the submission of special issues as to matters of defense, in order to escape the presumption of an adverse finding on such issues in support of a judgment for the defendant, under arts. 1970-1972, 1985. *Christian v. Dunaev* (Civ. App.) 232 S. W. 875.

See also notes to art. 1988.

— **Nature of action or issue in general.**—Where an issue of fraud was not submitted, and there was no request therefor, nor any showing of it in the judgment or finding thereon, it will be presumed on appeal that such issue was found by the court against the appellant under this article. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

Although services of doctors were rendered at special instance and on credit of employer, where no issue was requested as to whether employé became liable therefor, it will be presumed that court so found, so that reasonable charges for such services were properly included in judgment. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

In the absence of any finding by the jury that a homestead was never abandoned, a finding by the court to the contrary must be presumed in support of a judgment. *Thornton v. Wear* (Civ. App.) 202 S. W. 1038.

In a suit to recover state school surveys, contention that judgment against defendant for rents was error held without merit, in view of this article, as to presumption of findings where issues not submitted. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

In a boundary dispute, where court instructed that if it should be found that several lines were located by a surveyor, with reference to certain mounds, then the verdict should be for plaintiff, "otherwise, the finding should be for the defendant" and the jury returned a general verdict for plaintiff, there is no presumption that issues not submitted were resolved by the court in plaintiff's favor. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

Where there was evidence which would support a finding that the laws of Mexico were substantially, the same as the laws in Texas, and the issue was not submitted to the jury, in upholding action of court in taking jurisdiction, presumption must be indulged, under this article, that the court so found. *El Paso Electric Ry. Co. v. Carruth* (Civ. App.) 208 S. W. 984.

Where it was necessary for court, in a boundary line case submitted on special issues only, to refer to the evidence to determine the position of a line and the description of land for the judgment, the court will be presumed to have found such issue if supported by evidence in a way to support the judgment. *Thompson v. Russell* (Civ. App.) 211 S. W. 540.

In such case it must be held that appellant consented thereto, where he failed to request the submission of location and description. *Id.*

In action for value of automobile accessories it cannot be presumed, in order to support a judgment for plaintiff on special verdict, that the trial court found defendants removed the accessories, where the evidence only showed that they were removed while the car was in defendants' possession, and there was testimony denying removal by defendants or any one in their employ. *J. C. Killgore & Co. v. Whitaker* (Civ. App.) 217 S. W. 445.

Where the question whether a conspiracy between a mother and daughter to extort money from defendant was not submitted to the jury, there being no request for submission, and the court admitted as against the daughter, suing for breach of marriage promise, etc., evidence of declarations of the mother which would not have been admissible but for the conspiracy, it will be presumed that it was established. *Wells v. Scales* (Civ. App.) 222 S. W. 303.

If there was any issue as to appellant's domicile during a certain period, on account of his failure to request the submission of such issue, he consented that court should decide it, under this article. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

Court, having submitted issue of notice of fraudulent conveyance, a material issue by virtue of art. 3966, could not himself make a finding thereon under this article, because the jury did not answer it, having no right to submit his judgment for that of the jury on an unanswered question. *Ford v. Honse* (Civ. App.) 225 S. W. 860.

Where the evidence authorized the trial court to find that the separate ownership of land by a wife was open and notorious and that inquiry of her tenant would have informed the purchaser that the property was her separate property, the court will be presumed, in a case submitted on special issues, under this article, when necessary to support the judgment, to have found such facts. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

Where defendant did not request finding as to whether nuisance was permanent or finding of damages if the nuisance was temporary, and the question was a question of fact for the jury, it must be presumed in support of judgment allowing damages for permanent nuisance that the trial court found that the nuisance was permanent, in view of this article. *Town of Jacksonville v. McCracken* (Com. App.) 232 S. W. 294.

Where no issue of fraud per se was submitted to the jury, the Court of Appeals

must presume in support of the trial court's judgment for plaintiff, that the trial court found against fraud by him where the record supported such finding. *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

— **Actions and issues relating to contracts.**—See *Wheeler v. Moore* (Civ. App.) 208 S. W. 678, notes to art. 1980.

Although question whether agent, who consented to concurrent insurance, was still insurer's agent, was not submitted to jury, where case was tried upon special issues, and there was testimony tending to show agency presumption is that judge found such fact before judgment was rendered for plaintiff. *Prussian Nat. Ins. Co. v. Dalton* (Civ. App.) 198 S. W. 1075.

Where plaintiff sued for breach of contract, and defendant pleaded counterclaim which was not submitted with the other special issues, the Court of Appeals must assume that the findings of the court were such as to support the judgment. *Thompson v. Fleming* (Civ. App.) 200 S. W. 1134.

Where failure of court to submit question whether plaintiff had waived his right to rescind was not complained of, it will be presumed on appeal that court resolved such issue in favor of plaintiff, who procured judgment. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

In action to cancel deeds claimed by defendant to have been deeds of trust where defendant failed to request special finding in favor of lien on land, it will be presumed on appeal, in support of judgment for plaintiff, that court found against legality of lien. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

Where jury found that personalty sold to a creditor was worth considerably more than debt, and that the creditor was a bona fide creditor, court was not precluded from passing upon issue of constructive fraud, which was not submitted to the jury; court having defined "bona fide" as meaning "real." *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

Where it was doubtful whether defendant would have issued fire policy, where dealer had taken notes in full payment, to have submitted issue whether automobile was fully paid for, as represented, would not have made it an ultimate basis for judgment; and, as defendant did not request submission of issue whether misrepresentation was material, it must be presumed that court found in plaintiff's favor upon that issue, under this article, if necessary to sustain a judgment in favor of plaintiff. *Citizens' Guaranty State Bank v. Johnson* (Civ. App.) 211 S. W. 271.

In an action for conversion, plaintiff claiming both as a mortgagee and as a purchaser, where court submitted case upon special issues, and defendant did not ask to have issue of title by purchase submitted and there was testimony tending to prove such title, it will be presumed that court found in plaintiff's favor upon that issue, under this article, if necessary to sustain a judgment in favor of plaintiff. *Citizens' Guaranty State Bank v. Johnson* (Civ. App.) 211 S. W. 271.

In trespass to try title, where there was evidence to authorize finding that grantee did not promise to pay mortgage on land conveyed, it will be presumed, in order to support judgment rendered, that court so found. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

In an action on a vendor's lien note wherein the defense of payment to plaintiff's agent was interposed, although the case was submitted on special issues and neither party requested the submission of the question of agency, it will not be presumed that the court found in favor of defendants on such issue, where an inconsistent finding was made showing that judgment was rendered on the theory that the agent was the agent of defendants, to which defendants made no objection. *First State Bank of Abilene v. Shaw* (Civ. App.) 214 S. W. 442.

There was no presumption on appeal in favor of the verdict under this article, as to the issue, not submitted to the jury, of the discharge of a surety by dissipation of the chattel mortgage security, where there was no affirmative evidence to establish what became of the property. *Wahl v. Ramsey* (Civ. App.) 218 S. W. 559.

In action to cancel deed for fraud, in which it was claimed that grantor by delay waived the fraud and affirmed the sale, it must be presumed in support of the judgment for grantor that the court, in failing to submit such question to the jury before making a finding therein, impliedly found that grantor had not waived the fraud. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

Where the evidence was sufficient to show that insurance company made a bank its agent and waived the requirement that the bank should have a receipt, but the jury did not specifically find that the bank as agent collected the premium that finding may be imputed to the trial court to support a judgment sustaining the policy. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

In an action on policy insuring against illness common to both sexes, where there was evidence from which a court or jury could have found that a disease was common to both sexes, it will be presumed under the statute, where that issue was not submitted and no request was made for its submission, that it was determined by the court in favor of the insured, the successful party below. *National Life & Accident Ins. Co. v. Weaver* (Civ. App.) 226 S. W. 754.

Where no request was made for submission of a special issue on the value of attorney's services, it must be presumed in support of the court's judgment that the trial court concluded and held that the amount for which judgment was rendered against such defendant, there being evidence to authorize it, was reasonable. *Chapman v. Gross* & Co. (Civ. App.) 230 S. W. 471.

In an action to cancel an oil and gas lease which was delivered by a bank in whose favor judgment was rendered, it will be presumed that the court found that the bank was not negligent; no issue as to the bank's negligence having been submitted

to the jury, though the case was tried on special issues. *Haggood v. City Nat. Bank* (Civ. App.) 230 S. W. 775.

— **Negligence.**—Where defendant interposed plea of contributory negligence which was not submitted, the statute would require the court on appeal to presume that trial court found that plaintiffs were guilty of contributory negligence if necessary to an affirmation of judgment. *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 382.

In an action for injuries to a pedestrian, struck by a locomotive while crossing a street without maintaining a proper lookout, evidence held sufficient to warrant the court in completing the verdict by a finding of negligence on the part of the engineer which proximately caused the injury. *Baker v. Shafter* (Civ. App.) 208 S. W. 961.

An implied finding in a personal injury action that the servant was not a farm laborer within the Workmen's Compensation Act must stand on appeal, unless the evidence is insufficient to support it, in view of this article. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

Where employé was killed by an interurban car while crossing the track to board it, and the jury found on special issue that defendant's operatives did not have car under control, it will be presumed on appeal that the trial court found that defendant's servants were negligent in approaching and passing the station at a high and dangerous rate of speed, and that such negligence was the proximate cause of the employé's death, no special issue as to negligence having been submitted. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

In action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) where jury found that employé did not know of dangerous condition of tank, but made no finding as to obvious defective condition, and there was evidence to support a contrary finding, it will be presumed, under this article, in favor of judgment for employé, that such contrary finding was made by the court, where case was tried on special issues. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

Where defendant, having pleaded discovered peril, acquiesced in submission which eliminated such issue, he could not sustain verdict in his favor, on the ground that the evidence showed discovered peril, notwithstanding this article, which merely means that where a jury has passed on certain issues submitted to them, if there be evidence as to other necessary matters connected with the issues found by the jury, it will be deemed that the court found on such matters in order to support such judgment. *San Antonio Public Service Co. v. Tracy* (Civ. App.) 221 S. W. 637.

Under this article, it must be presumed that the court found a carrier was not negligent in handling a shipment of cattle, where no issue as to negligence was requested, and the judgment was rendered for the carrier. *Leon v. Hines* (Civ. App.) 223 S. W. 239.

— **Damages and amount of recovery.**—In action by church, trustees against contractor for amount over price expended in completing work, jury not being required by issue to find what sum material on ground brought after completion, court properly could do so. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where in a case submitted on special issues, the evidence is overwhelming that plaintiff had suffered the injuries alleged, it will be presumed that this issue was found by the court for plaintiff. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

Where plaintiff sued for breach of contract, and defendant pleaded a counterclaim and produced evidence thereon, but the counterclaim was not included in the special issues, the court had a right on proper evidence to deduct from plaintiff's damages as found by the jury, the amount of the counterclaim. *Thompson v. Fleming* (Civ. App.) 200 S. W. 1134.

Notwithstanding art. 4704, relating to the assessment of damages in death actions, the court, under this article, may, in a death action submitted on special issues, determine the question of the amount of damages, where the only special issue submitted or requested on the question of damages was to the yearly earnings of deceased. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 207 S. W. 329.

In action for breach of marriage promise, in absence of request to have jury pass upon issue, court had right to find that, if there was a breach of contract, plaintiff had sustained injuries for which she might claim compensation. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

Failure to submit issue not error unless requested.—Where servant's case for injuries was submitted on special issues, failure to submit issue whether negligent acts were proximate cause of injuries was not error in absence of request under this article. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256.

In suit for commission, where jury's finding that there was no satisfactory sale was supported by sufficient evidence, and there was no objection to questions submitted, or any request for additional questions, judgment for defendant will not be disturbed. *Heidritter v. Keith Lumber Co.* (Civ. App.) 197 S. W. 885.

Appellant cannot complain of omission from an issue which he did not seek to correct by requesting submission of a proper issue. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Defendant, having failed to request submission of question whether deceased was in position of peril, held not entitled to urge objection that special issue submitting question of its motorman's negligence after discovering deceased was on weight of evidence in assuming that deceased was in a position of peril. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

In action by intending passenger injured when he attempted to sit in a defective seat, submission of the issue, "Was plaintiff himself guilty of contributory negligence in sitting in said seat as he did?" was not erroneous, in the absence of a correct request for a more specific submission. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

Contention that court erred in overruling appellant's exception to main charge cannot be sustained, where bill of exception discloses that objection was to omission alone, since, under this article, failure to submit an issue is not ground for reversal, unless submission was requested in writing. *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

Where case is submitted upon special issues, failure to submit an issue does not present a ground of reversal, unless its submission has been requested in writing by the complaining party, in view of this article. *Davis v. White* (Civ. App.) 207 S. W. 679.

Assignment of error complaining of court's failure to submit requested issue to jury, neither it nor statement under it showing that plaintiff in error requested submission of any such issue, and record not showing that charge of court was excepted to for failing to submit issue, cannot be considered. *Neeley v. White* (Civ. App.) 208 S. W. 991.

Under this article, failure to submit a special issue is not error, where its submission was not requested in writing. *Douglass v. Wallace* (Civ. App.) 211 S. W. 530.

Where a cause is submitted on special issues and there are no special issues submitted by the opposite party from his viewpoint, it will be presumed such party is satisfied with those submitted. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

An assignment that the special issue on contributory negligence narrowed the defense cannot be sustained, where the issue followed generally the language of the answer, and the only exception was that it was erroneous, and that the restricting words should have been stricken out; it being the duty of defendant in such case to prepare and present a charge as required by this article. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Too great a generalization by the trial court in submitting ultimate issues of fact to the jury will not be reviewed, even upon timely objection, in the absence of correct special issues tendered by the objecting party, unless there is affirmative error in the issues submitted by the court. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

Where there was no request for the submission to the jury of an issue, there was no error in withholding it from the jury. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

Submission of a special issue as to contributory negligence over the defendant's objection that issue did not apply acts of deceased to the facts as disclosed by the evidence, and permitted jury to speculate, was unavailing on appeal, where defendant did not request special issue grouping the facts relied on to constitute contributory negligence. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

Failure of the trial court, in a switchman's action for personal injuries, to submit the issue of the foreman's anticipation of injury as related to proximate cause, was not prejudicial in the absence of refusal by the trial court to submit a correct special issue on such subject at the request of defendant. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Com. App.) 228 S. W. 1087.

The court's failure to submit a particular issue is not properly before the appellate court where it does not appear from assignment of error that appellant requested the submission of any such issue or filed any written objections to the charge because it was not submitted. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

In an action for breach of sale contract, where the defendants pleaded alteration and inferior quality of the goods, a judgment for defendants on a verdict by the jury, to which only the issue of alteration was submitted, will be affirmed, though the claimed alteration was immaterial, where the evidence would support a finding for defendants on the issue of quality, and no request was made to submit that issue to the jury. *Federal Stock Food Co. v. Thomas-Tyler Co.* (Civ. App.) 230 S. W. 528.

Failure to submit issue is not available on appeal, in absence of request therefor. *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

Objections to issues.—Where objections to an issue were general, specific objection, not included therein, cannot be urged on appeal. *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Objections to submission of special issues will not be considered, unless by proper authentication the record discloses that the objections were presented in the court below within the time prescribed. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

An assignment of error to the refusal of an issue requested will not be considered, when no objection was made in the trial court to such refusal. *Anderson v. Wilson* (Civ. App.) 204 S. W. 784.

In absence of exception to submission of any of the issues, appellants waived right thereafter to complain that evidence was insufficient to support findings not so objected to. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

Even were the articles of the statute relating to the filing of objections and exceptions to giving and refusing of charges applicable when case is submitted on special issues, sufficiency of evidence to support a finding is an open question on appeal, not waived by submission without objection, having been made ground of motion for new trial. *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717.

That a special issue did not give jury standard by which they were to be guided in determining the matter of agency is not ground for complaint where no request was made to correct the omission. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

Objection that special issue as to whether option was executed on account of deceit did not give jury any standard to guide them, is unavailing in absence of request therefor. *Id.*

An objection that evidence was insufficient to support a special issue submitted in the main charge held not to be a mere complaint that said special issue ought not to have been submitted to the jury. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

An exception to special issues in court's charge reciting that it was taken in proper time and properly signed by counsel, and which was indorsed by the court, "O. K. Ordered filed," is sufficient to show that the exceptions were presented to the court at the time and in the manner required by statute. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

In action by broker to recover commission court erred in submitting special issue, "Did defendant have his land listed with the plaintiff?" and in refusing to further instruct that, if the person with whom the land was listed was acting as agent of plaintiff, then the listing would inure to the benefit of the plaintiff and plaintiff need not go further and request issue whether such person was the agent of plaintiff, and whether the property was listed with such agent, under arts. 1970-1972, 1985, since the charge was sufficient to call attention to matter omitted from special issue. *Christian v. Dunavent* (Civ. App.) 232 S. W. 875.

See, also, notes to art. 1984a.

Form of judgment.—See *Aycock v. Paraffine Oil Co.* (Civ. App.) 210 S. W. 851; notes to art. 1990.

Art. 1986. [1332] [1332] Special verdict conclusive.

Conclusiveness of verdict.—When case is submitted to jury on special issues, trial court cannot, under this article, disregard its finding, though without support in evidence, and must enter judgment in conformity with verdict. *Stone v. Bare* (Civ. App.) 198 S. W. 1102.

Under this article, a special verdict should be upheld unless there is no evidence to sustain it. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

In view of arts. 1986, 1990, the trial court should render judgment on jury's findings of special issues, unless verdict be set aside or new trial granted. *Id.*

Plaintiff vendor's explicit testimony that he had not waived his vendor's lien held to preclude review of special verdict to that effect in view of this article. *George v. Thompson* (Civ. App.) 211 S. W. 835.

The holder of benefit certificate in a fraternal benefit association is conclusively presumed to know the constitution and by-laws of the association which form part of his policy so that a finding that he did not know a provision thereof will be disregarded. *Carter v. Sovereign Camp, Woodmen of the World* (Civ. App.) 220 S. W. 239.

Art. 1987. [1333] [1333] Jury to render general or special verdict as directed.

General or special verdict.—See *Cole v. Estell* (Sup.) 6 S. W. 175; notes to art. 1982. See, also, notes to art. 1984a.

Discretion of court.—It was assigned as error that the court submitted special issues. Held, that the statute (Rev. St. 1879, arts. 1327-1329, regarding verdicts) makes this a matter within the discretion of the court. *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646.

Art. 1988. [1333] [1333] Verdict to comprehend whole issue or all the issues submitted.

Failure to answer or agree on some issues.—Court, having submitted an issue to the jury, cannot make a finding thereon; the jury having failed to answer the same. *Benton v. Jones* (Civ. App.) 220 S. W. 193; *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

No judgment can be properly entered in a cause submitted on special issues where the jury fails to answer material matters so presented to them, under this article. *Goggan v. Wells Fargo & Co. Express* (Civ. App.) 226 S. W. 246; *Ford v. Honse* (Civ. App.) 225 S. W. 860.

In actions for injuries in collision at crossing, where jury found, in answer to special issues, that plaintiffs were negligent, failure to find on other issues was immaterial, and did not preclude judgment for defendant railroad. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397.

Where appellant had requested a special issue, which the jury had failed to answer, the court could not substitute his finding, but should have declared a mistrial instead of rendering judgment. *Early-Foster Co. v. Tom B. Burnett & Co.* (Civ. App.) 224 S. W. 316.

Response by the jury to material special issues, "Unable to say," when categorically directed to answer yes or no, amounted to no answer at all, and judgment could not be rendered thereon, although the court told the jury to answer the questions "as best they could." *Goggan v. Wells Fargo & Co. Express* (Civ. App.) 226 S. W. 246.

Where the jury answered some questions submitted to them, but failed to agree on others, the question whether the answers made were sufficient to enable the court to

render any judgment is within the trial court's discretion, and cannot be reviewed in the absence of abuse of that discretion. *Phoebus v. Connellee* (Civ. App.) 228 S. W. 982.

Art. 1989. [1333] [1333] Judge, on request, to state conclusions of fact and law separately, statement to be filed.

See *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; notes to art. 1949; *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306, 16 S. W. 1078.

Duty to make and file in general.—Where, by the pleadings and evidence, issues of fact are raised, failure of the trial judge after due request to file findings of fact and conclusions of law, as required by arts. 1989, 2075, is reversible error. *Beavers v. Supreme Home of Ancient Order of Pilgrims* (Civ. App.) 204 S. W. 718; *Irwin v. State Nat. Bank of Fort Worth* (Civ. App.) 224 S. W. 246.

In absence of statement of facts, failure of trial judge to file findings and conclusions, as required by this article, requires reversal of judgment. *Ft. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

On trial without a jury, it was trial court's right and duty to pass on issues of fact. *National Bank of Garland v. Gough* (Civ. App.) 197 S. W. 1119.

Case will not be reversed because of court's failure to file findings and conclusions upon appellant's request, where appellant filed statements of facts containing all the testimony, and in his brief concedes that the testimony is practically undisputed, and expresses the belief that the appellate court can determine the issues from such statement. *Aukerman v. Bremer* (Civ. App.) 209 S. W. 261.

Where statement of facts has been filed containing all the testimony introduced on the trial, court on appeal may determine the issues of the case from such statement, notwithstanding lower court's failure to file findings and conclusions. *Id.*

Where record shows that cause of action was barred, that defendant pleaded the bar, and that judgment of county court on certiorari from justice court states that special exception was sustained and judgment rendered thereon, assignment that court erred in not filing findings of fact and conclusions of law will be overruled; there being no facts to be found, and failure to file conclusions of law, if error, being harmless. *Hill v. Pavelka* (Civ. App.) 209 S. W. 709.

Under this article, where trial is by jury and case submitted upon special issues, to which jury returned their answers, and judgment of court upon motion of defendants was entered upon such verdict in their favor, court was not required to file findings of fact or conclusions of law. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Where the evidence is undisputed, the appellate court may declare its legal effect, and the fact that the trial court did not enter finding on the undisputed evidence is no ground for reversal. *Schaff v. Kennedy* (Civ. App.) 220 S. W. 223.

It was error for trial court to fail and refuse to file findings of fact and conclusions of law, though duly requested. *Culwell v. Allen* (Civ. App.) 220 S. W. 362.

Time for making and filing.—See *Lester v. Oldham* (Civ. App.) 208 S. W. 575; notes to art. 2075.

Facts and conclusions to be found.—Where a city charter is made a public act to be read in evidence without proof, it should be cited as a law and not found as a fact. *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

Requests for findings.—Where no request is made for findings on a certain issue, error cannot be assigned for failure to make findings on such issue. *School Dist. No. 7 v. Frazier* (Civ. App.) 199 S. W. 846; *Spearman v. Mims* (Civ. App.) 207 S. W. 573.

This article does not require that the request to the court be in writing. *Griner v. Trevino* (Civ. App.) 207 S. W. 947; *Irwin v. State Nat. Bank of Fort Worth* (Civ. App.) 224 S. W. 246.

After the court has entered an order showing a request and authorizing the findings to be filed, the person requesting the findings to be filed need not again call upon the court for or request the findings. *Lester v. Oldham* (Civ. App.) 208 S. W. 575.

Where a party is dissatisfied with findings or conclusions as made because not sufficiently full and definite, he cannot complain unless he has made request for more specific finding. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

Where a husband claimed that he furnished the purchase price of land, and put it in the name of his wife to be held in trust for him, a finding that the land was the separate property of the wife was in effect a finding that the husband intended to make a gift to his wife, and was sufficient, in the absence of a request for more specific finding. *Id.*

Where there is a statement of facts filed, but no findings of fact or conclusions of law, motion for new trial, or bill of exceptions, the judgment will be held conclusive on the facts, unless defeated by some testimony that shows that another judgment should have properly been rendered; no request to file findings of fact or conclusions of law having been made. *Pittman & Harrison Co. v. Knowlan Machine & Supply Co.* (Civ. App.) 216 S. W. 678.

Where request or motion for findings of fact was never called to the attention of the trial judge, and his action thereon was never properly invoked, he was not in error for failure to file findings of fact and conclusions of law. *Johnson v. Frost* (Civ. App.) 229 S. W. 558.

Preparation and form in general.—A bill of exceptions cannot be considered as a part of the statement of facts, nor as part of the judgment, or as a finding of fact by the court upon which the judgment is based. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

It was not reversible error for the judge, in open court and over defendant's objection, to request counsel for plaintiff to prepare the findings and conclusions, where the

judge replied to the objection that he would not sign and approve them unless found to be correct, and they were subsequently submitted to him, and signed and approved; there being no real delegation of judicial function. *Berkman v. D. M. Oberman Mfg. Co.* (Civ. App.) 230 S. W. 838.

Separate statement of facts and law.—That conclusions of law and fact are to some extent intermingled in court's findings of facts does not necessitate reversal of the case. *Leonard v. Torrance* (Civ. App.) 210 S. W. 295.

Sufficiency in general.—The court's findings should be of facts, and should not include evidence which it thought established, as facts, findings made. *Spearman v. Mims* (Civ. App.) 207 S. W. 573.

In suit by broker for commission in which defendants alleged that agency had been canceled, and that one of defendants, and not plaintiff, was the procuring cause of the sale, held that court's findings of fact were sufficient to comply with arts. 1985-1991, requiring only a statement of conclusions on issuable facts, and not a statement of the evidence. *Leonard v. Torrance* (Civ. App.) 210 S. W. 295.

It is unnecessary for the court to state the evidence upon which it bases a finding of fact, nor the reasons therefor. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

Where note passed into actual possession of payees only for purpose of having it indorsed to aid in further negotiation, a finding that the note was never delivered to payees. "in the sense that they advanced any money thereon," held not objectionable. *Rabb v. Seidel* (Civ. App.) 218 S. W. 607.

Conformity to pleadings, issues, and proof.—Where it is assigned as error that the court did not make certain findings of fact, such assignments, involving facts contradictory to findings made, will be overruled where the findings made are supported by the evidence. *School Dist. No. 7 v. Frazier* (Civ. App.) 199 S. W. 846.

Trial court's finding of fact, not supported by any allegation in pleadings of either party, cannot be considered. *Grand Lodge, A. O. U. W., v. Schwartz* (Civ. App.) 205 S. W. 156.

Requested findings in conflict with trial court's findings, which were sustained by evidence, held properly refused. *Magnolia Petroleum Co. v. City of Port Arthur* (Civ. App.) 209 S. W. 803.

In action for injuries received in collision between motor truck and street car, a finding that it was customary for defendant's cars to slow down for crossing was not authorized, where existence of custom was not alleged. *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275.

In trespass to try title based on delivery of a deed to plaintiff's decedent by his mother, a finding that the son said that the instrument was "of no present value and conveyed no present title" held not supported by the evidence and not to support a judgment based on the acceptance of such deed by the son. *Benavides v. Benavides* (Civ. App.) 218 S. W. 566.

Inconsistent findings and conclusions.—In suit for partition, involving construction of item of will, if trial court did not consider facts set out in its findings in its conclusion of law in construing item as to whether it contained a latent ambiguity requiring extrinsic evidence to explain, its failure was error. *Ladd v. Whitledge* (Civ. App.) 205 S. W. 463.

In a divorce suit, a finding that plaintiff and defendant agreed to work together to a common purpose, the proceeds of their labor to become their joint property, was not inconsistent with a finding that plaintiff and defendant had entered into a common-law marriage agreement made effective by cohabitation continuing for about 30 years. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In trespass to try title, findings that both plaintiffs and defendant acquired title by adverse possession were not contradictory the evidence showing that, after plaintiffs acquired title under the ten-year statute, their possession ceased, and defendant acquired title under the five-year statute. *Collins v. Megason* (Civ. App.) 228 S. W. 583.

In action by son's creditor against father on ground that father assumed payment of son's debts, findings held not inconsistent. *Bell v. Swim* (Com. App.) 229 S. W. 470.

In an action for breach of a contract for the shipment of high density Webb cotton, a finding that there was no general custom fixing the weight of a bale of such cotton is not in conflict with a finding that a bale of cotton properly compressed by the Webb process would weigh more than the average weight of the bales furnished for shipment, and that plaintiff thereby breached his contract. *Elder, Dempster & Co. v. Weld-Neville Cotton Co.* (Com. App.) 231 S. W. 102.

Additional findings.—In the absence of exceptions to the findings or request for further findings on an issue, the findings will not be questioned on appeal or the judgment disturbed, in view of this article. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983; *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153.

Construction and operation.—A finding in broker's action for commission on sale concluded directly by owner at price less than limited to broker held an expression of the court's view of the law rather than a finding on issue of fact of broker's efforts being procuring cause. *Goodwin v. Gunter*, 109 Tex. 56, 195 S. W. 848.

Where steamship owners sued cotton shippers because cotton shipped was not "Webb high density cotton" as agreed, and took up too much room, they could not recover when court found that cotton turned out by Webb high density presses in workmanlike manner, without reference to density, was generally regarded as compliance with contract for such cotton, notwithstanding further finding that such cotton should have specified average minimum density. *Weld-Neville Cotton Co. v. Elder, Dempster & Co.* (Civ. App.) 204 S. W. 678.

In an election contest, a declaration in a judgment that parties referred to were qualified voters, except for certain reasons, would not constitute a finding of fact, but would be a conclusion of law; hence appellants would not be entitled to have it given controlling effect in disposing of the appeal. *Barker v. Wilson* (Civ. App.) 205 S. W. 542.

Court's special findings, corroborated by decree that money tendered by plaintiff had been deposited in court, will control over statement of facts that shows no money was deposited, since trial court knew judicially whether money was in court. *Mission Auto Co. v. Aldape* (Civ. App.) 206 S. W. 223.

Conclusions, in court's findings of fact, that cancellation of plaintiff's agency was not done in bad faith, that one of defendants was the procuring cause of the sale, and that plaintiff was not the procuring cause, are conclusions of fact, not law. *Leonard v. Torrance* (Civ. App.) 210 S. W. 295.

Finding that payment was voluntarily made does not support conclusion of law that money was paid under mistake of law, since voluntary payment might have been induced by either mistake of law or of fact. *St. Louis Southwestern Ry. Co. v. White, Jackson & Co.* (Civ. App.) 211 S. W. 315.

In an action for burning of plaintiff's house by fire communicated thereto from defendant's oil tanks, court's findings as a fact that the defendant, "in the manner of the erection and maintaining of its tanks, was not guilty of a nuisance in the place in which the same were erected," held a conclusion of law not sustained by the evidence. *McGuffey v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 211 S. W. 335.

In suit to recover the amount of a promissory note for \$1,125 and for foreclosure of lien on the east half of a survey conveyed by plaintiff trustee to defendant maker, which lien secured payment of the note, finding that plaintiff and defendant agreed, when the note was signed, that money derived from the sale of timber on land constituting the west half of the survey should be credited on the note, held properly construed as a finding the agreement was that the credit against the purchase money due defendant on the land on account of the timber was to be entered as of the dates the payments for the timber were made by plaintiff. *Twyman v. Clark* (Civ. App.) 222 S. W. 299.

A finding by the trial court that a letter mailed to plaintiffs was not received is equivalent to a finding that the circumstances of the mailing proved by the evidence did not raise the presumption of the reception of the letter. *Bruck Bros. v. Lipman, Speir & Hahn* (Civ. App.) 228 S. W. 303.

Findings showing cessation of work for more than 18 months, removal of tools and appliances from the premises, and the allowing of a derrick to get into disuse held to sustain a conclusion that lessees unjustly abandoned a well before its completion. *Burnett v. Summerour* (Civ. App.) 228 S. W. 1013.

In an action against a railroad company by a passenger shot as a result of the alleged negligence of the conductor in handling a pistol, findings held not to necessitate a judgment for the railroad company on the theory that, as the passenger requested to see the operation of the safety device, the conductor was outside of his duties when he discharged the pistol. *Texas Midland R. R. v. Monroe* (Civ. App.) 229 S. W. 349.

The entire findings of the trial court should be read together and construed as a whole, and when they permit of more than one reasonable construction, that construction should be adopted which will support the judgment. *Elder, Dempster & Co. v. Weld-Neville Cotton Co.* (Com. App.) 231 S. W. 102.

Objections, exceptions and review.—Findings of fact not assailed by appellants are conclusive on appellate court. *Stark v. Haynes* (Civ. App.) 211 S. W. 343; *Samuel v. Branche* (Civ. App.) 211 S. W. 841.

Failure of trial judge to file findings of fact and conclusions of law, as required by this article, must be shown by bill of exception to authorize consideration of it as cause for reversal, as provided in rule 55 of the Court of Civil Appeals (142 S. W. xxi). *Ft. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

In suit on accident policy, held that defendant, not having complained in court below, that amount of attorney's fees awarded was excessive, or that court could not allow the same, could not raise such question on appeal. *Georgia Casualty Co. v. Shaw* (Civ. App.) 197 S. W. 316.

Where plaintiffs reserved no exception to court's findings, court is not called upon to consider complaints made of such findings in motion for new trial. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Failure to make finding does not present reversible error, where such failure was not called to attention of trial court. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

Where no exception was taken to findings, and no request made for additional findings, assignment complaining of findings will be overruled in view of this article. *Celaya v. City of Brownsville* (Civ. App.) 203 S. W. 153; *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Exception having been duly reserved to judgment overruling motion for new trial it was unnecessary that exceptions be also taken to conclusions of law and fact to secure their review under due assignments of error. *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593.

In suit to establish parol trust in land by certain heirs, failure to challenge finding that property given to a certain child was not in settlement of his interest in the community estate, as not being supported by the evidence, committed appellants to the proposition that there was sufficient evidence to sustain the finding. *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010.

Where a statement of facts appears in the record, findings of fact need not be excepted to in the trial court to be subject to review on appeal. *Lieber v. Nicholson* (Com. App.) 206 S. W. 512.

Under Rev. St. 1911, arts. 2058, 2073, and Court Rules 53, 54, 55 (142 S. W. xxi), the appellate court will not review failure of trial court to file findings of fact and conclusions of law, unless such matter is raised by a bill of exceptions, or at least unless it appears in the record, not merely that a request therefor was made, but also that, upon failure to comply with request, appellant excepted. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

When the trial is before the court without a jury, the appellant is not required to file a motion for new trial presenting alleged errors as a prerequisite to urging them in the appellate court, where the court has filed his findings of fact and conclusions of law, and exceptions have been taken. *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

Rulings on the sufficiency of the pleadings other than those subject to a general demurrer, such as the overruling of special exceptions, are not reviewable in the absence of a statement of fact or findings of fact. *Spitzer v. Smith* (Civ. App.) 218 S. W. 599.

An attack on the correctness of findings actually made by the court may be made without further predicate than an exception to the judgment. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

Document stating that plaintiff "enters of record its exceptions to the findings of fact and conclusions of law made and filed by the court" held too general and indefinite. *Stockyards Nat. Bank v. Wilkinson* (Civ. App.) 230 S. W. 1040.

Presumptions in aid of judgment.—Where there was no express finding by court on particular issue of fact, and none was requested, appellate court must presume that lower court found the facts, so as to support the judgment. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568; *Walker-Smith Co. v. Bilao* (Civ. App.) 204 S. W. 777; *Woldert v. Pukli* (Civ. App.) 221 S. W. 1112; *Campbell v. Turley* (Civ. App.) 224 S. W. 528; *Lewis v. Berney* (Civ. App.) 230 S. W. 246.

It must be presumed that the trial court found all the facts necessary to support its judgment. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* 192 S. W. 607; *First Nat. Bank v. Crespi & Co.* (Civ. App.) 217 S. W. 705; *Moore v. Moore* (Civ. App.) 225 S. W. 78; *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

No findings of fact or conclusions of law having been filed by the court below, the judgment must be sustained, if there is sufficient evidence to support it upon any theory of the case. *Pennington v. Fleming* (Civ. App.) 212 S. W. 303; *Blewett v. Richardson Independent School Dist.* (Civ. App.) 230 S. W. 255.

Where no findings of fact were filed by the trial court, it must be presumed by the Court of Civil Appeals that all issues of fact raised by the evidence were decided against the appellants. *Allison v. Hamic* (Civ. App.) 226 S. W. 483; *Cooks', Waiters' & Waitresses' Union No. 399, v. Theoharis* (Civ. App.) 228 S. W. 984.

In the absence of a statement of facts or findings of fact by the court, or a proper bill of exceptions showing the assertions made, a judgment must be taken on appeal as proved. *Nease v. Broadwater Mercantile Co.* (Civ. App.) 206 S. W. 692.

Where the trial is by a court without a jury, and there are no findings of fact in the record, it will be presumed on appeal in support of the judgment that the court did not consider improper testimony although admitted. *Kingsville Cotton Oil Co. v. Dallas Waste Mills* (Civ. App.) 210 S. W. 832.

Judgment being for plaintiff, it will be assumed on appeal, in the absence of a specific finding, that the issue of fact presented by defendant's defense was found against him. *Brannan v. First State Bank of Comanche* (Civ. App.) 211 S. W. 945.

Inconsistencies in the evidence, in the absence of findings of fact, must be resolved on appeal so as to support the judgment. *Crisp v. Christian Moerlein Brewing Co.* (Civ. App.) 212 S. W. 531.

In the absence of contrary facts found by the trial court, the Court of Civil Appeals must indulge the presumption that a gift of property, including land from plaintiff husband to plaintiff wife, attacked by defendant, was made in compliance with law, and was not by parol. *Fenton v. Miller* (Civ. App.) 218 S. W. 14.

If the conclusion of the trial court is not properly deducible from the facts set forth in his findings of facts, it will be presumed to have been established by other competent testimony given on the trial of the case. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

In view of rule 24 for district and county courts, it will be presumed in the appellate court, where there was nothing in the record to show the contrary, that there was other evidence, besides failure of defendant to call attention to its plea of privilege, to support a finding that the same had been waived. *Auds Creek Oil Co. v. Brooks Supply Co.* (Civ. App.) 221 S. W. 319.

Where appellant requested no express finding on an issue, it will be presumed that the court based its judgment upon sufficient facts and necessarily found against appellant on that issue. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Where a deed delivered November 30, 1876, conveyed land to R. with remainder to her children or their descendants, it will be presumed, in favor of the conclusion and judgment below, that the only child of R., who was born some time in the year 1876, was born prior to November 30th, as the law favors vested rather than contingent remainders. *Id.*

In mortgage sale purchaser's action against mortgagor, where court denied purchaser relief on ground that mortgage was a part of an immoral transaction, it will be presumed in support of the judgment that purchaser bought the property for mortgagee. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674.

It will not be presumed, in support of an injunction against acts of a county chairman after the election of his successor, that the court found that the successor had accepted

the office, where such finding would be against the preponderance of the evidence, and especially where the injunction was also issued against other officers. *Walker v. Hoping* (Civ. App.) 226 S. W. 146.

In the absence of an affirmative finding on an issue, the issue is resolved by law in support of the judgment rendered. *Magnolia Petroleum Co. v. Lockwood Nat. Bank* (Civ. App.) 227 S. W. 363.

The Court of Civil Appeals must indulge every intendment in support of the judgment, where no conclusions of fact have been filed, and must affirm the judgment, if the conclusion it embodies can be reasonably derived from the evidence. *Robertson v. Lee* (Civ. App.) 230 S. W. 730.

Where there was no finding of fact nor conclusion of law in the record, the judgment must be affirmed, if it can be done on any sound reason in law applicable to the pleadings and the facts. *Head v. Moore* (Civ. App.) 232 S. W. 362.

Art. 1990. [1333] [1333] Court to render judgment on special verdict or conclusions, unless set aside, etc.

See note 53 under art. 1994 in 1914 edition and 1918 supplement.

See *Thompson v. Fleming* (Civ. App.) 200 S. W. 1134; notes to art. 1985; *Benton v. Taylor* (Civ. App.) 208 S. W. 704; notes to art. 1994.

Cited, *First Texas State Ins. Co. v. Hightower*, 110 Tex. 52, 214 S. W. 299.

Judgment notwithstanding verdict.—See *Heimer v. Yates* (Com. App.) 210 S. W. 680. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357; *Hall v. Hayter* (Civ. App.) 209 S. W. 436; notes to art. 1994.

Rendering judgment or setting aside verdict.—See *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421; *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779; *Chicago, R. I. & G. Ry. Co. v. Hallam* (Civ. App.) 211 S. W. 309; *McBroom v. Weir* (Civ. App.) 219 S. W. 855; notes to art. 1994.

Under this article, it is imperative on the trial court to render judgment on the facts found by the jury, though it may then grant a rehearing, but error, if any, would be on the overruling of the motion for a new trial, and not on the motion to set aside the findings and render judgment. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

In the absence of motion to set aside the findings of the jury, the court is bound to enter up a judgment in accordance with the jury's answers. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

Under this article, judgment must follow verdict of jury on special issues, unless same is set aside and new trial granted, even though verdict be so erroneous as to require granting of new trial after judgment is rendered. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

In view of arts. 1986, 1990, the trial court should render judgment on jury's findings of special issues, unless verdict be set aside or new trial granted. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

It is court's duty to enter judgment in accordance with findings of jury, even though they are unsupported by the evidence, where verdict is not set aside. *Pyle v. Park* (Civ. App.) 214 S. W. 652.

An assignment of error that the court erred in rendering judgment because the special verdict was without support in the evidence will be overruled under the rule that it is the duty of the court to conform its judgment to the special verdict regardless of whether it has support in the evidence, and thereafter either upon its own motion or that of the complaining party set the verdict aside. *Cobb & Gregory v. Lanier* (Civ. App.) 221 S. W. 990.

Assignments of error complaining of the entry of judgment for the damages assessed by the jury cannot be sustained, where there was no motion to set aside the findings, since, unless they are set aside, the court is bound to enter judgment in accordance with them. *Town of Gilmer v. Pickett* (Civ. App.) 228 S. W. 347.

The trial court could do only one of two things, he had either to set aside the findings of the jury, or render judgment in conformity with them. *Tompkins v. Hooker* (Civ. App.) 229 S. W. 351.

Review.—Under arts. 1990, and 1991, as well as Supreme Court rule 71a, it is unnecessary, where a case was submitted on special issues, and a special verdict returned, that motion for new trial be made in order to entitle appellant to review of judgment which he asserted was erroneous because not following the findings. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

Though, under this article, the trial court must render judgment on the special verdict or set it aside, a Court of Civil Appeals, under article 1626, is not limited to rendering such judgment as the trial judge should have rendered on such verdict. *Houston Belt & Terminal Ry. Co. v. Lynch* (Com. App.) 221 S. W. 959, affirming judgment (Civ. App.) 185 S. W. 362.

Under arts. 1990, 1991, where a case has been tried; upon special issues, a motion for new trial is not necessary to perfect the appeal. *Stubblefield v. Jones* (Civ. App.) 230 S. W. 720.

It being the statutory duty of the trial court to render judgment in accordance with the jury's verdict unless the same be set aside and a new trial granted, a failure so to do presents a fundamental error which can and should be considered by the Court of Civil Appeals whether properly assigned or not. *Id.*

Art. 1991. [1333] [1333] Exceptions to conclusions or judgment noted in judgment; appeal, etc.; transcript.

Cited, *Johnson v. Masterson Irr. Co.* (Civ. App.) 217 S. W. 407.

Exceptions and motions for new trial.—Where record does not show that appellees excepted to the judgment and caused the exception to be noted on the record of the judgment entry, as required by this article, and they filed no cross-assignment in the trial court, their assignment on appeal cannot be considered. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Under arts. 1990 and 1991, as well as Supreme Court rule 71a, it is unnecessary, where a case was submitted on special issues, and a special verdict returned, that motion for new trial be made in order to entitle appellant to review of judgment which he asserted was erroneous because not following the findings. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 543.

Under arts. 1990, 1991, where a case has been tried upon special issues, a motion for new trial is not necessary to perfect the appeal. *Stubblefield v. Jones* (Civ. App.) 230 S. W. 720.

Where trial is before court without jury and judgment is excepted to, exceptions need not be taken to the findings of fact and conclusions of law as a prerequisite to review. *Temple Hill Development Co. v. Lindholm* (Com. App.) 231 S. W. 321.

Art. 1992. [1333] [1333] No submission of special issues unless requested.

Operation in general.—Notwithstanding this article, the trial court may, under art. 1984a, submit a case upon special issues without request by either party. *Penelope Real Estate Co. v. Dawson* (Civ. App.) 206 S. W. 702.

CHAPTER FIFTEEN

JUDGMENTS

Art. 1994. Judgments, how framed.	Art. 2005. Against executors acting independently of probate court.
1995. For or against one or more plaintiffs, etc.	2006. Against partners when all not sued.
1995a. Contribution between tortfeasors on payment of judgment.	2007. Confession of judgment.
1997. But one final judgment.	2008. Acceptance of service, waiver of process.
1998. Judgment may pass title, etc.	2009. Confession of by attorney.
2000. Judgments of foreclosure of liens.	2010. Releases errors, but impeachable, etc.
2004. Judgments against executors, etc.	

Article 1994. [1335] [1335] Judgments how framed.

See *Davis v. Mitchell* (Civ. App.) 225 S. W. 1117.

Cited, *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865.

½. Nature of judgment.—A "judgment" is a conclusion of the law upon matters contained in the record or the application of the law to the pleadings and facts as found by the court or admitted by the parties or deemed to exist upon their default in a course of judicial proceedings. *Allen-West Commission Co. v. Gibson* (Civ. App.) 228 S. W. 342.

¾. Rendition of judgment.—A judgment rendered when a court is not in session is not a judgment of the court, and is void in any proceeding when that fact is shown. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

A judgment of the county court held not void on its face as rendered and the cause heard in vacation, although it recited a hearing had in vacation, and that pursuant to said hearing the court "concluded" the plaintiff should recover, and that such judgment should be entered at the succeeding regular term. *Kerr v. Hume* (Civ. App.) 216 S. W. 908.

Where the trial was not concluded and the case submitted to the court until the last day of the term, rule 66 for the district courts (142 S. W. xxii) did not apply, and judgment was properly rendered on the last day of the term. *Richards v. Howard* (Civ. App.) 218 S. W. 95.

1. Entry of judgment.—The rendition of a judgment is to be distinguished from the entry thereof. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

If, after hearing and decision by the county court of a cause in vacation, nothing had been done relative to the judgment at the succeeding regular term of the court but to have the clerk enter it upon the minutes of the court, it would have been a nullity. *Kerr v. Hume* (Civ. App.) 216 S. W. 908.

Where defendants permitted judgment to be entered against them by default without making a defense against plaintiff's cause of action, they are precluded from inter-

posing such defenses on motion to enter judgment nunc pro tunc. *Miller v. Trice* (Civ. App.) 219 S. W. 229.

A motion made in March, 1919, to enter nunc pro tunc a final judgment by default rendered November 2, 1915, was not too late. *Id.*

Where the jury in the county court, disposing of the issue as to a party's sanity, found that he was of sound mind, and the judge made entry on the probate docket, the entry had the full force and effect of a formal judgment of record, and it was immaterial that the judgment was not formally entered until later. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

The office of an order nunc pro tunc is to make a present record of something previously done, though not recorded. *Barnes v. State* (Cr. App.) 230 S. W. 986.

2. Parties.—Claims against a railroad company under art. 6625, enacted September 1, 1910 (Acts 31st Leg. [4th Called Sess.] c. 4), could not have been adjudicated in receivership proceedings had prior to the enactment of such statute, and therefore prior to the existence of the purchasing corporations. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

In suit by trustee, judgment held admissible, though the copy offered misnamed the beneficiary, while the defendant in the present suit, is sued as "G. W. Wigham," while in the other suit he was sued simply as "Geo. Wigham." *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

The legal owner of a note could procure a judgment in his own name, even though he admitted in his pleadings that the equitable title was in another; such judgment to be subject to the equities shown to exist against the beneficial owner. *Rabb v. Seidel* (Civ. App.) 218 S. W. 607.

Action of the court in directing a verdict in favor of the S. G. D. Motor Car Company, under which trade-name plaintiff was doing business, being inadvertent, amounted to no more than a misnomer, and as between the parties themselves did not impair the validity or effect of the judgment for the motor car company. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701.

4. Sufficiency and certainty of determination in general.—In a vendor's suit for specific performance, decree for plaintiff held too uncertain and indefinite to be sustained. *Giles v. Union Land Co.* (Civ. App.) 196 S. W. 312.

Description in judgment, sufficient to identify land as that described in petition, is sufficient. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Judgment held not void for lack of sufficient description of land involved where it was apparent from the judgment, by reversing the calls, that the beginning call for Twenty-Third street was a mistake, and that Twentieth street was meant. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

A description of land in a judgment is sufficient, if by it the true location of the land may be ascertained, and if it contains an erroneous or false call or designation or description, or other detail, and by omitting or disregarding such there remains sufficient description by which the land may yet be identified and located, the judgment is effective. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

13. Conditions.—A judgment for a specified amount, providing that plaintiff "may have his execution," and also that certain banks who were parties might have their executions for certain amounts of that obtained by plaintiff, was not erroneous as allowing double recovery, where it also provided that any money paid to such banks would be credited on the judgment of the plaintiff. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

14. Validity and partial invalidity.—Where a court of general jurisdiction, in the exercise of its ordinary judicial function, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and the subject matter, such judgment is never void, no matter how erroneous it may appear to be. *Evans v. McKay* (Civ. App.) 212 S. W. 680; *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

When a court has jurisdiction to enter a particular order or render a given judgment and enters an order or judgment regular on its face, its validity is conclusively presumed unless set aside or annulled in a direct proceeding. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

To show judgment for defendants on cross-bill is nullity, it must appear from judgment record court did not acquire jurisdiction over plaintiff's person as to cross-action. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

A probate court is a court of general jurisdiction, and its judgments, within the scope and power granted to it by law, are entitled to the same presumptions in favor of their validity as those of any other court of record of general jurisdiction. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

Judgment establishing plaintiff's right to the use of particular roadway held objectionable as decreeing title to the land. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 207 S. W. 960.

If judgment, entered in county court on defendant's appeal from justice court, against defendant and sureties on his appeal bond, was erroneous as to the sureties because of its form, or its entry, or because obtained by agreement from the defendant without sureties' knowledge or consent, it was not therefore void, but at most only voidable. *C. J. Gerlach & Bro. v. Du Bose* (Civ. App.) 210 S. W. 742.

There is a presumption in favor of judgments of courts of competent jurisdiction, and one attacking the judgment has the burden of showing that in no possible way could it have been valid. *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

Where the district court in trespass to try title rendered judgment divesting an infant of title to land which had been part of the community estate of her mother and

deceased father, and which had been conveyed by the mother after remarriage, held that though the mother had no authority to convey the property, and though as a general rule a minor's interest in land can be sold only under order of court of probate, the presumption in favor of the validity of the judgment was not overthrown. *Id.*

Where it is shown that judgment condemning land at a city's instance was invalid for lack of service of notice on the infant landowner, other matters recited in the judgment vacating such judgment do not affect it, because, if void for one reason, it is void for all. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Where, in an action against husband and wife to recover land sold to the community, the judgment for the recovery of the land was divisible, it is valid against the husband for possession of the land notwithstanding the failure to serve the wife, even though it also taxed the cost against both. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

Where defendants made a third person a party defendant and prayed for judgment against him in event of recovery by plaintiff, error of the court in making a finding as to the value of the cattle sued for, in that it submitted such issue to the jury and the jury had not answered it, did not invalidate the portion of the judgment in favor of plaintiff, but invalidated the portion in favor of the original defendants against the third party. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

The fact that a judgment rendered within the jurisdiction of the court was erroneous does not make it void. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

A judgment is not void unless there was want of jurisdiction over the subject-matter, or over the parties, or some of them, or want of power to grant the relief contained in the judgment, and where the subject-matter was the title to land as to which that court had jurisdiction under the Constitution and statutes, the defendants appeared and answered, the minor defendant by guardian ad litem, under art. 1942, and the decision was in accordance with the issues made by the pleadings, the judgment was not void. *Id.*

15. Construction and operation.—In suit by only son of deceased's first wife against administrator, surviving wife, and children of second and third wives, to recover such part of estate as belongs to his deceased mother, decree setting aside to such son one-fourth of property and to administrator and other defendants other three-fourths had no other effect than to partition interest of plaintiff from interest belonging to estate without adjudication of rights of defendants as between themselves. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

In tenant's suit for possession from a subtenant, decree for plaintiff on ground of renewal of original lease after commencement of action, without prejudice to any right of defendant growing out of suit and execution of writ of sequestration, had no more effect than usual order sustaining exceptions to part of cause of action, and dismissing it. *Adams v. Van Mourick* (Civ. App.) 206 S. W. 721.

In an action on an account, judgment rendered against defendants for the exact amount claimed in petition is necessarily a finding against the counterclaim, and in legal effect disposes of counterclaim. *Yerby v. Heineken & Vogelsang* (Civ. App.) 209 S. W. 835.

When the language of a decree is susceptible of two constructions, that construction should be adopted which correctly applies the law to the facts. *Gough v. Jones* (Com. App.) 212 S. W. 943.

In trespass to try title, where affirmative judgment for defendant on his cross-bill was rendered on the day of trial, recitation in the judgment, held not to show waiver by agreement of counsel of notice of defendant's cross-action. *McGowan v. Lowry* (Civ. App.) 230 S. W. 465.

18. Service of process.—See notes to art. 1885.

A judgment rendered without service of process is void, though the return shows legal service, and the judgment recites legal service, whether or not plaintiff was guilty of fraud or collusion in procuring a false return. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Judgment against plaintiff on cross-bill, supported by judgment record silent on question of service on plaintiff or his appearance, is not nullity. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

Statement, in citation served by publication, that suit was filed in the Seventy-Fifth judicial district court, though in fact it had been transferred to such district, held not to affect validity of default judgment or the judgment against another party. *Hill v. Liberty State Bank* (Civ. App.) 221 S. W. 328.

20. Collateral attack in general.—The allowance by a court of competent jurisdiction of a claim against a decedent's estate is a judgment which cannot be collaterally attacked. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Where a default judgment foreclosing vendor lien notes was rendered, it cannot thereafter be collaterally attacked by evidence that the plaintiff was not the owner of the notes, the rule as to collateral attack applying to default judgments. *Allen-West Commission Co. v. Gibson* (Civ. App.) 228 S. W. 342.

The county court is a court of general jurisdiction over the estates of decedents, and, unless a lack of jurisdiction in a given case affirmatively appears of record, its orders will not be subject to collateral attack. *Tholl v. Speer* (Civ. App.) 230 S. W. 453.

21. — Invalidity in general.—See *Teat v. Perry* (Civ. App.) 216 S. W. 650.

Judgment against an insane person is not void and can be attacked only on a direct proceeding for that purpose. *Howell v. Fidelity Lumber Co.* (Com. App.) 223 S. W. 181; *Fidelity Lumber Co. v. Howell* (Civ. App.) 206 S. W. 947.

A judgment rendered when a court is not in session is not a judgment of the court,

and is void in any proceeding when that fact is shown. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Order of probate court, divesting itself of supervisory control of guardianship estate, being a nullity, was subject to collateral attack. *Davis v. White* (Civ. App.) 207 S. W. 679.

A dormant judgment is not void, but only voidable, and for that reason it cannot be attacked in a collateral proceeding. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

In personal injury action where defendant filed no plea challenging plaintiff's right to prosecute the action without joinder of her former husband, a merely collateral attack upon the divorce decree, will not support an assignment that the evidence shows that the divorce decree is null and void. *Ablene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

A judgment rendered in pursuance of a parol agreement of compromise is not void, and can be attacked only by a direct proceeding. *C. J. Gerlach & Bro. v. Du Bose* (Civ. App.) 210 S. W. 742.

A void judgment may be collaterally attacked. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

On collateral attack upon a judgment as not disposing of a defendant, it will be presumed that some disposition of him satisfactory to the court was made. *Conner v. McAfee* (Civ. App.) 214 S. W. 646.

Where judgment on its face is legal and does not disclose any fact which indicates that it is invalid, to disclose that it is void requires direct attack, which must be made in the court where the judgment was obtained. *Cotulla State Bank v. Herron* (Civ. App.) 218 S. W. 1091.

The wife not being a necessary party to trespass to try title against the husband as to community property though he was insane, judgment against him is binding on the community estate as well as him when attacked collaterally. *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

22. — **Want of jurisdiction.**—See *Reed v. First State Bank of Purdon* (Civ. App.) 211 S. W. 333.

Judgment rendered when a court is not and cannot be in session is without color of law, but a judgment of a court purporting to be in session under an order regular on its face and authorized by law is under color of law, and imports verity except upon direct attack. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

In collateral attack upon a judgment of a domestic court of general jurisdiction regular on its face, inquiry by evidence aliunde the record into any fact which the court must have passed upon is precluded; "jurisdiction" meaning simple power to determine and give judgment. *Id.*

A presumption in favor of the jurisdiction of courts and the validity of their judgments cannot be overcome in a collateral proceeding by evidence dehors the record that the necessary jurisdictional facts did not exist. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

In husband's action for custody of child awarded him by divorce decree, where defense is that decree has been modified, husband will not be permitted to show, by evidence aliunde the record, that court at time of modification of judgment had no jurisdiction over child because it was a nonresident at such time; it being presumed in a collateral attack that jurisdiction attached. *Milner v. Gatlin* (Civ. App.) 211 S. W. 617.

That petition, in action by temporary administratrix, did not affirmatively show her authority from probate court to bring suit, does not render judgment subject to collateral attack upon ground that court was without jurisdiction, notwithstanding art. 3302, the judgment being a judicial determination that court had jurisdiction. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

A judgment is void, and so subject to collateral attack, only in case of an entire absence of power in the court to render such a judgment. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

23. — **Rights of parties or third persons to impeach judgment.**—In a collateral attack by one not a party to a former judgment, the meritorious sufficiency of the grounds relied on in the pleading will not be inquired into. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

As a general rule, no one has such an interest in a dormant judgment which is merely voidable that he can attack the same, except the parties thereto or their privies. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

While a judgment binds only the parties thereto and those in privity with them, it is not subject to collateral attack by a stranger unless he shows that he has rights, claims, or interests which would be prejudiced or injuriously affected by its enforcement. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

The question of whether a judgment should have been for the amount of a replevin bond or for the value of the property replevied cannot be raised on collateral attack by surety, on application by plaintiff after judgment for a writ of garnishment. *Trippllett v. Hendricks* (Civ. App.) 212 S. W. 754.

Where a domestic court of general jurisdiction has acquired jurisdiction of the parties and subject-matter, its judgment, unless reversed or annulled in some manner provided by law, or unless absolutely void, cannot be successfully attacked or impeached by parties thereto, or their privies, in any collateral proceeding. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

The rule that every reasonable presumption is indulged to support the judgment on collateral attack by a party does not apply to a collateral attack by a stranger, who

may make such attack on any ground which could be urged against it on direct attack. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

In trespass to try title to land sold on foreclosure of a lien for street improvements after service on unknown owners by publication, a resident owner of an interest, who was not served, can attack the decree for defects in the service on his cotenants, so that he is entitled to a new trial for newly discovered evidence as to such defects, though his interest was excepted from the judgment. *Id.*

24. — Effect of recitals in record or judgment.—A domestic divorce judgment can be collaterally attacked only when it does not recite jurisdictional facts. *Givens v. Givens* (Civ. App.) 195 S. W. 877.

Under arts. 5502, 7506, a judgment reciting that service was had on "defendant" showed sufficiently that service was had on two defendants, for the purpose of a collateral attack. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

Recitals of judgment concerning service of process import absolute verity, and cannot be contradicted or disproved in a collateral proceeding by extrinsic evidence. *Milner v. Gatlin* (Civ. App.) 211 S. W. 617.

In action for custody of child awarded plaintiff by divorce decree, the defense being a modification of the decree, where there is nothing in the record upon which the judgment as modified was founded showing affirmatively plaintiff's nonresidence, he will not be permitted to contradict the recital of the judgment as modified, as to issuance and service of citation upon him, by proving by evidence de hors the record that he was in fact a nonresident. *Id.*

In a prosecution by habeas corpus brought by a juvenile to be released from a training school, that no notice was given to the parents of relator of her arrest and prospective trial as recited in the judgment was properly provable to show the invalidity of the judgment of commitment. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

25. — Errors and irregularities.—A judgment based upon an erroneous view of the law is not for that reason void and subject to collateral attack. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Collateral attack on a judgment for insufficiency of the pleadings cannot be sustained, even though the judgment granted more relief than was demanded, which did not render it void. *Conner v. McAfee* (Civ. App.) 214 S. W. 646.

26. — Fraud or perjury.—A judgment cannot be questioned for fraud in its procurement in an independent suit between the same parties, when the judgment was entered after due notice and upon evidence offered pro and con. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 207 S. W. 580.

A judgment rendered fraudulently on account of improper overruling of defendant's plea of privilege was not void so as to be subject to collateral attack, but voidable merely. *Price & Beard v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478.

27. — Foreign judgment.—A foreign divorce judgment, though reciting jurisdictional facts, may be collaterally attacked. *Givens v. Givens* (Civ. App.) 195 S. W. 877.

Where Louisiana administrator, who was also mortgagee, purchased property at his own sale and immediately resold it at a profit, if the approval of final account as administrator was an adjudication of its right to the profits, the judgment could be attacked in Texas for fraud. *Vann v. Calcasieu Trust & Savings Bank* (Civ. App.) 204 S. W. 1062.

Decree of divorce obtained in a foreign state may be collaterally attacked to show that the court which rendered it had no jurisdiction, even though it recites all necessary jurisdictional facts. *Richmond v. Sangster* (Civ. App.) 217 S. W. 723.

A judgment in an action in rem or in personam, procured in a court of foreign jurisdiction by willful fraud upon the jurisdiction, may be collaterally attacked. *Id.*

28. — What is collateral attack.—Injunction to restrain sale under execution issued upon justice court judgment forfeiting bail bond was collateral attack on judgment, not permissible where judgment was not void. *Fleming v. Bonine* (Civ. App.) 204 S. W. 364.

A suit to set aside a sale of community property by the survivor because of insufficiency of his bond is a collateral attack on the decree of the probate court which cannot be sustained. *Rice v. Lipsitz* (Civ. App.) 211 S. W. 293.

Under art. 3600, authorizing the survivor of a community to sell community property, after qualifying, for the best interest of the estate without control by the court, a suit to set aside a sale by a survivor because not for the best interest of the community is not a collateral attack on a probate court judgment. *Id.*

A suit by the owners of water rights to compel the delivery of water to them by one who purchased the irrigation system at a receiver's sale, under an order that the system be sold free from the easement of the water claimants, is a collateral attack on the order of sale, which cannot be sustained, where the order was not void. *McBride v. United Irr. Co.* (Civ. App.) 213 S. W. 988.

In an action to recover land, where answer set up judgment as res adjudicata, plaintiffs' supplemental petition, alleging invalidity of judgment for purpose of avoiding such defense, held a collateral and not a direct attack. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Adjudication by one district court that a judgment of another district court had been satisfied before an execution sale under it was not void for want of jurisdiction over subject-matter, not being an impeachment of the integrity of such judgment of the other court, nor such an attack upon it as could only be presented in the court that rendered it. *Williams v. Croom* (Civ. App.) 215 S. W. 156.

Plaintiff, who had recovered judgment in trespass to try title, filed a petition, to correct the former judgment. Held that defendant's cross-bill, attacking the former judgment and asserting title in herself, was a direct, and not a collateral, attack on the original judgment. *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

An objection to a judgment offered in evidence on the ground that an application for a new trial was pending was not a collateral attack on the judgment. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Although a judgment rendered against a surety recites appearance by the surety, in an action on such judgment want of jurisdiction over the person of the surety may be set up by him; such defense not constituting a collateral, but a direct, attack upon the judgment. *Walker v. Chatterton* (Com. App.) 222 S. W. 1100, reversing judgment (Civ. App.) 192 S. W. 1085.

A suit to set aside a default judgment rendered in a tax suit and the sheriff's deed thereunder and recover title to the property was a direct attack on the judgment rendered in the tax suit. *Rowland v. Klepper* (Com. App.) 227 S. W. 1096.

An action, though in the briefest and simplest form of trespass to try title, held, in effect, a collateral attack on a judgment, execution, and sale. *Graves v. Griffin* (Com. App.) 228 S. W. 913.

Where, in a suit to foreclose a tax lien, sale was had under regular judgment and order of sale, suit by the owner, or one claiming under him, to recover the land from the purchaser at the tax sale, was a collateral attack on the judgment. *Brown v. Bonogli* (Sup.) 232 S. W. 490.

29. Conclusiveness of judgment in general.—That decree claimed to conclude issue in subsequent litigation was rendered in friendly litigation, where no real contest took place, is without importance. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

Where landowners intervened in receivership proceedings against irrigation company, the court's adjudication that rates had been fixed without collusion precluded it from again passing on the question of such collusion upon intervener's second plea of intervention. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

An erroneous judgment is not void, and, unless appealed from, remains in force, and any error or irregularity therein does not lessen its effect as a bar to further suits upon the same cause of action. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

Res judicata is but the assertion in a pending suit that some legal or equitable issue there presented has been decided by some other court of competent jurisdiction and is as a consequence a bar to again litigate. *Id.*

Absolute verity attaches to judgment of district court on appeal from order appointing guardian as it appears on the minutes, and the judgment entry on the minutes cannot be controlled by what appears on the docket, unless and until the district court shall itself correct the minutes. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Recitals in a judgment forfeiting a bail bond as to service of citation will not on direct attack, as writ of error, prevail against recitals in the sheriff's return. *Saunders v. State*, 86 Cr. R. 413, 217 S. W. 148.

In an action on a judgment, the original cause of action is merged in the judgment, and, unless void, it is conclusive; the principles of estoppel attached to final adjudications being as operative and conclusive in an action on judgment as in other cases, so that no defense can be urged which existed anterior to the judgment, the effect of which would be to render the judgment voidable, or erroneous, but not void. *Walker v. Chatterton* (Com. App.) 222 S. W. 1100, reversing judgment (Civ. App.) 192 S. W. 1085.

Conceding that parties had title by limitation prior to the rendition of a compromise judgment which through erroneous description excluded such land, yet such judgment divested title out of them, and they are now estopped to claim under a prior deed as if they had voluntarily conveyed it. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

32. — Dismissal or nonsuit.—Judge's order refusing temporary injunction, after which plaintiff dismissed its suit, is not *res adjudicata* of right of petitioners to have an alleged illegal assessment of taxes enjoined. *Eaker v. Druesedow* (Civ. App.) 197 S. W. 1043.

Judgment of district court dismissing action on ground that such action was within the exclusive original jurisdiction of county court does not militate against a suit in the county court. *Nueces Hotel Co. v. Ring* (Civ. App.) 217 S. W. 255.

33. — Judgment by default.—A default judgment based on sufficient pleadings and legal service is as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest so long as it is unreversed and unappealed from. *Allen-West Commission Co. v. Gibson* (Civ. App.) 228 S. W. 342.

34. — Finality of judgment.—In action to set aside a judgment for the price for fraud, etc., a previous judgment setting aside such purchase price judgment held on appeal not a final judgment and not *res judicata*. *Lyon-Taylor Co. v. Johnson* (Civ. App.) 195 S. W. 875.

A judgment was not a final judgment, and was not admissible in evidence for any purpose if a pending application for a new trial was filed by a person having authority to file it. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

35. — Judgment on demurrer or exceptions.—An entry on the trial docket that defendants' exception to plaintiff's petition was sustained was not a final judgment amounting to *res judicata*, though it recited that plaintiff excepted to the ruling and refused to amend and gave notice of appeal, as there is no such thing as an automatic

judgment, and affirmative judicial action by the court is necessary. *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

37. — **Pendency of appeal.**—Suit cannot be maintained on a judgment on which appeal is pending, whether on cost or supersedeas bond. *Van Natta v. Van Natta* (Civ. App.) 200 S. W. 907.

38. — **Vacation of judgment.**—Where judgment has, at a succeeding term, been reopened and dismissed, it does not preclude a party defendant thereto from being a proper party defendant to another suit on the same cause. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

39. — **Foreign judgments.**—The administration of an estate is a proceeding "in rem" and is binding upon all parties when notice of the proceedings is given as required by law of state in which proceedings are had, but is binding only as to matters and things brought before the court and essentially within its jurisdiction. *Vann v. Calcasieu Trust & Savings Bank* (Civ. App.) 204 S. W. 1062.

A Louisiana judgment confirming account of administrator who made profit from the estate was not res judicata against the Texas domiciliary administrators who could not have instituted any suit or made any defense in the courts of Louisiana. *Id.*

Where petitioner was granted a divorce in a foreign state, and was also granted the control and custody of infant children the courts of Texas, are not bound by the judgment in the divorce, though required to give in full faith and credit, but may inquire into the matter and award the custody of the infants according to their best interests. *Cox v. Cox* (Civ. App.) 214 S. W. 627.

Judgment probating a will in Oklahoma gave such will no standing in Texas. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Judgment in favor of divorced wife, in her suit on a cashier's check for half the price of land sold by her husband, held conclusive upon the husband's executor, appointed in another state, who had been given legal notice of wife's claim and had full knowledge of all facts and opportunity to take necessary steps to assert any right the husband had. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

39½. **Persons to whom bar available.**—Where plaintiff had recovered against decedent's employer, and its indemnitor under Workmen's Compensation Act, her suit against a third person for the injury was barred. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

A judgment of foreclosure in an action by a vendor against purchasers of vendee who had assumed incumbrances, the amount claimed being interest which the vendor had been required to pay to protect his interest and for interest on the note, did not estop him from subsequently suing the vendee for the amount of the note; the vendee not being a necessary party to the foreclosure proceeding. *Rector v. Brown* (Civ. App.) 208 S. W. 702.

Judgment in action by creditors against assignees for benefit of creditors, to which assignors are not parties, declaring conveyances by the assignees void as to creditors, does not avail the assignors, as to right to surplus. *McCord v. Bass* (Com. App.) 223 S. W. 192, reversing judgment (Civ. App.) *Bass v. McCord*, 178 S. W. 998.

40. **Persons concluded.**—See *Prairie Oil & Gas Co. v. State* (Com. App.) 231 S. W. 1088; *Whiteman v. Whiteman* (Civ. App.) 232 S. W. 888.

Where party invoked a decision of question of insolvency of corporation and right of court to administer its assets by a receiver, and had a trial on issue, it is estopped, in a collateral proceeding, to question right to sell property on such theory. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Copy of opinion rendered in action between other parties holding that one under whom plaintiff claimed did not have title to lands, including that in controversy, is inadmissible as against plaintiff. *Ludtke v. Murray* (Civ. App.) 199 S. W. 321.

Where one having a lien on land under a trust deed is not made a party to an action against the trustor for the ownership of the land, he can set up, as a perfect defense to conversion of wood any superior title he may prove to have obtained as a purchaser on foreclosure of the trust deed. *Chavez v. Chairer* (Civ. App.) 199 S. W. 892.

Where railroad was not party to suit in which state recovered section of land from another railroad, its title to its own section of land overlapping other was not affected by judgment. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

In trespass to try title by claimants under original patent, against claimants under conflicting subsequent patent, judgment in earlier suit between different persons, dividing original patent and fixing corner was not admissible, since plaintiffs would not be estopped thereby, having deraigned title under earlier owners. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

In a suit for an injunction against a foreclosure action, wherein the wives of petitioners did not set up their homestead rights, the decree in the foreclosure action did not conclude them; they not being joined in the foreclosure action. *Massillon Engine & Thresher Co. v. Barrow* (Civ. App.) 203 S. W. 933.

Where, in a divorced wife's suit for partition of her husband's lands, the pleadings were insufficient to bring the independent executor of the husband into court as such, he, in his capacity as executor, and his successor, were not concluded by the decree. *McDaniel v. Lauchner* (Civ. App.) 206 S. W. 221.

Transferee of vendor's lien notes, who was not a party to suit between maker and former owner of land, who claimed a one-half interest therein as a homestead, was not bound by the judgment. *Durst v. Bludworth* (Civ. App.) 209 S. W. 217.

A judgment rendered in a proceeding to which the present plaintiff was not a party is not binding on him by way of estoppel. *Jansen v. Mitchell* (Civ. App.) 209 S. W. 495.

One not a party to proceedings was not bound by judgments therein, and could pursue his remedy against garnishee bank for recovery of his deposit. *Reed v. First State Bank of Purdon* (Civ. App.) 211 S. W. 333.

In trespass to try title, a judgment in another proceeding vesting in one of plaintiffs an undivided interest in the land, was admissible as a link in plaintiff's chain of title, notwithstanding defendants were not parties to that suit, and such judgment, in connection with the decree of partition and sale by an executor, held to establish title in plaintiffs. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

In trespass to try title, a previous judgment recovering land involved against others than defendant held admissible to establish plaintiff's title. *Clark v. Scott* (Civ. App.) 212 S. W. 723.

A judgment by default against a corporation for conversion of the proceeds of cotton after its directors had been dismissed from the suit, held not conclusive, in a subsequent suit against the directors alone, either that such directors had participated in the misappropriation or that they were negligent in not preventing such misappropriation. *McCullum v. Dollar* (Com. App.) 213 S. W. 259.

Where husband and wife, sold land to purchasers, who failed to appear in third party's action to recover the land and permitted default judgment but thereafter rescinded contract, such default did not affect the interest inherited by vendor's daughter, not a party to the action. *Brader v. Zbranek* (Civ. App.) 213 S. W. 331.

Though court refused to rule that an appeal was frivolous, for purpose of awarding costs, such holding would not make applicable the doctrine of stare decisis as against a party not party to suit attempting to base liability for fraud on ground that appeal was frivolous and to hinder collection of a judgment. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

If a necessary party, for whose use and benefit plaintiff assumed to sue, were personally present at trial of the suit, directing the suit as far as it affected his interests, judgment therein would bind him. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

All parties in receivership suit are bound by judgment therein. *Francklow v. Ullmann, Stern & Krausse* (Civ. App.) 214 S. W. 797.

Judgment, in suit to remove cloud from title against unknown heirs in terms simply vesting title in plaintiff held not, in trespass to try title against a third person, evidence of the facts recited in petition. *Woodley v. Becknell* (Civ. App.) 214 S. W. 932.

Where an action is brought by a particular class of persons, as citizens and taxpayers, all members of such class are bound by the judgment rendered, although not named in the record as parties. *City of Dallas v. Armour & Co.* (Civ. App.) 216 S. W. 222.

It is essential to the application of the principle of res adjudicata, not only that the person sought to be bound by the former judgment should have been a party, but he must have been a party in the same capacity. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

A party to a suit who has not appealed from the judgment is bound thereby. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

Mother's recovery of damages for delay in delivery of her telegram to son, informing him of daughter's impending death, did not preclude son from recovering damages. *Western Union Telegraph Co. v. Morgan* (Civ. App.) 219 S. W. 244.

Supply creditors of the receiver were privies to receivership proceeding, and were affected by the decrees entered in due process of administration of the receivership. *Maytown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

Persons claiming interest in land as heirs are barred by judgment foreclosing any interest of the person through whom they claim; they being in privity with her. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.

In an action to recover ordinary taxes on land, a judgment obtained could not bind the interest of a co-owner who was not made a party to the suit. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

The title and right of possession of landlords could not have been put in issue in a forcible detainer suit brought by one of their tenants against the others, and the landlords are not bound by the judgment. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

Judgment rendered in favor of receiver of an insolvent corporation suing its debtor on a stock subscription will, when paid, be a complete bar to any further suit in behalf of the same creditors represented by the receiver. *Davis v. Mitchell* (Civ. App.) 225 S. W. 1117.

Judgment for defendants in action on a contract which the defendants claimed did not exist was res adjudicata in subsequent action by plaintiffs against same defendants and other defendants who were privies to defendants in first action, based on the same cause of action. *Ben C. Jones & Co. v. State Printing Co.* (Civ. App.) 228 S. W. 619.

Divorce decree, recognizing existence and validity of husband's note secured by deed of trust in wife's land, was not conclusive, in subsequent action to foreclose the deed of trust, that wife was sane at time of divorce, and therefore ratified it, notwithstanding art. 4632, as amended by Acts 33d Leg. (1913) c. 97, the plaintiff in subsequent action not having been a party to the divorce suit. *White v. Holland* (Civ. App.) 229 S. W. 611.

In trespass to try title, a judgment in favor of defendants against the unknown heirs of the person under whom defendants claimed title was admissible in evidence. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

42. **Matters concluded in general.**—Ordinarily judgment is conclusive not only as to subject-matter determined, but as to other matters which might have been litigated. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Whenever question is of such character it requires evidence to sustain it, and on that evidence determination has been declared, fact adjudicated is one which parties and privies will not be permitted to reopen. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

When subject-matter of two suits is not same, it devolves upon those invoking estoppel by prior adjudication to show by record or evidence that particular question has been previously determined. *Id.*

The distinction between a judgment conclusive as to a particular question and one which is a complete bar to a second suit is that in the former there must be an identity of parties and issues, while in the latter there must be also identity of subject-matter. *Parlin & Orendorff Implement Co. v. Frey* (Civ. App.) 200 S. W. 1143.

That claim under art. 6625, could have been asserted by amendment of plea of intervention filed prior to enactment of such statute did not make determination of plea res adjudicata as to such claim. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

In order for judgment to be res adjudicata, it must have litigated same claim as that involved in second action. *Id.*

Recovery of damages for obstructing property by erection of bridge bars plaintiff, after raising his house to the bridge level, from recovering damages for obstruction by bridge balustrade, not changed since first action, and from claiming mandatory injunction requiring tearing down of bridge balustrade. *Medley v. Brown* (Civ. App.) 202 S. W. 137.

Doctrine of res judicata will not be enforced when failure to have question determined was not due to any negligence or fault of the party against whom rule is invoked, and against whom enforcement will produce injustice, unless the issue was clearly within the pleading in first suit. *Vann v. Calcasieu Trust & Savings Bank* (Civ. App.) 204 S. W. 1062.

In respect to its operation upon the subject-matter, a judgment is to be understood as determining whatever follows by necessary implications from its terms, although not specified, and as disposing of all issues raised, unless questions are reserved or leave given to take further proceedings. *McKenzie v. Withers* (Com. App.) 206 S. W. 503.

A wife injured by contact with an electric wire on going to the aid of her husband who had come in contact therewith and who died from his injury, can maintain a suit for her own injuries and a separate suit for his death, and a judgment in the first is not a bar to the second. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

In action for wrongful sequestration, the pleadings and judgments rendered in original action are admissible in evidence; the result of such action being basis of action for damages, and proof of its outcome being necessary to proof of damages. *Fred Mercer Dry Goods Co. v. Pikes* (Civ. App.) 211 S. W. 830.

In a second suit on the same claim or demand the judgment constitutes an absolute bar, while in an action between the same parties upon a different claim or demand the judgment operates only as an estoppel as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In order for a second suit upon the same cause of action to be barred under the doctrine of res judicata, there must be identity in the thing sued for in the cause of action, in the persons and parties, and in the quality in the persons for or against whom the claim is made. *Id.*

A judgment in an action to recover wages and to cancel an assignment of the wages adjudging that the debt to defendant had been paid prior to notice to the employer was res judicata in an action against defendant for falsely and maliciously notifying the employer that plaintiff owed defendant a debt, and that defendant had an assignment of plaintiff's wages. *Id.*

A suit to enforce a personal judgment against the land of the judgment debtor held not to state the same cause of action as a former suit to subject the property in question to a lien for paving, in which the personal judgment was rendered. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

Judgment upholding validity of election amending city charter held conclusive in subsequent action involving validity of election, not only as against objections urged in prior action, but also as to objections which might have been urged therein. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

A prior judgment disposing of the same land as between the same parties was res adjudicata of all matters affecting the title to the land that could have been appropriately pleaded therein by those properly before the court. *Cunningham v. Cunningham* (Civ. App.) 227 S. W. 221.

Where, in violation of an agreement in an action on a note and to foreclose a deed of trust the creditor took a default judgment, and the debtors then filed a suit to have the judgment vacated the statement, on the hearing at which the injunction was dissolved, that the debtors abandoned any ground based on any homestead claim, did not estop the debtors thereafter from urging the homestead claim as a ground for setting aside the default judgment; for a point is not concluded by a judgment, although it was involved in the action, or was placed in issue thereon, if it was withdrawn or abandoned or ruled out by the court. *Jones v. Wootton* (Com. App.) 228 S. W. 142.

Judgment dismissing suit for injuries caused by defect in gasoline engine, on the ground that it was barred by limitations, held to preclude plaintiff from setting up claim for such damages in subsequent action for price of engine. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

In buyer's action against seller for breach of agreement not to engage in the same business in the community, where a writ enjoining further violation was applied for but refused by the trial court but ordered five years later on appeal, defendants having violated the contract pending the entire appeal, plaintiff is entitled to recover for the injuries thus inflicted. *Riddlesperger v. Malakoff Gin Co.* (Civ. App.) 229 S. W. 636.

Where plaintiff, not knowing that an automobile had been transferred to third persons, recovered a judgment for title and possession, such judgment is not conclusive against his right to maintain an action for conversion against the transferees for res judicata arises only as to matters directly in issue, or fairly within the scope of the pleadings. *Palmer v. Bizzell* (Civ. App.) 229 S. W. 971.

Ordinarily a judgment is res adjudicata only as to those matters which are in issue or disposed of or necessarily are included or should have been included and disposed of by the action. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

Where all the parties were before the court on a motion to correct the judgment entry, and the answer to the motion had raised the issue of fraud, the judgment on the motion correcting the judgment entry with no express disposition of such issue held res judicata as to validity of judgment in subsequent action making attack thereon. *Waggoner v. Knight* (Com. App.) 231 S. W. 357.

43. — **Matters in issue and essentials of adjudication.**—Where second partition suit involves property different from that involved in first, though involving same parties or privies, in order for judgment in first to be conclusive as to whether party's wife left children, it must appear that particular issue was decided in first suit. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

In passing on plea of res adjudicata, issues involved in actions are determined from pleadings therein. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Judgment is not res adjudicata to prior suit, where matter in issue in subsequent suit was not in issue in prior suit. *Id.*

If set-off is presented by defendant in his pleadings and attempted to be supported, whether allowed or disallowed it will become res judicata, being settled by judgment as conclusively when it does not appear to have been allowed as though there were express finding against it. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

In bill of review, seeking a revision and cancellation of a judgment for personal injuries, held that issues presented had been decided in suit for damages. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 207 S. W. 580.

Where suit has been brought and judgment obtained, the original cause of action is merged in the judgment. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

A judgment against a vendee for the amount due on notes and against all defendants foreclosing vendor's lien, directing that any excess proceeds be paid to the "defendants," in the absence of any pleading or proof as to the amounts each was entitled to receive will not preclude either of the defendants from having their equities in any such excess proceeds thereafter adjudicated. *Clark v. Taylor* (Civ. App.) 212 S. W. 231.

Where the pleadings upon which trial was had put in issue plaintiff's right to recover upon two causes of action, and judgment awarded him a recovery upon one and was silent as to the other, such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause of action. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

Where the court had jurisdiction of a suit by a widow to recover lands which belonged to the community estate of herself and her deceased husband, and also were part of the homestead, the judgment in the widow's favor is conclusive, not only as to matters decided, but as to all matters which by necessary implication must have been decided to support the judgment. *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

Whenever there is an issue directly involved and common to two causes of action, its determination in the first suit operates as an estoppel and bar to a litigation of it in the second suit. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

Where vendor sued vendee on note which had been secured by a vendor's lien judgment did not bar an action by the defendant to have a foreclosure under the doctrine of subrogation, land having been conveyed to persons who assumed payment, and plaintiff having foreclosed his vendor's lien and having purchased and resold the land, especially where such judgment was rendered in the county court. *Brown v. Farquhar* (Civ. App.) 225 S. W. 541.

44. — **Personal status and right.**—See *Lee v. State*, 86 Cr. R. 146, 215 S. W. 326.

45. — **Title or claim to property.**—In trespass to try title to strip off east side of lot 20, evidence held to sustain finding that default judgment in former suit for strip of same width upon east side of lot 21 did not bar plaintiff's right to all of lot 20. *McKinley v. Bone* (Civ. App.) 199 S. W. 298.

In partition suit, court must assume that court, in prior suit involving same parties and privies, wherein husband claimed interest by inheritance from wife, who died without issue, heard necessary evidence as to who were wife's heirs, and on it based decree as to husband's interest. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

A judgment merely denying to plaintiff recovery of land, without vesting title thereto in defendant, is not *res judicata* as to right to recover the land in a subsequent suit. *R. B. Godley Lumber Co. v. C. C. Slaughter Co.* (Civ. App.) 202 S. W. 801.

Plaintiff in a suit to recover land is not precluded by a former judgment from asserting a subsequently acquired title. *Id.*

In suit on an account alleged to have been assigned, the assignment is not proved by showing decree merely directing the assignment, and not itself vesting title to the assets assigned, since it cannot be assumed that the decree was complied with. *Inter-type Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

A decision as to title not involving boundaries is not *res adjudicata* in a suit to establish boundaries not involving title. *Benavides v. State* (Civ. App.) 214 S. W. 568.

Action to recover land was barred by former judgment though at time of former action plaintiffs claimed title to only a half interest, the other half interest having been subsequently conveyed to them, where the beneficial title was in plaintiffs. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Judgment obtained in a wife's divorce and partition suit, giving the wife no interest in income from spendthrift's trust estate devised to husband, held not *res adjudicata* in a suit to enjoin attachment sale of part of the corpus of such trust estate, in which the husband was not a party. *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

Where, after death of husband and probate of will of himself and wife, giving their property to trustees subject to payment of half the income to the survivor, she conveyed a half interest to a university, and at her request suit was brought by the trustees to remove cloud caused thereby, judgment in their favor, on disclaimer by her, was sufficient to foreclose any right asserted by her contrary to the will. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.

Where court in an action to foreclose a paving lien, determined that the entire property was the defendant's homestead, the plaintiff was estopped, in a subsequent action from claiming that there was an excess over and above the homestead exemption, but a judgment lien attached to all the property as soon as it was abandoned as a homestead. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

If possession of land was accompanied by cultivation, use, or enjoyment so as to vest the title thereto in defendant's vendor before judgment adverse to him on disclaimer, such judgment operated as an estoppel of record against him and those claiming under him to assert the title he had so acquired. *Smith v. Wood* (Civ. App.) 229 S. W. 583.

In an action by grantor to cancel a conveyance, a judgment quieting title in defendants would not estop plaintiff from maintaining his right to foreclose in case he should be required to pay a mortgage subject to which the land had been conveyed. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

If, as between plaintiffs and certain others, the former had perfected a title by limitation to land before making a settlement with the latter in another action, then this limitation claim was merged into the judgment, and plaintiffs could assert no rights thereunder without first correcting the judgment, which erroneously described the land, where they had not, since judgment, perfected title by limitation. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

A judgment awarding a 50-acre tract to defendants E. and J., as against another defendant, and reciting that "as to said defendants" J. was the owner of the west half and E. of the east half, "as will appear from their answer to said cross-bill," held not to vest any title in J. as against E. *Laidacker v. Palmer* (Com. App.) 231 S. W. 362.

See also notes to arts. 6115, 7758.

46. — **Rights and liabilities under contracts.**—Landlord's suit, under contract to pay \$240 rental for a year at \$20 a month, held not to estop him to sue again. *Neal Commission Co. v. Radford* (Civ. App.) 197 S. W. 1052.

Under lease for 26 months for rental payable monthly, judgment for rent for certain months held not to bar action for rent for subsequent months. *Meacham v. O'Keefe* (Civ. App.) 198 S. W. 1000.

A decree canceling a deed for part of plaintiffs' homestead and enjoining the assignee of a vendor's lien note from selling the property will not bar an action at law on the note, where personal liability was not litigated. *Sessions v. Sanders* (Civ. App.) 200 S. W. 180.

Judgment against fraternal order in favor of claimed beneficiaries was not *res judicata* of claim against order of guardian of another beneficiary. *Dorsey v. United Brotherhood of Friends* (Civ. App.) 202 S. W. 350.

Where judgment in seller's action on notes given for an auto truck recited buyer's cross-action for damages for breach of warranty and misrepresentations, and that he take nothing thereby, it would be presumed that issue as to misrepresentations was presented. *McCoy v. Wichita Falls Motor Co.* (Civ. App.) 207 S. W. 332.

In suit upon notes for price of auto truck, wherein buyer pleaded breach of warranty, judgment on notes and that buyer take nothing by his cross-action, was a defense to buyer's subsequent action for damages for same breach of warranty. *Id.*

It was not necessary for an assured, in an action by insurer, to assert his right to a rebate, and he could subsequently sue therefor, where the only issue in the first suit was the amount of the premium. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 210 S. W. 558.

Where judgment denies specific performance of an agreement, the right to such performance is *res judicata* in a subsequent suit between the same parties. *Wiess v. McFaddin* (Civ. App.) 211 S. W. 337.

In an action against employer and another for wages and cancellation of an assignment, a judgment for plaintiff necessarily included a finding that the debt had been paid, and the assignment canceled prior to the date notice was given the employer, and the judgment was admissible in another action by plaintiff against the assignee to show such fact. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

In action to recover usurious interest paid and to cancel an assignment of wages on the ground that the debt had been paid, a judgment only canceling the assignment was prima facie an adjudication that plaintiff was not entitled to recover the alleged usurious interest. *Id.*

Judgment, in suit to enjoin cutting of timber, held conclusive, in suit by buyers from the successor of the grantee against the successors of the grantor, that shortleaf pine timber was merchantable at the date of the original timber deed. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

Although a contract by which seller of a gin plant agreed to refrain from operating another plant in the community for an indefinite period of time is entire in the sense that such promise is single, it was subject to separate and distinct breaches for each of which damages is recoverable. *Riddlesperger v. Malakoff Gin Co.* (Civ. App.) 229 S. W. 636.

47. **Conformity to pleadings and proof in general.**—A judgment must have support in the pleadings of the parties, regardless of the state of the evidence. *Western Union Telegraph Co. v. Tartar* (Civ. App.) 200 S. W. 559; *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180; *Kirby Lumber Co. v. Lewis* (Civ. App.) 222 S. W. 332; *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

An order in suit to enjoin construction of a levee, as diverting surface water, to plaintiff's injury, permitting a different levee, without pleading or evidence to support it, is improper. *Bevens v. Hughes* (Civ. App.) 195 S. W. 651.

Judgment must be supported by both pleadings and proof, and absence of either is fatal. *Hill v. Alexander* (Civ. App.) 195 S. W. 957.

A judgment, in a buyer's action, could not allow recovery for feed buyer could have purchased in place of unsound feed purchased, which evidence showed buyer did not in fact buy. *Kincannon & Gaines v. Independent Cotton Oil Co.* (Civ. App.) 196 S. W. 878.

In action for title to land, held, that description given in petition and that given in judgment described the same tract of land, and that judgment was valid. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Description in judgment, sufficient to identify land as that described in petition, is sufficient, and more comprehensive description in judgment than in petition does not render judgment void. *Id.*

Where purported receiver of estate of insane person sued as such, and, realizing he had no authority to enter into agreed judgment, sought to make same effective by reciting he recovered both as receiver and next friend, but he did not in fact prosecute suit as next friend, recital in judgment was not recognition of him in such capacity. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

Judgment cannot be sustained by evidence introduced over defendant's objection tending to establish facts not alleged in petition. *Shamburger v. Scheurrer* (Civ. App.) 198 S. W. 1069.

In action for failure to deliver message of fatal illness, where complaint failed to allege possibility of delivery on any other than the day when sent, or that any subsequent delivery would have enabled plaintiff to have attended the funeral, or to have seen his sister alive, and the judge found no negligence on that day, judgment for the plaintiff could not stand. *Western Union Telegraph Co. v. Tartar* (Civ. App.) 200 S. W. 559.

Where plaintiff suing on notes alleged that it acquired them by written transfer, and evidence showed that there was no indorsement or writing, there was nevertheless no variance in view of arts. 1994, and 582; production of the note being presumptive evidence of ownership, especially where the original payee was a party. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 888.

In actions against a common carrier for injuries, negligence not alleged, though proved, cannot form basis of judgment. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

In suit for breach of warranty, judgment in another suit in another county held not unsupported by evidence in that the evidence showed the land conveyed was part of the grantor's addition, and not the land described in the judgment. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

In action on a note deposited by defendant to be forfeited if he should fail to accept certain cattle, a judgment for plaintiff was sustained where, plaintiff alleged and proved, and the court found, actual damages resulting from refusal to take cattle in excess of amount of the note, although court found that note represented a penalty, and not liquidated damages. *Slavens v. James* (Civ. App.) 211 S. W. 842.

In an action for rent, a judgment against defendant was proper, although the facts showed a partnership contract between defendant and others and that other persons were jointly liable, where defendant admitted the facts which made him individually liable. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

While plaintiff husband's connivance in his wife's adultery is an affirmative defense in so far as it is unnecessary for plaintiff to negative connivance, and defendant cannot introduce evidence thereof unless the issue is made by the pleadings, yet when

the evidence shows connivance a divorce will be denied. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

In purchaser's action for shortage in tract of land, where the jury failed to agree upon the value of the land, and the evidence wholly failed to show the value of machines, etc., constituting a part of the consideration, verdict for plaintiff and judgment thereon held reversible error; there being no basis in the verdict for the essential elements in ascertaining the damages. *Taylor v. Hill* (Com. App.) 221 S. W. 267, reversing judgment (Civ. App.) 183 S. W. 836.

To enforce a rate claimed to be established by a contract between express company and railroad company, the decree must follow the contract in its entirety, and any substantial variation therefrom, and substitution therefor, of the court's judgment, would be the fixing of the rate by the court in usurpation of a legislative function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

Where plaintiff in trespass to try title did not allege right to recover land east of a certain survey, and in his agreement as to the evidence it was admitted he owned the east half of the survey, judgment in his favor should have been limited to such survey. *Grimes v. Norris* (Civ. App.) 223 S. W. 718.

A petition, alleging that the carrier failed to deliver the cattle shipped to the consignee or to the consignor, does not support recovery by the shipper for the carrier's delivery to the person in whose care the consignee was to be reached without requiring the surrender of the bill of lading, even though the latter cause of action was supported by the evidence. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

A judgment, canceling a mineral lease based on grounds not pleaded, although supported by evidence, cannot be sustained. *McCasky v. McCall* (Civ. App.) 226 S. W. 432.

In a suit by grantors to cancel their deed and subsequent deeds, rents were not recoverable for the use and occupation of the property where there was no sufficient evidence that defendants had been in possession or had the use or occupancy of the premises. *Lawson v. Armstrong* (Civ. App.) 227 S. W. 687.

48. — **Issues raised by pleadings.**—A judgment awarding interveners in a garnishment proceeding payment of a claim which pleadings indicated belonged to others, held not supported by the pleadings. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

In suit to set aside judgment, held that, in view of defendant's pleadings, court could not have rendered judgment for defendant for 32 acres awarded to him by judgment set aside as to plaintiff. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245.

In action on benefit certificate by beneficiary claiming that change of beneficiary was made while insured was insane, and fraudulently, petition held to support judgment for plaintiff. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

In suit to restate account because of usury, etc., judgment establishing lien not pleaded is erroneous. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

A judgment in a buyer's action for damages could not allow recovery upon a phase of the case not pleaded. *Kincannon & Gaines v. Independent Cotton Oil Co.* (Civ. App.) 196 S. W. 878.

Where plaintiff alleged suit was to obtain settlement of partnership accounts, and defendant partner and sister alleged debts due sister were partnership debts, pleadings were sufficient basis for decree subjecting partnership property, to partnership's debts to sister. *Bolding v. Bolding* (Civ. App.) 200 S. W. 587.

Where in suit to restrain extracting of oil from right of way plaintiffs did not sue for reformation or allege fraud, accident, or mistake, deed to railroad company could not be reformed, and its title must be determined by the deed. *Crowell & Conner v. Howard* (Civ. App.) 200 S. W. 911.

Though petition of contractor suing on bond of subcontractor was insufficient, held, in view of answers or cross-actions of creditors, pleadings were sufficient to support judgment for contractor against subcontractor's surety. Art. 6394f et seq. *Southern Surety Co. v. Owens Bros.* (Civ. App.) 200 S. W. 1148.

In action against seller of swing for injuries when hook gave way, petition held to support judgment for buyer. *Rick Furniture Co. v. Smith* (Civ. App.) 202 S. W. 99.

Petition which may reasonably be construed as suing both railway company and receivers supports judgment against company. *Texas & P. Ry. Co. v. Aiken* (Civ. App.) 202 S. W. 811.

In a suit by the payee of a promissory note against the surety, a finding that the payee promised the surety to bring action on the note will not support a judgment where the issue was not pleaded. *Fisher v. Russell* (Civ. App.) 204 S. W. 143.

In suit by creditors of sellers to enforce a trust in note given by purchasers, allegation that purchasers, parties defendant, executed the note and signed the contract, creating the trust, authorized a judgment against the purchasers for the amount of the note. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

In suit against city by bidder for paving bonds to recover money obtained by city by cashing check after bidder's attorney had reported unfavorably, judgment ordering city officers to provide by taxation to pay sum recovered, held without support in pleadings to that extent. *City of Amarillo v. W. L. Slayton & Co.* (Civ. App.) 208 S. W. 967.

In action to enjoin sale of land under execution, court did not have jurisdiction to order sale of the property in satisfaction of costs incurred in the injunction suit and of the judgment under which the execution had been rendered, in the absence of plead-

ings that would authorize the entry of such a judgment. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

A judgment cannot be based on a pleaded conclusion of law not warranted by the facts pleaded. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Finding of breach of contract could not sustain a judgment for damages for such breach, where breach was not pleaded. *Langben v. Crespi & Co.* (Civ. App.) 218 S. W. 144.

Where defense of discharge of sureties was limited by the pleadings to the mere fact of an agreement to extend time in consideration of interest to be paid, judgment cannot be sustained by finding that plaintiff agreed that sureties should be released. *Archenhold Co. v. Smith* (Civ. App.) 218 S. W. 808.

A suit on contract will not authorize a recovery for a tort, and a judgment for a tort will be set aside where the pleadings only seek recovery on a contract. *Sanger Bros. v. Barrett* (Civ. App.) 221 S. W. 1087.

The court is without jurisdiction to render judgment against one party in favor of another without a pleading filed as a basis in favor of such party, with process duly served upon him, such judgment being a nullity. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

In a suit to restrain the sale of lots in violation of agreement to include restrictions in the deeds, where it was undisputed that defendant had sold one lot without the restrictions, and the jury found that it would sell other lots without restrictions, it was not error to grant the injunction, though the petition did not specifically charge an intent to sell without the restrictions. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

In trespass to try title collaterally attacking a judgment and sale on execution, where there was no pleading therefor, it was error to render judgment for defendant for the money paid by him upon the land purchased at execution sale, and to admit or hear any parol proof. *Graves v. Griffin* (Com. App.) 228 S. W. 913.

Judgments must conform to issues raised by pleadings and upon which case was tried, and courts cannot ignore jury's findings and render judgment upon theory of discovered peril in an action for personal injuries in railroad crossing accident where such matter was not pleaded. *Baker v. Shafter* (Com. App.) 231 S. W. 349.

49. — **Prayer for relief in general.**—Personal judgment against defendant, warranted by facts pleaded and proved, is authorized by prayer not specifically asking it, but such other and further relief as in law or equity plaintiff may show itself entitled to. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

In trespass to try title, it is error to grant to plaintiffs rent for which their petition does not pray, in view of art. 7733, subd. 7. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

In replevin, where defendant's prayer for relief was that plaintiffs take nothing by their suit, a judgment that defendant recover the property, was not supported by the pleadings. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

In divorced wife's suit to set aside decree, in so far as affecting community property, wife's pleadings, and her prayer for general relief, held adequate basis for judgment, making a redistribution in money of the community property. *Celli v. Sanderson* (Civ. App.) 207 S. W. 179.

Art. 1830, subd. 25, providing that, where freight has been damaged in transit over two or more railroads, the damage shall be apportioned, does not require the apportionment, where defendants have not filed pleadings asking apportionment. *Ft. Worth & D. C. Ry. Co. v. Kemp* (Civ. App.) 207 S. W. 605.

Although court would not have jurisdiction to cancel instruments as requested in special prayer, where petition stated facts showing jurisdiction of defendants, and that a fraud had been committed for which a remedy could be afforded by requiring defendants to reconvey, the court had jurisdiction to grant such relief under the general prayer. *Griner v. Trevino* (Civ. App.) 207 S. W. 947.

A judgment on either a cause of action on a quantum meruit or on an express contract cannot be sustained unless that particular cause of action is pleaded in the alternative or in different counts, and a mere prayer for relief in the alternative is not sufficient. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

In an action by stockholders against another stockholder and president for recovery of secret profits, where judgment was based on what was due suing stockholders, no recovery of attorney fees could be had, the pleading not asking for them. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

One who applies to the equity powers of the court for relief cannot complain that the rules of equity are applied against him in determining the rights of the parties, instead of enforcing the strict rules of law. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Where, although plaintiff in action on insurance policy did not pray for recovery of the lesser amount for which the insurance company admitted liability, yet a ground of her motion for a new trial was alleged error in not rendering judgment for that amount, judgment should have been so rendered. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

Where the petition in a suit to cancel deeds prayed for restitution and for all legal and equitable relief both general and special to which plaintiffs might be entitled, and the heirship of plaintiffs and defendants were established, the court had power to partition the property. *Sherwood v. Sherwood* (Civ. App.) 225 S. W. 555.

50. — **Amount demanded.**—Judgment on item sued for could not be for more than claimed in petition. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

In suit against heirs to rescind contract for purchase of land, where defendants averred no equitable relief further than that permanent and valuable improvements were put on land and prayed for value of such improvements only, judgment was not erroneous for failure to award to defendants portion of purchase money paid and value of improvements. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

In suit to rescind contract for purchase of land and to recover amount paid, judgment allowing \$58.65 as attorney's fees, when there is neither pleading nor proof that any such fees were contracted for, is excessive. *Rascoe v. Myre* (Civ. App.) 202 S. W. 780.

In action for conversion of ore, in absence of pleading and evidence as to cost of shipping ore or charge for smelting, defendant lumber company cannot get judgment for such items, and converters of ore who shipped to lumber company, being trespassers, are not entitled to recover expenses. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

In trespass to try title, defendant, who impleaded his warrantor, could not recover from him an amount in excess of that pleaded, although a greater price was proven. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

In trespass to try title, petition which expressly alleged value of use of premises to be \$250 per annum, and asked for judgment for damages, rents, and costs of suit, was sufficient to support judgment for \$381 for use of premises for two years prior to beginning of suit. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

Allegations of value of automobile, \$550, and allegations of its wrongful detention, in connection with general and special prayer for relief, would authorize decree awarding, if possession could not be restored, its value, fixed at \$300. *Mission Auto Co. v. Aldape* (Civ. App.) 206 S. W. 223.

Where broker sued on parol contract for one-half of commission collected by defendants, and defendants alleged the contract was for one-third of the commission collected, judgment for one-third of the commission from the latter was within the pleadings. *Security Realty Co. v. Critchett* (Civ. App.) 206 S. W. 852.

Where plaintiff, suing for a balance due of \$298.46, admitted in testifying that defendants were entitled to credits aggregating \$130.35, he was not entitled to recover any sum in excess of \$168.11. *Jennings v. Pollard* (Civ. App.) 208 S. W. 415.

In action for damages due to collision of steamship with canal bridge of plaintiff city, affording only means of access to its pleasure pier, the contract price between plaintiff and a third person for the use of the pier could not be recovered, there being no pleading to the effect that defendant knew of contract. *Magnolia Petroleum Co. v. City of Port Arthur* (Civ. App.) 209 S. W. 803.

In an action for injuries to a shipment of goods, where interest was not claimed on the damages from date of delivery of the damaged goods, the awarding of such interest was erroneous. *Baker v. Lyons* (Civ. App.) 218 S. W. 1090.

51. — On counterclaim.—Judgment should not be for plaintiff for amount sued for, and for defendant on his cross-action for greater amount, but that plaintiff take nothing, and defendant recover excess. *Hegman v. Roberts* (Civ. App.) 201 S. W. 268.

Where defendants, by cross-petition, alleged two items of actual damages, one for \$1,000, and other for \$100, judgment for \$1,010 was not erroneous, simply because prayer left out \$100 item. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In grantor's heirs' action to cancel deed, where plaintiffs alleged that rental value was an adequate compensation to grantee for the support and maintenance of grantor, it was incumbent upon grantee, in order to recover for such support, to allege and prove that value thereof exceeded the rental value. *Wisdom v. Peek* (Civ. App.) 220 S. W. 210.

52. Conformity to verdict or findings in general.—See *Smith v. Smith* (Civ. App.) 218 S. W. 602.

Rule that, if proof is sufficient to show negligence of defendant in any one of three acts charged, judgment for plaintiff should be sustained, does not apply where the case was submitted upon a general charge, the verdict was general, and there was nothing to show upon which charge of negligence the verdict was returned. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

Judgment should conform to verdict, whether it be correct or not and whether the error therein, if any, arose from erroneous instructions or from misinterpretation of the evidence by the jury. *Turner-Cummings Hardwood Co. v. Phillip A. Ryan Lumber Co.* (Civ. App.) 201 S. W. 431.

In trespass to try title to determine boundary, general verdict being for plaintiff, fact that, in addition to description of line in petition, judgment gives variation and other data identifying line does not make it obnoxious to rule requiring judgment to follow verdict. *Grawunder v. Gotoskey* (Civ. App.) 204 S. W. 705.

In action for deficiency in property received in exchange, the measure of damages is the difference between the value of the property given and that actually received in exchange at the time of the exchange, and in the absence of a finding as to value of the respective properties the court cannot render a proper judgment. *Foster v. Atlier* (Com. App.) 215 S. W. 955.

A judgment must conform to the verdict. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647.

Where the trial court did not find the time of shipment on the line of the terminal carrier was unreasonable, and found only the amount of the decline in the market between the issuance of a diversion order before the car was received from a connecting carrier and the delivery, the findings do not support a judgment against the terminal carrier for any depreciation in the market value. *Lancaster v. Smith* (Civ. App.) 226 S. W. 460.

53. — **Special verdict and findings.**—See, also, notes under art. 1990. See *Manes v. J. I. Case Threshing Mach. Co.* (Civ. App.) 204 S. W. 255; *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

Sufficiency of special findings to warrant judgment, see notes to art. 1985. See, also, notes to art. 1990.

Court may make specific finding for item and render judgment therefor without finding by jury, when issue is not submitted to jury and none requested; there being evidence supporting finding. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where plaintiff sued for breach of contract, and defendant pleaded a counterclaim and produced evidence thereon, but the counterclaim was not included in the special issues, the court had a right on proper evidence to deduct from plaintiff's damages, as found by the jury, the amount of the counterclaim. *Thompson v. Fleming* (Civ. App.) 200 S. W. 1134.

Although the trial judge is required to render judgment in conformity to a special verdict, yet where the verdict finds issue in favor of one or the other party, and finds facts supported by the evidence which clearly entitle one to a judgment, the court should so render judgment. *Board v. Emerson-Brantingham Implement Co.* (Civ. App.) 203 S. W. 421.

Where evidence was conflicting, and tended to support theory of both defendant and plaintiff, and findings of jury were in support of plaintiff's theory of case, court properly entered judgment for plaintiff. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

In an action for profits from a sale of cattle where defendant set up a settlement and that through plaintiff's fraudulent representations a certain sum had subsequently been paid to plaintiff, for which recovery was sought, held error to fail to allow a recovery of such amount under the special findings. *Benton v. Taylor* (Civ. App.) 208 S. W. 704.

Where jury found that personalty sold to a creditor was worth considerably more than debt, and that the creditor was a bona fide creditor, court was not precluded from passing upon issue of constructive fraud, which was not submitted to the jury; court having defined "bona fide" as meaning "real." *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

That court copied into judgment a general verdict, though case was submitted on special issues, is harmless error, where judgment rendered was demanded by the special issues. *Aycock v. Paraffine Oil Co.* (Civ. App.) 210 S. W. 851.

In an action for damages to a shipment of live stock brought against connecting carriers, where the findings of the jury required a judgment against all the defendants, it was fundamental error to render a judgment against one alone. *Chicago, R. I. & G. Ry. Co. v. Hallam* (Civ. App.) 211 S. W. 809.

In suit for title and possession of land, where jury found in response to special issue that deed executed by plaintiffs to defendant's grantor to correct mistake was intended to operate as a deed, the court could not enter judgment for plaintiffs, who neither objected to the issue nor filed motion to set aside answer. *Galloway v. Hodnett* (Civ. App.) 216 S. W. 239.

An injured servant's right to recover is limited to the material allegations contained in his pleadings as to how the accident occurred, and when a verdict on special issue negatives the alleged cause of action, judgment should be rendered for defendant. *Bartlett Lumber Co. v. Chaney* (Civ. App.) 219 S. W. 837.

The trial court, under the law, was bound to render judgment according to the findings on special issues submitted to the jury. *McBroom v. Weir* (Civ. App.) 219 S. W. 855.

When the court gives a charge, which is inaccurate but for the purpose of submitting an issue raised, and the jury answers the same, the answer cannot be disregarded because inaccurate. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

In action for injuries in a crossing collision, error in instructing the jury as a matter of law that it was the duty of plaintiff to keep a lookout held not to warrant trial court in rendering judgment for plaintiffs in face of answer of jury that plaintiff would have seen the approaching train in time had she kept a lookout, and that her failure to keep a lookout caused or contributed to the accident. *Harrell v. St. Louis & S. W. Ry. Co. of Texas* (Com. App.) 222 S. W. 221, reversing judgment (Civ. App.) *St. Louis & S. W. Ry. Co. of Texas v. Harrell*, 194 S. W. 971.

54. — **Amount awarded.**—If what plaintiff would have realized from sale of apples damaged in transit was proper measure of damages, no judgment could have been entered on jury's answer to issue as to what plaintiff would have realized, because expense which should have been deducted was unknown. *Quannah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

Though as a rule judgment must be based on verdict, where verdict is excessive, remittitur may be filed, and error in rendering judgment for amount authorized without formally entering judgment and filing remittitur is immaterial. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Notwithstanding defendant expressly admitted he owed plaintiff a certain sum, so that the court did not submit that issue in his general charge, it was error to enter judgment for such sum, since the judgment must follow and conform to the verdict, and cannot exceed it, in view of our statutes. *Shotwell v. Crier* (Civ. App.) 216 S. W. 262.

In purchaser's action for shortage in land, where the jury failed to agree upon the value and the evidence wholly failed to show the value of machines, etc., constituting a part of the consideration for such land, the rendition of verdict for plaintiff and judgment thereon held reversible error; there being no basis in the verdict for ascertaining the damages. *Taylor v. Hill* (Com. App.) 221 S. W. 267, reversing judgment (Civ. App.) 183 S. W. 836.

55. — Parties.—In action for wrongful dispossession of lessee, finding of jury that lessor had not conspired with dispossessors did not require judgment for all defendants. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

Judgment not conforming to the verdict, as required by this article, with respect to the parties, was erroneous. *Turner-Cummings Hardwood Co. v. Phillip A. Ryan Lumber Co.* (Civ. App.) 201 S. W. 431.

Where only the receiver of a railroad was sued, a verdict against company alone will not support a judgment against receiver and company. *Ponder v. Crenwelge* (Civ. App.) 203 S. W. 1125.

56. — Interest and attorney's fees.—In action for negligence in transportation of a shipment of cattle, interest was properly included in judgment, though special verdict contained no finding respecting interest. *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521.

Where the question of the amount of damage suffered by plaintiff when the basement of his store was flooded, was submitted to the jury, and a verdict was returned thereon fixing the damage, the court cannot add interest. *City of San Antonio v. Pfeiffer* (Civ. App.) 216 S. W. 207.

In an action for injuries to an automobile, where the jury was only required to find facts from which the court could ascertain the damage, interest may be awarded by the court, provided it is sued for. *Id.*

In suit for unliquidated damages for a breach of contract, it was improper to add to the verdict interest from date of breach, since interest, when allowed in such contracts, is allowed as a part of the damages. *Faulkner v. Reed* (Civ. App.) 223 S. W. 945.

In action for breach of covenant against incumbrances, it was improper to allow interest on the amount specially found by the jury to be the value of the diminution of the use and enjoyment of the land from the date of the accrual of the cause of action, there being no jury finding awarding such interest; but interest was recoverable only from the date of the judgment. *Morriss v. Hesse* (Com. App.) 231 S. W. 317.

59. — Notwithstanding the verdict.—A judgment contrary to the jury's verdict or findings of fact is unwarranted. *Hodge v. Keels* (Civ. App.) 196 S. W. 645; *Mason v. Gantz* (Civ. App.) 226 S. W. 435; *Duke v. Walter* (Civ. App.) 227 S. W. 714.

Where a special verdict was rendered, the court could not render a judgment non obstante veredicto, in view of arts. 1990, 1994. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357.

In suit to foreclose vendor's lien, in which defendant filed cross-bill for fraud and failure to furnish water for irrigation, court held to have erred in ignoring verdict and rendering judgment against defendant on the cause of action for failure to furnish water. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

Where jury found insured to have been disabled for 21 weeks and 3 days, it was error to render judgment for the benefit of 39 weeks contrary to the verdict, in view of art. 1990. *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779.

To be entitled to a judgment notwithstanding the verdict, a party must be able to show that undisputed facts other than those involved in the findings of the jury entitle him to a judgment, even though the facts found by the jury are taken as true. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

Trial court could not have entered judgment in favor of plaintiff on his motion on the jury's verdict, which was wholly adverse to him; practice of entering judgment non obstante veredicto having become obsolete. *Hall v. Hayter* (Civ. App.) 209 S. W. 436.

Having submitted the case to the jury on special issues, the court was without authority to render judgment for defendant notwithstanding verdict for plaintiff; the limit of the court's power under such circumstances being to set aside the verdict and grant new trial, in view of art. 1990. *Heimer v. Yates* (Com. App.) 210 S. W. 680.

When a special verdict has been rendered which entitles one of the litigants to judgment, the trial court has but two alternatives, either to set aside the verdict and to grant new trial, or to render judgment upon and in conformity with it; and it is error for the court to ignore special verdict on an issue erroneously submitted, and to award the party found against judgment non obstante veredicto. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

It is not permissible to render judgment contrary to the jury's findings, though the trial court has authority to set aside findings made by the jury. *Walker v. Ames* (Civ. App.) 229 S. W. 365.

60. Disposition of rights of parties.—A judgment was not erroneous because not disposing of one who was a party plaintiff in the original petition, and because not disposing of part of suit to cancel deed to defendant, where such party plaintiff was eliminated by amended petition, and prayer for cancellation of deed was made in case there was no recovery of damages, which were awarded. *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

Upon appeal from a probate court order appointing guardian of a minor's person and estate, a district court order appointing guardian for minor's person only is erroneous, since it did not dispose of entire case. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Where there are more parties than one on a bail bond and sureties have not all been served, a judgment cannot be rendered against them even by default, unless judgment dismisses as to parties not served, and renders judgment against those served. *Saunders v. State*, 86 Cr. R. 322, 216 S. W. 870.

64. Revival of.—Under Rev. St. 1879, art. 1248, which provides that, when a defendant dies before judgment, his administrator or executor, and, in a proper case, his heir, may be substituted as defendant, a petition for scire facias to revive a money judgment

against a deceased defendant, which alleges that deceased left assets which came into the possession of his heirs, but does not show that there was no administration, or necessity for administration, does not show a proper case for citing the heirs as defendants. *Schmidke v. Miller*, 71 Tex. 103, 8 S. W. 638.

Where scire facias proceeding to revive a judgment is a new action for debt on the judgment, the court is without jurisdiction to render judgment of revivor; there being no appearance by the judgment debtor, and the only service had on him, in such connection, being in another state, where he then resided. *Collin County Nat. Bank v. Hughes*, 110 Tex. 362, 220 S. W. 767, affirming judgment (Civ. App.) 154 S. W. 1181.

69. Foreign judgments.—The court in which an action on foreign judgment is brought does not lack jurisdiction because the foreign judgment was not a final one. *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397; *Walker v. Garland* (Civ. App.) 220 S. W. 399.

As the Oregon Supreme Court has construed the state statutes as clothing the court rendering judgment for alimony with power to set aside as well as to alter or modify a provision for permanent alimony or allowance, and the decree of annulment may be made to operate retrospectively, a judgment for alimony for support and maintenance is not, as to installments already accrued, entitled to be given effect under the full faith and credit clause of the federal Constitution (article 4, § 1). *Criteser v. Gaffey* (Com. App.) 222 S. W. 193, affirming judgment (Civ. App.) *Gaffey v. Criteser*, 195 S. W. 1166.

A judgment for the periodical payment of alimony in an Oregon divorce suit under L. O. L. §§ 513, 514, held not a final judgment within the full faith and credit clause of Const. U. S. art. 4, § 1. *Gaffey v. Criteser* (Civ. App.) 195 S. W. 1166.

In suit on foreign judgment, held, under evidence, that trial court was justified in finding that defendant was not party to suit when judgment was entered, and that judgment was nullity for want of jurisdiction. *Guaranty Trust Co. of New York v. Green* (Civ. App.) 197 S. W. 1026.

Under Const. U. S. art. 4, § 1, and Rev. St. U. S. § 905 (U. S. Comp. St. § 1519), in action on a sister state judgment, defense being pending appeal, effect of appeal on finality of the judgment and its admissibility in evidence is determinable by the laws of state where rendered. *Van Natta v. Van Natta* (Civ. App.) 200 S. W. 907.

Where action is brought in Texas on a judgment rendered in Indiana, from which an appeal is pending, and the right to sue thereon in Indiana is not shown, the action is governed in that respect by the laws of Texas. *Id.*

Where a foreign corporation had been put through receivership proceedings in federal court with ancillary appointment of receiver in Texas, and property of foreign company had been sold to another corporation under decree providing limit of time for filing claims and selling free of claims, judgment of Texas court in action by Texas creditor not submitting himself to jurisdiction of federal court, held not to deny full faith and credit of federal court's judgment. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

Foreign divorce decree procured through wife's fraud and falsehood was not vitalized and validated by the act of the husband, never made a party to the suit, and who knew nothing of the action until after rendition of the decree, in subsequently visiting the wife after her return from the foreign state, and by failing to go there and attack the judgment because of fraud. *Richmond v. Sangster* (Civ. App.) 217 S. W. 723.

The validity of a decree of divorce, procured in the Illinois courts by a wife who left her husband in Texas, depended on the truthfulness of the facts stated in the wife's affidavit for substituted service upon the husband, rather than upon the good faith of the wife or her attorney in making the affidavit. *Id.*

Where wife left husband in Texas, and, going to Illinois, sued him for divorce, and citation by publication was based on false affidavit, the substituted service was insufficient; and, where by the statutes of Illinois the wife was required to have transmitted to defendant husband a copy of her petition, and by fraud induced the clerk to send copy to a post office where it would not be received by her husband, there was such a fraud on the jurisdiction of the Illinois court as to void wife's divorce. *Id.*

In an action against three defendants jointly and severally liable, a judgment against two defendants which recited that the case was continued as to the third defendant is merely interlocutory, and does not support an action thereon in another state. *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397.

An order of a court in another state giving intervener a lien on the property involved in a suit to be protected when the decree of foreclosure shall be entered in favor of plaintiff is an interlocutory order, not a final judgment, and cannot be made the basis for a suit within this state. *Walker v. Garland* (Civ. App.) 220 S. W. 399.

Where the right to installments of alimony becomes absolute and vested upon becoming due, the judgment providing therefor is protected by the full faith and credit clause of the federal Constitution (article 4, § 1) as to such installments, but that rule does not apply where, by the law of the state in which the judgment for future alimony is rendered, the right to demand and receive the same is discretionary with the court rendering the judgment to such an extent that no vested right attaches. *Criteser v. Gaffey* (Com. App.) 222 S. W. 193, affirming judgment (Civ. App.) *Gaffey v. Criteser*, 195 S. W. 1166.

Art. 1995. [1336] [1336] For or against one or more plaintiffs, etc.

Joint and several judgments.—In suit by corporate stockholders to recover assets of company wrongfully disposed of by director, judgment must be for all stockholders and company, not for plaintiffs individually for respective interests in recovery. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

Where an injury is occasioned by acts of two or more joint tort-feasors, though the party injured may have judgment against all of them, he can have but one satisfaction for the injury received. *City of Austin v. Johnson* (Civ. App.) 204 S. W. 1181.

In an action on a note given in payment for bulls bought by first defendant and delivered to a subsequently created partnership, held that under the pleadings and evidence a judgment for plaintiff for the full amount against the first defendant and in his favor for half the amount of the note against the second defendant was improper. *Snyder v. Slaughter* (Civ. App.) 208 S. W. 974.

Where liability of sureties upon a bond is joint and several a judgment in favor of one does not discharge the other. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 460.

In suit against two sureties on a bond, where one surety failed to appear and answer, and plaintiff's petition stated a cause of action against him, and was sustained by proof, plaintiff was entitled to judgment against such surety notwithstanding the other surety pleaded and proved facts entitling him to discharge. *Id.*

Where members of a truck growers' association brought action joining the association for defendant's breach of contract to furnish onion crates, each member having a separate cause of action, a joint judgment was improper; since each member separately should have been awarded such damages as he proved. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

Where, in a suit to foreclose a chattel mortgage, defendants S. and C. answered separately, S. claiming a lien for storage, and C. a lien for repairs, it was error to render a joint judgment for them for the amount of C.'s claim as proved; there being no proof with respect to S.'s claim. *Holt v. Schwarz* (Civ. App.) 225 S. W. 856.

Demand for judgment.—Where certain defendants disclaimed before petition was assailed, if plaintiff desired judgment as to disclaiming parties he must demand judgment. *Ballard v. Ellerd* (Civ. App.) 199 S. W. 305.

Judgment for each defendant.—In a suit involving the homestead of husband and wife, though the wife was not a necessary party, a judgment in her favor as well as her husband's was proper. *General Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 195 S. W. 873.

Art. 1995a. Contribution between tort feasons on payment of judgment.

General rule.—Usually there is no contribution between joint tort-feasons, and they are each jointly and severally liable for the entire damages. *Parks v. Schoellkopf Co.* (Civ. App.) 230 S. W. 704.

Art. 1997. [1337] [1337] But one final judgment.

See *W. T. Wilson Grain Co. v. Tobian* (Civ. App.) 230 S. W. 426.

Necessity of final judgment.—Ordinarily courts can enforce a plaintiff's rights only after a trial on the merits, their power preliminary to the final adjudication being limited to the preservation of the subject-matter, the maintenance of the status, and issuance of extraordinary writs for the purpose of securing an effective adjudication and enforcement of the rights of the parties after such adjudication. *Colby v. Osgood* (Civ. App.) 230 S. W. 459.

Essentials of final judgment.—A "final judgment" should contain the judicial ascertainment of the facts, together with the manner of their ascertainment and a recorded declaration of the court pronouncing the legal consequences upon the facts thus ascertained. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

To constitute a "final judgment," the record must affirmatively show, not only that the court expressed its opinion as to the merits of the case, but that it awarded the judicial consequences which it held that the law attached to the facts, and there is no final judgment until the court by affirmative action has applied the law to the facts and pronounced a judgment in favor of one and against the other party to the litigation. *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

Judgments which are final.—A judgment awarding land to claimant under tax title, and the city judgment for taxes accruing since claimant's purchase, and reciting that it does not affect former tax adjudications against parties other than claimant, is a final judgment, not violating the law against rendering two judgments in a cause. *Ivey v. Teichman* (Civ. App.) 201 S. W. 695.

To sustain general demurrer to answer is a final judgment of the court on all the issues raised, and is just as effective as a judgment on the full hearing. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

Where, upon the return of a verdict, the court entered upon its docket, "Judgment for the defendant on verdict of jury," but failed to enter the judgment on the minutes during the term, no ruling having been made on a motion for a new trial, the judgment was final. *Aetna Ins. Co. v. Dancer* (Com. App.) 215 S. W. 962.

Where plaintiff abandoned his cause of action as against a defendant, there was no merit in an objection to judgment in plaintiff's favor that it was not a final judgment, because not in terms making any disposition of the case as to such defendant. *Buchanan v. Gribble* (Civ. App.) 216 S. W. 899.

Where plaintiff sought to secure a dissolution of a partnership, and a determination that plaintiff was entitled to one-half of the assets, and defendant demanded a trial of

the question of partnership before a jury, a judgment declaring the existence of a partnership and its dissolution and that plaintiff was the owner of an undivided one-half interest, and appointing a receiver held a full and final adjudication of all the matters involved. *Leyhe v. McNamara* (Civ. App.) 230 S. W. 450.

— **Judgments not final.**—A judgment which leaves something further to be determined and adjudicated by the court in disposing of the parties and their rights is "interlocutory." *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

Number of judgments.—Under this article, there cannot be final judgments on both plaintiff's original claim and defendant's plea in reconvention, a plea in reconvention or a cross-action being so much a part of the entire suit that, when judgment is rendered for plaintiff, the judgment will be held to have disposed of such plea so as to be appealable. *Taylor v. Masterson* (Civ. App.) 231 S. W. 856.

Art. 1998. [1338] [1338] Judgment may pass title, etc.

Passing of title.—A decree of the federal District Court held to divest out of plaintiff's predecessor in interest any title which such predecessor had acquired by virtue of possession under the ten-year statute of limitations. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

Where the grantee in a quitclaim deed subsequently obtained a judgment establishing his title as against the child of the former owner, he held title to the child's interest under the judgment, and not under the quitclaim deed. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

Art. 2000. [1340] [1340] Judgment of foreclosure of liens.

See *Howard v. Parks*, 1 Civ. App. 603, 21 S. W. 269.

Cited. *Ives v. Culton* (Civ. App.) 197 S. W. 619; *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

7. **Execution, issuance of.**—In view of arts. 2000, 3727, the clerk of a county district court was without authority to issue an order of sale in foreclosure, requiring the sheriff of another county to sell lands lying still in another county. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

11. **Jurisdiction of foreclosure suits.**—In view of this article, value of property against which farm laborer's lien is asserted, if greater than the debt, controls in determining jurisdiction; a rule applying to common-law and statutory liens as well. *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

14. **Personal and foreclosure judgments.**—Where creditor under a trust deed bought at a sale and, to protect its title, purchased a prior mortgage, it is entitled to be subrogated to the senior lien, but the land is the primary fund for its payment, and foreclosure must be first had, after which it may have judgment for any deficiency. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Civ. App.) 203 S. W. 1167.

Where judgment decrees foreclosure of lien on land claimed as a homestead for only a portion of the amount of the judgment, an appeal may be taken from only so much of the judgment as affects the land claimed as a homestead. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

Evidence that mortgagors' attorney stated he would bid in the property, and the mortgagees requested him not to do so, promising to take the property in full satisfaction of their judgment, held sufficient, though contradicted, to sustain a verdict finding an agreement by the mortgagees to release from deficiency liability, if they procured the property. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

The promise of mortgagors not to bid at the foreclosure sale, whereby the mortgagees were enabled to bid in the property for less than its market value, and to avoid the payment of sheriff's fees on the full value, is sufficient consideration for the promise of the mortgagees to release their deficiency liability. *Id.*

Where on exchanging lands covenant in deed was qualified as being subject to a mortgage, the contract was executed, and not executory, and defendants were not obligated to pay the incumbrance, and no personal judgment could be obtained against them, where there was no agreement to pay this sum as part of the consideration for the land. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

One conveying land subject to a mortgage could, if he desired, pay the mortgage when due and secure subrogation, but, if he does so, he is only entitled to foreclose against the land, and cannot obtain a personal judgment against the grantee; the payment of the mortgage not having been made a part of the consideration for the land. *Id.*

17. **Requisites and validity of judgment.**—Where an improper description is put in a mortgage and foreclosure is had and the mistake is carried into the sheriff's deed, the sheriff's deed cannot be reformed, but to get title the mortgage itself should be reformed and another foreclosure had. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

In action on notes and to foreclose vendor's lien against the vendee and others, a judgment against the vendee for the amount due and against all of the defendants foreclosing the lien and ordering sale in directing the officers making the sale, in event the lands should sell for more than sufficient to satisfy the judgment, to pay the excess to the "defendants," was not indefinite nor uncertain, so as to require that it be reversed or reformed. *Clark v. Taylor* (Civ. App.) 212 S. W. 231.

Where a foreclosure judgment described the land to be sold with certainty, but recited that it was all situated wholly or partly in one county, whereas after a division of coun-

ties, certain tracts were wholly in another county, the description was nevertheless good. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

19½. **Relief to defendant.**—Where mortgagor was entitled to sever personal property on land, court may cause such severance in foreclosure proceedings. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 196 S. W. 626.

20. **Conformity of judgment to pleadings, proof and verdict.**—In suit to foreclose implied vendor's liens arising from sale of lease and other rights, judgment for defendants was properly directed where lease was not sufficiently described nor identified, and there was nothing in pleadings, evidence or record whereby description thereof might be made definite and certain. *Blair v. Armstrong* (Civ. App.) 204 S. W. 465.

In such suit judgment for defendants was properly directed, where petition contained no sufficient description of land involved to enable court to locate it. *Id.*

In such suit, judgment was properly directed for defendants where it did not appear that plaintiffs had any title to any property claimed to have been sold by them, but petition and contract of sale attached showed that prior to such alleged sale they had conveyed all their rights in and to property in controversy. *Id.*

Judgment for defendants was properly directed where neither pleadings nor evidence showed anything to enable court to fix amount. *Id.*

Where original petition in suit to foreclose vendor's lien did not ask for personal judgment against defendant, and there was no personal service after amendment, there could be no personal judgment. *Henson v. C. C. Slaughter Co.* (Civ. App.) 206 S. W. 375.

In a suit to foreclose vendor's lien against the vendee and others who had purchased part of the land from the vendee, in the absence of any pleading of equities or any pleading or proof as to the amount either defendant was entitled to receive, the court could not do otherwise than direct that excess proceeds be paid to the defendants jointly. *Clark v. Taylor* (Civ. App.) 212 S. W. 231.

In action to enjoin sale by trustee under power conferred by deed of trust, prayer of answer for the "foreclosure of their said deed of trust lien as provided for in said deed of trust" held to authorize a foreclosure by the court, and not merely an order directing foreclosure by trustee. *Poole v. Cage* (Civ. App.) 214 S. W. 500.

In action to foreclose contract lien, plaintiff's failure to plead and prove compliance with the contract, did not render judgment of foreclosure invalid; noncompliance with contract being a matter of defense. *Johnson v. Barker* (Civ. App.) 215 S. W. 348.

Foreclosure of a mortgage could not be awarded in an action to rescind a trade for deceit. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

21. **Conclusiveness of judgment.**—Rights of holder of deed of trust are not affected by suit, to which he is not a party, to foreclose a prior vendor's lien. *Houston v. Johnson* (Civ. App.) 197 S. W. 1121.

Judgment foreclosing mortgage, in action against husband, is not *res adjudicata* against wife who was not made a party to the suit, and in no way affects her right to assert her homestead claim to the land. *Barbee v. Lundy* (Civ. App.) 212 S. W. 257.

Where a defendant was duly cited by personal service outside of the state, and did not appear, but made default, a judgment which foreclosed the vendor's lien securing the notes sued on as to such defendant was a judgment in rem; the only judgment which the court could have rendered as to him, and disposed of him and his rights, divesting him of all interest in the land. *Conner v. McAfee* (Civ. App.) 214 S. W. 646.

A judgment in an action on a note and to foreclose a mortgage held conclusive as to the amount due on the note and the right to foreclose the lien. *Chandler v. Young* (Civ. App.) 216 S. W. 484.

In suit to foreclose improvement certificate, where owner, being cited, failed to set up her claim of homestead exemption, judgment of foreclosure held *res judicata* of the claim of homestead exemption under Const. art. 16, §§ 50, 51. *Eureka Paving Co. v. Barnett* (Civ. App.) 216 S. W. 903.

The foreclosure of a lien on land at the suit of the senior mortgagee who did not have notice of the right in the owner of the junior mortgage in the property bars such right, notwithstanding the junior mortgagee was not a party to the foreclosure suit. *Masterson v. Ginn's Mut. Underwriters' Ass'n of Texas* (Civ. App.) 222 S. W. 263.

Unless a party to a suit for foreclosure of a mortgage, the holder of the legal title to the land is unaffected by the foreclosure. *Martinez v. Logan* (Civ. App.) 222 S. W. 611.

Judgment and sale in prior suit to foreclose vendor's lien held *res adjudicata* of every right possessed in the land by the holder of certain of the vendor's lien notes as against the holder of other of such notes; all parties having been properly before the court in such prior suit. *Burns v. Dyer* (Civ. App.) 230 S. W. 227.

21½. **Construction and operation.**—Judgment foreclosing mortgage liens, etc., intended simply to change form of securities held by judgment creditors can be enforced only to same extent as principal debt could have been. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

After a judgment has been entered on a note secured by a trust deed and foreclosure thereof ordered, the 4-year statute of limitations no longer applies, even in favor of subsequent lien claimants who were not parties, but the judgment can be enforced at any time within 10 years. *Shaw v. Jackson* (Civ. App.) 227 S. W. 520.

23. **Sales under foreclosure.**—Where mortgagor had sold land, held that, if sale of L. tract occurred prior to hypothecation to bank, before maturity of notes for J. tract, or if L. had no notice of hypothecation, interest of bank in J. tract should be sold before resorting to L. tract. *Magee v. Snell* (Civ. App.) 197 S. W. 364.

Where plaintiff was in possession of mortgaged lands before foreclosure under a lease of mortgagor, his possession was notice to mortgagee who bought in land at foreclosure of his rights to crops. *Temple Trust Co. v. Pirtle* (Civ. App.) 198 S. W. 627.

In mortgage foreclosure sale, owners may divide land and have it sold in lots, under art. 3754; process issued upon judgments decreeing foreclosure of mortgage lien being "execution" within such statutes, in view of arts. 2000 and 3729, subd. 3. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

24. — **Validity.**—In view of Houston City Charter of 1905, art. 2, § 2, and article 3, § 8, and arts. 2000 and 2004, a sale of ward's land under a tax judgment was invalid. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

Art. 2004. [1344] [1343] Judgments against executors, etc.

Enforcement of judgment.—In view of Houston City Charter of 1905, art. 2, § 2, and article 3, § 8, and Civ. St. arts. 2000 and 2004, a sale of ward's land under a tax judgment was invalid. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

This article, requiring money judgment against "guardian as such" to be certified to probate court, and there enforced, contemplates an existing guardianship at time of the recovery, and does not deal with a recovery against "minors." *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

Under arts. 4062, 4067, 2004, 3921, and 4051, a judgment creditor of a minor whose person or property is not under the jurisdiction of the probate court in a guardianship proceeding, need not institute such a proceeding, or cause it to be instituted and perfected, for execution of his judgment. *Id.*

Art. 2005. [1345] [1344] Against executors acting independently of probate court.

Rights and liabilities of independent executors.—In view of arts. 2005, 3235, 3362-3364, when an executor authorized to act independently of the probate court in good faith, passes the estate to those entitled to receive it, he loses control thereof and may not thereafter administer it for creditors, and is not as a consequence further accountable to creditors in his representative capacity. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

Art. 2006. [1347] [1346] Against partners when all not sued.

See *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409.

Citation against partners.—Under Rev. St. 1879, art. 1346, providing that service on one partner is service on the firm, and on the partner actually served, service by publication, where the records shows the defendant's residence to be unknown, is "actual service," within the meaning of the statute. *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072.

Judgments, validity.—Where an oil lease was taken in the name of a company under which a partnership did business, and the petition to cancel alleged the name of the partnership and of each individual member, and prayed judgment against all, it was proper to render judgment against all defendants. *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

Execution.—Under this article, execution may issue against the partnership property where the petition showed that the debt was the obligation of the partnership as such, and it was sued, the individual partners being named, and neither those served nor those not served can complain of such execution. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

Art. 2007. [1348] [1347] Confession of judgment.

Stipulation.—A stipulation whereby defendant, in consideration of an extension of time, agreed that judgment might be taken against him, is a pleading in the nature of a confession of judgment under this article. *Dunne v. Vogeley* (Civ. App.) 209 S. W. 197.

Agreement of parties.—In suit on vendor's lien notes, the judgment entered by agreement held binding on the appealing defendants, as made in open court and entered of record in full compliance with rule 47 for the district and county courts (142 S. W. xxi), in the absence of objection, except in two particulars. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

That a judgment did not follow the prior parol agreement of the parties would not make the judgment less binding, and, if different from the agreement through mistake, it would control so long as it was not reformed. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

Construction of judgment.—A consent judgment in a suit on vendor's lien notes, which recited that all defendants had been duly and legally cited, were properly before the court, and that the rights and interests of all were determined, held to have disposed of the rights of a defendant whose name was not specially mentioned. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

Art. 2008. [1349] [1347a] The acceptance of service and waiver of process.

Constitutionality.—This act relates to the remedy, and does not impair the obligation of a contract, executed prior to its enactment, which authorized a licensed attorney

to appear in court, waive process, and confess judgment against the party liable thereon. *Worsham v. Stevens*, 66 Tex. 89, 17 S. W. 404.

Applicability of provision.—This article does not forbid a stipulation in a bond for performance of a contract in a certain county that the bond may be sued on in that county. *Ft. Worth Board of Trade v. Cooke*, 6 Civ. App. 324, 25 S. W. 330; *Howard v. Barthold & Casey* (Civ. App.) 206 S. W. 378.

Acceptance and waiver before suit.—Under this article, defendants' acceptance of service and waiver of process indorsed on the petition in the suit against him, before it was filed, will not support a judgment by default. *McAnelly v. Ward*, 72 Tex. 342, 12 S. W. 206.

Art. 2009. [1350] [1348] Confession of, by attorney.

Applicability of provision.—A judgment reciting that the parties appeared by their attorneys, and by agreement judgment was rendered, does not show an agreement or confession by attorney merely, so as to require filing and recital of power of attorney under this article. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 24 S. W. 834.

Art. 2010. [1351] [1349] Releases errors, but may be impeached.

Impeaching for fraud.—A consent decree between husband and children without notice to wife, by which the children were given the former homestead and another tract, subject to a life estate in the husband and a lien on the life estate to secure notes executed by the husband, held void as to the wife as a fraud on her homestead rights. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

CHAPTER SIXTEEN

REMITTER AND AMENDMENT OF JUDGMENT

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| <p>Art.
2012. Remitter of excess in verdict.
2013. Remitter of excess in judgment in open court.
2015. Mistakes in judgments corrected in open court.</p> | <p>Art.
2016. Misrecitals, etc., corrected in vacation or term time in certain cases.
2017. Correction made in vacation to be certified to clerk.
2018. Correction or remitter operates to cure errors.</p> |
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Article 2012. [1353] [1351] Remitter of excess in verdict.

Power of court.—Where jury rendered excessive verdict, the trial court had authority to require remittitur to reduce verdict to a proper amount. *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

Curling excessiveness.—In action against railroad for destruction of pasturage by failing to fence right of way, any error in excessive verdict for \$1,200, evidence justifying verdict for at least \$750, was cured by remittitur of \$450. *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

Remittitur before judgment.—Though as a rule judgment must be based on verdict, where verdict is excessive, remittitur may be filed, and error in rendering judgment for amount authorized without formally entering judgment and filing remittitur is immaterial. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Art. 2013. [1354] [1352] Remitter of excess in judgment in open court.

See *Pope v. Wedgeworth* (Com. App.) 221 S. W. 950, reversing judgment (Civ. App.) 196 S. W. 621.

Art. 2015. [1356] [1354] Mistakes in judgments corrected in open court.

See *Pope v. Wedgeworth* (Com. App.) 221 S. W. 950, reversing judgment *Wedgeworth v. Pope* (Civ. App.) 196 S. W. 621.

Cited, *Uppenkamp v. State* (Cr. App.) 229 S. W. 544.

Authority of court.—Trial court has inherent power to correct evident mistake in its judgment. *Mouser v. First Nat. Bank* (Civ. App.) 197 S. W. 1000.

An error in the ministerial entry of the judgment may be subsequently corrected by a proceeding in the same case on the initiative of the court or a motion of the parties; the power to correct the record existing in the court, not by reason of continued jurisdiction over the subject-matter, but by virtue of its continuing power over its record. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Court may, in view of this article enter nunc pro tunc the order outlined in Code Cr. Proc. art. 658, upon motion to quash venire. *Barnes v. State* (Cr. App.) 230 S. W. 986.

— **Judgments and mistakes which may or may not be corrected.**—See *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; notes to art. 2016; *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

Where court was authorized to direct verdict, and in so doing directed verdict against one not served with citation, it was equally authorized to set it aside as to such person, and enter judgment accordingly, instructed verdicts being in effect judgments which may be corrected. *American Surety Co. v. Sheerlin* (Civ. App.) 203 S. W. 1120.

Judgment, in suit to determine boundary line, which was not written in accordance with the order of the court, will be corrected on motion. *Johnson v. McBee* (Civ. App.) 205 S. W. 159.

Under this article, the court may correct a judgment entry nunc pro tunc so as to make it show that the cause was determined as to all parties who joined issue. *Smith v. Moore* (Civ. App.) 212 S. W. 988.

Where a judgment followed the petition which misdescribed land, held that many years thereafter the judgment could not be corrected nunc pro tunc so as to correctly describe the land; the matter not being an error which could be corrected on motion. *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

The proper procedure to amend a judgment is by motion showing ground for and praying for such relief filed in the original action; but, where a judgment, in trespass to try title, which misdescribed the land, followed the petition, the defect is such that it cannot be remedied by mere motion. *Id.*

The court may at any time after a judgment is entered correct a ministerial error as to description of land. *Renois v. Griffith* (Civ. App.) 230 S. W. 1067.

What constitutes amendment.—The effect of entry of second judgment during same term was to amend first judgment. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

Evidence justifying correction.—Where writ of garnishment issued against one who answered that he was indebted to defendant in a sum secured by lien, and judgment was against the garnishee, but by mistake the lien was not foreclosed, the garnishee's answer furnished a sufficient basis for the correction of the judgment. *Mouser v. First Nat. Bank* (Civ. App.) 197 S. W. 1000.

This article does not require the existence on the court's records of some written memorandum or evidence showing the judgment actually rendered, in order to correct a judgment entry to make it speak the truth. *Smith v. Moore* (Civ. App.) 212 S. W. 988.

Notice.—Under this article, entry of judgment nunc pro tunc after notice only to plaintiff's attorney of record, where it was not shown that he had authority to continue to represent her, was void, and must be set aside. *Hamilton v. Hamilton* (Civ. App.) 225 S. W. 69.

In a proceeding to correct a ministerial error in a judgment in describing land, that parties were permitted to intervene, without notice of intervention being given nonresident defendants, cited to answer the original petition, is without merit, where the interveners merely adopted the allegation of the original motion. *Renois v. Griffith* (Civ. App.) 230 S. W. 1067.

Rights of third persons.—The fact that petitioners, interested in land, were not parties to the original suit, in which the decree was corrected for ministerial error in description of land, is immaterial, since the right to have the error corrected is not personal. *Renois v. Griffith* (Civ. App.) 230 S. W. 1067.

Nature and form of proceeding.—Under art. 2016, a suit will lie for correction of a mistake in judgment. *Mouser v. First Nat. Bank* (Civ. App.) 197 S. W. 1000.

A motion to correct record of judgment is not an "action," and does not raise question of correctness of judgment on the merits; the only issue being whether the judgment as actually rendered was accurately recorded. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Where answer to motion to correct entry of judgment raises issue of correctness of judgment on the merits, and court actually hears and tries issues and renders judgment thereon, the proceeding and judgment may properly be regarded as a proceeding in an independent action, though it was filed in and took the number and style of the original suit. *Id.*

Motion or application and answer thereto.—Where, on trial of action to determine boundary line, plaintiff set up defense of limitations, which was disregarded, and no appeal was prosecuted, plaintiff cannot raise issue in defendant's action in nature of motion to correct clerical error in judgment. *Johnson v. McBee* (Civ. App.) 205 S. W. 159.

Where all the parties to an action in which a judgment was rendered were served with notice of motion to correct the judgment entry, it was permissible for the answer to the motion to raise the issue of fraud in the rendition of the judgment and to ask that it be annulled. *Waggoner v. Knight* (Com. App.) 231 S. W. 357.

Answer to motion to correct judgment entry, alleging that judgment was procured by fraud, raised the issue of fraud, though movant did not deny allegations of fraud. *Id.*

Time for application.—When a will was probated it was incorrectly recorded. Seven years later the court ordered the record amended, and the will properly recorded. Held, that the probate court had power in such case to amend the record, under arts. 2015, 2016, and the lapse of time was immaterial. *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Civ. App. 380, 23 S. W. 520.

The court may, at any time after a judgment is entered, correct a ministerial error as to description of land, first giving notice to the parties in interest, and in the absence of intervention of rights of innocent parties, who are not parties to the suit, the defense of delay cannot be invoked. *Renois v. Griffith* (Civ. App.) 230 S. W. 1067.

See, also, notes to art. 2016.

Dismissal after opening judgment.—Where in suit in equity judgment is opened at succeeding term, the court may upon correction dismiss the action. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

Art. 2016. [1357] [1355] Misrecitals, etc., corrected in vacation or term time, in certain cases.

See *Pearce v. Tootle*, 75 Tex. 148, 12 S. W. 536; see *Mouser v. First Nat. Bank* (Civ. App.) 197 S. W. 1000; *Smith v. Moore* (Civ. App.) 212 S. W. 988.

Cited, *Halsell v. McMurphy* (Civ. App.) 21 S. W. 777; *Imlay v. Brewster*, 3 Civ. App. 103, 22 S. W. 226; *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Amendments allowable.—Where, in an action against a carrier for destruction of cotton, the court finds for plaintiff, but the weight, as computed by him, includes only the bales covered by two of the bills of lading, and the findings fail to show how the error occurred, the error is not clerical, and cannot be amended under Rev. St. 1879, arts. 1354 and 1355. *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605.

Amendments during term.—Court has full authority during term to set aside judgment if erroneous and render proper judgment, and it may do so on its own motion. *Ballard v. Ellerd* (Civ. App.) 199 S. W. 305; *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Court may revise any judgment, decree, or order at term at which it was rendered. *Gulf. C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

Independently of arts. 2015, 2016, the court, during the term at which a judgment is rendered, has plenary power over it, and may vacate, modify, or correct it at discretion, not only as to clerical mistakes, but mistakes as to rights of parties, provided the intervention of a jury is unnecessary, or that it does not involve the entry of judgment against the verdict. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

Trial court could during term, on its own motion, amend judgment. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

Amendments after term.—A judgment may, in equity at a succeeding term, be reopened for such corrections as justice demands. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

Where a judgment, through mistake of court and counsel, did not dispose of an abandoned issue, the court may at a later term amend the judgment and make it final. *Rouser v. Wright* (Civ. App.) 205 S. W. 849.

After adjournment of term during which judgment was rendered, trial judge lost all jurisdiction to correct error in allowing excessive interest. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

Upon adjournment of term, the jurisdiction or power of the court over judgment, rendered during the term, on its merits is exhausted. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Amendments in vacation.—Hart. Dig. art. 786, which provides that the court may correct a judgment "in vacation" in case there shall be among the records any instrument in writing whereby such judgment may be safely amended, does not apply to amendments requested in open court during the term at which the judgment is rendered. *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605.

Time for application.—See *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Civ. App. 380, 23 S. W. 520; notes to art. 2015.

Art. 2017. [1358] [1356] Correction made in vacation to be certified to clerk, etc.

Cited, *Imlay v. Brewster*, 3 Civ. App. 103, 22 S. W. 226. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 2018. [1359] [1357] Correction or remitter operates to cure error.

Cited, *Imlay v. Brewster*, 3 Civ. App. 103, 22 S. W. 226.

CHAPTER SEVENTEEN

NEW TRIALS AND ARREST OF JUDGMENT

Art.	Art.
2019. New trials may be granted.	2024. Not more than two new trials, except, etc.
2020. Motion for, requisites of.	2025. Determined when.
2021. Misconduct of jury, etc., as ground of motion; evidence.	2026. Bill of review in suits by publication.
2022. New trials granted where damages too small, etc.	2029. Sale under such execution not avoided but, etc.
2023. Time of making motion.	

Article 2019. [1370] [1368] New trials, etc., may be granted.

See *McGuire v. State*, to Use of Bee County (App.) 15 S. W. 917.

I. IN GENERAL

3. Arrest of judgment.—One who entered into a lease without revealing names of his partners, and proceeded in a trial against him for rent up to the closing of the testimony without attempting to plead the facts and ask that the other partners be brought in, was in no position to demand an arrest of judgment simply because such other persons might be jointly and severally liable with him. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

II. GROUNDS FOR NEW TRIAL

8. In general.—Where mortgagee sues for all he loaned person of unsound mind, and at no time asks for any part thereof, he cannot maintain that verdict and judgment against him were contrary to law and evidence, although some of money was spent for necessities. *Bass v. Joseph* (Civ. App.) 201 S. W. 1047.

Where trial before the court progressed to a certain point, whereupon the court announced that the trial would be resumed on a day following, at which time the final testimony was taken and judgment rendered, but defendant was not then in court, he cannot be granted a new trial on ground that judgment was not rendered at a regular trial, but on the unverified report of an auditor without opportunity to defendant to object. *Kerwin v. Mead* (Civ. App.) 229 S. W. 677.

9. Discretion of court.—Motions for new trial for newly discovered evidence are addressed to the sound discretion of the trial judge. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149; *Nations v. Miller* (Civ. App.) 212 S. W. 742; *Donoho v. Carwile* (Civ. App.) 214 S. W. 553; *Woldert v. Pukll* (Civ. App.) 221 S. W. 1112; *Rooney v. Porch* (Civ. App.) 223 S. W. 245; *Smith v. Folmar* (Civ. App.) 224 S. W. 526; *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

The granting of an order setting aside a judgment and granting a new trial is largely within the discretion of the trial court, and every presumption must be indulged in favor of the ruling on the motion. *McCaskey v. McCall* (Civ. App.) 226 S. W. 432.

10. Absence of party.—Where defendant failed to appear at either the first or second time for which case was set, and, though notified that it was again set for 9:30 the next morning, failed to start from his home, 20 miles in the country, till that morning, and, because of mud and automobile troubles, arrived after judgment, there was no abuse of discretion in refusing new trial. *Scaling v. Collins* (Civ. App.) 207 S. W. 424.

A new trial of a divorce suit will not be granted merely on account of the absence of defendant who was in jail, and who could have testified to material facts, where there is no evidence that he was denied the right to appear, but only evidence that he told the jailer to let him know when the suit came up and that the jailer did not do so. *Harris v. Harris* (Civ. App.) 230 S. W. 224.

14. Misconduct of counsel.—See *Denison Cotton Mill Co. v. McAmis* (Com. App.) 215 S. W. 442.

Although it is a general rule that advantage cannot be taken of improper argument unless the objection be presented at the time the argument is made, yet, where the argument is intensely vituperative and based on matters not in evidence, so that it necessarily must have caused prejudice and probably thwarted justice, the trial judge should set aside the verdict even though no objections were urged at the time. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

20. Surprise in respect to evidence.—Plaintiff's testimony that there was no fastening on a gate when it was installed having been received, though the proper conclusion from the petition was that plaintiff expected to show that fastening was insufficient or had become out of repair, new trial should have been granted on motion presenting testimony of three reputable persons that defendant placed a proper fastening on the gate when installed. *Texas Electric Ry. Co. v. Simmons* (Civ. App.) 214 S. W. 563.

A new trial to permit plaintiff to produce stenographic report of testimony of one of the defendants given at a former trial, which differed with his testimony at the trial, was properly denied, where plaintiff sought no postponement to procure such stenographic report, and not only failed to interrogate defendant as to his former testimony, but did not seek to prove it in any other way. *Hagar v. Adams* (Civ. App.) 220 S. W. 592.

22. Insufficiency of evidence.—It is not ground for new trial that the verdict or judgment was against the evidence, or against the preponderance of evidence; but it must be against all the evidence, or at least against the overwhelming weight of the evidence. *Southern Traction Co. v. Coley* (Civ. App.) 211 S. W. 265.

Verdict, to authorize trial or Appellate Court to set it aside, must be against the preponderance of the evidence to a degree showing that manifest injustice has been done, at least it must be affirmatively wrong. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

23. Verdict defective or not responsive.—Where findings of jury were conflicting on several pertinent issues rendering their conclusions as to controlling facts uncertain, it was error to refuse new trial. *Southern Traction Co. v. Gee* (Civ. App.) 198 S. W. 992.

Conflicting jury findings on question whether mortgage notes were delivered to trustee under trust deed as attorney for collection or to institute foreclosure proceedings as

trustee, held to require new trial. *Oak Cliff State Bank & Trust Co. v. Conroy* (Civ. App.) 201 S. W. 699.

Where, in a personal injury suit, the answers indicated that the jury was confused by the multifarious and unnecessary issues submitted, and as a result rendered inconsistent and irreconcilable answers upon which no intelligent judgment could be based, a new trial should have been ordered. *Bowdoin v. Houston & T. C. R. Co.* (Civ. App.) 211 S. W. 538.

25. **Denial of continuance.**—See *Vaughn v. Charpiot* (Civ. App.) 213 S. W. 950.

33. **Newly discovered evidence.**—In action to recover land, showing of newly discovered evidence as to adverse possession held sufficient to require new trial. *Stark v. Leonard* (Civ. App.) 196 S. W. 708.

In a servant's action for injuries wherein he obtained judgment, newly discovered testimony, as to which due diligence had been exercised, that before his alleged injuries he complained of the condition on account of which he sued was required to grant a new trial. *American Indemnity Co. v. Hubbard* (Civ. App.) 196 S. W. 1011.

After judgment for defendants in action to set aside a previous judgment because of disqualification of judge, the discovery of a letter tending to show such judge had acted as adviser and attorney for defendants as to the claim on which they recovered in the former action was sufficient to warrant new trial. *Cotulla State Bank v. Herron* (Civ. App.) 202 S. W. 797.

After verdict against a railroad company for personal injuries to a pedestrian, struck by a loose door when the train passed him, newly discovered evidence that the pedestrian was attempting to board the train when injured required a new trial. *Lancaster v. Settle* (Civ. App.) 204 S. W. 772.

Alleged newly discovered evidence as to declaration made by defendant cannot be said to have been newly discovered after trial, where plaintiff was in fact present at time such declaration was made. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Newly discovered evidence being relevant, material, and competent, and there being no suggestion of lack of diligence or of interest of the affiants in the result, a new trial should have been granted. *International Life Ins. Co. v. Lester* (Civ. App.) 215 S. W. 351.

In an action for rent, where defense was that plaintiff had not constructed building as agreed, it was not error to refuse a new trial on the ground of newly discovered evidence to the effect that the building was not constructed according to the plans and specifications. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

A motion for a new trial in an action on a foreign judgment in which no issue was raised at the first trial as to the statutory law of the foreign state, based on a statute, of which plaintiff's attorney had learned since the former trial, was properly overruled, since such a motion must set forth evidence relating to an issue at the trial which could not have been discovered by due diligence. *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397; *Walker v. Garland* (Civ. App.) 220 S. W. 399.

In personal injury action where verdict was not claimed to be excessive, appellate court will not set aside verdict and judgment to enable defendant to use newly discovered evidence on issue of nature and extent of plaintiff's injuries, or to affect her credibility as a witness. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

Where it was claimed that mutual benefit certificate had been altered by the insertion of the name of plaintiff's alleged wife, newly discovered evidence of notary public relating to the original condition of the certificate held insufficient to require new trial. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

Where vendor's wife refused to sign the deed, and the sale failed, it was not an abuse of discretion in an action by broker for commission to deny a new trial on the ground of newly discovered evidence that the purchaser would not have bought unless the vendor's wife joined; for such evidence could not have been newly discovered and would not have affected the result on another trial. *Carson v. Brown* (Civ. App.) 229 S. W. 673.

35. — **Materiality and admissibility.**—Newly discovered evidence as to the foreclosure proceedings on which plaintiff's title was based, accompanied by a proof of due diligence, entitles defendant to a new trial, though his answer did not contain any allegation under which the newly discovered evidence could be based, where it reasonably appeared that he intended, after a new trial was granted, to make such evidence available by proper pleadings. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

36. — **Cumulative evidence.**—See *Morrison v. Neely* (Civ. App.) 214 S. W. 586.

New trials are not granted upon newly discovered evidence which is merely cumulative. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 207 S. W. 580; *City of Polytechnic v. Redmon* (Civ. App.) 217 S. W. 730.

Newly discovered evidence held merely cumulative. *Jones v. Wichita Valley Ry. Co.* (Civ. App.) 195 S. W. 890.

Newly discovered cumulative evidence which is probably not true and which would not change the result is not ground for new trial. *Zamora v. Vela* (Civ. App.) 202 S. W. 215.

In an action involving contract, there being a conflict as to whether there was one or two conversations over telephone, court did not abuse its discretion in denying new trial on ground of newly discovered evidence, consisting of affidavit of telephone company employe that files showed two conversations. *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367.

The principle that new trial will not be granted upon newly discovered evidence which is merely cumulative applies to a bill of review, seeking a review and cancellation of judgment after term time. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 297 S. W. 580.

Motion for new trial for newly discovered evidence was properly denied, where the same character of evidence had been given on the trial by other witnesses; such evidence being merely cumulative. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Court did not abuse its discretion in denying motion for new trial on ground of newly discovered evidence, where such evidence was cumulative in tendency. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Where the greater part of newly discovered evidence, relates to distinct and independent facts, that such facts would strongly corroborate evidence which was offered at the trial, and would contradict the evidence of plaintiff appellee, does not render such evidence merely cumulative. *International Life Ins. Co. v. Lester* (Civ. App.) 215 S. W. 351.

The trial court did not err in overruling the motion for new trial on the ground of newly discovered evidence, where the testimony relied on was cumulative, and there was no showing as to when the testimony was discovered, nor why it was not produced on trial. *Frye v. Wayland* (Civ. App.) 228 S. W. 975.

37. — Impeachment of witness.—Newly discovered evidence which is merely impeaching is not ground for new trial. *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333; *Nations v. Miller* (Civ. App.) 212 S. W. 742.

After verdict against a railroad company for personal injuries to a pedestrian, struck by a swinging door as the train passed him, newly discovered evidence that plaintiff's witness stated, in plaintiff's hearing, without denial, that plaintiff was trying to jump the train and fell, was more than impeaching testimony, and required a new trial. *Lancaster v. Settle* (Civ. App.) 204 S. W. 772.

Plaintiff seeking damages for the death of her alleged common-law husband is not entitled to new trial for newly discovered evidence impeaching witness who testified that deceased was the lawful husband of another, which evidence was not material, because plaintiff failed to show a common-law marriage. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

39. — Credibility and probable effect.—Newly discovered evidence held to show no probability that new trial would change the result. *Jones v. Wichita Valley Ry. Co.* (Civ. App.) 195 S. W. 890.

In a suit to set aside a settlement of partnership affairs, held, that court did not abuse its discretion in refusing to grant a new trial for newly discovered evidence concerning items in evidence, where it probably would not have changed the result and there was nothing to indicate that the court charged defendant with such items. *Woldert v. Pukli* (Civ. App.) 221 S. W. 1112.

Motion for new trial on ground of newly discovered evidence that plaintiff subsequent to injury had made application for life insurance, in which she stated that her health was in good condition, was properly denied, where both plaintiff and the physician who had filled in application testified that plaintiff had not authorized physician to make such statements, since the application would be of little or no value on a new trial. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 333.

In trespass to try title, where affirmative judgment for defendant was rendered in plaintiff's absence, affidavits accompanying plaintiff's motion for new trial held to show that a different result would be obtained by a new trial. *McGowan v. Lowry* (Civ. App.) 230 S. W. 465.

III. RIGHT TO NEW TRIAL AND PREREQUISITES TO GRANTING THEREOF

43. Diligence.—Court properly denied defendant new trial for newly discovered evidence materially affecting controlling issue where same diligence that secured evidence after trial would have secured it before trial. *Robbins v. Bell* (Civ. App.) 195 S. W. 865.

Motion for new trial for newly discovered evidence was properly denied where the alleged facts were known at the time of the trial and for at least 20 days prior to judgment. *Neal Commission Co. v. Golston* (Civ. App.) 197 S. W. 1124.

One is not entitled to new trial for newly discovered evidence; lack of diligence in not discovering it before being apparent. *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333.

Where the existence of evidence was known at the time of the trial, but not the whereabouts of the witness, and no continuance or postponement was requested, new trial was properly refused, although great effort was made to find the witness before trial. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

No error was committed in refusing a new trial on ground of newly discovered testimony as to certain transactions, where the moving party knew of such transactions before trial, made no motion for continuance to secure the new testimony, and other like testimony was introduced. *Morrison v. Neely* (Civ. App.) 214 S. W. 586.

Question as to time of closing post office should have been asked postmaster when he was on the stand, and motion for new trial based upon alleged newly discovered evidence as to time of closing is not supported by an affidavit of postmaster. *Schkade v. Western Union Telegraph Co.* (Civ. App.) 216 S. W. 1113.

In a pedestrian's action for personal injuries, due to falling into a culvert, it was not error to refuse a new trial for newly discovered evidence, where the suit had been pending for nearly two years, and the city had made no effort to have the witnesses testify, although their residence was known. *City of Polytechnic v. Redmon* (Civ. App.) 217 S. W. 730.

Motion for a new trial for newly discovered evidence held properly overruled, where the newly discovered witness resided within 2 miles of the land in controversy for approximately 63 years, was well acquainted with the land and the history of that locality, and there was no reason why such witness had not been approached prior to the trial. *Barlow v. Greer* (Civ. App.) 222 S. W. 301.

A new trial for newly discovered evidence was properly denied where the suit had been pending nearly three years, the witnesses were personally acquainted with plaintiff and his attorney, and plaintiff wholly failed to show diligence in procuring their attendance. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

Where plaintiff, suing for death of her alleged common-law husband, had notice long prior to trial that deceased was previously married, but made no investigation whatever, a new trial for newly discovered evidence relative to marriage would not be granted. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

Where the materiality of certain evidence became known to the defendants before the close of the trial, they should have promptly asked for a continuance or a postponement in order to secure such evidence, and, having failed to do so, they did not use sufficient diligence to require the granting of a new trial. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

Though the motion does not show sufficient diligence, the ends of justice require the granting of new trial, in action for death of a son, for newly discovered evidence that the parents will receive, during life, \$50 a month from government for death of another son in war. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

44. Codefendants.—In trespass to try title, that portion of a judgment awarding a tract to certain defendants may be set aside, and a new trial granted, without disturbing a portion of the judgment which awarded another tract to another defendant on separate and distinct defenses. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 216 S. W. 281.

45. Conditions on granting new trial.—An order granting a new trial directed the party to whom it was granted to pay witness fees "as a condition upon which" such new trial was granted. Held, that the payment of the fees was the "terms" on which the order was made under Rev. St. 1879, art. 1368, and not a condition on performance of which it should take effect. *Fenn v. Gulf, C. & S. F. Ry. Co.*, 76 Tex. 380, 13 S. W. 273.

IV. RULING ON APPLICATION AND EFFECT THEREOF

49. Construction and operation of order in general.—When a new trial is granted, the legal effect is the same as though there had been no judgment, and the case stands on the docket for trial and future disposition by the trial court. *Liz Mar Plantation Co. v. Whitfill* (Civ. App.) 224 S. W. 1118.

V. REVIEW BY APPELLATE COURTS

55. Review of discretion of trial court.—Motions for new trial for newly discovered evidence are addressed to the sound discretion of the trial judge, and where denied appellate court will not reverse, except for clear abuse. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149; *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333; *Woldert v. Pukil* (Civ. App.) 221 S. W. 1112; *Rooney v. Porch* (Civ. App.) 223 S. W. 245; *Smith v. Folmar* (Civ. App.) 224 S. W. 526; *St. Louis-Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

Judgment held not to be reversed on ground that it was based on false evidence and that refusal of new trial is gross injustice and abuse of discretion, where diligence or excuse for failure to introduce evidence presented on motion is not shown, and the evidence is not conclusive. *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424.

The granting of an order setting aside a judgment and granting a new trial is largely within the discretion of the trial court, and every presumption must be indulged in favor of the ruling on the motion. *McCaskey v. McCall* (Civ. App.) 226 S. W. 432.

56. Necessity of motion for new trial.—An assigned error not presented to the trial court in a motion for new trial, cannot be considered. *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Western Union Telegraph Co. v. Golden* (Civ. App.) 201 S. W. 1080; *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

A replevin bond, valid on its face and adjudged valid, will not be presumed invalid because of an order quashing the writ of sequestration or other defect not shown and not urged on motion for new trial. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Where court had jurisdiction of action on notes and no fraud, accident, or mistake was shown, under statute, defendant must raise question of errors in judgment by new trial application and appeal from order thereon. *De Berry v. Chambers* (Civ. App.) 200 S. W. 1141.

Where a motion for new trial has been filed, the party appealing is confined to the matters therein assigned, under Court of Civil Appeals rule 24 (142 S. W. xii). *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

Under art. 1612, as amended by Acts 33d Leg. c. 136, assignments of error which are not copies of any paragraphs of motion for new trial cannot be considered. *Olguin v. Apodoca* (Civ. App.) 202 S. W. 367.

In jury trials filing of motion for new trial is prerequisite to appellant's right to assign error in Court of Civil Appeals. *Neeley v. White* (Civ. App.) 208 S. W. 991.

Where there was no motion for new trial in trial court, there can be no assignments

of error except those based on fundamental error, in view of art. 1607. *Stewart v. McAllister* (Civ. App.) 209 S. W. 704.

Assignments of error not included in the motion for new trial cannot be considered on appeal, unless the error assigned arose after filing of the motion. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

Where no effort was made in the trial court by motion for a new trial to set aside a stipulation as improvident, the effect of the stipulation cannot be avoided in the Court of Civil Appeals. *Richmond v. Sangster* (Civ. App.) 217 S. W. 723.

Where appellant not only did not file a motion for a new trial, but also failed to file assignments of error in the trial court as required by arts. 1612, 2113, appellant was not entitled to complain of the judgment except for error "in law apparent on the face of the record," under art. 1607. *Ætna Accident & Liability Co. v. Trustees of First Christian Church of Paris* (Civ. App.) 218 S. W. 537.

Under arts. 1990 and 1991, as well as Supreme Court rule 71a, it is unnecessary, where a case was submitted on special issues, and a special verdict returned, that motion for new trial be made, in order to entitle appellant to review of judgment, which he asserted was erroneous, because not following the findings. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

Under arts. 1990, 1991, where a case has been tried upon special issues, a motion for new trial is not necessary to perfect the appeal. *Stubblefield v. Jones* (Civ. App.) 230 S. W. 720.

When judgment is based entirely on findings by the court or jury, it is not indispensable to the right of the losing party who duly excepted thereto, to have the judgment reviewed on appeal, that he should have filed and had the trial court act on a motion for new trial. *Southwestern Oil Corporation v. Bois D'Arc Creek Oil & Gas Co.* (Civ. App.) 230 S. W. 821.

57. — **Trial by court.**—Where case is tried by court, motion for new trial was not prerequisite for appeal. *Gilbreath v. Cage & Crow* (Civ. App.) 198 S. W. 972; *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593.

When the trial is before the court without a jury, the appellant is not required to file a motion for new trial presenting alleged errors as a prerequisite to urging them in the appellate court, where the court has filed his findings of fact and conclusions of law, and exceptions have been taken. *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

58. — **Sufficiency and scope of motion.**—A motion for new trial and an assignment of error, on the ground that the trial court erred in instructing the jury to return a verdict for plaintiff in any amount, is sufficient to be considered on appeal. *Harlington Land & Water Co. v. Houston Motor Car Co.* (Com. App.) 209 S. W. 145.

Ground of motion for new trial, that the judgment rendered should be set aside because the verdict of the jury is contrary to the law and the evidence and not supported by the evidence, is too general to justify its consideration on appeal. *Ball v. Henderson* (Civ. App.) 228 S. W. 361.

60. — **Review of rulings on pleadings.**—That agency should have been taken as existing, because alleged in petition and not denied in answer, cannot be urged on appeal, plaintiff having requested instruction for verdict because evidence showed agency, and in motion for new trial complained of its refusal. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.

Where, though record showed order sustaining exceptions to answer, case was tried on the answer, without objection or exception to evidence, and motion for new trial did not raise the question, held, that plaintiff was estopped from asserting that there was no pleading raising the issue. *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641.

Under court rules 24 and 70 (142 S. W. xii, xxii), rules 1 and 101a (159 S. W. viii, xi), and art. 1612, overruling of a plea of privilege for change of venue cannot be reviewed where not set up in the motion for new trial. *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519.

Where the trial on issues raised by sequestration and replevin proceedings was to the court without a jury, objection to assignments of error attacking a ruling sustaining a plea to the jurisdiction on the ground that there was no motion for new trial in the court below cannot be sustained. *Automobile Underwriters of America v. Brooks* (Civ. App.) 228 S. W. 367.

64. — **Review of sufficiency of evidence and verdict or findings.**—In action to recover automobile, plaintiff having sued out writ of sequestration and car having been replevied by defendant, failure of verdict and judgment to find value of car held error apparent on face of record requiring reversal, though not raised in motion for new trial. *Reeves v. Avina* (Civ. App.) 201 S. W. 729.

The correctness of the court's action in rendering a judgment in accordance with the verdict cannot be questioned on the ground that a finding was unsupported by the evidence, where no move was made to set aside the verdict. *Green v. Hall* (Civ. App.) 203 S. W. 1175.

Unless the sufficiency of the evidence to support the jury's findings has been raised and the verdict attacked by motion for new trial, it cannot be considered in the Court of Civil Appeals in view of Rule 71a of District Court and Rules 24 and 25 of Court of Civil Appeals. *Neeley v. White* (Civ. App.) 208 S. W. 991.

In the absence of a motion for new trial and proper assignments based thereon, the Court of Civil Appeals will not consult the statement of facts to ascertain if the allegations were sustained by the evidence. *Stewart v. McAllister* (Civ. App.) 209 S. W. 704.

Assignments of error based on the insufficiency of the evidence to support the verdict will not be reviewed unless that ground was specified in a motion for new trial. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

66. **Exceptions and objection in trial court.**—Though plaintiff, whose motion for new trial was denied, did not formally except, held that, where it appeared that after such motion was overruled she gave notice of appeal in open court, the appeal may be considered. *Allen v. Crutcher* (Civ. App.) 216 S. W. 236.

VI. OPENING DEFAULT JUDGMENTS

68. **Right to vacation in general.**—In transferee's action on note against maker, refusal to set aside default judgment against defendant, and to permit defendant to file answer, alleging that plaintiff was not the owner and holder of the note, held not error. *Mach v. Wofford* (Civ. App.) 228 S. W. 275.

In such action refusal to set aside default judgment to permit maker, who claimed that there was a conspiracy between payee and transferee and that transferee was not holder in good faith, to make the payee a party to the action, held not error. *Id.*

70. **Discretion of court and review.**—The question of setting aside default judgments is largely a matter of discretion of trial court. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341; *Schultz v. Burk* (Civ. App.) 227 S. W. 700.

Where a defendant did not answer because of pending negotiations between parties, held, that court did not abuse its discretion by refusing a motion to set aside default judgment two days after it was rendered. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341.

The discretion enjoined by the court in the matter of setting aside default judgments is not an arbitrary discretion, and is subject to such review, where manifest injustice has been done. *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

71. **Excuses for default.**—Necessary absence of defendant's attorney in distant state when default judgment was taken held not to excuse defendant's failure to file answer before appearance day or have some attorney to represent him on that day. *Southwestern Surety Ins. Co. v. Gulf, T. & W. Ry. Co.* (Civ. App.) 196 S. W. 276.

Letters from plaintiff's attorneys held to contain no statements which could have misled defendant's attorneys into believing that a default would not be taken, and hence not to authorize setting aside the default judgment. *Id.*

Where defendant had filed an answer on a former trial, and his codefendant promised to have his attorney represent him, but failed to do so, and default was entered, and there was only one issue which the jury decided in favor of such codefendant, the court erred in not setting aside a default judgment. *Pye v. Robinson* (Civ. App.) 203 S. W. 96.

Motion for new trial, made at same term that default judgment was rendered, alleging that defendants were cited to appear November 19th, that Legislature by Acts 35th Leg. c. 91, § 2 (art. 30), effective August 1st, changed term of court so that it began October 8th, and that defendants were nonresidents and had no knowledge of the change, showed sufficient excuse for failure to appear. *Queiroli v. Whitesides* (Civ. App.) 206 S. W. 122.

Where defendant appeared on day of return and filed answer, but failed to appear on day to which case was continued, a default entered on such nonappearance should have been set aside, where showing, in support of motion, that postponement had been agreed to, was not controverted. *Counts v. Southwestern Land Co.* (Civ. App.) 206 S. W. 207.

Plaintiff, who had not resided in the county for two years, and was unable to speak, read, or write English, held to have been sufficiently diligent to justify setting aside defendant's judgment by default, Legislature having changed time of holding court, etc. *Ramirez v. Martinez* (Civ. App.) 208 S. W. 330.

Where plaintiff's attorney was diligent in preparation of his case and had a meritorious cause of action, but did not appear when case was called because mistaken as to time when term of court convened, trial court erred in refusing to set aside an order of dismissal, in absence of a finding that attorney was negligent. *Hickman v. Swain* (Civ. App.) 210 S. W. 548.

Where answer was not filed until one day after judgment was rendered, because of inadvertence and mistake of counsel in misdirecting answer through the mail, court did not abuse its discretion in setting aside default. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

Court's refusal to set aside default judgment on ground of sickness held not error. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

Where trial judge announced that he would hear no contested cases for a period of two weeks, counsel for defendant were not diligent, where they did not make inquiry concerning the status of their case until several months after such statement and after entry of default judgment. *Dumas v. Easley* (Civ. App.) 219 S. W. 866.

On a surety's motion for rehearing or new trial after default judgment in the state's proceeding on a forfeited bail bond, a sufficient excuse must be shown by the surety for his failure to answer. *Briggs v. State*, 87 Cr. R. 473, 222 S. W. 246.

In the absence of some showing of fraud, accident, or unavoidable cause, a default judgment of a court of competent jurisdiction will not be set aside. *Id.*

A count in trespass to try title attacking a default judgment rendered in a prior suit was insufficient, where, assuming that it showed a meritorious defense, it alleged no facts excusing plaintiffs from presenting the defense in the prior suit. *Hare v. Marshall* (Civ. App.) 226 S. W. 482.

Trial court held to have erred in denying a motion to set aside a default where defendant's attorney made affidavit that he had prepared a plea of privilege and that on the day he was expecting to leave to attend the trial his wife was seriously injured

he was detained, but immediately mailed the plea and wired plaintiff's attorneys and sent a message to the district judge in care of the clerk. *Walker v. Harris* (Civ. App.) 227 S. W. 360.

Where plaintiff took a default judgment foreclosing a deed of trust in violation of an agreement that the time would be extended and the case would not be tried for a year, the default should be vacated on a showing of a meritorious defense. *Jones v. Wootton* (Com. App.) 223 S. W. 142.

Where return day stated in citation served upon corporation was incorrect, and another citation giving the correct return date was served but neither the officers of the corporation nor its attorneys had been referred had actual knowledge of the service of the second citation until after default judgment was taken, the default will be set aside; there being an equitable excuse for the failure to appear and answer. *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

72. Meritorious cause of action or defense.—Although defendants presented sufficient excuse for not appearing at time default judgment was rendered, court was justified in refusing to grant new trial unless it was shown that defendants had a meritorious defense. *Queiroli v. Whitesides* (Civ. App.) 206 S. W. 122.

On motion to vacate default judgment against indorser on note, a defense that the maker and another indorser had not been joined as defendants was insufficient, where it appeared that such parties were wholly insolvent. *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

Where judgment was entered against a defendant failing to appear at trial, his motion for new trial will be denied, where the meritorious defense urged would require the use of incompetent parol evidence. *Gregory v. South Texas Lumber Co.* (Civ. App.) 216 S. W. 420.

A party seeking to set aside a default judgment must show not only that he was prevented from presenting his defense at the proper time by some cause unmixed with negligence on his part, but that he has a good defense. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

On a surety's motion for rehearing or new trial after default judgment in the state's proceeding on a forfeited bail bond, a sufficient excuse must be shown by the surety for his failure to answer, as well as a further showing that he has a meritorious defense. *Briggs v. State*, 87 Cr. R. 473, 222 S. W. 246.

In retail dealer's action against wholesale dealer in which it was alleged that retailer had agreed to sell tractors at market price, and that wholesaler had agreed to reimburse retailer on reduction thereof, answer, held to present a meritorious defense, on motion to set aside default judgment and for a new trial, as against contention that the agreement alleged was illegal, and that court should not aid party to illegal agreements who has suffered default to go against him. *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

VII. OPENING AND VACATING JUDGMENTS

74. Authority of court.—During the term at which a judgment is rendered the court has jurisdiction to hear additional testimony in regard to any part of the proceedings as to which he might entertain doubt, and to open all or part of the judgment for such purpose. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

The power of the trial court to open and modify a judgment entered at the same term is reversible for abuse of discretion. *Id.*

A judgment rendered by a court of competent jurisdiction and regular on its face cannot be set aside after the adjournment of the term at which it was rendered. *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

Trial court could during term, on its own motion, set aside judgment. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

A judgment can be set aside after adjournment of term only in an independent action brought for that purpose. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

Where a final judgment in a civil action has been rendered and has not been set aside during the term, the court has no power on motion for new trial to set it aside at a subsequent term. *Ætna Ins. Co. v. Dancer* (Com. App.) 215 S. W. 962.

75. Nature of proceeding or relief.—If record does not speak truth, and extraneous evidence is necessary to establish facts as to jurisdiction, suit to set aside judgment on cross-bill against plaintiff on ground court had no jurisdiction of his person is proper remedy, but it must appear he had no opportunity to move for new trial during term. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

Petition of landowner and husband to cancel and annul, for want of service judgment in a condemnation suit, held to set up a cause of action as distinguished from a mere motion to correct an error of entry. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

Since equitable defenses may be interposed to actions at law, a defendant in an action on a judgment may interpose by way of defense facts which would require a vacation of the judgment for want of jurisdiction, and such defense should be given the same force and effect as a cross-bill. *Walker v. Chatterton* (Com. App.) 222 S. W. 1100, reversing judgment (Civ. App.) 192 S. W. 1085.

An independent suit for a new trial to cancel a judgment and enjoin enforcement is an equitable proceeding. *Huddleston v. Texas Pipe Line Co.* (Civ. App.) 230 S. W. 250.

76. Judgments which may be vacated.—Any judgment, decree, or order, including order granting new trial, may be vacated by court at term at which it was rendered. *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

A default judgment may be attacked by a direct bill for the reason that it was rendered on an amendment to the complaint which stated a new cause of action and which was never served on defendant. *Young v. City Nat. Bank* (Civ. App.) 223 S. W. 340.

79. Persons entitled to relief.—See *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

A judgment on attachment bond will be set aside for alteration in bond by party to original action only. *Knox v. Horne* (Civ. App.) 200 S. W. 259.

In action to set aside compromise judgment for fraud, plaintiff held to be in "privity" with plaintiffs in action in which the judgment was rendered. *Fidelity Lumber Co. v. Ewing*, (Civ. App.) 201 S. W. 1163.

In an action to set aside a mortgage foreclosure by one who had purchased part of mortgaged land and had not been made a party, the mortgagor could not show that the mortgage note had been paid prior to the foreclosure, where he had agreed to the rendition and entry of judgment, and did not ask in his pleading that such judgment be annulled. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

80. Persons against whom relief may be granted.—The reason for requiring a direct attack to set aside a judgment for any reason not appearing on the face of the record is to enable the court to adjust the equities of the parties and protect the rights of innocent persons, and an innocent purchaser who has acquired rights under a judgment apparently regular will be protected against a direct attack on the judgment. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

81. Failure to resort to other remedies.—Where court was in error in asserting jurisdiction of plaintiff's person on defendants' cross-bill for lack of service or appearance, error required correction by writ of error, and, in absence of showing plaintiff could not have procured relief thereby, separate suit in equity will not lie to set aside judgment. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

Failure to prosecute writ of error from judgment on cross-bill erroneous because court had no jurisdiction of his person, does not deprive plaintiff of his remedy by separate suit to vacate judgment, if there are sufficient grounds aside from errors which should have been corrected on writ of error. *Id.*

That defendant had the right to make motion for new trial or appeal from judgment did not preclude her from instituting separate action to set aside the judgment, where such motion or appeal would have brought up for review only irregularities, and would not have gone to the real merits of her case. *Knight v. Waggoner* (Civ. App.) 214 S. W. 690.

The dismissal of an appeal because notice of appeal was not given within time does not affect any rights which appellant may have to set aside the judgment in a direct suit for that purpose. *Sovereign Camp Woodmen of the World v. Shaddox* (Civ. App.) 217 S. W. 1094.

In a city's proceedings to condemn land, the infant owner, for lack of notice to her, was not required to request a new trial on the proceedings, petition and report of which were void, before suing to set aside judgment of condemnation. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

82. Laches.—A delay of four years in filing a bill making a direct attack on a default judgment rendered on an amended petition stating a new cause of action is not barred by laches if filed within one year after the judgment debtor first learned of the terms of the judgment. *Young v. City Nat. Bank* (Civ. App.) 223 S. W. 340.

83. Grounds for relief in general.—Where attorney purporting to act for party in arranging compromise judgment was not in fact the attorney for such person, and person for whom he purported to act was never served with citation, and never appeared, judgment against such party will be set aside, irrespective of fraud. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245.

That orders of court appointing receiver of estate of person of unsound mind were not entered of record upon minutes of court, as required by art. 4088, is sufficient to void judgment taken by receiver as such in case of direct attack on judgment. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

In view of arts. 1822, 1906, where defendants in an action on notes answered, and failed to raise the issue that the plaintiff bank was not duly incorporated, they could not raise such question by motion to set aside the judgment. *Sayles v. First State Bank & Trust Co. of Abilene* (Civ. App.) 199 S. W. 823.

Where defendant appeared and answered judgment against him will not be set aside because no citation was served upon him. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

A judgment cannot be set aside on ground that judgment debtor had good defense in original action, unless equitable excuse be shown for failure to assert such defense therein. *Id.*

Defenses which should have been presented in original action present no ground for setting judgment aside. *Id.*

In action to set aside judgment on note, judgment creditor's ownership thereof cannot be questioned without adequate excuse for failure to raise point in original action. *Id.*

In action by sureties to set aside judgment on attachment bond, their failure to know of alleged alteration in bond until after term of court had expired held not suffi-

cient excuse for failure to set up such defense in original action. *Knox v. Horne* (Civ. App.) 200 S. W. 259.

In suit to set aside judgment for want of service, where judgment and return showed service, facts constituting meritorious defense should have been alleged. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Where plaintiff's attorneys withdrew from case without notice when he was so ill he was forced to rely upon them, he was entitled to relief in equity against judgment on defendant's cross-action, which he had no opportunity to defend, and which it would be inequitable to allow to stand. *Elstun v. Scanlan* (Civ. App.) 202 S. W. 762.

In suit to vacate judgment against plaintiff on cross-action allegations, showing homestead character of premises involved, and that plaintiff's wife was not party to suit, state no grounds for relief, where it does not appear any defense to cross-action could have been based on ground of homestead. *Id.*

Where attorney for several plaintiffs abandoned one without her knowledge, she could not have the judgment set aside in equity after the expiration of the term of its rendition, if she had knowledge of the judgment before the expiration of such term, in the absence of fraud. *Durfee v. Crawford* (Civ. App.) 203 S. W. 426.

If defendant's attorney told plaintiffs suit on a note would be dismissed and no judgment taken, and defendant, without notice, regular trial, and jury, took judgment before cause of action was due, plaintiffs were entitled to equitable relief. *Wootton v. Jones* (Civ. App.) 204 S. W. 237.

A final judgment, in an action by a guardian ad litem, can be attacked by the infant's guardian only for fraud, accident, or mistake in an independent proceeding instituted for that purpose. *Jones v. Chronister Lumber Co.* (Civ. App.) 204 S. W. 704.

In equitable suits to reopen judgments for new trial, the complaining party must allege and show, not only a just defense, but that he was prevented from making it by some fraud, accident, or mistake, unmixed with negligence on his part. *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

Usury being a defense which must be specifically pleaded, such issue cannot be raised for the first time in a suit to set aside the judgment on a note asserted to be usurious. *Chandler v. Young* (Civ. App.) 216 S. W. 434.

One who sues to annul a judgment by agreement must not only establish its invalidity, but must also show that he will suffer some injury if the judgment is permitted to stand. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

An infant landowner had a right to show that judgment of condemnation in favor of a city was obtained without jurisdiction over her person for lack of personal service, but she was not required, in suing to set aside such judgment to ask that the city proceed again to condemn. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

A petition to set aside a judgment for recovery of land by vendor under his reserved title, which alleged that purchaser could sell the property for more than the vendor's lien, but stated no defense against liability on the note, presented no meritorious defense. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

In a suit against a husband and wife where the husband when served told the officer he would deliver the citation to his wife, the husband has no equity to attack the judgment for failure to serve wife. *Id.*

To entitle a party to set aside and vacate a judgment after the adjournment of the term, he must allege a meritorious defense to the original cause of action, and show that his failure to present the defense at the proper time was not due to lack of diligence. *Jones v. Wootton* (Com. App.) 228 S. W. 142.

That a judgment is erroneous as a matter of law is no ground for setting it aside on direct attack. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Where husband filed an answer in divorce action, and also an application for continuance, but failed to take any further steps to protect his interests, and the motion for continuance was overruled, and judgment in favor of the wife rendered in his absence, held that under the circumstances the judgment could not be set aside on the theory of mistake. *Id.*

In a husband's action to set aside a judgment of divorce held that his physical condition was not such an accident as prevented him from being in attendance; it appearing that his failure to attend court was due to his own negligence. *Id.*

Judgment rendered against defendants not served with process, though an attorney without authority appeared for them, can be vacated by direct proceeding. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

The court in vacation properly denied a motion to set aside a judgment for defendant on the ground that it was not binding on third persons whom plaintiff might properly have made parties where plaintiff did not show that he was deprived by fraud, accident, mistake, or other uncontrollable circumstances of the opportunity of properly presenting his cause. *Whiteman v. Whiteman* (Civ. App.) 232 S. W. 888.

84. **Fraud, perjury, or other misconduct.**—See *Watts v. Baker* (Civ. App.) 203 S. W. 623.

Insane person held entitled to have set aside judgment denying cancellation in suit by purported receiver of her estate to cancel her deed, it having been procured by fraud and collusion of purported receiver and her grantees. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

A party, prevented from making a valid defense by misrepresentations or fraud or misconduct of the opposite party, unmixed with negligence on his part, may have the

judgment vacated after term of court at which rendered. *Reed & Reed v. McKee* (Civ. App.) 204 S. W. 717.

District courts may grant relief against a judgment by re-examining the case on its merits, when it appears that the judgment has been obtained by fraud, mistake, or accident without any want of diligence on the part of the person against whom rendered. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 207 S. W. 580.

While a judgment will not be vacated after adjournment of the term to allow defendant to present a defense which might, in the exercise of diligence, have been urged at trial, this rule has no application where the complaining party has been prevented by fraud from presenting such defense. *Jones v. Wootton* (Com. App.) 228 S. W. 142.

Where plaintiff's counsel promised to advise defendant's attorney when a case was to be set, but failed and obtained judgment, such judgment may be vacated and enforcement enjoined on the ground of fraud. *Huddleston v. Texas Pipe Line Co.* (Civ. App.) 230 S. W. 250.

Judgments may be set aside, by direct suit brought for that purpose, upon proper showing of fraud, accident, or mistake. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

A judgment cannot be vacated for fraud when the particular question of fraud was in issue in the original proceedings. *Id.*

A judgment will not be set aside on direct suit, despite showing of fraud, accident or mistake, unless the party seeking relief can show that he was prevented from making a valid defense by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. *Id.*

In an action for divorce, where the husband was duly served, appeared, and filed answer, the action of the trial court in allowing plaintiff to amend so as to amplify the grounds of divorce held no fraud on the husband, who did not appear at the trial. *Id.*

Where the defendant husband wrote a letter to his wife, stating that it looked like the only way for her to get possession of her property was for her to file suit for divorce, and she shortly thereafter filed suit for divorce, held that he could not, being a participant, attack the judgment for fraud. *Id.*

As the fact of residence is jurisdictional and in a divorce action must be proved, a judgment cannot be vacated on the ground that plaintiff was guilty of fraud in establishing the allegations as to her residence, for that issue was adjudicated. *Id.*

85. **Evidence.**—In action to set aside compromise judgment for fraud and mistake, evidence held to show fraud and mistake. *Fidelity Lumber Co. v. Ewing* (Civ. App.) 201 S. W. 1163.

In action to set aside compromise judgment releasing plaintiff's warrantors from liability, evidence held to show amount of purchase price paid warrantors. *Id.*

In action to set aside compromise judgment as having been procured by fraudulent representations inducing purchase by defendants therein, evidence held to show that such defendants did not purchase a "chance of title." *Id.*

In an action to set aside a decree of mortgage foreclosure, evidence held sufficient to support a finding that mortgage indebtedness had been paid. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

In suit to set aside judgment entered on agreement of attorneys on the ground that the attorneys were unauthorized, evidence held to sustain the trial court's conclusion that cancellation of the judgment was not justified in view of absence of injury. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

Where, since rendition of judgment by agreement, the rights of innocent third parties have become involved, the courts will be more exacting as to the quantum of proof required before setting aside the judgment on the ground that the attorneys who made the agreement were unauthorized by plaintiffs. *Id.*

In suit to cancel a judgment and enjoin enforcement, a prima facie showing of a meritorious defense is sufficient. *Huddleston v. Texas Pipe Line Co.* (Civ. App.) 230 S. W. 250.

In an action to set aside judgment of divorce, evidence held not to show that plaintiff wife knew of defendant's lunacy at the time he was served with citation and filed his answer. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Recital in judgment against defendants of service on and appearance by them raises only a presumption of regularity, which can be removed in direct proceeding to set aside the judgment. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

85½. **Operation and effect.**—Where judgment has, at a succeeding term, been reopened and dismissed, it does not preclude a party defendant thereto from being a proper party defendant to another suit on the same cause. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

Even if judgment against an insane person in trespass to try title be opened, by direct proceeding, the defense of adverse possession cannot be aided by time elapsing after rendition of the judgment. *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

88. **Petition or bill of review.**—See notes to art. 2023.

89. **Hearing and determination.**—On petition to vacate judgment and enjoin enforcement, it is the court's duty to determine the rights of the parties to a judgment on the pleadings and evidence, and it is error to enjoin enforcement of the judgment without a hearing. *Reed & Reed v. McKee* (Civ. App.) 204 S. W. 717.

Art. 2020. [1371] [1369] Motion for new trial, etc., requisites of.

See *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 204 S. W. 1026.
Cited, *Petri v. First Nat. Bank of Fond du Lac*, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657.

Motion for new trial.—Under Rev. St. 1879, art. 1369, a motion without signature will not be considered on appeal, where there are no material errors in the record. *Smith v. Fordyce* (Sup.) 18 S. W. 663.

A motion for a new trial for newly discovered evidence, which failed to give the names of the witnesses by whom the alleged facts could be proved, and offered no proof that they would testify as claimed, was properly denied. *Neal Commission Co. v. Golston* (Civ. App.) 197 S. W. 1124.

A motion for a new trial for newly discovered evidence which failed to show any diligence to discover such evidence prior to trial was properly denied. *Id.*

The trial court held not to have abused his discretion in holding that the motion failed to show diligence. *Rooney v. Porch* (Civ. App.) 223 S. W. 245.

A statement in a motion for new trial that movants used diligence to secure alleged newly discovered and that it was not due to negligence or lack of diligence on the part of the plaintiffs that such evidence was not had, amounted to no more than legal conclusions, and was insufficient, it being necessary to state facts showing diligence. *Tomlinson v. Noel* (Civ. App.) 223 S. W. 1028.

One seeking to have a judgment set aside and a new trial granted must distinctly show, not only that he was prevented from presenting his defense at the proper time by some cause unmingled with negligence on his part, but that he has a good defense to the action brought against him, and his defense must be made to appear with such particularity that the court may know of what it consists. *McCasky v. McCall* (Civ. App.) 226 S. W. 432.

A motion for new trial after rendition of judgment on failure of defendant to appear, stating that the case was based on alleged fraudulent representations made by an agent, and that "such representations could not be binding, * * *" held not to show a good and meritorious defense; statements in reference thereto being mere legal conclusions. *Monarch Petroleum Co. v. Jones* (Civ. App.) 232 S. W. 1116.

— **Specification of errors.**—The grounds of error must be set out in the motion for a new trial, and must distinctly specify the error complained of. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

Where motion for new trial was filed May 1st, and overruled May 2d, and bills of exception was not filed until July 18th, reference in the motion to a bill of exception, without stating more, does not distinctly specify the error complained of. *Id.*

Where defendant desired to complain of the excessiveness of the judgment because of recovery on account of certain shipments, held that, under rules 24, 25, and 26 for Courts of Civil Appeals (142 S. W. xii), and rule 68 of the district courts (142 S. W. xxii), matter should be distinctly set out, and general assignment is not enough. *Quannah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

Under Rule 68 for district courts (142 S. W. xxii), the trial court was justified in disregarding a ground of a motion for a new trial asserting merely that the verdict was contrary to the evidence. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

— **Amended and supplemental motions.**—Refusal to permit amendment to amended motion for new trial on last day of term, and after a hearing had begun on the amended motion, was a proper exercise of court's discretion. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

— **Affidavits and other evidence.**—It is not error to refuse a motion for a new trial on the ground of newly discovered evidence when the motion is not supported even by an affidavit of the party applying. *Neal Commission Co. v. Golston* (Civ. App.) 197 S. W. 1124.

It was not an abuse of discretion to deny a new trial for newly discovered evidence on an affidavit that a witness admitted that he lied on the stand, where the witness denied the statement under oath. *Texas & N. O. R. Co. v. Glass* (Civ. App.) 201 S. W. 730.

A motion for new trial for newly discovered evidence should be accompanied by the affidavit of the witness. *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

Where motion for new trial for newly discovered evidence was unaccompanied by the affidavit of the witnesses, no diligence was shown, and the testimony was chiefly on the matter of the impeachment of the adverse party's testimony, such motion was properly denied. *Id.*

— **Opening default.**—This article, providing every motion for new trial shall be in writing and signed, and specify ground, is directory, and court had authority to set aside, on own motion, in term, default judgment in absence of written motion invoking relief. *Dorsey v. United Brotherhood of Friends* (Civ. App.) 202 S. W. 350.

A motion to vacate a default judgment regular on its face, on the ground that defendant had no notice of the date of trial and that such date had not been set nor posted, was insufficient, where it did not show defects, that the case was irregularly tried, nor that counsel had been misled. *Drinkard v. Jenkins* (Civ. App.) 207 S. W. 353.

A party seeking to set aside a default judgment must set out his defense with such particularity that the trial and appellate courts may know of what it consists. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

An allegation in a motion to set aside a default judgment in a water improvement district's suit for taxes that the moving party believed the assessment and levy illegal and exorbitant, without alleging facts showing that it was illegal or exorbitant, was insufficient to justify relief. *Id.*

A petition to vacate a default judgment which merely showed that defendant defaulted because he erroneously believed he could not be sued without joinder of another, and which did not state any defense, is insufficient. *Strickland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

Defendant cannot complain of refusal to set aside default without showing in his motion the judgment was not the result of a negligent failure on his part, and also that he had a meritorious defense to plaintiff's cause of action; the facts and not conclusions of defendant being stated. *Schultz v. Burk* (Civ. App.) 227 S. W. 700.

Motion of defendant to set aside default judgment held insufficient as not stating the facts on which his belief was based that the controversy between the parties would be settled out of court which led him to make default. *Id.*

Allegations, in defendant's motion to set aside default judgment against him, that he had a meritorious defense without stating the facts on which the defense rested, held merely statement of a conclusion. *Id.*

— **Affidavits and other evidence on application.**—Where default judgment was taken on notes, and defendants sought to set aside the default on the ground that plaintiff had violated an agreement whereby he was to be allowed to make a crop before making payment, it was proper for the court to hear evidence as to whether the agreement had terminated. *Winniford v. Lawther Grain Co.* (Civ. App.) 232 S. W. 853.

— **Hearing and determining and effect of granting relief.**—In lessor's action against lessee and assignee, where only relief sought against lessee was cancellation of the lease, and lessor failed to show any ground for cancellation as against assignee, court, in setting aside the default against the assignee, also properly opened it as against lessee. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

On motions to set aside default judgments, a court must determine from the proof whether or not the failure of defendant to appear is to be justified and excused, and from the allegations of the verified motion whether or not he has a meritorious defense. *Winniford v. Lawther Grain Co.* (Civ. App.) 232 S. W. 853.

The truth or falsity of a defense alleged in a motion to set aside a default judgment is not a proper subject of inquiry in passing upon the motion. *Id.*

Art. 2021. [1371] [1369] Misconduct of jury, etc., as ground of motion; evidence.

Disqualification of jury.—Having failed to challenge juror for interest in subject-matter, interveners could not first present question of ineligibility on motion for new trial. *Wise v. Johnson* (Civ. App.) 198 S. W. 977.

Where garnishment bond executed by juror as one of sureties was on file, interveners, contending they did not know fact juror was surety until after trial, must be held to have had constructive notice. *Id.*

In view of Const. art. 16, § 19, and Rev. St. 1911, arts. 5114, 5115, 5117, 5194, 5206, a juror under 21 years of age is incompetent and disqualified, the word "competent" in the statute meaning legally qualified, but such disqualification does not render the verdict void where the question was first raised on motion for new trial. *German v. Houston & T. C. R. Co.* (Civ. App.) 222 S. W. 662.

Misconduct of jury.—Though jury discussed matters outside the issues, held, that new trial was properly denied, where 10 of the 11 jurors had already agreed on a verdict, and the eleventh juror was not affected by such discussion. *Fritsche v. Niechoy* (Civ. App.) 197 S. W. 1017.

Act of juror during introduction of evidence in action to reprevin diamond in placing dampened paper over it, and calling attention of other jurors to fact that presence of flaw testified to by plaintiff was thereby made more apparent, did not evidence undue bias authorizing new trial. *Hall v. Collier* (Civ. App.) 200 S. W. 880.

On its appearing with reasonable certainty that jury has been guilty of misconduct affecting amount of verdict, new trial should be granted. *West Lumber Co. v. Tomme* (Civ. App.) 203 S. W. 784.

Trial courts should be liberal in granting new trial where misconduct of jury in discussing necessity of plaintiff's paying, from his verdict, a share thereof to his attorney, is clearly shown to have taken place and should not hold defendant to a too strict showing of injury. *Id.*

In suit to recover money paid for an automobile because not as warranted, juror's statements concerning his experiences with engine of similar make, etc., held to require new trial. *Manes v. J. I. Case Threshing Mach. Co.* (Civ. App.) 204 S. W. 235.

In an action for plaintiffs' ejection from defendant's train after being carried beyond destination, the jury's consideration of its foreman's map, statements based on his own knowledge held to constitute misconduct of jury warranting new trial. *German v. Houston & T. C. R. Co.* (Civ. App.) 222 S. W. 662.

It was misconduct for which defendant in a personal injury case should be granted a new trial that, not only matters of negligence, but items of damage not in evidence nor authorized by the charge, as hospital and doctor's charges and attorney's fees, were discussed by the jurors, and by part of them, considered in making up the amount of the verdict. *Crystal Palace Co. v. Roempke* (Civ. App.) 227 S. W. 230.

In suit to recover an amount paid under false representations for cancellation of an oil and gas lease, where the evidence raised the issues as to whether plaintiff lessor relied on return of the lease contract within 10 days, etc., the jury were at liberty to discuss them, and their doing so did not constitute misconduct, and the trial court properly refused to hear evidence in support of defendant's motion for new trial as to such discussions. *Ware v. Campbell* (Civ. App.) 229 S. W. 593.

Admissibility of evidence of misconduct or to impeach verdict.—Misconduct of jury as ground for new trial could not be proved by juror's affidavit; this article requiring testimony to be taken in open court. *Jones v. Wichita Valley Ry. Co.* (Civ. App.) 195

S. W. 890; *Morales v. Cline* (Civ. App.) 202 S. W. 754; *Hines v. Parry* (Civ. App.) 227 S. W. 339.

This article would not include reception of testimony to show that jurors did not understand the legal effect of their answers to special interrogatories. *Farrand v. Houston & T. C. R. Co.* (Civ. App.) 205 S. W. 845.

Verdict of a jury cannot be impeached on motion for new trial by affidavits of the jurors that there was a mistake entering into the verdict. *Ellerd v. Ferguson* (Civ. App.) 218 S. W. 605.

It is the province of the jury to find the facts, and they have no concern with the legal effect of their findings, and a new trial should not be granted under this article, on affidavit by the jurors that they did not understand the legal result of their verdict. *Id.*

In a suit to set aside a sheriff's sale under foreclosure of a vendor's lien, it being claimed that the purchaser had bid in the property pursuant to a conspiracy, findings of such a fraudulent conspiracy could not be impeached by testimony of jurors that they had so found in order to answer another issue as to whether defendant had agreed not to bid in the affirmative. *Jenkins v. Moore* (Civ. App.) 230 S. W. 886.

Sufficiency of proof.—Evidence held to show that the amount of the verdict was not influenced by consideration of attorney's fee. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539; *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 223 S. W. 637.

On motion for new trial, evidence held sufficient to show that jurors improperly discussed that plaintiff would have to pay large attorney fees, and that their verdict was influenced thereby. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

Testimony as to misconduct of the jury in considering what portion of recovery in personal injury action would go to plaintiff's attorneys held sufficient to show that new trial should have been granted. *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

Discretion of court and review.—See *Morales v. Cline* (Civ. App.) 202 S. W. 754; *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119; *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

Whether there has been misconduct of the jury is for the determination of the trial judge, whose discretion is ordinarily controlling in the absence of a showing of abuse. *Penelope Real Estate Co. v. Dawson* (Civ. App.) 206 S. W. 702; *Fritsche v. Niechoy* (Civ. App.) 197 S. W. 1017; *Missouri, K. & T. Ry. Co. of Texas v. R. G. Andrews Lumber Co.* (Com. App.) 206 S. W. 823; *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749; *Hines v. Parry* (Civ. App.) 227 S. W. 339.

On motion for new trial for misconduct of jurors in discussing that plaintiff's attorney would get large fee, held it was abuse of discretion of trial court to overrule motion. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004; *Louisiana Western R. Co. v. White* (Civ. App.) 202 S. W. 794.

Denial of new trial on ground that juror was influenced by statement of other juror concerning the facts and his expert knowledge held not an abuse of discretion. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

Refusal of new trial for juror's comment on character of witness held not abuse of discretion. *Jones v. Wichita Valley Ry. Co.* (Civ. App.) 195 S. W. 890.

Where undisputed evidence showed misconduct of jurors in reaching their verdict, trial court's refusal to grant new trial was abuse of discretion, reviewable on appeal. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

In a personal injury case, the fact that there was mention by several jurors of the fact that plaintiff would have to pay his attorneys a portion of any amount recovered is of itself insufficient to warrant reversal, unless it clearly appears that the trial court abused its discretion in denying new trial. *West Lumber Co. v. Tomme* (Civ. App.) 203 S. W. 784.

Denial of plaintiff's motion for new trial on account of misconduct of juror in talking with witness, who averred that a witness for plaintiff had lied, but whose statement did not go against plaintiff's substantive case, held not abuse of discretion reposed in court by this article. *Missouri, K. & T. Ry. Co. of Texas v. R. G. Andrews Lumber Co.* (Com. App.) 206 S. W. 823.

In action for personal injuries, it was not an abuse of discretion to refuse a new trial to plaintiff because statements were made in the jury room that plaintiff's witness had been guilty of stealing cotton, but escaped conviction, and that plaintiff had been convicted of ravishing a girl less than 15 years old. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

An appellate court will not review the trial court's action in denying a new trial, on account of the alleged misconduct of the jury, under this article, unless it appears that the rights of the parties have been disregarded, or unless the evidence left the question reasonably doubtful, considering the effect of the misconduct on the jury. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

In proceedings to condemn land and easement that a juror had stated during the jury deliberations that he had been authorized to offer for similarly situated land \$750 per acre, held not such misconduct that refusal of new trial therefor constituted abuse of discretion under this article. *Dallas Power & Light Co. v. Edwards* (Civ. App.) 216 S. W. 910.

In condemnation proceedings, refusal of new trial on the ground that a juror concealed upon examination his preconceived ideas as to the value of the land was not an abuse of discretion, where it appeared merely that such juror knew at the time that he

had been authorized by another party to pay \$750 per acre for land similarly situated. *Id.*

The discretion of the trial judge in refusing a new trial for misconduct of the jury in considering evidence of their foreman given while deliberating on verdict is subject to review upon appeal. *German v. Houston & T. C. Ry. Co.* (Civ. App.) 222 S. W. 662.

The statute vests discretion in the trial judge in the matter of granting new trial on account of a quotient verdict having been returned. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

Refusal of new trial for misconduct of juror in receiving information other than at the trial and talking about it to other jurors, held not an abuse of discretion, in view of his and their statements as to its failure to influence them, and the manner in which he voted before and after the information. *Hines v. Parry* (Civ. App.) 227 S. W. 339.

Where it did not affirmatively appear from the evidence that a suggestion made in the jury room during deliberation as to amount of verdict, that plaintiff's attorney was to receive one-half of the amount recovered, influenced the verdict, court's denial of new trial held not an abuse of discretion, under this article. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

While the discretion of a trial judge in refusing to set aside a verdict for improper conduct of a jury is not an arbitrary one, and is subject to review by the appellate courts, the action of the trial court will be reviewed only where there has been a clear abuse of discretion. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

Art. 2022. [1452] [1448] New trials granted where damages too small, etc.

Inadequacy or excessiveness.—Verdict for personal injuries held not excessive. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881; *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614; *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003; *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983; *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213; *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225; *Burnett v. Anderson* (Civ. App.) 207 S. W. 540; *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739; *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837; *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275; *Cohn v. Saenz* (Civ. App.) 211 S. W. 492; *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410; *Pollack v. Perry* (Civ. App.) 217 S. W. 967; *Lancaster v. Keebler* (Civ. App.) 217 S. W. 1117; *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534; *Southwestern Gas & Electric Co. v. Raines* (Civ. App.) 218 S. W. 545; *Hines v. Messer* (Civ. App.) 218 S. W. 611; *West Lumber Co. v. Powell* (Civ. App.) 221 S. W. 339; *Hines v. Parsons* (Civ. App.) 221 S. W. 1027; *Texas Power & Light Co. v. Martin* (Civ. App.) 226 S. W. 451; *Flores v. Garcia* (Civ. App.) 226 S. W. 743; *Lancaster v. Knighton* (Civ. App.) 230 S. W. 876; *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102; *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429; *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

In action for personal injuries, verdict held excessive. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 196 S. W. 230; *Santa Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164; *City of Polytechnic v. Redmon* (Civ. App.) 217 S. W. 730.

\$4,500 held not excessive damages to parent for loss of arm of 13 year old boy, where suit was not brought until child was 21. *Houston & T. C. Ry. Co. v. Lawrence* (Civ. App.) 197 S. W. 1020.

On evidence in a suit for damages for wrongful sequestration of personal property, judgment for plaintiff for \$419.70, in view of the restoration of the property to plaintiff, held grossly excessive. *Keppeler v. Kelly* (Civ. App.) 201 S. W. 447.

A verdict of \$2,750 held excessive, and reduced to \$1,800, where a Pullman porter was injured by being thrown from his car and shot by defendant's watchman. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

Where railroad's conductor slandered plaintiff by imputing to him theft of overcoat, verdict for plaintiff for \$500 against the railroad cannot be set aside as excessive. *Beaumont, S. L. & W. Ry. Co. v. Daniels* (Civ. App.) 204 S. W. 481.

A jury cannot arbitrarily set an amount in a verdict that is not sustained by the evidence. *Jeanes v. Blount* (Civ. App.) 206 S. W. 209.

In action against railroad for failure to seasonably deliver shipments to connecting carrier, held, that verdict awarding damages for particular shipments did not show passion or prejudice on part of jury. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

The imposition of heavy exemplary damages, where the actual damages recoverable were small, is a fact which ought to be looked to to determine whether passion rather than reason dictated the verdict. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

An award of \$400 actual damages and \$3,500 exemplary damages in favor of an employé whose discharge had been brought about by a loan broker, who, after being paid more than the principal of his loan, filed an assignment of wages, thus causing the employé's discharge, held, warranted, and not to have been dictated by passion or prejudice. *Id.*

In action for breach of marriage promise against a man worth \$35,000, who under promise of marriage had seduced plaintiff and was the father of her child, a verdict of \$9,000 was not excessive. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

In an action for fraudulent representations, which induced plaintiff to purchase and pay for corporate stock, evidence as to alleged fraud held insufficient to justify verdict for plaintiff for \$750. *Barthold v. Thomas* (Com. App.) 210 S. W. 506.

In an action against a railroad for damages arising from overflows on plaintiff's land and crops, evidence as to the damages to plaintiff's crops held insufficient to sustain an award for more than the sum of \$25. *Payne v. Cummins* (Civ. App.) 232 S. W. 1118.

Art. 2023. [1373] [1371] Time of making motion.

Cited, *Childs v. Mays*, 73 Tex. 76, 11 S. W. 154.

In general.—The making of a motion in arrest of judgment does not prevent a court entering judgment before passing upon the motion, there being nothing in this article to indicate that a motion in arrest of judgment has precedence over a motion for a new trial. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

Where suit was filed March 13, 1918, and plaintiff took default judgment in March, 1919, the denial of defendant's motion for new trial, filed 15 days after judgment by default was taken, held not reversible error. *Anderson v. Adams* (Civ. App.) 218 S. W. 552.

Discretion of court.—The court may, within its discretion, entertain a motion for new trial, filed after the expiration of the two days as provided in this article; but it is largely within the discretion of the court whether such a motion should be granted or not. *Dumas v. Easley* (Civ. App.) 219 S. W. 866.

Where more than 3 months intervened between trial and decision, failure to present evidence discovered after trial before decision was rendered, with motion to reopen the case, and failure to file motion for a new trial on that ground for several days after the decision was rendered, and until the last day of the term, shows such want of diligence that it was not an abuse of discretion to overrule the motion. *Smith v. Folmar* (Civ. App.) 224 S. W. 526.

Where a motion for new trial is not filed within two days after notice of rendition of judgment, on defendant's failure to appear, the granting of the motion rests largely within the discretion of the trial court, and the delay imposes on the moving party, not only the duty of showing some excuse for the failure to sooner move, but of showing that it has a meritorious defense. *Monarch Petroleum Co. v. Jones* (Civ. App.) 232 S. W. 1116.

Petition or bill of review.—One can obtain new trial by original proceeding after term of court has expired only by affirmatively alleging diligence to prevent judgment, or that defense in original action was prevented solely by fraud, accident, or opposing party's acts. *Knox v. Horne* (Civ. App.) 200 S. W. 259.

In bill of review, seeking a revision and cancellation of a judgment for personal injuries, held that issues presented had been decided in suit for damages. *Texas & P. Ry. Co. v. Duff* (Civ. App.) 207 S. W. 580.

A motion to vacate an order of dismissal for want of prosecution is in the nature of a bill in equity, and may be granted at a succeeding term, if plaintiff shows that he was not negligent and has a meritorious suit. *Hickman v. Swain* (Civ. App.) 210 S. W. 548.

A judgment of partition in favor of plaintiffs, in a suit in which two of the persons named as plaintiffs were dead, and a necessary party not joined, is at least voidable, and may be attacked for fraud and mistake at a subsequent term in a direct proceeding by a bill of review. *Farras v. Delgado* (Civ. App.) 210 S. W. 610.

Default judgment will not be set aside upon ground of insufficient service, in action brought after the term at which it was rendered, where defendant had such notice of the judgment entry that he could have moved to set the judgment aside at the term at which it was rendered. *Kimmell v. Edwards* (Civ. App.) 211 S. W. 284.

An independent suit for a new trial of a divorce suit is an appeal to the conscience of the court, and, where he hears the evidence and it does not appear that he abused his judicial discretion in refusing a new trial, the appellate court will not disturb the judgment. *Harris v. Harris* (Civ. App.) 230 S. W. 224.

In a suit in the nature of a bill of review to set aside a divorce judgment on the ground that plaintiff was in jail and did not know when the suit was to be tried, relief will not be granted unless a meritorious defense is presented and proved. *Id.*

Art. 2024. [1372] [1370] Not more than two new trials, except, etc.

In general.—In view of Const. art. 1, § 15, and this article, it is the province of the jury to determine the credibility of witnesses and the weight of testimony, and the court may not assume its functions by deciding that testimony is entitled to no credit because overborne by contradictory testimony, or that it is so contradictory to circumstances and proof as to be improbable. *Drew v. American Automobile Ins. Co.* (Civ. App.) 207 S. W. 547.

Art. 2025. [1374] [1372] Determined when.

Cited, *Childs v. Mays*, 73 Tex. 76, 11 S. W. 154.

Time for hearing and decision in general.—The district courts have statutory power to grant new trials or arrest judgments during term, or until final adjournment have control of all judgments. *Liz Mar Plantation Co. v. Whitfill* (Civ. App.) 224 S. W. 1118.

Motion for new trial was discharged by operation of law when the term at which the judgment was rendered ended, and the act of the trial court in continuing the mo-

tion to the next term was unauthorized and void. *White v. Day* (Civ. App.) 230 S. W. 843.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2025, court is without authority to determine a motion for new trial at a term subsequent to that during which motion is made. *Southern Surety Co. v. Brown* (Civ. App.) 231 S. W. 144.

Rehearing.—The granting of a new trial cannot be called in review at a subsequent term upon a pleading in the form of a plea in abatement, where judgment was entered at the former trial but was set aside during the term. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

Art. 2026. [1375] [1373] Bill of review in suits by publication.

Cited, *Powell v. Heckerman*, 6 Civ. App. 304, 25 S. W. 166.

Parties.—Under this article a bill of review to amount to a new trial must be filed by those authorized so to do. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Art. 2029. [1378] [1376] Sale under such execution not avoided, but, etc.

Cited, *Powell v. Heckerman*, 6 Civ. App. 304, 25 S. W. 166.

CHAPTER EIGHTEEN

COSTS AND SECURITY THEREFOR

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| <p>Art.
2030. Who responsible for costs.
2031. Each party liable for costs incurred by him.
2032. Officers may demand payment of, to adjournment of each term.
2033. May put bill of costs with officer for collection, when; same has force of execution; appeal not to prevent execution for costs.
2035. Successful party to recover.</p> | <p>Art.
2037. Fees of only two witnesses to any fact.
2042. Where demand reduced by payment, etc.
2046. On appeals and certiorari.
2048. Court may otherwise adjudge costs.
2050. Who may require security.
2051. Judgment on cost bond.
2052. Affidavit of inability to give cost bond.
2054. No security to be required of whom.</p> |
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Article 2030. [1421] [1420] Each party responsible to officers for his own costs.

See *Extence v. Stewart* (Civ. App.) 23 S. W. 295; notes to art. 2033; *Walker v. Hopping* (Civ. App.) 226 S. W. 146; notes to art. 2046.

Parties liable—Primary liability.—Under *Rev. St. 1879*, arts. 1420, 1420a, no injunction to restrain a district clerk from collecting appeal costs can be sustained, as appellant is primarily liable for the costs, though successful on his appeal. *Moore v. Moore* (Sup.) 8 S. W. 28.

Art. 2031. [2491] [2427] Each party liable for costs incurred by him.

In general.—Costs of an unsuccessful claimant in garnishment should not be adjudged against plaintiff in garnishment, though he is unsuccessful because of the claim of another under this article. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

Art. 2032. [1422] [1420a] Officers may demand payment of costs up to adjournment of each term.

See *Moore v. Moore* (Sup.) 8 S. W. 28, notes to art. 2030; *Extence v. Stewart* (Civ. App.) 23 S. W. 295, notes to art. 2033.

Art. 2033. [1423] [1420b] May put bill of costs in hands of officer for collection, when. Same to have force of execution. Appeal not to prevent issuance of execution for costs.

Execution, issuance of.—Under *Rev. St. 1879*, arts. 1420, and 1420b, after an appeal bond has been filed, execution for costs against appellant can be issued only for such costs as appellant has incurred. *Extence v. Stewart* (Civ. App.) 23 S. W. 295.

Art. 2035. [1425] [1421] Successful party to recover of his adversary.

See *Denson v. McCasland*, 2 Civ. App. 184, 21 S. W. 169; notes to art. 2042.

2. **Persons entitled to costs.**—Under Rev. St. 1879, plaintiffs are entitled to costs on a judgment in their favor in a suit on a dormant judgment and for the costs of the original suit; but, even if they were not, that objection is unavallable, when raised for the first time on appeal. *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539.

Plaintiff in an action on notes providing for attorney's fees is not entitled to costs; the action being prematurely brought, and defendant having made tender when notes were due. *Brooks v. Long* (Civ. App.) 199 S. W. 510.

Where judgment was in favor of one of the defendants, though against the other, plaintiff was not entitled as against the unsuccessful defendant to costs for making the successful defendant a party. *Angelina County Lumber Co. v. Mast* (Civ. App.) 208 S. W. 360.

Where an account is assigned pending action thereon, and assignee is permitted to intervene and prosecute the suit, the assignee upon recovering judgment is entitled to costs. *Yerby v. Heineken & Vogelsang* (Civ. App.) 209 S. W. 835.

Where probate of a will offered by appellant was denied, as was probate of an earlier alleged will offered by a contestant, held that, where all of the costs were taxed against appellant, it will be presumed on appeal, that contestant was the successful party, and under this article, entitled to recover all her costs. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Under this article, the successful party shall recover all costs incurred, and plaintiffs were successful parties though they did not recover on every count, but only on some. *Veltmann v. Slator* (Civ. App.) 219 S. W. 530.

In an action for debt and to foreclose a deed of trust lien on real estate, where plaintiff obtained judgment for the debt, he was entitled to costs, notwithstanding that third persons recovered the property. *Lemm v. Kramer* (Civ. App.) 224 S. W. 560.

4. **Persons and funds liable for costs in general.**—Cost should not be adjudged against unnecessary defendants in trespass to try title, who promptly disclaim; nor should costs incurred in improperly making such parties defendants be adjudged against the other defendants. *Johnson v. First Nat. Bank* (Civ. App.) 198 S. W. 990.

Where vendor owned five lots, four of which were subject to trust deed, and he sold the fifth lot and three others on consideration that the vendee discharge the trust deeds on all of them, and she failed to do so, all costs should be awarded against her in the foreclosure suit. *Nix v. Albert Pick & Co.* (Civ. App.) 203 S. W. 1112.

In action against county where different officers were made defendants, it was error to tax against the county costs incident to making defendants other than the county parties to the action. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

All costs incurred by reason of receivership of a corporation, including the receiver's salary, are taxable against the plaintiff and his sureties where the receivership was improperly granted. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

Where executor appointed temporary administrator, under art. 3302, intervened in will contest, though the order appointing him did not authorize him to do so, costs were properly taxed against him individually, and not against estate. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

A county which improperly is allowed to make itself party to a suit, which merely involves the question of land being plaintiffs' private property or a city street, should be charged only with costs incurred by making itself a party and prosecuting its claim, and the balance of the costs should be adjudged against plaintiffs unsuccessful on their claim. *Feris v. Bassett* (Civ. App.) 227 S. W. 233.

9. — **Quo warranto.**—In quo warranto, the costs will be taxed against the relator, where judgment was rendered against him on his claim for the salary, fees, and emoluments of the office and the suit for the office is dismissed because the term has expired. *Griffith v. State* (Civ. App.) 226 S. W. 423.

13. **Tender.**—Where plaintiff, suing on an insurance policy, made no prayer for recovery of the lesser amount for which defendant admitted liability and when it was tendered by the company it was refused by her, costs should be adjudged against her. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

Where amount of judgment was not tendered by answer, it was not error for court to tax costs against defendant, though record showed defendant was ready at all times to pay such amount; the filing of the suit being a sufficient demand therefor. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

In action on purchase-money notes and to foreclose vendor's lien, the court on finding that plaintiffs had tendered the amount due before commencement of suit, properly taxed the costs against the plaintiffs and refused to allow plaintiffs attorney's fees. *Easley v. Easley* (Civ. App.) 229 S. W. 343.

15. **Attorney's fees as costs.**—A litigant is not liable to his adversary for any sum expended by the latter as attorney's fees apart from exceptions made by the Legislature. *American Nat. Ins. Co. v. Turner* (Civ. App.) 226 S. W. 487.

16. **Guardians ad litem, fees of, as costs.**—See *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184; notes to art. 2048.

Under art. 1942, authorizing the appointment of a guardian ad litem, the fee allowed such guardian should be taxed as costs against the losing party. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

18. **Stenographer's fees.**—See *Brod v. Luce* (Civ. App.) 225 S. W. 553; notes to art. 2048.

19. **Witnesses' fees.**—It is only when a witness appears in obedience to an authorized subpoena entitling him to the statutory compensation that his fees may be finally taxed against the party cast in the suit. *Fidelity & Deposit Co. of Maryland v. Scott* (Civ. App.) 211 S. W. 245.

24. **Discretion and review.**—In an action by several against a brother to set aside a deed executed by a parent to the defendant, wherein children of a deceased plaintiff were impleaded by defendant and judgment was in favor of plaintiffs, a decision of the appellate court reversing the judgment and rendering one for defendant was not erroneous because upsetting an order of the trial court taxing defendant with an item allowed guardian ad litem of children as attorney's fees. *Rogers v. Rogers* (Civ. App.) 230 S. W. 489.

Art. 2037. [1427] [1423] Fees of only two witnesses to any fact.

Application.—Rev. St. 1879, art. 1423, does not apply to criminal cases. *Tracy v. State* (Cr. App.) 24 S. W. 897.

Art. 2042. [1432] [1428] Where demand reduced by payments, etc.

Reduction by set-off.—Under Rev. St. 1879, arts. 1421, 1428, and 1434, where plaintiff's claim was reduced to an amount not within the jurisdiction of the court by counterclaim, and not by payment, and the court, without stating any reason, adjudged the costs against him, the Court of Civil Appeals will reverse the judgment, and allow plaintiff his costs. *Denson v. McCasland*, 2 Civ. App. 184, 21 S. W. 169.

Art. 2046. [1436] [1432] On appeal and certiorari.

Costs on appeal or writ of error in general.—Where plaintiff obtained judgment in the justice court and again upon certiorari, but the defendant obtained judgment on a counterclaim not given him below, it was not error to assess the costs in county court to plaintiff under this article. *Nations v. Williams* (Civ. App.) 203 S. W. 1176.

Where one contesting the probate of a will offered for probate another alleged will, and probate thereof was denied, held that, where such contestant also appealed, as did the original proponent, and all records were consolidated, all costs incurred by such contestant, who failed to maintain her contention on appeal, must be taxed against her. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

In negligence action against railroad and receiver, where court, on appeal from judgment for plaintiffs, dismisses action as to railroad on ground that it was not a necessary or proper party, the costs incurred by the railroad will be taxed against plaintiffs, though judgment is affirmed as to receiver. *Schaff v. Mason* (Civ. App.) 222 S. W. 288.

Generally, appellate court in dismissing appeal on ground that the subject-matter has ceased to exist will adjudge costs against appellant. *Koy v. Schneider* (Civ. App.) 225 S. W. 188.

The court on dismissal of appeal following receipt of Supreme Court's answer to certified questions, on ground that subject-matter has ceased to exist, will tax costs against appellee, where answer to certified questions showed that judgment of lower court should have been for appellant. *Id.*

Where, pending a motion for a rehearing on appeal from an injunction to restrain the party committee from entertaining a contest of the primary election, the general election was held, the case has become moot and will be dismissed; each party under art. 2030, paying the costs incurred by him. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Amount of recovery as affecting right to costs.—Under Rev. St. 1879, art. 1432, the interest pending the appeal should not be counted, in determining the amount of judgment, to ascertain the liability for costs. *Galveston, H. & S. A. Ry. Co. v. Weimers*, 74 Tex. 564, 12 S. W. 281.

Under Rev. St. 1879, art. 1432, it is error to tax the costs of appeal against a defendant who has obtained a smaller verdict thereby, although the record contains sworn statements of the jurors that they intended to give a larger verdict. *Rogers v. Fox* (App.) 16 S. W. 781.

Where on appeal judgment had been reduced, it was error to tax costs against appellant. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

Where plaintiff recovered judgment in the justice's court, and upon appeal to the county court again recovered judgment, but for a lesser sum, the costs in the county court should be assessed against the plaintiff. *St. Louis, B. & M. Ry. Co. v. Sutherland* (Civ. App.) 207 S. W. 982.

Where amount of recovery by appellee in trial court has been reduced in Court of Civil Appeals, costs of appeal will be taxed against appellee. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

Where insurer, without appealing from award of Industrial Accident Board, refused to make payment of the weekly amounts as they became due, and upon employe's action on award it sought to have award set aside, appellate court, on insurer's appeal, properly adjudged costs against insurer, though it reduced judgment, notwithstanding

this article; the court, under the circumstances, having "geod cause" to "adjudge the costs otherwise" under art. 2048. *Southern Surety Co. v. Lucero* (Civ. App.) 218 S. W. 68.

Where judgment is reformed on appeal so as to draw the statutory rate of 6 per cent. instead of 10 per cent. interest as rendered by lower court, costs of appeal will be taxed against appellees. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

Reversal as affecting costs.—No costs of the appeal should be taxed against an appellee, where the case has been reversed for error in admitting testimony not offered by her. *Reese v. Hamlett* (Civ. App.) 223 S. W. 346.

Acts or omissions of parties affecting right.—Correction of judgment with respect to amount of interest allowed would not prevent taxing of costs of appeal against appellant who failed to seek correction in trial court. *San Antonio & A. P. Ry. Co. v. Sutherland* (Civ. App.) 199 S. W. 521.

Where a judgment was too large by reason of error in calculation, the appellate court, though it reduces the judgment, will not relieve appellants of the payment of the costs in the appellate court, where such error in calculation was raised for the first time on appeal. *Koger v. Clark* (Civ. App.) 216 S. W. 434.

Where the fact that the judgment did not conform to the verdict was not called to the attention of the trial judge, and a party appeals, assigning such matter as error, and the judgment is corrected upon appeal, costs of appeal will be taxed against the appellant. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647.

A judgment will be reversed at the cost of appellant where the errors were not called to the court's attention by motion to correct or otherwise, and would have been corrected if timely requested, and there is no objection to the correction. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Where judgment was rendered against both the Director General of Railroads and the railroad, and the trial court's attention was not called to error, on reversal as to the railroad the entire costs of the appeal should be adjudged against the appellants. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

Apportionment of costs.—Under Rev. St. 1879, arts. 1432 and 1434, it is not a good reason for dividing costs, where the judgment was reduced over half on appeal, that defendant failed to make any defense in the justice's court. *Gulf, C. & S. F. Ry. Co. v. Kluge* (App.) 17 S. W. 944.

Expenses of record.—Where statement of facts is prepared by trial court pursuant to art. 2069, parties having failed to agree, there can be no charge against either party for such statement taxed as costs. *Dugan v. Smith* (Civ. App.) 200 S. W. 548.

Under Acts 32d Leg. c. 119, §§ 5, 6 (arts. 1924, 2070), where narrative form of testimony was transcribed by stenographer on request of appellant his fee is not taxable as cost of appeal. *Schallert v. Boggs* (Civ. App.) 210 S. W. 601.

Where plaintiffs in error did not object to exhibits attached to the answer, and did not ask to have exhibits detached in the trial court, but signed agreement that exhibits should be copied in transcript, they were not entitled to have cost of copying them charged against the defendants in error, on court affirming judgment. *Ben C. Jones & Co. v. State Printing Co.* (Civ. App.) 228 S. W. 619.

Taxation of costs on appeal or error.—Where a cause is reversed and remanded, a motion filed at a subsequent term to retax the costs so as to include an item representing stenographic fees in preparing a statement of facts will be overruled, where such item was not taxed in the district court and was not included in the bill of costs in the transcript, mandate having issued and been filed below prior to the making of the motion, although the error was not discovered until after the adjournment of the appellate court. *Brady v. Cobbs & Bonner* (Civ. App.) 216 S. W. 420.

Art. 2048. [1438] [1434] Court may otherwise adjudge costs.

Power of court in general.—See *Denson v. McCasland*, 2 Civ. App. 184, 21 S. W. 169; notes to art. 2042.

On appeal, see *Southern Surety Co. v. Lucero* (Civ. App.) 218 S. W. 68; notes to art. 2046.

In action on a fire insurance policy, underwritten by numerous parties, some of whom were not served, costs incurred in attempting to serve such parties were improperly taxed to defendant, although plaintiff prevailed in the suit, since they were not necessary parties. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

Where tenant, suing subtenant, to recover possession, had no cause of action when his suit was filed, but could only recover on theory of renewal of original lease after commencement of action, which was set up in his amended pleadings, it was not error for court to tax costs to him. *Adams v. Van Mourick* (Civ. App.) 206 S. W. 721.

Though fee of guardian ad litem is, under art. 1942, taxable as costs, and though the infants were the successful parties, and article 2035 declares such parties shall recover all the costs incurred, "except where it is * * * otherwise provided by law," yet under art. 2048, judgment charging the fee on the lands recovered for the infants is not void, and this though the "good cause" be not stated on the record; this being at most but an irregular exercise of the court's power. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

Under arts. 1932, 2035, 2048, the trial court is authorized to adjudge costs of the stenographer against the successful party, as where the stenographer was demanded by a defendant as to whom plaintiff admitted he had no case, though it be conceded that plaintiff is the successful party. *Brod v. Luce* (Civ. App.) 225 S. W. 553.

Apportionment of costs.—On appeal, see *Gulf, C. & S. F. Ry. Co. v. Kluge* (App.) 17 S. W. 944; notes to art. 2046.

In trespass to try title, where neither party was entirely successful, each recovering some land claimed by the other, costs were properly divided. *Brooks v. Slaughter* (Civ. App.) 232 S. W. 856.

Art. 2050. [1440] [1436] Defendant or any officer may require security.

Dismissal for failure to give security.—Where an action in trespass to try title was dismissed for plaintiff's failure to file a cost bond, the court is without jurisdiction to reinstate the same at a subsequent term. *Osborne v. Younger* (Civ. App.) 218 S. W. 1089.

Art. 2051. [1441] [1437] Judgment on cost bond.

Sufficiency of judgment.—Under this article, the justice court final judgment must expressly recite the liability of the sureties on the bond given for costs, in order to support an execution thereon against the property of the sureties; a suit on the bond being otherwise the proper remedy. *Ramsel v. Miller* (Civ. App.) 292 S. W. 1050.

Art. 2052. [1442] [1438] Affidavit of inability to give.

Cited, *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794.

Proper party to affidavit.—Under Rev. St. 1879, art. 1438, a husband who joins in a suit with his wife for the purpose of prosecuting her rights is the proper party to execute the bond for costs, and an affidavit in forma pauperis, made by the wife alone, is insufficient. *Crocket v. Maxey* (App.) 18 S. W. 138.

Art. 2054. [1443] [1439] No security to be required of executors, etc.

Cited, *Linch v. Broad*, 70 Tex. 92, 6 S. W. 751.

DECISIONS RELATING TO SUBJECT IN GENERAL

Objections to allowance for review on appeal.—Where taxing of certain costs was never passed upon by trial court except by overruling a motion for new trial, the question is not presented for review, especially when court's invitation to present motion for retaxing costs was ignored. *George v. Thompson* (Civ. App.) 211 S. W. 835.

Motion to retax costs below is not necessary to allow complaint on appeal of error in the judgment of the court below in adjudging costs. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 835.

Payment of costs from proceeds of sale.—In suit to foreclose vendor's lien, in which no apportionment of the costs between defendants was made by the decree, it was the right of purchaser who had not assumed lien to have the costs satisfied out of the proceeds of the sale before applying such proceeds to paying the lien, and the decree, being ambiguous in this respect, would be interpreted to accord such right. *Gough v. Jones* (Com. App.) 212 S. W. 943.

CHAPTER NINETEEN

BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS

<p>Art. 2058. Exceptions to rulings taken, when. 2059. Requisites of bill of exceptions. 2060. May refer to statement of facts. 2061. Charges regarded as approved unless excepted to. 2062. No bill of exceptions where ruling appears of record. 2063. Bill to be presented to the judge. 2064. Submitted to opposing counsel, etc. 2065. If found incorrect. 2066. On disagreement, judge to make out bill, etc. 2067. Bystanders' bill, how obtained. 2068. Statement of facts, how prepared. 2069. When the parties disagree.</p>	<p>Art. 2070. Statement of facts prepared from transcript of official shorthand reporter, when and how, etc.; in duplicate; original sent up; reporter to prepare on request, etc., fees. 2071. [Superseded.] 2073. Time for preparing and filing statements of facts and bills of exceptions; judge may extend, provided, etc. 2074. Statement of facts not filed in time, when considered by court. 2075. Time for judge to file conclusions, etc. 2076. Where term of office expires before adjournment, etc.</p>
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Article 2058. [1360] [1358] Exception to rulings taken, when.

Cited, Powers v. State, 23 Tex. App. 42, 5 S. W. 153.

1. **Reservation of exceptions.**—See Gulf, C. & S. F. Ry. Co. v. Lockhart (App.) 13 S. W. 649; Smith v. Houston Nat. Exch. Bank (Civ. App.) 202 S. W. 181; See, also, particular subjects, such as Pleading, Evidence, etc.

Exceptions not acted upon by the trial court will, on appeal, be treated as waived, in the absence of any showing that the trial court's action was invoked. Hadnot v. Hicks (Civ. App.) 198 S. W. 359.

Assignments of error, no exceptions having been reserved, may not be reviewed. Southwestern Gas & Electric Co. v. Cobb (Civ. App.) 200 S. W. 1116.

3. **Office of bill of exceptions.**—A bill of exceptions is not the proper way to bring up for review the action of the court on a motion for new trial. Rhoades v. El Paso & S. W. Ry. Co. (Civ. App.) 230 S. W. 481.

4. **Necessity of bill of exceptions, statement of facts, or conclusions of law and facts.**—In the absence of a statement of facts or findings of fact by the court, or a proper bill of exceptions showing the assertions made, a judgment must be taken on appeal as proved. Nease v. Broadwater Mercantile Co. (Civ. App.) 206 S. W. 692.

5. — **Bill of exceptions or statement of facts.**—There being no statement of facts, bill of exception, or assignment of error in the record, judgment will be affirmed, where no fundamental error is disclosed. Ogg v. Loyd (Civ. App.) 207 S. W. 553.

Where the jury's findings showed that one who had celebrated an invalid ceremonial marriage with deceased received more in rents out of his personal property than she had paid in securing title to certain lands in which she was given no share, held, that final decree of partition did not disclose fundamental error in her favor, reviewable in absence of bill of exceptions and statement of facts. Cunningham v. Cunningham (Civ. App.) 210 S. W. 242.

6. — **Bill of exceptions.**—Where there are no proper bills of exception and no fundamental error apparent of record, the judgment will be affirmed without consideration of merits. C. R. C. Law List Co. v. Rowe (Civ. App.) 204 S. W. 781.

The assignments of error in a criminal prosecution should be brought up by bills of exception, verified by the trial court or proved up by bystanders, in view of this article, and Code Cr. Proc. art. 744. Perez v. State, 84 Cr. R. 184, 206 S. W. 192.

Where all bills of exception and assignments of error were stricken from the record, and there was no fundamental error apparent in the pleadings, charge, or judgment, the judgment must be affirmed. Gulf Refining Co. v. Nelson (Civ. App.) 227 S. W. 549.

9. **Decisions not reviewable without bill of exceptions.**—In general.—Assignments of error not supported by bills of exception will be overruled. Walker v. Kellar (Civ. App.) 218 S. W. 792; Zeiger v. Woodson (Civ. App.) 202 S. W. 164.

No bill of exceptions is necessary to preserve the question of the illegality of the election of a special judge to try certain cases. Texas & Pacific Coal Co. v. Ready (Civ. App.) 198 S. W. 1034.

Assignments of error, failing to show that they are predicated on any bill of exceptions or that any exception was taken to the ruling complained of, will not be considered. Sullivan v. Masterson (Civ. App.) 201 S. W. 194.

To review the court's action in refusing landlord's motion requesting the court to construe the lease, it was necessary to reserve the usual bill of exceptions. Evans v. Caldwell (Civ. App.) 219 S. W. 512.

Assignments of error, based on bill of exceptions, stricken because filed after expiration of period granted for the filing thereof, will not be considered. Robertson v. Lee (Civ. App.) 230 S. W. 730.

10. — **Refusal to remove to federal court.**—Under arts. 1902, 1909, 1910, and in view of rule 7 for district and county courts (142 S. W. xvii), defendant waived its plea of privilege to be sued in the federal court, where no bill of exception preserving overruling of such plea was reserved, and final judgment to which exceptions were reserved purported to overrule plea. Houston & T. C. R. Co. v. City of Ennis (Civ. App.) 201 S. W. 256.

11. — **Rulings as to pleadings.**—Where petition showed cause of action for amount within jurisdiction of court, and where judgment was for an amount within the court's jurisdiction, failure to sustain plea to jurisdiction held not error, in the absence of a statement of facts and bills of exceptions. Mach v. Wofford (Civ. App.) 228 S. W. 275.

12. — **Ruling on plea of privilege.**—Although the effect of sustaining a plea of privilege is to change the venue, pleas of privilege are not included within district and county courts rule 55 (142 S. W. xxi), providing for bills of exceptions to review rulings on change of venue. Valdespino v. Dorrance & Co. (Civ. App.) 207 S. W. 649.

If judgment showing action of court in overruling plea of privilege is in the record, formal bill of exceptions is unnecessary. St. Louis, B. & M. Ry. Co. v. Webber, 109 Tex. 383, 210 S. W. 677.

14. — **Interlocutory proceedings.**—Where motion to strike bills of exceptions covering refusal to compel appellee to submit to examination by physicians was sustained as filed too late, assignments presenting rulings with reference to such request will not be considered. Texas & P. Ry. Co. v. Duff (Civ. App.) 195 S. W. 1169.

Though petition for partition alleged that one defendant was a minor without legal guardian, held that, though the record showed no appointment of a guardian ad litem, etc., no fundamental error appeared, reviewable in absence of bill of exceptions and statement of facts. Cunningham v. Cunningham (Civ. App.) 210 S. W. 242.

If an objection to the consideration of an assignment of error to proceedings on motion for examination of injured plaintiff that there was no bill of exceptions as required by court rules 53, 54, and 55 for district and county courts (142 S. W. xxi) had been presented at the proper time, the court would have been bound to sustain it. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

15. — **Denial of continuance.**—The action of the trial judge in overruling defendant's motion for a continuance cannot be reviewed, where no bill of exceptions was reserved thereto. *Stephenson v. Arceneaux* (Civ. App.) 227 S. W. 729; *Moore v. Denman* (Civ. App.) 199 S. W. 1175; *Ayo v. Robertson* (Civ. App.) 207 S. W. 979; *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247; *Parker v. Harrell* (Civ. App.) 212 S. W. 542; *Hardin v. Hanson* (Civ. App.) 220 S. W. 368.

Refusal of application for continuance cannot be reviewed unless exceptions are duly reserved and presented in bill of exceptions filed within time. *Cottonniere v. White, Jackson & Co.* (Civ. App.) 200 S. W. 906.

An assignment of error to the overruling of a motion for continuance cannot be considered, where there is no bill of exceptions to the action of the court, though the judgment recites that the motion was presented and overruled, and that appellant duly excepted. *Anderson v. Rich* (Civ. App.) 223 S. W. 540.

18. — **Conduct of trial.**—Where there was no bill of exceptions, and no evidence was introduced, and statement of facts did not show that affidavits had been introduced to show that the jury took evidence into the jury room, such matter cannot be reviewed under art. 2021. *Morales v. Cline* (Civ. App.) 202 S. W. 754.

Where there was no bill of exception to alleged misconduct of counsel in argument, an assignment of error asserting prejudice resulting from such misconduct must be overruled. *Du Bois v. Tyler* (Civ. App.) 219 S. W. 211.

19. — **Rulings on evidence.**—An assignment of error based upon the introduction of evidence cannot be considered when not supported by a bill of exceptions. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535; *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203; *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005; *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951; *Carwile v. Frazier* (Civ. App.) 209 S. W. 781; *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

That one may complain on appeal of introduction of improper evidence, he must have objected to it at the time, and preserved the objection by bill of exceptions. *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191.

An assignment against the overruling of a motion to strike out certain evidence will not be reviewed where the record shows no bill of exceptions to such action. *Stephens v. Miller* (Civ. App.) 202 S. W. 1051.

Where the action of the court in overruling a motion to strike out evidence is not evidenced in the record by any bill of exceptions, the question cannot be reviewed. *Gilroy v. Rowley* (Civ. App.) 210 S. W. 623.

Even if an objection was made to testimony when offered, it was waived by failure to reserve bill of exceptions. *Evans v. Caldwell* (Civ. App.) 219 S. W. 512.

Assignment complaining that the court required defendant to answer question cannot be reviewed, where there was no bill of exception or statement of facts showing any objection by defendants. *W. J. & F. J. Powers v. James* (Civ. App.) 220 S. W. 382.

In an action against a carrier for injuries to live stock, it cannot be said that it was error to offer expense bills in evidence, where the bill of exceptions does not show that the contents of such papers were ever known to the jury. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

21. — **Submission of issues.**—Refusal to submit special issues cannot be reviewed without a bill of exceptions under arts. 2061, 2062, article 2053 being controlling. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

22. — **Instructions.**—Rulings upon special instructions cannot be reviewed, where the exceptions thereto are not supported by a formal bill of exceptions as required by the statute in force at the time of the trial. *Handly v. Adams* (Civ. App.) 195 S. W. 888; *Miller v. P. W. Ezell Mercantile Co.* (Civ. App.) 201 S. W. 734.

Assignments of error based on refusal of special charges or on giving of instructions will not be considered, where there is no bill of exceptions reserved to any of such errors as specifically required by art. 2061. *Couch v. Biggers* (Civ. App.) 198 S. W. 1101.

Reservation and seasonable filing of bills of exceptions is necessary under Acts 33d Leg. c. 59, for review of rulings in giving special requested charges. *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203.

Objections to paragraphs of general charge, if shown by record to have been presented to trial court before giving of charge, are sufficient, without formal bills of exception, for review. *Id.*

Where there is no bill of exceptions, an assignment that the court gave a verbal instruction cannot be considered, although it was assigned in the motion for a new trial. *Morales v. Cline* (Civ. App.) 202 S. W. 754.

Where the record shows that appellants objected to the court's charge, and the authentication of the judge shows that these objections were presented and overruled, and that appellants excepted to the action of the court before the charge was read to the jury, an assignment is sufficient, although the formal bill of exceptions was stricken out by order of this court. *Thomas v. Derrick* (Civ. App.) 207 S. W. 140.

To have a peremptory instruction reviewed, the giving of the instruction must be excepted to at the time and before it is given to the jury, and unless a bill of exceptions is reserved the giving of the instruction cannot be reviewed. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

The giving of a peremptory instruction does not raise the question of fundamental error to be reviewed by the court in the absence of bill of exceptions attacking the giving of such instruction. *Id.*

Where proper bill of exceptions was not taken to the manner and form of court's charge to the jury, an assignment on the charge cannot be considered on appeal. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

An assignment that the court erred in refusing to give additional instructions, which the jury asked for in writing, cannot be considered on appeal, where there is no bill of exception in the record bringing up the matter. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

23. — **Verdict or findings.**—There being no statement of facts with record, or bills of exceptions therein, assignments complaining of findings of fact of trial court, or refusal to find facts requested, will not be considered. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Where the judgment itself shows that appellants duly excepted to the action of the court in rendering judgment against them, they are entitled to have the trial judge's findings of fact reviewed, without properly authenticated bills of exception thereto. *Johnson v. Masterson Irr. Co.* (Civ. App.) 217 S. W. 407.

25. — **Matters pertaining to judgment.**—A decree and proceedings in partition held not to show fundamental error, reviewable in absence of bill of exceptions and statement of facts, on the theory that the court in its first decree judicially determined that the land was susceptible of partition, and thereafter in conformity to the report of commissioners ordered it sold, and thus violated art. 6101. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

26. — **Failure to file conclusions of law and fact.**—Failure of trial judge to file findings of fact and conclusions of law, as required by art. 1989, must be shown by bill of exception to authorize consideration as provided in rule 55 of the Court of Civil Appeals (142 S. W. xxi). *Ft. Worth & R. G. R. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

Court's failure to file conclusions of fact and law will not be considered on appeal without a bill of exceptions. *Masterson v. Pullen* (Civ. App.) 207 S. W. 537.

Under arts. 2058, 2073, and Court Rules 53, 54, 55 (142 S. W. xxi), the appellate court will not review failure of trial court to file findings of fact and conclusions of law, unless such matter is raised by a bill of exception, or at least unless it appears in the record, not merely that a request for findings and conclusions was made, but also that upon failure of trial court to comply with request, appellant excepted to such failure. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

27½. **Presumptions from failure to make.**—See art. 2068, note 68, and notes at end of chapter 20.

Where there was no bill of exceptions showing the evidence adduced upon the hearing on a plea of privilege, it must be presumed on appeal from the order overruling such plea that the evidence showed the mineral leases sued on vested in the plaintiffs an interest in the lands. *Stemmons v. Matthal* (Civ. App.) 227 S. W. 364.

28. **Substitutes for bill of exceptions.**—Where the record shows no bill of exceptions, the detailing of alleged reasons why the court erred in admitting the evidence and the statement that plaintiff excepted are wholly insufficient as a basis for consideration of the assignment. *Stephens v. Miller* (Civ. App.) 202 S. W. 1051.

An assignment that the court erred in refusing to give additional instructions, which the jury asked for in writing, cannot be considered on appeal, where there is no bill of exception bringing up the matter, although there is a statement signed by appellant's counsel, not approved or ordered filed by the judge, to the effect that the jury requested certain additional instructions, and that the court refused the request. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

A statement of the judge, certifying that he advised with the jury without the knowledge or presence of plaintiffs, serves all the purposes of a bill of exceptions, for it is the approval by the trial judge that gives force and effect to a bill of exceptions. *Holman Bros. v. Cusenbary* (Civ. App.) 225 S. W. 65.

Art. 2059. [1361] [1359] Requisites of bills of exceptions.

See *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474; notes to art. 2060.

Requisites and sufficiency of bill of exceptions in general.—Where bill of exceptions did not show or state that testimony of witness violating rule was material, it could not be aided by the statement of facts. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

Where witness in civil case was permitted to testify after admitting that he had been convicted of a felony and sentenced, objections to certified copy of pardon, subsequently placed in evidence, will not be considered, where bill of exceptions only objects to statement of witness that he had been pardoned. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

Under this article, a notice of appeal given at the time of court's ruling on motion to set aside default was sufficient exception to the ruling, no formal words being necessary. *Counts v. Southwestern Land Co.* (Civ. App.) 206 S. W. 207.

Where there is neither a statement of fact nor a finding of facts by court, and a bill of exceptions falls to negative that there was other evidence, it cannot be said, from the mere fact that an improper authenticated transcript was admitted in evidence, that a judgment of a foreign court was not proven by competent testimony. *Nease v. Broadwater Mercantile Co.* (Civ. App.) 206 S. W. 692.

An assignment of error in admitting deposition over objection that answers were immaterial and irrelevant will be overruled, where bill of exceptions failed to separate the

admissible evidence from that which was inadmissible. *Padgitt Bros. Co. v. Dorsey* (Civ. App.) 206 S. W. 851.

Bill of exceptions reciting that judgment is void because judge was a cousin of surety on appeal bond and was therefore disqualified, under art. 1736, was insufficient to present matter, where it failed to show that relationship was within third degree of consanguinity. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

Substantial compliance with this article is necessary to enable the Court of Criminal Appeals to perform its reviewing function; the appellate court must in some authentic way be advised of the nature of the ruling, the character of the objection, the subject-matter to which it related, and the probable influence upon the result. *Crisp v. State* (Cr. App.) 231 S. W. 392.

— **Certainty and definiteness.**—Bill of exceptions to the admission in evidence of hooks kept, etc., held so indefinite as to be of itself sufficient ground for overruling assignment predicated upon ruling excepted to. *Avery v. Llano Cotton Seed Oil Mill Ass'n* (Civ. App.) 196 S. W. 351.

A bill of exceptions, stating that "the charge is incomplete and fails to submit to the jury material issues raised by the pleading and testimony, and covered by issues requested on the part of" appellant, is too general to be considered. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

— **Scope and contents in general.**—The failure to exclude testimony on motion will not be considered where the bill of exception does not affirmatively show that the court ruled on the motion. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

A bill of exceptions which did not affirmatively show that a witness giving opinion evidence was examined as to whether he was sufficiently informed upon the matters to express an opinion is insufficient to show error. *Southern Pac. Co. v. Stephens* (Civ. App.) 201 S. W. 1076.

The record must go further than to show that a party excepted to a refusal to give special charges, and must show by bill of exceptions that the charges were presented at the time and manner prescribed by law. *Morales v. Cline* (Civ. App.) 202 S. W. 754.

Where deeds were excluded on objection that descriptions were insufficient, and bill of exceptions did not contain a description of the property, and the record did not otherwise give a description, the court could not say that the trial court erred in excluding the deeds. *Hopkins v. King* (Civ. App.) 204 S. W. 360.

In an action on notes given for the price of a piano, testimony of the buyer as to the market value of the instrument will not be held inadmissible on the ground the buyer was not an expert, but that his testimony was mere hearsay; the bill of exceptions failing to rebut the presumption that the buyer qualified himself to testify as an expert. *Lee v. Buie* (Civ. App.) 212 S. W. 230.

The trial court will not be required by mandamus to include certain facts in bill of exception complaining of court's ruling on motion for new trial on ground of insufficiency of evidence, since the facts proved should be brought up by a statement of facts, and not by the bill of exception. *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

— **Setting forth errors.**—Where answer to question is not shown in assignment of error, and statement of facts or bill of exceptions, to which reference is made, contains certain testimony of the witness, but does not show the question complained of, no error is presented. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

Bills of exceptions should be sufficient to disclose the error complained of without the aid of the statement of facts, but, where the record contains a statement of facts, the bill should not be construed so strictly as to defeat the purpose of the law requiring bills of exceptions, in view of arts. 2059 and 2060. *Plummer v. State*, 36 Cr. R. 487, 218 S. W. 499.

An assignment of error complaining of the refusal of the court to suppress an answer in a deposition cannot be considered, where the bill of exceptions referred to to sustain the assignment had no reference to the testimony complained of. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

A statement of the reason for objecting to court's ruling does not comply with this article, but the facts showing the relation of the ruling to the case must be stated in a manner to disclose that they are facts certified to by the trial judge. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

— **Showing prejudice to appellant.**—In a review upon an incomplete record, held, that the ruling admitting the testimony of a witness to a will cannot be revised where neither the bill of exceptions nor the record shows sufficient to determine if such testimony controlled the jury's finding or prejudiced appellant. *Fruitt v. Blesi* (Civ. App.) 204 S. W. 714.

— **Setting forth objections and exceptions.**—Where bill of exceptions fails to disclose objection made to introduction of testimony, action of trial court in regard thereto cannot be reviewed. *Carothers v. Finley* (Civ. App.) 209 S. W. 801; *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

An assignment of error to an instruction not embodied in the bill of exceptions taken to such instruction cannot be considered. *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

An assignment of error complaining of the argument will be overruled where the bill of exception states no reason for the objection, especially where it appears therefrom that the argument was within the record and proper. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Bills of exception not disclosing specific ground of objection, urged to introduction of each particular receipt offered, merely-reciting court excluded each receipt from evidence,

and appellant duly excepted, held insufficient to authorize review. *Wittliff v. Tucker* (Civ. App.) 208 S. W. 751.

An assignment of error based on objections to the charge will not be considered, where there is no authentic record that objections were presented to trial court before main charge was read to jury, as required by art. 1971, though it is not necessary to show by formal bill of exceptions that objections were so presented. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 213 S. W. 253.

Where bill of exceptions to exclusion of testimony fails to disclose the objections made to the evidence, the action of the trial court in the matter cannot be reviewed. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

A bill of exceptions to the exclusion of testimony cannot be sustained, where it failed to disclose the basis of the exception. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

Where the bill of exception taken to the admission of testimony does not show that its admission was objected to on the ground that there was no pleading authorizing it, such objection cannot be first raised on appeal. *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432.

— **Incorporating evidence in general.**—Bills of exception to admission of testimony, which fail wholly to show facts elicited from the witness, are insufficient. *National Bank of Garland v. Gough* (Civ. App.) 197 S. W. 1119.

Bill of exceptions is not sufficient for review of admission of testimony over objection that the question called for a conclusion, and that witness was not shown qualified; neither the question nor the evidence as to qualification being shown. *Long v. State*, 82 Cr. R. 312, 200 S. W. 160.

Assignments of error in admitting evidence cannot be considered, where the bills of exceptions do not disclose what the evidence objected to was. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Civ. App.) 203 S. W. 1167..

Bill of exceptions to the overruling of objections to questions propounded to witnesses, which failed to show what the answers were, presents no reversible error. *Willard v. Knoblauch* (Civ. App.) 206 S. W. 734.

Testimony taken under the statute authorizing a new trial for misconduct may be perpetuated as part of the record by means of a bill of exceptions. *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

Bill of exceptions not containing in narrative form, as required by the statutes and rules, evidence taken on issue of misconduct of jury in juryroom, is insufficient to present the question on appeal. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

The practice of reproducing in bill of exceptions the testimony of a witness in question and answer form is to be avoided, except when such a reproduction is necessary to explain the meaning, notwithstanding this article. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

Under district and county court rule 58 (142 S. W. xxi), a bill of exception taken to the overruling of an objection to testimony should set out so much of the evidence as is necessary to show that the objection to the testimony is well taken. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

— **Setting forth evidence excluded.**—Where the bill of exceptions does not show what the answer would have been, no error is shown in the sustaining of an objection to evidence. *Horn v. Price* (Civ. App.) 200 S. W. 590; *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247; *McBroom v. Weir* (Civ. App.) 219 S. W. 855.

Where exclusion of statement of account and refusal to permit witness to testify as to items thereof are assigned as error, assignment will be overruled where bills of exception do not contain statement or show what witness would have testified. *Schallert v. Boyd* (Civ. App.) 203 S. W. 940.

Complaint cannot be made of argument of counsel that testimony of a certain witness should not be believed on the ground that the opposing party had not produced other witnesses, when in fact such party had offered to account for the absence of other witnesses, where the bill of exceptions does not show what the absent witnesses would testify to. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

Assignment of error to the exclusion of testimony, based on a bill of exceptions, not mentioning the witness' name or what testimony of his was excluded, must be considered as waived, and cannot be entertained by the Court of Civil Appeals. *McBroom v. Weir* (Civ. App.) 219 S. W. 855.

Conflict between bill of exceptions and statement of facts.—See notes to art 2068.

Operation and effect of bill.—Though bill of exceptions showed that court explained written charge after jury had retired, the court's statement therein that he gave no additional instructions held controlling. *Kansas City, M. & O. Ry. Co. of Texas v. Harral* (Civ. App.) 199 S. W. 659.

A bill of exception cannot be considered as a part of the statement of facts, nor as a part of the judgment, or as a finding of fact by the court upon which the judgment is based. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

Art. 2060. [1362] [1360] May refer to statement of facts.

Construction with statement of facts.—Bills of exceptions should be sufficient to disclose the error complained of without the aid of the statement of facts, but, where the record contains a statement of facts, the bill should not be construed so strictly as to defeat the purpose of the law requiring bills of exceptions, in view of arts. 2059 and 2060. *Plummer v. State*, 86 Cr. R. 487, 218 S. W. 499.

Relation to statement of facts.—Reversal of conviction of manslaughter, on the ground that evidence was improperly admitted, held not objectionable as a decision on deductions

from matters appearing from the statement of facts, and not the bills of exceptions, and that it violated Civ. St. arts. 2059, 2060, and Code Cr. Proc. 1911, art. 744, governing the relation of bills of exceptions to statements of fact. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

Art. 2061. [1363] [1361] Charges regarded as approved unless excepted to.

See *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687; *Delano v. Delano* (Civ. App.) 203 S. W. 1145; *Ablon v. Electric Express & Baggage Co.* (Civ. App.) 206 S. W. 717; *Southern Pac. Co. v. Walters*, 110 Tex. 496, 221 S. W. 264, affirming judgment (Civ. App.) 157 S. W. 753.

Application in general.—Arts 1973, 1974, 2061, as amended by Acts 1913, c. 59, § 3, relate exclusively to special requested instructions or charges, and not to special issues submitted in the main charge, while arts. 1970 and 1971, as amended by section 3, and also art. 1972, which was neither repealed nor amended by the act of 1913, are applicable to main charges submitting cases on special issues under art. 1984a. *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S. W. 1030.

Decisions under prior act.—An instruction that a carrier of passengers must use "all possible care" for a safe conveyance was not merely a defective statement of the law, but was a positive error, and, as such, stood excepted to, under Rev. St. 1879, art. 1361, and no request for a special charge in respect to it was necessary. *International & G. N. R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829.

Necessity in general.—See *Couch v. Biggers* (Civ. App.) 198 S. W. 1101; notes to art. 2058.

Under this article, as amended, the refusal of a requested instruction could not be considered on appeal, where it did not appear that any exception had been reserved to such ruling. *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886; *Texas & P. Ry. Co. v. Duff* (Civ. App.) 195 S. W. 1169.

Assignment of error "the court erred in failing to give special charges," numbering them, was insufficient because it did not appear that appellant excepted to refusal of court to give such special charges as required by Rev. St. art. 2061. *Shuler v. City of Austin* (Civ. App.) 201 S. W. 445; *Beadle v. McCrabb* (Civ. App.) 199 S. W. 255.

Where the master, in action for injuries to servant when motor car was derailed, failed to except to charge on account of its failure to limit testimony as to prior derailments and submitted no special charge thereon, he could not complain; the testimony being admissible for some purpose. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

Reservation and reasonable filing of bills of exceptions is necessary under Acts 33d Leg. c. 59, for review of rulings in giving special requested charges and admitting evidence. *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203.

Where the record fails to show that appellant reserved exceptions to the trial court's refusal to give requested instructions, the assignment will not be considered. *Mansfield v. Gerding* (Civ. App.) 203 S. W. 462.

Failure to except to court's refusal to special charge requested was waiver of right to assign error thereto. *Southern Surety Co. v. Hartman* (Civ. App.) 206 S. W. 379.

Failure to except to the general charge does not preclude court on appeal from considering appellant's objections thereto. *Id.*

Refusal to give a correct charge in lieu of an erroneous one will not be considered, in the absence of a proper exception and assignment. *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340.

Under this article, the ruling of the court in giving, refusing, or qualifying instructions will be regarded as approved, unless excepted to in the manner provided by law. *Wolf v. Gardner* (Civ. App.) 209 S. W. 752.

Peremptory instructions.—Refusal of a motion for a directed verdict, if it could be treated as a requested special charge, is not ground for complaint, where no exception was taken to the ruling. *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183.

To have a peremptory instruction reviewed, the giving of the instruction must be excepted to at the time. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

Special issues.—Under specific provision of this article, as amended, failure to except to refusal to submit special issues waives objection thereto, and the alleged error cannot be considered on appeal, notwithstanding Acts 35th Leg. c. 177, § 1 (art. 1974), which was not effective at the time of trial. *Robinson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 203 S. W. 395.

Necessity of ruling.—Where record showed that the cause was tried March 22d and judgment on peremptory instruction was rendered the same day, and that plaintiff filed exceptions to the charge on the same day, but failed to show that the court considered them or acted thereon, assignment of error to the giving of peremptory instruction could not be considered. *Mosher v. Dingee* (Civ. App.) 203 S. W. 102.

Sufficiency of exceptions.—See *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112; notes to art. 2058.

Where requests for special instructions were on three separate pieces of paper, bill of exceptions disclosing but single exception to single action of court was insufficient, in view of Acts 33d Leg. c. 59. *Gulf Coast Transp. Co. v. Standard Milling Co.* (Civ. App.) 197 S. W. 874.

Where the formal exception was stricken out, and the transcript only showed that a charge was presented to the court and refused, and that defendant excepted, as shown

by the indorsement of the judge on the special charge, the notation and authentication are insufficient to constitute an "exception" under the statute. *Thomas v. Derrick* (Civ. App.) 207 S. W. 140.

An exception "to the rulings of the court in not submitting to the jury defendant's special issues Nos. 1 to 12" is insufficient, under this article, since it fails to show that the request was made in the time and manner required by the act. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 212 S. W. 155.

Where but one general exception is taken to the action of the court in refusing to give several distinct charges or issues, it is not entitled to consideration on appeal if one or more of such charges or issues should not have been given. *Id.*

Effect of failure to except.—Under arts. 1971, 1972, 1973, appellant's failure to except to charge for appellee does not preclude consideration of his objections to refusal of his requested charge on same issue. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

An assignment of error attacking the verdict and judgment cannot be sustained, where appellant did not except to the general charge and did not request special charge covering the particular phase of the case covered by the assignment. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

Objections.—See *Texas Midland R. R. v. Combs* (Civ. App.) 195 S. W. 1173; *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886; *Mason v. Olds* (Civ. App.) 198 S. W. 1040; *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758; *McDonald v. Wilson* (Civ. App.) 209 S. W. 440; *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602; *Graves v. Haynes* (Civ. App.) 214 S. W. 665; *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1089; *Earl v. Mundy* (Civ. App.) 227 S. W. 716; notes to art. 1971.

Art. 2062. [1364] [1362] No bill of exceptions where ruling appears of record.

Cited, *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

In general.—See *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112; notes to art. 2058.

For consideration on appeal of assignments to overruling of exceptions to pleadings, exception to ruling, afterwards set up in motion for new trial, need not be noted in the order, in view of this article, and district court rule 53 (142 S. W. xxi). *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.

Rulings shown by record.—In suit to foreclose chattel mortgage, failure to allege the value of the property mortgaged to secure the debt is fundamental error apparent of record, requiring reversal, whether or not there was an exception, plea, or other objection to the petition on that ground in the court below. *People's Ice Co. v. Phariss* (Civ. App.) 203 S. W. 66.

Affidavits in support of motion for new trial are a part of the motion, and under this article, will be considered in connection with the order overruling the motion without a formal bill of exceptions. *Counts v. Southwestern Land Co.* (Civ. App.) 206 S. W. 207.

Under this article, a bill of exceptions was not necessary to reserve an exception to court's ruling on motion to set aside default judgment, the motion and the ruling thereon being a part of the record proper. *Id.*

Under this article, an exception is not necessary where a plea of privilege was overruled and the evidence heard was incorporated in the record. *Valdespino v. Dorrance & Co.* (Civ. App.) 207 S. W. 649.

Rulings not shown by record.—In view of arts. 1971, 1972, 2061, 2062, where the record fails to disclose, either by bill of exceptions or filed objections to the charge, that any objections were made thereto, the court on appeal is justified in disregarding an assignment of error to the failure of the court to direct a verdict. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

Art. 2063. [1365] [1363] Bill to be presented to the judge.

See *Frisby v. State*, 26 Tex. App. 180, 9 S. W. 463; *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

Cited, *Nowlen v. State*, 33 Cr. R. 141, 25 S. W. 774.

Necessity of allowance and signature by judge.—An assignment of error, which predicated error upon a state of facts shown by a bill of exceptions not approved by the trial court, could not be considered. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

Under statutes, requiring that a bill of exceptions be taken to the refusal of requested special instructions, and that such bill be authenticated, and allowance or approval shown, where proof thereof is not of record the alleged error cannot be reviewed. *Planters' Oil Co. v. Hill Printing & Stationery Co.* (Civ. App.) 208 S. W. 192.

A purported bill of exceptions showing that objections were presented to the court before the charge was read to the jury, which is not approved by the judge or authenticated in any manner, but merely filed by the clerk, is not sufficient under art. 1971, to present objections to instructions for review. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Time for presentation and approval.—See *Gulf, C. & S. F. Ry. Co. v. Lockhart* (App.) 18 S. W. 649; notes to art. 2073.

Sufficiency of approval.—Refusal to submit special issues cannot be reviewed without a bill of exceptions under arts. 2061, 2062, article 2058 being controlling; and the mere

fact that the court's indorsement upon objections and exceptions recites that a bill was allowed is insufficient. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

Effect of approval.—A statement in a bill of exception that objection was made to evidence on certain grounds is not a statement approved by the trial court that those grounds in fact existed. *Trabue v. Ash* (Civ. App.) 200 S. W. 415.

Grounds for rejecting bill.—Failure to except or object to the action of the court is not a ground for rejection of the bill by the court, though the bill may show such failure, so that the matters therein stated cannot be reviewed. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Art. 2064. [1366] [1364] Submitted to opposing counsel, etc.

See *Frisby v. State*, 26 Tex. App. 180, 9 S. W. 463; *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Jones v. State* (Cr. App.) 229 S. W. 865.

Presumption as to filing.—Under Rev. St. 1879, art. 1364, requiring bills of exceptions to be filed during the term, and within 10 days after the trial is concluded, where the bill of exceptions was contained in a statement of facts filed during the term, in the absence of any showing, it would be presumed that it was filed within the 10 days, though the statement of facts appeared to have been filed after that time. *Hefron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

Art. 2065. [1367] [1365] If found incorrect.

See *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552.
Cited, C.-R.-C. Law List Co. v. *Rowe* (Civ. App.) 204 S. W. 781; *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Duty to allow or qualify.—That the trial court did not concur with the facts as stated in the bill of exceptions tendered is not ground for final rejection of the bill, but the court should qualify it to state the facts as he understands them, or should prepare a new bill stating the facts. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Qualification of bill.—Where appellant accepted bill of exceptions as qualified by court, he is bound by the court's statement therein, which will be presumed to be true. *Quanah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606; *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670; *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Where the qualification of a bill of exceptions by the trial judge contradicts a statement of appellant's counsel in the body of the bill, the facts stated in the qualification will control. *Conner v. McAfee* (Civ. App.) 214 S. W. 646; *Guyler v. Guyler* (Civ. App.) 220 S. W. 604.

Though bill of exceptions showed that court explained written charge after jury had retired, the court's statement therein that he gave no additional instructions held controlling. *Kansas City, M. & O. Ry. Co. of Texas v. Harral* (Civ. App.) 199 S. W. 659.

Where the qualified bill of exceptions discloses that a different charge was requested and refused than the one alleged on appeal, appellant's counsel may not contradict the court's qualification and thus vary the facts by their ex parte affidavit. *Rickey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

Though the trial judge qualified the bill of exceptions with the statement that he had no recollection as to any request that he file written findings of fact and conclusions of law, yet, where the qualification admitted that such request was made, the fact of making must be accepted on appeal. *Irwin v. State Nat. Bank of Ft. Worth* (Civ. App.) 224 S. W. 246.

Where counsel refused to agree to the qualifications of his bills by the trial judge, but, after the trial judge had marked them refused, had them filed by the clerk, whereupon the judge again inserted the qualifications and had the bills refiled, accused is not entitled to have the bills considered either as they were originally drawn, or as qualified, under arts. 2063-2067, made applicable to criminal prosecutions by Code Cr. Proc. art. 744. *Jones v. State* (Cr. App.) 229 S. W. 865.

Mandamus.—Under arts. 1607, 2065-2067, the Court of Civil Appeals cannot by mandamus, upon application therefor by plaintiff in error, supervise the making of the bill of exceptions by instructing the lower court what to put in the bill. *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Art. 2066. [1368] [1366] On disagreement, judge to make out bill, etc.

See *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Jones v. State* (Cr. App.) 229 S. W. 793; *Weige v. State*, 31 Cr. R. 476, 196 S. W. 524; *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282; notes to art. 2067; *Jones v. State* (Cr. App.) 229 S. W. 865; *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481; notes to art. 2065.

Cited, *St. Louis, A. & T. R. Co. v. Whitaker*, 63 Tex. 630, 5 S. W. 448; C.-R.-C. Law List Co. v. *Rowe* (Civ. App.) 204 S. W. 781.

Art. 2067. [1369] [1367] Bystanders' bill, how obtained.

See *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Jones v. State* (Cr. App.) 229 S. W. 865; notes to art. 2065; *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Bystanders' bill—In general.—Though jurors are not "bystanders" at the trial of a case in the ordinary meaning of that term, they can sign a bystanders' bill of exceptions to acts and comments by the court and the argument of attorneys thereon, since as to those matters they are impartial. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

The fact that jurors, because of their situation and duties, could not sign a certificate as bystanders, authenticating a bill of exception at the time the occurrence took place, does not prevent them from signing such bill as bystanders after their discharge. *Id.*

Bystanders' bills filed in April after trial had in November, which were not verified by bystanders or any one else, and which were filed after adjournment of the term at which cause was tried, cannot be considered. *Scheps v. Giles* (Civ. App.) 222 S. W. 348.

This article, in using the term "bystanders" does not include parties to the suit or their attorneys; "bystander" meaning one who stands near, one not concerned with the business transacted. *Walker v. State* (Cr. App.) 227 S. W. 308.

A defendant and his attorneys are not such "bystanders" as the law contemplates, so that bills of exceptions verified by them are not entitled to consideration as bystanders' bills. *Hunt v. State* (Cr. App.) 229 S. W. 869.

— **When allowed.**—Trial court, in homicide case, probably abused discretion in requiring accused's counsel to whisper his objections regarding prosecuting attorney's misconduct, since Const. art. 1, § 10, guarantees a speedy public trial and right to be heard by counsel, and a bystanders' bill of exceptions could not be made, pursuant to arts. 2066, 2067, in case court and attorneys failed to agree upon objections or ruling so made. *Weige v. State*, 81 Cr. R. 476, 196 S. W. 524.

This article contemplates the prior filing of a bill by the court as provided in article 2066, but does not deny the right to prove by bystanders' bills of exceptions refused by the court, where none are prepared in lieu thereof by the court as directed by the statute. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

— **Time of preparation, verification and filing.**—Bystanders' bill, filed after the trial, is in time, under this article. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

Where a bill of exceptions was filed within the term, but was retained by the judge until after the term, and then rejected without a new bill prepared by the judge in lieu thereof, a bystanders' bill, filed thereafter within the time fixed by the court under the authority of art. 2073, for filing bills of exceptions and statements of fact, was in time. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

Though originally a bill of exceptions authenticated by bystanders must have been made at the time of the occurrence, the statutes, extending the time for filing the bill, if approved by the court, also extended the time for filing the bystanders' bill. *Id.*

— **Signing and verifying.**—*Bostick v. State*, 81 Cr. R. 404, 412, 195 S. W. 862, 863; *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 631.

Art. 2068. [1379] [1377] Statement of facts, how prepared.

See *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

Cited, *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *City of Galveston v. Dazet* (Sup.) 16 S. W. 20; *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

1. **Not repealed.**—Arts. 2068, 2069, relating to statement of facts on appeal, were not repealed or modified by act providing for appointment of official court stenographers, or subsequent acts relative to their duties and preparation of statement of facts by them when requested. *Dugan v. Smith* (Civ. App.) 200 S. W. 548.

3. **"After the trial."**—See *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

11. **Decisions not reviewable without statement—Rulings on pleadings.**—Rulings on the sufficiency of the pleadings other than those subject to a general demurrer, such as the overruling of special exceptions, are not reviewable in the absence of a statement of fact or findings of fact. *Spitzer v. Smith* (Civ. App.) 218 S. W. 599.

Misjoinder of defendants and causes of action is a matter properly raised by special exception to the pleadings, and not reviewable in the absence of a statement of facts or findings of fact. *Id.*

In the absence of a statement of facts, assignments of error, relating to rulings on special exceptions, cannot be reviewed. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

Where petition showed cause of action for amount within jurisdiction of court, and where judgment was for an amount within the court's jurisdiction, failure to sustain plea to jurisdiction held not error, in the absence of a statement of facts and bills of exceptions. *Mach v. Wofford* (Civ. App.) 228 S. W. 275.

In a landlord's action for tenant's breach of lease, if defendant's pleadings were true, he was entitled to show his damages by reason of plaintiff's false statement inducing the lease, and the court, having stricken out this part of the answer, an objection that because there is no statement of facts, exceptions to such ruling cannot be considered, is not well taken. *C. R. Miller & Bro. v. Nigro* (Civ. App.) 230 S. W. 511.

12. — **Denial of continuance.**—Where there was no statement of facts in the record making it appear that the denial of a continuance was error, the matter cannot be reviewed. *Martin v. Martin* (Civ. App.) 229 S. W. 695.

13. — **Interlocutory proceedings.**—Denial of injunctive relief held not to be disturbed in the absence of a statement of facts, where allegations of petition were denied by answer. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

Though the record showed no appointment of a guardian ad litem, etc., for minor defendant, held that no fundamental error appeared, reviewable in absence of bill of exceptions and statement of facts, where the judgment of partition rendered two years later recited that another defendant, a minor, appeared by guardian ad litem, and all of the other defendants by attorney. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

Assignment of error to the dissolving of temporary injunction against opening of road because the road judgment was void, held to present no question for review in the absence of a statement of facts. *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569.

14. — **Admissibility of evidence.**—In the absence of a statement of facts, rulings upon admission and exclusion of evidence will not be revised, unless it manifestly appears from the bill of exceptions and the record that such ruling was both erroneous and prejudicial to the complaining party. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714; *Robinson v. Robinson's Estate* (Civ. App.) 225 S. W. 93.

Assignments of error attacking the charge and the admissibility of evidence cannot be reviewed without statement of facts, unless the necessary facts otherwise appear, however difficult it might be to conceive any legal support for the action of the lower court. *Robinson v. Robinson's Estate* (Civ. App.) 225 S. W. 93.

15. — **Weight and sufficiency of evidence.**—Assignments, complaining that findings are not sustained by evidence, must be overruled, in the absence of a statement of facts. *Burnett v. Summerour* (Civ. App.) 228 S. W. 1013.

Where there is no statement of facts in the record, appellant is in no position to say that the judgment was not supported by the evidence. *Leyhe v. McNamara* (Civ. App.) 230 S. W. 450.

17. — **Questions depending on facts.**—Where there is no statement of facts in the record, assignments of error dependent upon the facts cannot be considered on appeal. *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

18. — **Submission of issues.**—In absence of a statement of facts, the Court of Civil Appeals cannot say that the issues made by the pleading and the evidence were not fully submitted. *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

19. — **Instructions.**—There being no statement of facts which can be considered as such, the court on appeal cannot determine whether there is merit in complaint that trial court erred in giving and refusing instructions. *Billingsley v. Texas Midland R. R.* (Civ. App.) 208 S. W. 408.

In the absence of a statement of facts, special exceptions to the giving or refusing of instructions cannot be reviewed, since the testimony might have shown defendant in error entitled to recovery, notwithstanding the giving or refusing of charges or issues. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

Errors in giving or refusing charges cannot be reviewed on appeal, in the absence of the statement of facts, unless the pleadings show that the charge is necessarily erroneous. *Robinson v. Robinson's Estate* (Civ. App.) 225 S. W. 93.

In the absence of a statement of facts, the Court of Civil Appeals cannot pass on the propriety of giving a charge as to jurors being exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to their testimony. *Jemison v. Estes* (Civ. App.) 231 S. W. 797.

20. — **Conclusions of law and fact.**—There being no statement of facts with record, or bills of exceptions therein, assignments complaining of findings of fact of trial court, or refusal to find facts requested, will not be considered. *Frick v. Giddings* (Civ. App.) 197 S. W. 330.

Findings of trial court will not be disturbed, in absence of statement of facts. *Hoff v. Clark* (Civ. App.) 200 S. W. 431.

21. — **Verdict or judgment.**—Where the jury's findings showed that one who had celebrated an invalid ceremonial marriage with deceased received more in rents out of his personal property than she had paid in securing title to certain lands in which she was given no share, held, that final decree of partition did not disclose fundamental error, reviewable in absence of bill of exceptions' and statement of facts. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

A decree and proceedings in partition held not to show fundamental error, reviewable in absence of bill of exceptions and statement of facts, on the theory that the court in its first decree judicially determined that the land was susceptible of partition, and thereafter in conformity to the report of commissioners ordered it sold, and thus violated art. 6101. *Id.*

In an action to foreclose vendor's lien it cannot be said on appeal that the direction to pay the excess to the "defendants" was not proper, where there was no pleading between the defendants, and the only allegation as to the ownership of the land was an allegation in plaintiff's petition that part of the tracts had been sold by the vendee to the other defendant, and where there is no statement of facts with the record. *Clark v. Taylor* (Civ. App.) 212 S. W. 231.

26. **Form and contents of statement.**—In general.—Terms of receipt issued by defendant compress company to plaintiff for cotton delivered, not being set out in statement of facts, court on appeal cannot discuss effect of receipt. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

Although record fails to show that map was attached to findings of fact, where there is a complete map among papers which were attached to statement of facts, and both parties rely on such map, it will be considered by court on appeal, there being no

dispute concerning fact that it is a part of statement of facts. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

In a suit involving the ownership of oil, petroleum, and gas in a tract of land, a judgment vesting title in plaintiff was not shown to be erroneous by a statement of facts which showed that a deed excepted certain rights without showing what the excepted rights were. *Luse v. Penn* (Civ. App.) 220 S. W. 303.

28. — Setting forth objections.—Assignment complaining that the court required defendant to answer question cannot be reviewed, where there was no bill of exception or statement of facts showing any objection by defendants. *W. J. & F. J. Powers v. James* (Civ. App.) 220 S. W. 382.

31. — Setting forth evidence in general.—Where answer to question is not shown in assignment of error, and statement of facts or bill of exceptions, to which reference is made, contains certain testimony of the witness, but does not show the question complained of, no error is presented. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

Where there was no bill of exceptions, and no evidence was introduced, and statement of facts did not show that affidavits filed had been introduced in evidence, to show that the jury took evidence into the jury room, such matter cannot be reviewed under art. 2021. *Morales v. Cline* (Civ. App.) 202 S. W. 754.

Where statement of facts fails to show any testimony given by a witness on the question of reasonable time for shipment of stock as complained of in a bill of exception, assignment that court erred in overruling objection to question, held not sustainable. *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

37. Sufficiency of statement in general.—Under this article, authorizing parties to agree to a written statement of facts, such a statement, when duly made and approved by the trial judge and filed in time, is sufficient. *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

38. Execution and approval—In general.—Where purported statement of facts is not signed by counsel or approved by trial judge, appellate court cannot consider it for any purpose. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

39. — Signature of parties or attorneys.—Paper purporting to be a statement of facts and signed by the trial judge and appellee's counsel, held to be treated as a statement of facts though not signed by appellant's counsel. *Bigham v. Stamps* (Civ. App.) 212 S. W. 775.

A statement of facts, certified by the judge, may be considered, though it is signed by counsel for one party only, there being a presumption that it was properly certified. *Schneider v. Stephens*, 60 Tex. 419.

40. — Approval and signature of judge.—A purported statement of facts, not approved by the trial court, as required by arts. 2068–2070, will not be considered on appeal. *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

45. Time for preparing and filing.—See *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458; *Aistrop v. State*, 31 Cr. R. 467, 20 S. W. 989; notes to art. 2073.

51. Operation and effect of statement—Conclusiveness.—The statement of facts, signed and certified to by the trial judge, imports absolute verity. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

Court's special finding, corroborated by decree that money tendered by plaintiff had been deposited in court, will control over statement of facts that shows no money was deposited, since trial court knew judicially whether money was in court. *Mission Auto Co. v. Aldape* (Civ. App.) 206 S. W. 223.

Suit to set aside judgment being a direct attack on the judgment, under the record as presented the Court of Civil Appeals is not at liberty to go behind the statement of facts approved below, and to assume or presume there may have been some other and different citation, than the one shown in the record. *Rousset v. Settegast* (Civ. App.) 210 S. W. 219.

53. — Conflict with bill of exceptions.—An assignment of error complaining of the admission of a deposition will be overruled where it appears from statement of facts agreed to by appellant that the deposition was put in evidence by him, though the bill of exceptions impliedly states that it was offered by appellees. *Missouri, K. & T. Ry. Co. of Texas v. Storey* (Civ. App.) 195 S. W. 350.

The statement of facts showing that a witness' testimony was rejected will prevail over a bill of exceptions objecting that witness was incompetent and that his testimony was admitted. *Carvel v. Kusel* (Civ. App.) 205 S. W. 941.

Where a bill of exceptions seems to show that a question and answer were read to the jury, but under the statement of facts approved by the court it appears that they were not read, the assignment of error in admitting the evidence need not be considered. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

In case of conflict between the bill of exceptions and the statement of facts, the latter, when agreed to by the counsel and approved by the court, will control. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

54. Documents considered in connection with statement.—On appeal in a tax judgment case, the Court of Civil Appeals will not consider a city map, and assertions, not contained in statement of facts, designed to show that city contained no such block or street as tax assessment described. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

59. Amendment or correction of statement.—The statement of facts is a part of the record made by the district court, and motions affecting such record and to make it

speak the truth should be filed in that court. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

62. Striking from record—Grounds in general.—Statements of facts will not be stricken out, though not bearing clerk's file mark, when accompanied by certificate that it is exact copy and duplicate original of the statement filed. *Brillhart v. Beever* (Civ. App.) 198 S. W. 973.

66. Effect of absence of statement—in general.—In absence of statement of facts, failure of trial judge to file findings and conclusions, as required by art. 1989, requires reversal of judgment. *Pt. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

Appeal will not be dismissed on the ground that there is no statement of facts, but will be entertained so that court may ascertain if any of the assignments of error can be sustained without such statement. *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489.

Where neither party has filed a statement of facts or briefs, the case will be dismissed for want of prosecution. *Burnett v. Foster* (Civ. App.) 225 S. W. 574.

67. — Conclusiveness of findings.—Where no statement of facts accompanies record, trial court's finding that services were performed in a certain county is conclusive upon appeal. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

Where the court made findings of fact and conclusions of law, and there was no statement of facts in the record, the Court of Appeals can look alone to the findings of fact to determine the rights of the parties. *Carter v. Sovereign Camp, Woodmen of the World* (Civ. App.) 220 S. W. 239.

In the absence of statement of facts, the court's findings of fact are conclusive on appeal. *Finch v. Wood* (Civ. App.) 223 S. W. 868.

68. — Presumptions.—In the absence of statement of facts, it will be presumed that the judgment is supported by the evidence. *Wedgworth v. Smith* (Com. App.) 213 S. W. 254; *Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson* (Civ. App.) 200 S. W. 197; *Bailey v. Burkitt* (Civ. App.) 201 S. W. 725; *Hardy Buggy Co. v. Pinckard & Sanders* (Civ. App.) 204 S. W. 354; *Schlag v. Johnson* (Civ. App.) 208 S. W. 369; *Thompson v. Russell* (Civ. App.) 211 S. W. 540; *Johnston v. Cobb & Gregory* (Civ. App.) 213 S. W. 354; *Scaling v. Collins* (Civ. App.) 214 S. W. 624; *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

In absence of statement of facts, it will be presumed on appeal that evidence supported court's findings. *Frick v. Giddings* (Civ. App.) 197 S. W. 330; *Woytek v. King* (Civ. App.) 218 S. W. 1081; *Swaney v. Finch* (Civ. App.) 226 S. W. 422.

In absence of statement of facts, presumption is that evidence was introduced sufficient to support all material allegations of plaintiff's petition, plaintiff having secured judgment. *Mother Mary Angela v. Battle* (Civ. App.) 198 S. W. 1030; *Phillips v. Phillips* (Civ. App.) 223 S. W. 243.

Where there was no statement of facts, trial court's findings of plaintiff's ownership held not subject to construction as based on plaintiff's mere oral testimony that she "owned" the property, as it would be presumed that it was based on oral evidence of possession. *Texas & P. Ry. Co. v. Taylor* (Civ. App.) 200 S. W. 1117.

Appellant being required to show error, it will be presumed, in absence of statement of facts, in favor of instruction on weight of evidence, that fact was undisputed. *Hegman v. Roberts* (Civ. App.) 201 S. W. 268.

Where, in granting prayer for temporary restraining order in action to annul a marriage, the court stated that the petition and proof had been considered, allegations that marriage in another state was invalid must be taken as true on appeal where there was no statement of facts. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

In the absence of a statement of facts or findings of fact by the court, or a proper bill of exceptions showing the assertions made, a judgment must be taken on appeal as proved. *Nease v. Broadwater Mercantile Co.* (Civ. App.) 206 S. W. 692.

Where an answer was filed and hearing had, resulting in judgment for plaintiff, and no statement of facts was brought up on appeal, it must be presumed the evidence supported plaintiff's allegations and did not support the pleaded defenses, and the judgment must be affirmed if plaintiff's petition states a cause of action. *Live Oak County v. West* (Civ. App.) 206 S. W. 965.

There being no bill of exceptions or statement of facts, it will be presumed that appellant had due notice of the purpose to amend judgment during term. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

Where there was no statement of facts and plaintiffs were denied relief on the ground of the pendency of another suit in the federal bankruptcy court, it will be presumed in favor of the trial court's holding that there was sufficient evidence that the bankruptcy court had jurisdiction. *Spencer v. Burk* (Civ. App.) 217 S. W. 1110.

In the absence of a statement of facts, and in view of a recitation in the judgment and order overruling the motion for new trial that evidence was heard, the appellate court will presume that the evidence failed to support appellant's motion for new trial. *Dumas v. Easley* (Civ. App.) 219 S. W. 866.

Where there was no exception to petition and pleas of intervention against the sureties on a school building contractor's bond for failure to allege that the certificate required by arts. 2904n, 2904o, was procured, and no allegation that such certificate was not procured, it will be presumed, on appeal without statement of facts, in support of the court's finding, that such certificate was procured. *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699.

There being no statement of facts, it will be presumed that the court in its findings set out all the evidence on the subject before it material on the issue. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Ordinarily, it will be presumed on appeal, in the absence of a statement of facts, that every fact necessary to sustain the verdict and judgment which is responsive to and follows the relief sought by the complaint or petition was proven, but it will not be presumed that facts were proven, which will sustain verdict and judgment for relief not sought, or to which the parties were not entitled under the broadest construction of the pleading. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

Where a statement fails to show that the court ever acted on special exceptions to the petition, and the record is itself silent on the subject, the presumption must prevail on appeal that the court did not act on the exceptions. *Modern Order of Praetorians v. Neimann* (Civ. App.) 226 S. W. 438.

In the absence of a statement of facts, it must be presumed that the sum found by the trial court, in a suit relative to taxation, as the reserve liabilities of plaintiff domestic insurance company, consisted of outstanding policies, which art. 4764, declares shall constitute the reserve. *City of Waco v. Texas Life Ins. Co.* (Civ. App.) 223 S. W. 245.

In the absence of a statement of facts to the contrary, the appellate court will regard every finding made as proven, and will indulge in every presumption necessary to support the finding and judgment. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

69. — Affirmance of judgment.—A judgment must be affirmed where all the assignments of error must be tested by the facts, and no statement of facts was filed. *Hamilton v. Wilson* (Civ. App.) 198 S. W. 172.

In absence of statement of facts, and where no error is apparent on face of record, judgment will be affirmed. *Lutcher v. Fuller* (Civ. App.) 200 S. W. 553.

Where the statement of facts and bills of exception have been stricken, and the assignments of error are such as cannot be considered without a statement of facts, a cause must be affirmed, where the trial court had jurisdiction and rendered a judgment authorized by the pleadings. *Cook v. Trinity County Lumber Co.* (Civ. App.) 202 S. W. 214.

Upon a motion for affirmance of judgment for failure to file statement of facts within required time, that court reporter failed to transcribe testimony in form required by art. 1924 did not excuse appellant, where neither attempt to mandamus reporter nor to make statement of facts from memory under art. 2068 was made. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714.

On appeal from order dissolving temporary injunction, where there is no statement of facts and no information as to any evidence which may have been heard and considered except the affidavits filed, the court will affirm order of dissolution, unless the facts shown by the petition and motion to dissolve disclosed order to be erroneous. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316.

Failure to file statement of facts is not alone ground for affirmance; and, if defendant in error desires an affirmance, he must file briefs in accordance with rule 42 for the Courts of Civil Appeals (142 S. W. xiv), and where he fails to do so the court can only dismiss the writ of error for want of prosecution. *Edwards v. Holder* (Civ. App.) 215 S. W. 480.

70. Substitutes for statement of facts.—Where the attorneys and the judge could not agree upon a correct statement of the evidence, evidence not brought to the court on appeal except by statement in the appellant's brief could not be considered. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Where no statement of facts has been filed, Court of Civil Appeals may examine bill of exceptions to ascertain facts upon which court decided question of venue. *Sanders v. George M. Hester Cotton Co.* (Civ. App.) 195 S. W. 269.

A bill of exception cannot be considered as a part of the statement of facts, nor as part of the judgment, or as a finding of fact by the court upon which the judgment is based. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

The appellate court can only consider evidence incorporated into the statement of facts, and cannot consider an account book which by agreement was sent to the court for its consideration. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

Where in the transcript certain documents appear which purport to be the records of a former suit, but which are not agreed to by counsel, nor approved by the court as a true statement of the evidence introduced, such documents cannot be given consideration as a statement of facts. *Scaling v. Collins* (Civ. App.) 214 S. W. 624.

Where no statement of facts appeared in the record, instruments incorporated in the transcript which were not agreed to by attorneys, nor approved by the court as statements of fact, nor attached to the pleadings in the trial court, cannot be considered. *Id.*

The appellate court is confined to the statement of facts and cannot consider evidence from any other source. *McLendon Hardware Co. v. J. A. Hill & Son* (Civ. App.) 226 S. W. 825.

Testimony from the evidence adduced on motion for new trial and not from the certified statement of facts on appeal cannot properly be considered by the Court of Civil Appeals in testing the accuracy of the judgment entered. *Kerwin v. Mead* (Civ. App.) 229 S. W. 677.

71. Reversal because of inability to secure statement.—On a motion to reverse a judgment of conviction because of failure to secure a statement of the facts adduced at the trial, held that, no diligence being shown by defendant to procure the statement of facts, an appellate court will not reverse the judgment. *Aistrop v. State*, 31 Cr. R. 467, 20 S. W. 989.

That the official reporter had lost the shorthand notes which he was required to take and preserve under arts. 1923 and 1924, so that he could not prepare a statement of

facts, and that the attorneys who represented appellant had moved from the county, do not entitle appellant to reversal, where the citation in error was served more than four months after final judgment, and appellant made no attempt to prepare a written statement of facts under art. 2068, or to secure an agreed statement of facts under art. 2112, or to seasonably apply for proper process to compel the reporter to file transcript of his notes or substitute them as provided under arts. 2157 and 2158. *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569.

Art. 2069. [1380] [1378] When the parties disagree.

See *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

Cited, *City of Galveston v. Dazet* (Sup.) 16 S. W. 20.

½. **Repeal.**—Arts. 2068, 2069, were not repealed or modified by act providing for appointment of official court stenographers, or subsequent acts relative to their duties and preparation of statement of facts by them when requested. *Dugan v. Smith* (Civ. App.) 200 S. W. 548.

2. **Statement of facts prepared by judge—Duty to prepare.**—Under Rev. St. 1879, arts. 1378, 1379, requiring the judge, on a motion for a new trial, to file a statement of facts, if the parties disagree, the failure to file such statement within the time required is error. *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313.

Where request for court to make statement of facts was not presented within 30 days granted for filing, held, court could not be required to make statement, in view of art. 2073. *Hoff v. Clark* (Civ. App.) 200 S. W. 431.

5. — **Presumption of disagreement.**—Though it is the better practice for the judge preparing a statement of facts to certify that the parties failed to agree, under Rev. St. 1895, art. 1380, when the statement is signed by the judge, the presumption exists that the parties failed to agree, and the statement of facts is not insufficient. *McGlasson v. Fiorella* (Civ. App.) 228 S. W. 254.

8½. — **Presentation of statement by party.**—Where on failure of the parties to agree as to the statement of facts counsel for plaintiff in error presented to the trial judge within time as extended a statement of facts bearing their signed certification that it was a true and correct statement of facts in the case, there was a sufficient compliance with art. 2073. *Martin v. Martin* (Civ. App.) 229 S. W. 695.

21. — **Reversal for failure to prepare and file.**—Where the statement of facts is stricken out because not properly authenticated by the trial judge, appellant cannot, on the ground that he was deprived of the statement through no fault of his own, have the judgment reversed, under art. 2074, requiring the judge to file a statement of facts if the parties disagree as to their statement. *Railway Co. v. Bell* (App.) 16 S. W. 908.

Where appellant exercised proper diligence to obtain a complete statement of facts, but the parties were unable to agree and the statement presented by the court was incomplete and did not contain facts justifying the direction of a verdict, it will not be presumed that a complete statement would have justified the judgment, but appellant is entitled to a reversal. *Shumaker v. Byrd* (Civ. App.) 226 S. W. 817.

Under art. 2073, where the parties fail to agree on a statement of facts, and the party appealing or bringing error presents his statement to the trial judge and requests him to prepare and file a statement of facts it is the duty of the judge to do so, and, if he fails or refuses, the appellant is entitled to have the case reversed. *Martin v. Martin* (Civ. App.) 229 S. W. 695.

22. **Costs.**—Where statement of facts is prepared by trial court pursuant to this article, parties having failed to agree, there can be no charge against either party for such statement taxed as costs. *Dugan v. Smith* (Civ. App.) 200 S. W. 548.

Art. 2070. Statement of facts prepared from transcript of official reporter, when and how, etc.; in duplicate; original sent up; reporter to prepare on request, etc.; fees.

See *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

2. **Does not repeal other articles.**—Arts. 2068, 2069, were not repealed or modified by act providing for appointment of official court stenographers, or subsequent acts relative to their duties and preparation of statement of facts by them when requested. *Dugan v. Smith* (Civ. App.) 200 S. W. 548.

11. **Preparing statement from stenographer's report—Execution and approval.**—Statement of facts prepared under this article, by the official stenographer must be approved by the trial judge, and will not be considered unless so approved. *Texas Portland Cement Co. v. Lumparoff* (Civ. App.) 204 S. W. 366.

14. **Condensation.**—A statement of facts containing 40 pages, 30 per cent. of which consists of questions and answers, and much of which is unnecessary repetition and testimony as to undisputed facts, is in violation of this article and district court rule 78 (142 S. W. xxiii), requiring statement to be condensed, and will be stricken. *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 489.

Superfluous and unnecessary words should not be inserted and statements of witnesses should not be prefaced with the words "as to," in view of this article. *Vogt v. Guidry* (Civ. App.) 220 S. W. 343.

19. **Filing and time for filing.**—See *Buvens v. Barden* (Civ. App.) 196 S. W. 333; notes to art. 2073.

22. **Sending up original statement.**—The copying of statement of facts into the transcript of the proceedings does not constitute compliance with statute requiring original statement of facts to be sent to appellate court. *City of Pearsall v. Crawford* (Civ. App.) 213 S. W. 327.

23. — **Appeals from county courts.**—Rule that a statement of facts should not be included in the transcript, but the original statement of facts set up with the agreement of counsel thereto and approval of the judge, applies in appeals from the county court to the Court of Civil Appeals. *Sealing v. Collins* (Civ. App.) 214 S. W. 624.

29. **Expenses of record.**—See *Schallert v. Boggs* (Civ. App.) 210 S. W. 601; notes to art. 2046.

Art. 2071.

Note.—Superseded by Acts 1920, 36th Leg. 3d C. S., ch. 47, § 1, amending section 8 of ch. 119, Acts 1911 (as amended by Acts 1917, ch. 189, as amended by Acts 1917, 1st C. S., ch. 27, as amended by Acts 1918, 4th C. S., ch. 79, and as amended by Acts 1919, ch. 111), so as to read as set forth in art. 1925, ante. The amendatory act makes no provision for a poverty affidavit. But see art. 1925b, ante, making special provision in this respect as to the 3d, 39th, and 50th judicial districts.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113

Art. 2073. Time for preparing and filing statements of fact and bills of exceptions; judge may extend, provided, etc.; when parties fail to agree on statement, etc.; proviso.

See *Gribble v. State* (Cr. App.) 210 S. W. 215, 3 A. L. R. 1096; *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

1½. **Application in general.**—This article does not apply to testimony taken on motion for new trial for misconduct of jury, which must be preserved by bill of exceptions or statement of facts filed in term time. *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119.

The amendatory act applies to bills of exceptions containing testimony taken on a motion for new trial under the statute relating to misconduct of the jury. *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

Within this article, removal of a case from a trial court to an appellate court by writ of error is a method of "appeal," and the time for filing the statement of facts may be extended. *Martin v. Martin* (Civ. App.) 229 S. W. 695.

1¾. **Construction in general.**—Statutes relating to filing bills of exception, like other statutes relating to appeals, are always liberally construed. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

5. **Time for filing—in general.**—A statement of facts filed within 12 months is in time, where the case is brought to the appellate court for review by writ of error. *Brillhart v. Beever* (Civ. App.) 198 S. W. 973.

This article does not apply to testimony taken on motion for new trial for misconduct of jury, which must be preserved by bill of exceptions or statement of facts filed in term time. *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119.

Under art. 2075, a bill of exceptions to the court's failure to file findings could not be filed before adjournment, and was therefore properly filed after adjournment. *Lester v. Oldham* (Civ. App.) 208 S. W. 575.

Appellate court may consider refusal of plea of privilege, although appellant did not prepare and have approved and file a formal bill of exceptions at term same was acted upon; it being sufficient that appellant prepared and had approved and filed statement of facts and upon final trial prepared and had approved and filed a formal bill of exceptions. *Trevathan v. G. M. Hall & Son* (Civ. App.) 209 S. W. 447.

A ruling which would have been reviewable under proper bill of exceptions filed to the term at which it was made is clearly not reviewable under a bill of exceptions filed to a succeeding term. *St. Louis, B. & M. Ry. Co. v. Webber*, 109 Tex. 383, 210 S. W. 677.

Where a bill of exceptions was filed within the term, but was retained by the judge until after the term, and then rejected without a new bill prepared by the judge in lieu thereof, a bystanders' bill, filed thereafter within the time fixed by the court under the authority of this article was in time. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

6. — **Filing within time for filing transcript.**—Where a statement of facts was filed in the appellate court more than eight months after final judgment, a motion to strike out bills of exceptions and statement of facts held to be overruled, under this article, as amended, and article 2073, as amended, since it is legal to file a statement of facts as long as it is legal to file a transcript in an appellate court, and the time for filing bills of exception being within the legal limit or that of extensions. *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330.

Under art. 1608 and this article, where the transcript was filed as required, a statement of facts filed before the expiration of the time for filing the transcript was filed in time, though not presented to opposing counsel, or to the court within 100 days after the court's adjournment. *Early-Foster Co. v. Mid-Tex Mills* (Civ. App.) 232 S. W. 1117.

9. **Extension of time—Time of granting extension.**—Bill of exceptions filed nearly year after judgment in district court cannot be considered; no order extending time appearing to have been granted within 30-day period allowed for filing of bill of exceptions. *Cottoniere v. White, Jackson & Co.* (Civ. App.) 200 S. W. 906.

12. **Excuses for failure to file in time.**—Statutes prescribing time for filing bills of exception and statements of fact are mandatory, and it is no defense to motion to strike that trial court and attorneys were mistaken as to time, or that appellant was misled by opposing counsel. *St. Louis, Southwestern Ry. Co. of Texas v. McCord* (Civ. App.) 199 S. W. 526.

That the regular court reporter was absent from the state, with approval of the court, and engaged in private work much of the time between the trial of the cause and the motion to dismiss appeal for want of statement of facts, held not to excuse plaintiff's failure to compel transcription and filing of testimony. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714.

13. **Effect of failure to file in time—In general.**—Bills of exception, not filed in time, cannot become valid parts of the record by any waiver, as by failure to file motion to strike out bill of exceptions within the time prescribed by Court of Appeals rule No. 8 (142 S. W. xi). *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

14. — **Not considered.**—Bills of exceptions not filed within the time allowed therefor cannot be considered on appeal. *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203; *Byrne v. Texas Lumber & Loan Co.* (Civ. App.) 198 S. W. 600; *Camp v. Gourley* (Civ. App.) 201 S. W. 671; *Smith v. Smith* (Civ. App.) 213 S. W. 273.

Where a statement of facts on appeal was not filed with the transcript, and leave was not obtained to file it subsequently, it will not be considered. *Lauvens v. Barden* (Civ. App.) 196 S. W. 333.

Document delivered to clerk of court on appeal will not be considered as a statement of facts, where not filed in the court below within 90 days from the date the citation in error was served, as required by arts. 1608, 2073. *Billingsley v. Texas Midland R. R.* (Civ. App.) 208 S. W. 408.

A bill of exceptions not filed within the time prescribed by law cannot be considered. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

15. — **Striking out.**—Bills of exception, filed long after the time granted for filing, cannot be considered by the Court of Civil Appeals, and will be stricken out. *Carwile v. Frazier* (Civ. App.) 209 S. W. 781.

Bills of exceptions filed more than 30 days after adjournment where no order extending time for filing has been made, will be stricken from the record upon appellee's motion made within 30 days after filing of transcript in court of appeals, in view of this article. *Allen v. Berkmier* (Civ. App.) 216 S. W. 647.

15½. **Preparation of statement by judge.**—See *Hoff v. Clark* (Civ. App.) 200 S. W. 431; *Martin v. Martin* (Civ. App.) 229 S. W. 695; notes to art. 2069.

30. **Decisions under prior acts—Excuses for failure to file in time.**—Where an attorney neglected to file a statement of facts on appeal, and, in excuse of the neglect, files an affidavit stating that he prepared and signed the statement, and delivered it to his opponent's counsel, with the request that he get the approval of the trial judge, and such affidavit is denied by a counter-affidavit of the opponent's counsel, the latter neutralizes the former; and, the burden of proof being on the party guilty of the neglect, his excuse fails. *Spencer v. State*, 25 Tex. App. 585, 8 S. W. 648.

Under the Texas act of March 8, 1887 (Gen. Laws, p. 17), appellant is not excused by sickness, when it appears that he was in court at the time, and the statement was agreed to in the presence of the trial judge. *Id.*

Under Rev. St. 1879, arts. 1377, 1379, where the court adjourned two days after conviction, and a statement was filed nearly a month thereafter, the delay was not excused because a statement mailed by defendant's counsel to the district attorney six days after adjournment was on account of delayed mails, ten days in reaching him. *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458.

33. — **Effect of failure to file in time.**—Under Rev. St. 1879, art. 1314, requiring a bill of exceptions to be presented and filed during the term, this court cannot consider a bill of exceptions filed after the term, though it is included in a statement of facts settled within the time allowed for that purpose. *Schaub v. Dallas Brewing Co.*, 80 Tex. 634, 16 S. W. 429.

A mandamus to compel a county judge to certify a bill of exceptions stating that he failed to comply with Rev. St. 1879, art. 1306, relative to admonishing the jury, will not issue, where no exception was reserved at the time, as required by art. 1358, or presented within 10 days after the close of the trial, as allowed by art. 1363. *Gulf, C. & S. F. Ry. Co. v. Lockhart* (App.) 18 S. W. 649.

Art. 2074. [1382] [1379a] Statement of facts not filed in time, when considered by court.

See *George v. State*, 25 Tex. App. 229, 8 S. W. 25; *Bell v. State*, 31 Cr. R. 521, 21 S. W. 259.

Excuses for failure to file in time.—See *Spencer v. State*, 25 Tex. App. 585, 8 S. W. 648; notes to art. 2073.

Art. 2075. Time for judge to file conclusions, etc.

See *Lester v. Oldham* (Civ. App.) 208 S. W. 575; *Gerhart v. Moore* (Civ. App.) 229 S. W. 876.

Time for filing.—Where a case is tried before the court without a jury, the court must file written findings of fact and conclusions of law within 10 days after adjournment. *Mueller v. Spencer* (Civ. App.) 225 S. W. 223.

Since this article provides that the judge shall have 10 days after adjournment in which to prepare his findings of fact and conclusions of law, it is not error for the court to decline to make and file his findings before entry of judgment. *Wilcox v. Crawford* (Civ. App.) 231 S. W. 1104.

Excuse for failure to file in time.—It is no excuse, for failure of trial court to prepare and file findings of fact and conclusions of law, as required by this article, that appellant asked time to prepare and file statement of facts. *Anderson v. Lockhart* (Civ. App.) 209 S. W. 218.

Filing after time allowed.—Findings of fact and conclusions of law not filed within the time required by law cannot be considered on appeal. *Owen v. Smith* (Civ. App.) 203 S. W. 1171.

Where the findings of fact and conclusions of law were omitted from the transcript, and appellants and appellee agreed to have them incorporated in a supplemental transcript, but the findings and conclusions were not filed within the time prescribed by statute, they are not before the Court of Civil Appeals. *Patton v. Texas Pac. Coal & Oil Co.* (Civ. App.) 225 S. W. 857.

Reversal for failure to file in time.—Where issues of fact are raised, failure of the trial judge after due request to file findings of fact and conclusions of law, as required by arts. 1989, 2075, is reversible error. *Beavers v. Supreme Home of Ancient Order of Pilgrims* (Civ. App.) 204 S. W. 718; *Lester v. Oldham* (Civ. App.) 208 S. W. 575; *Stryker v. Van Velzer* (Civ. App.) 212 S. W. 674; *Marvin v. Kennison Bros.* (Civ. App.) 230 S. W. 831.

In shipper's action, where the evidence was conflicting and the court dismissed one defendant and found for the other, its failure to file its findings of fact and conclusions of law, after due request, under this article, prevented appellant from fairly presenting the appeal, and was ground for reversal. *Stewart & Threadgill v. El Paso & S. W. Co.* (Civ. App.) 207 S. W. 594.

For failure of trial court to prepare and file findings of fact and conclusions of law, as required by this article, preventing assignments of error thereon, there being several affirmative defenses, calling for findings and conclusions, judgment will be reversed. *Anderson v. Lockhart* (Civ. App.) 209 S. W. 218.

Where a proper statement of facts accompanies the record on appeal, and it is manifest therefrom that no other judgment could have been properly rendered, the failure to file findings and conclusions in 10 days under request in accordance with this article, is not cause for reversal. *Gerhart v. Moore* (Civ. App.) 229 S. W. 876.

Art. 2076. Where term of office expires before adjournment, etc.

Power of trial judge's successor.—Purported bills of exception and statement of facts did not become part of record by signature of successor of presiding judge, who was living at time bills were presented for approval. *C.-R.-C. Law List Co. v. Rowe* (Civ. App.) 204 S. W. 781.

CHAPTER TWENTY**APPEAL AND WRIT OF ERROR**

- | | Art. | |
|---|--------|---|
| 2078. Appeals, etc., to the courts of civil appeals, allowed in what cases. | 2100. | Appeal, etc., on cost bond or affidavit does not suspend execution. |
| 2079. Appeal from interlocutory order appointing receiver or trustee, etc. | 2101. | Supersedeas bond. |
| 2079a. Appeal from interlocutory order overruling motion to vacate order appointing receiver or trustee, etc. | 2102. | Supersedeas bond where judgment is for land or other property. |
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| 2097. Cost bond on appeal or writ of error. | | |
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Art.		Art.
2109.	To contain all proceedings, except, etc.	2112. Agreed statement of pleadings and proof.
2110.	Citation and return omitted, when.	2113. Transcript must contain, what.
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		2115. Briefs filed in court below, and notice given.

Article 2078. [1383] [1380] Appeals, etc., to the courts of civil appeals, allowed in what cases.

1. **Appeals and writs of error—Nature and origin.**—Unless granted by the Constitution, right of appeal itself is but a privilege, not an irrevocable right, and may be restricted, changed, and regulated by Legislature at discretion. *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 502, 1153.

There is no such thing as a right of appeal, except as the same may be conferred by the Constitution or legislative enactment; and, being wholly derived therefrom, such right moves only in channels fixed by such legal direction. *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934.

Habeas corpus is not a method of appeal. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

2. — **Statutory provisions and remedies.**—The Legislature cannot take away the right to appeal given by the Constitution, although it may enact rules of procedure limiting the exercise of the right, and may increase, diminish, or change, civil or criminal jurisdiction. *City of Ft. Worth v. Capps Land Co.* (Civ. App.) 265 S. W. 491.

3. — **Proper mode of review.**—Under art. 3065, a decision in an election contest can be reviewed only by appeal, and a writ of error to review the same must be dismissed. *Frank v. Sufford* (Civ. App.) 216 S. W. 283.

Under the statute, the Court of Civil Appeals has jurisdiction to review on writ or error the action of the county court in overruling defendant's plea of privilege, the right given by art. 1903, as amended by Acts 35th Leg. (1917) c. 176, to appeal from judgment sustaining or overruling such a plea, not being exclusive. *Bennett v. Rose Mfg. Co.* (Civ. App.) 226 S. W. 143.

4. — **Successive proceedings for review.**—Under Rev. St. 1879, art. 1389, the perfecting of an appeal, which is never prosecuted, does not deprive a party of his right to a writ of error, especially where defendant in error, although entitled to an affirmance of the judgment, fails to ask for it during the term to which the appeal is returnable, and the appeal itself in no way obstructed his enforcement of the judgment. *Thompson v. Anderson*, 82 Tex. 237, 18 S. W. 153.

A proceeding in error will not be dismissed because it is prosecuted after the dismissal of an appeal from the same judgment where the judgment was not affirmed on the appeal. *Brillhart v. Beever* (Civ. App.) 198 S. W. 973.

6½. — **Appeal from part of judgment.**—Where judgment decrees foreclosure of lien on land claimed as a homestead for only a portion of the amount of the judgment, an appeal may be taken from only so much of the judgment as affects the land claimed as a homestead. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

7. **Grounds of appellate jurisdiction—In general.**—Jurisdiction cannot be conferred on the appellate court to review by writ of error, by waiver or estoppel on defendants in error. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

8. — **Existence of actual controversy.**—Where, pending appeal from an order refusing to enjoin defendants from paying money and before the filing of the appeal bond, the money was paid, the appellate court cannot entertain the appeal. *Flood v. City of Dallas* (Civ. App.) 217 S. W. 194.

Where the subject-matter of the litigation has ceased to exist, an appeal will not be entertained merely to determine a question of costs. *Id.*

9. — **Jurisdiction of lower court.**—Jurisdiction in county court on appeal from justice was necessary to give Court of Civil Appeals jurisdiction on appeal from judgment of county court. *Fruit Dispatch Co. v. Independent Fruit Co.* (Civ. App.) 198 S. W. 594.

It is the duty of appellate courts to pass upon the jurisdiction of the trial court to render the judgment, whether the question is raised or not. *Werner v. Needham* (Civ. App.) 201 S. W. 213.

Where it appears from face of petition for injunction in county court that such court had no jurisdiction over subject-matter of suit, Court of Civil Appeals has no jurisdiction over appeal from judgment of county court. *Lunning v. Scott* (Civ. App.) 201 S. W. 663.

If county court had no jurisdiction, Court of Civil Appeals is without appellate jurisdiction. *Baker v. Cole* (Civ. App.) 203 S. W. 411.

12. **Decisions reviewable—In general.**—Under art. 1990, it is imperative on the trial court to render judgment on the facts found by the jury, though it may then grant a rehearing, but error, if any, would be on the overruling of the motion for a new trial, and not on the motion to set aside the findings and render judgment. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

No appeal lies from an order granting a continuance. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 205 S. W. 158.

Where landowners intervened in receivership proceedings of irrigation plant, alleging water rights, and collusion in the fixing of rates, court's decree, holding that

there was no collusion and that court had right to fix rates, was appealable. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

Where the district court, in term time, entered an order postponing the hearing on a motion to substitute receivers to a day certain beyond the term in another county, a provision in the order that the hearing should be had and considered as in term time did not operate to make the decision of the motion a judgment of the court from which an appeal would lie; arts. 1714, 1726, not being applicable. *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

13. — **Action of judge in vacation or at chambers.**—The fact that an order in vacation is void has no bearing upon whether or not it is appealable. *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

An order made by a district court in vacation, removing receivers and appointing their successors, is not appealable, in the absence of statutory provision; art. 2079 not applying. *Id.*

14. — **Discretionary action.**—It is duty of appellate court to sustain trial court's action in dismissing cause unless there has been abuse of discretion. *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

A discretionary order or decree will not be reversed unless it clearly appears from record that there has been a disregard of rights of a party. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

Appellate court will not review causes on ground of abuse of discretion, unless it clearly appears that such discretion was abused. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

16. **Finality of judgment.—In general.**—See *Ford v. State* (Civ. App.) 209 S. W. 490. Judgment for probate of will is not lacking in finality for appeal because will was not copied therein, if the judgment identified the will by definite description, declared it probated, and ordered it to be filed and recorded, and the transcript to the district court showed compliance with art. 7874, as to filing wills. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

Judgment merely finding facts and conclusions of law without pronouncing legal consequences thereof is not final appealable judgment. *Ogburn v. Loop Land & Irrigation Co.* (Civ. App.) 202 S. W. 366.

No appeal can be prosecuted from any other than a final judgment. *Taylor v. Masterson* (Civ. App.) 231 S. W. 856.

18. — **Nature and scope of decision.**—In suit to foreclose deed of trust lien, order of court that lands and nursery stock thereon be sold separately held final and appealable judgment. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 196 S. W. 626.

Under Code Cr. Proc. arts. 438-643, and arts. 490, 493-498, dismissal of motion to set aside judgment nisi on forfeiture of bail bond left such judgment in statu quo, and the order was not appealable, in view of Code Cr. Proc. arts. 504, 960, and Civ. St. art. 2078. *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

The action of the court in setting aside a judgment or decree in divorce must be treated as any other interlocutory order granting a new trial; and, not being final, the Court of Appeals has no jurisdiction to review it. *Henderson v. Henderson* (Civ. App.) 213 S. W. 315.

Orders directing a sale of property by a receiver and confirming the sale are not merely interlocutory, but are orders from which an appeal will lie, before the determination of the main controversy. *McBride v. United Irr. Co.* (Civ. App.) 213 S. W. 988.

Appeal does not lie from order for custody of children pending suit for divorce; the statute not providing for appeal from a temporary order of such kind. *Goodman v. Goodman* (Civ. App.) 224 S. W. 207.

Where during the same term at which judgment was entered, the court set it aside and granted a new trial, and ordered that the cause be continued by operation of law, an appeal, subsequently taken, was premature, and from no final judgment and the Court of Civil Appeals is without jurisdiction to entertain it, and it will be dismissed. *Liz Mar Plantation Co. v. Whitfill* (Civ. App.) 224 S. W. 1118.

An order entered after trial before jury in which special issues were submitted, some of which were answered, and others of which the jury could not agree on, which order declared a mistrial and set the case for another trial, is not a final judgment, and is not appealable. *Phœbus v. Connellee* (Civ. App.) 228 S. W. 982.

Order of district court, fixing the capacity of contestants to contest the probate of a will, on appeal from order of county court denying probate, held not appealable, being an interlocutory order to be passed on in an appeal from the final judgment. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

The overruling of a motion to strike a case from the docket for plaintiff's abandonment of the case by not sooner filing papers after change of venue, is not a final order from which an appeal will lie, in view of art. 1997. *W. T. Wilson Grain Co. v. Tobian* (Civ. App.) 230 S. W. 426.

A judgment granting a petition for review and setting aside a decree of divorce, and holding the original suit for divorce for trial anew, is not a final judgment, and is not appealable under this article. *McVey v. McVey* (Civ. App.) 230 S. W. 781.

An order sustaining a demurrer and special exceptions to pleas in reconvention, followed by a decree reciting that defendants declined to amend and gave notice of appeal, and stating that the cause was continued, was not a final judgment, but an interlocutory order or decree which the appellate court has no jurisdiction to review. *Taylor v. Masterson* (Civ. App.) 231 S. W. 856.

Where the trial court only overruled motion for order transferring the cause

and asking the court to sustain pleas of privilege and to transfer the cause, such order was merely interlocutory, from which there is no right of appeal, under arts. 1903, 2078. *Seale v. Anderson* (Civ. App.) 232 S. W. 928.

19. — **Finality as to all parties.**—Where the court overruled motion for continuance to bring in other parties as sought by cross-bill, such parties were not before the court, and it was not necessary, in order to be final, that the judgment dispose of them, or of any cause of action asserted against them. *Thompson v. Harmon* (Com. App.) 207 S. W. 909.

In action against partnership operating bank, cross-bill held to seek no relief as against temporary administrator of partner, so that judgment was final, although it failed to dispose of his interest. *Id.*

Judgment foreclosing laborer's lien against all defendants is final, although it failed to dispose of certain parties against whom plaintiff sought only to foreclose lien. *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

Where the account sued on was assigned, and assignee was permitted to intervene, and prosecute the suit, and amended petition, though including original plaintiff as a nominal party, alleged that the account had been assigned for a valuable consideration, judgment for interveners without formally dismissing the action as to plaintiffs or reciting that plaintiffs take nothing by the action held a "final judgment," and appealable as such. *Yerby v. Heineken & Vogelsang* (Civ. App.) 209 S. W. 835.

In a suit by the holder of a secured note and the trustee under the deed of trust, a judgment awarding foreclosure to the creditor only is a final judgment; the trustee being only a nominal party. *Gregory v. South Texas Lumber Co.* (Civ. App.) 216 S. W. 420.

In action to cancel oil lease, judgment ordering cancellation of lease as to two of the defendants, but making no disposition as to a third defendant's interest, held not appealable, not being final. *McKay v. Hines* (Civ. App.) 220 S. W. 171.

Judgment for defendants in action for specific performance, which, makes no disposition as to one of the plaintiffs, held not a final judgment, and not within jurisdiction of appellate court. *Tenison v. Donigan* (Civ. App.) 220 S. W. 362.

A judgment denying recovery to one of two plaintiffs and requiring him to pay the costs, but making no disposition of the suit by the other plaintiff, is not a final judgment, and an appeal therefrom must be dismissed. *Cock v. Marshall Gas Co.* (Civ. App.) 224 S. W. 527.

In an action to quiet title wherein defendant asked judgment against a third party, a judgment dismissing the suit so far as it was by one plaintiff against the defendant, and awarding defendant relief against the third party, one of the plaintiffs not being mentioned, was not a final one, and an appeal therefrom must be dismissed. *Widows' and Orphans' Home and Charitable Institution of the Church of the Living God v. Anderson* (Civ. App.) 224 S. W. 1115.

20. — **Determination of controversy.**—Where verdict disposes of issues, in main suit and those in a cross-action a judgment not disposing of issues on cross-action is not final and appealable. *Burton Lingo Co. v. First Baptist Church* (Civ. App.) 198 S. W. 1013.

Judgment in action in which set-off is interposed, finding for plaintiff for less than claimed, is final, though set-off is not expressly mentioned. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

A plaintiff who abandoned his case by refusing to offer proof in support of the part of petition sustained on exception is not entitled to appeal from the judgment against him, as only part of the case would be brought up for review. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 209 S. W. 186.

Where defendant counterclaimed for balance in his favor, but in open court admitted balance in favor of plaintiffs, and merely disputed one item, judgment failing to dispose of or eliminate the cross-action, held a final judgment, and appealable as such. *Yerby v. Heineken & Vogelsang* (Civ. App.) 209 S. W. 835.

A judgment which does not dispose of all the parties and issues is not a final judgment, and therefore not within the jurisdiction of appellate court. *Tenison v. Donigan* (Civ. App.) 220 S. W. 362.

The general rule is that a judgment is "final" only when it leaves nothing further to be litigated. *Burton Lingo Co. v. First Baptist Church of Abilene* (Com. App.) 222 S. W. 203, reversing judgment (Civ. App.) 198 S. W. 1013.

Judgments, in suits for partition disposing of the rights of the parties and appointing commissioners to partition the land in accordance with the provisions of the judgment, are final and appealable. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

Judgment in action to enforce award of Industrial Accident Board held final and appealable, it disposing of all of the issues. *U. S. Fidelity & Guaranty Co. of Baltimore v. Parson* (Civ. App.) 226 S. W. 418.

Under art. 1997, there cannot be final judgments on both plaintiff's original claim and defendant's plea in reconvention, and when judgment is rendered for plaintiff on his claim without mentioning defendant's plea, the judgment will be held to have disposed of such plea so as to be appealable. *Taylor v. Masterson* (Civ. App.) 231 S. W. 856.

For purpose of appeal, a judgment is only "final" when the whole matter in controversy is disposed of as to all the parties, and no order or decree which does not preclude further litigation is final. *Id.*

A judgment for plaintiff for less than the amount due from garnishee, without any mention of cross-action, held *res judicata* as to the cross-action, and therefore a final

judgment, from which an appeal may be taken. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

23. Amount in controversy.—Where plaintiff alleged he had paid \$42.30 usurious interest, and that defendant was asserting an illegal claim for \$20, the principal debt, and prayed for judgment for \$84.60, and for cancellation of the debt, the amount was insufficient to give the Court of Civil Appeals jurisdiction. *Watson v. Evans* (Civ. App.) 195 S. W. 1170.

Where plaintiff, in an action for conversion, asked for \$100 for mental anguish, but did not allege injury to person, and hence was not, on face of pleading, entitled to damages for mental anguish, the \$100 will not be considered in determining amount in controversy, for purpose of appeal. *Dunn v. Wilkerson* (Civ. App.) 203 S. W. 59.

The Court of Civil Appeals is without jurisdiction of the appeal of plaintiff from an adverse judgment in his action to recover less than \$100, one-half of the fee paid an attorney in a personal injury case whom plaintiff had assisted, in the absence of allegation of unlawful or tortious act. *Yeager v. Houston & T. C. Ry. Co.* (Civ. App.) 218 S. W. 3.

Art. 1903, as amended by Acts 1917, c. 176, providing procedure for contesting plea of privilege and that either party may appeal, is subordinate to and must be construed in harmony with art. 2078, limiting appeals from county court to Court of Civil Appeals to cases involving more than \$100. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

26. — Interest.—Where plaintiff in justice court could not have added interest without exceeding the jurisdiction of the justice court, she cannot amend in the county court by claiming interest, so as to bring the amount in controversy within the appellate jurisdiction of the Court of Civil Appeals. *Dunn v. Wilkerson* (Civ. App.) 203 S. W. 59.

30. Persons entitled to and right of review—Appeals between co-parties.—Where appellants complain of a void judgment against a codefendant, which, if allowed to stand, would estop them in a controversy with such codefendant over the matter involved, they have a right to be heard, which right cannot be impaired by the dereliction of such codefendant. *Hull v. First Guaranty State Bank of Overton* (Civ. App.) 199 S. W. 1148.

31. — Interest in subject-matter.—Appellant, which was in possession of the property, had the right to protect its possession and claim by questioning validity of plaintiff's laborer's lien, and by seeking relief from judgment foreclosing lien. *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

Where the judgment canceling an oil lease required the lessee to pay costs, he could appeal therefrom, though he had parted with his interest in the lease. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

Directors of an insolvent corporation, who were trustees for the corporation and creditors, and had the legal title to the assets, had such interest in the property that they could prosecute a writ of error from a judgment in an action to foreclose a lien against it. *Leyhe v. Leyhe* (Civ. App.) 220 S. W. 377.

32. — Parties or persons injured or aggrieved.—Any one or more of the parties aggrieved by the judgment of a trial court may perfect his or their appeal. *Farrias v. Delgado* (Civ. App.) 210 S. W. 610.

To maintain writ of error or appeal, the damage must be a direct and positive one, effected by the judgment and not merely in consequence thereof. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

A party cannot appeal when his substantial rights are not affected, or when he is given all the relief sought; therefore, where appellant took the position of an interpleader, and the judgment determined the rights of the claimants, it is not entitled to appeal. *Id.*

35. Waiver of right of review—Recognition of or acquiescence in decision.—Where personal judgment is recovered against husband, and foreclosure of lien on land claimed as homestead is decreed as to a portion of the judgment, the husband and wife, by appealing from only that portion of the judgment, concede that the judgment is correct except in so far as it establishes and forecloses a lien against such land. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

An action started by appellant against prevailing plaintiff, petition referring to the adverse judgment, filed prior to motion for a new trial, held not to show acquiescence in the judgment rendered as a matter of law so as to bar his right of appeal. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

36. — Compliance with judgment.—Act of a defendant in purchasing judgment for plaintiff held not satisfaction precluding appellate court from entertaining appeal, since other defendants have right to appeal. *Boyd v. Urrutia* (Civ. App.) 195 S. W. 341.

Where, in the main case, a judgment was given against garnishee as trustee for defendants' creditors, which was not appealed from but was paid, an appeal will not lie from the judgment discharging the garnishee, which would relitigate matters already finally adjudicated. *Fergin v. Vincent* (Civ. App.) 204 S. W. 356.

39. Persons entitled to allege error.—Where appeal was by individual defendant and by defendant firm only, plaintiff not appealing from judgment rendered in favor of two members of firm, such part of judgment is not before Court of Appeals for review. *Wooster v. Hoecker* (Civ. App.) 195 S. W. 332.

Where defendant and cross-complainant sought judgment for attorney's fees on note against both plaintiff and defendant indorser, his cross-assignment as to such defendant could not be considered or judgment rendered against him without rendering judgment against plaintiff. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Court of Civil Appeals will not consider suggestion of fundamental error made by party not appealing. *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934.

Judgment creditor, against whom and the sheriff suit to enjoin execution was brought and sustained, held in no position to complain of service of original citation on sheriff by his deputy. *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330.

Where, in an action for conversion, judgment is rendered against both defendants, court will not, on appeal, determine whether there was error as to defendant not appealing in submitting a special issue to the jury. *Sikes v. Keller* (Civ. App.) 197 S. W. 311.

Defendant cannot complain of judgment for widow for entire amount of damages to community property and adjudging that children who were parties take nothing. *San Antonio & A. P. Ry. Co. v. Evans* (Civ. App.) 198 S. W. 674.

In action for damages to community property, held that court did not dismiss the children from the suit before judgment, but ruled that there was no testimony authorizing recovery by them, and hence defendant could not complain. *Id.*

Where no objection was made by intervener or any one else to judgment in his favor and he is not included in appeal bond and made no motion for new trial, but filed a brief styling himself appellant, he has no standing in Court of Civil Appeals. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Assignments of error which are only available to certain defendants who did not file motion for new trial or assignments of error will not be considered. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

Plaintiff's right to recover against appellant's codefendant, as well as against appellant, being a matter affecting plaintiff's rights only, appellant cannot complain. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

Where defendant brings a cross-action against a third party and the latter alone appeals, the third party cannot complain of the overruling of plaintiff's exception to the answer interpleading the third party. *Lester v. Park* (Civ. App.) 205 S. W. 734.

In passenger's action for injuries, sleeping car company could not complain that liability of railway company was not submitted to the jury, so far as the judgment rendered against it in favor of the passenger was concerned; both it and the railway company being joint tort-feasors. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

Although in suit on covenant of warranty defendant filed cross-action against his grantor, he could not, on appeal, complain of exclusion of the original warranty deed to him, since such deed could not affect his rights in the main suit. *Fisher v. Sands* (Civ. App.) 211 S. W. 269.

Where there was full proof as to appealing defendants they cannot raise any question as to whether or not the judgment against other defendants not appealing rested on any evidence. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

Director General of Railroads cannot complain, in an action for death of employé, that jury was permitted to apportion the damages between the widow and children in that such apportionment infringed upon the jurisdiction of the probate court. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

On defendant's appeal, where plaintiff did not object to failure of court to include interest, and presented no such question by cross-assignment, appellate court cannot consider such question in determining whether defendant's complaint against judgment should be sustained. *Langben v. Cresp & Co.* (Civ. App.) 218 S. W. 144.

In an action by a husband to establish his rights in his wife's separate property, where the trial court erred in adjudging a lien on the separate property, and the wife did not appeal, or object, the error will not be corrected on appeal by the husband. *King v. King* (Civ. App.) 218 S. W. 1093.

Where plea of privilege was sustained as to one defendant and overruled as to others, and only the latter defendants appeal, plaintiff by cross-assignment cannot complain of the judgment as to the other defendants. *Rutledge v. Evans* (Civ. App.) 219 S. W. 218.

The appellate court will not reform a judgment in favor of an appellee who has sued out no cross-appeal nor filed cross-assignments of error. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647.

In partition suit, the sole appealing defendant could not object to the action of the court in disposing of the interest of minor defendants, on the ground that they were not properly within the court's jurisdiction, unless he had a right to and did appeal as representative of the minors. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

No complaint can be made on appeal concerning a judgment against sureties on a replevy bond, where the sureties prosecuted no appeal. *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

That the judgment was rendered against a party as a member of a firm, who was in fact not a member, cannot affect the judgment on appeal, where such party did not appeal. *Schweers-Kern Live Stock Commission Co. v. Kothmann* (Civ. App.) 224 S. W. 593.

Appellee cannot complain of errors in the judgment of the court below in awarding costs, and the appellate court is without power to disturb a judgment against it. *Minnick v. Dreyer Motor Co.* (Civ. App.) 227 S. W. 365.

A defendant who did not appeal cannot, on appeal by other defendants, ask a reversal of the judgment against him, even though he suggests fundamental error as to him. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

On appeal from judgment for defendant in original suit, where there was no appeal from the judgment against defendant in his cross-action, the appellate court will not reverse such judgment. *Nesbitt v. Hudson* (Civ. App.) 230 S. W. 746.

On appeal by plaintiff in an action in which judgment was rendered for plaintiff and

others in defendant's cross-action the appellate court will not consider matters affecting merely issues between plaintiff's coparties on the one hand and defendant on the other. *Id.*

40. — **Estoppel to allege error.**—Party requesting submission of issue held not entitled to assail the verdict for want of evidence to support it. *Moglia v. Rios* (Civ. App.) 200 S. W. 1133; *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032; *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

Appellant cannot complain that recitals in a surveyor's field notes were erroneously admitted, where he read such field notes in evidence, and did not object to the testimony when it was offered. *Houston Oil Co. of Texas v. Miller* (Civ. App.) 196 S. W. 189.

In servant's action for injuries, any error in court's charge held invited by defendant's request. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 196 S. W. 230.

In action for feed sold, where defendants introduced in evidence the account which was attached to plaintiff's pleadings as an exhibit and made a part thereof, they waived their right to complain of its admission. *Avery v. Llano Cotton Seed Oil Mill Ass'n* (Civ. App.) 196 S. W. 351.

An assignment of error to the court's definition of "reckless" and "careless" will be overruled, where the objecting party requested a charge substantially as given. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

Where jury were told to diminish damages if employé was negligent, employer held in no position to complain of further instruction requested by it to find for it if employé was negligent. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003.

Assignment relating to evidence drawn out by appellant, and not of such nature as to probably injure him, presents no ground for reversal on his appeal. *Southern Traction Co. v. Ellis* (Civ. App.) 198 S. W. 983.

In suit by plaintiff for injury to his wife, defendant, who introduced testimony showing that wife's eyesight was defective, cannot complain that cross-examination upon subject was permitted. *Id.*

Court having charged, at defendant's request, that damages should be diminished if plaintiff was negligent, refusal of further instruction to find for defendant, if his negligence was the sole proximate cause, held not ground for complaint by defendant. *St. Louis Southwestern Ry. Co. of Texas v. McCallister* (Civ. App.) 198 S. W. 1082.

Where an abstract of title in its entirety was introduced in evidence by a party, he cannot complain of the introduction of a part thereof by the other party. *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183.

That party, objecting to testimony as hearsay, brings out testimony to same effect on cross-examining witness, does not waive error. *Jurado v. Holmes* (Civ. App.) 200 S. W. 859.

Defendant employers held not to waive objection to submission of separate issue as to defective gun used by employé in glass factory, by subsequent request for instruction as to ordinary care. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Where both sides introduced similar evidence, without objection, one party cannot later complain that the evidence was improper. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

In city's action to recover taxes assessed long after the year in which they were due, where defendant objected to introduction of assessment rolls on the ground that the description of the property was totally void, he could not complain that plaintiff introduced no evidence to identify the land. *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

An appellant cannot complain of failure of the court to file findings of fact and conclusions of law, where such failure was not the fault of the court but of appellant's counsel. *Bragg v. Bragg* (Civ. App.) 202 S. W. 992.

Submitting a special issue containing several distinct matters, being at request of appellant, is not ground for reversal. *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793.

Where appellant asked a special charge on the burden of proof, he cannot complain that the evidence was insufficient to warrant submission of the case to the jury. *Schalbert v. Boyd* (Civ. App.) 203 S. W. 940.

Plaintiff could not complain of instruction which did not materially differ from a special charge which she requested; the error, if any, being invited. *Dutton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 204 S. W. 352.

Alleged error in a special charge invited and acquiesced in by the appellant could not be complained of on appeal in view of art. 1971. *First Nat. Bank v. Hardtt* (Civ. App.) 204 S. W. 712.

Where court with appellant's acquiescence instructed that appellees' knowledge and good faith in purchasing property from appellant's debtor need not be considered if jury found that debtor was not insolvent, and jury did not so find, refusal of appellant's special charges submitting issue of appellees' good faith was not error. *Id.*

A party cannot complain that improper evidence was elicited from his witness on cross-examination, where same evidence had been given on direct examination. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

It being alleged that defendant listed cattle with plaintiff for sale, proof that cattle belonged to a partnership will not create a fatal variance; defendant, who personally listed cattle and failed to plead that his partner was jointly liable, being in no position to complain. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

Where an erroneous instruction, conflicting with another, was given at appellant's request, appellant cannot complain. *Ferguson v. Johnson* (Civ. App.) 205 S. W. 512.

In action for failure to deliver goods sold, where defendant sought to prove plain-

tiff's insolvency and to have that issue submitted, defendant could not complain of the manner in which the instructions submitted the question, and at the same time contend that it was immaterial whether plaintiff was insolvent. *Rankin-Hill Co. v. Albertson-Lewis Co.* (Civ. App.) 206 S. W. 731.

Where the measure of damages submitted by the court was in accordance with a requested instruction by defendant, defendant cannot complain that the measure of damages was improper, and constituted fundamental error. *Angelina County Lumber Co. v. Mast* (Civ. App.) 208 S. W. 360.

Where the testimony objected to was first given on direct examination of a witness by one of defendant's attorneys, defendant cannot complain. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

A party cannot complain of a charge submitting the issue of negligence to the jury, where he invited the error by pleading negligence, offering proof thereon, and impliedly assenting to the charge by failing to object to it. *Nabors v. Colorado & S. Ry. Co.* (Civ. App.) 210 S. W. 276.

If an instruction is erroneous as assuming facts, it must be considered as invited error, where defendant offered an instruction which was given upon the same subject, and which is subject to the same criticism. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

A party cannot complain of the submission of an issue, where he requested its submission. *Hanrick v. Hanrick*, 110 Tex. 59, 214 S. W. 321.

In suit to enjoin drilling for oil and gas on the public highways under an attempted lease by commissioners' court, where appellants had in their answer expressly invited the court to grant injunction as to all portions of the highway except those where the county owned only an easement, and lessees had acquired the mineral rights from the owners, appellants could not complain that the suit should have been abated in its entirety for plaintiffs' failure to allege a special injury as to all the portions of the highway involved. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

An appellant cannot complain of the admission of testimony, where on cross-examination of the witness he elicited similar testimony. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Contention that trial court erred in submitting special issues Nos. 1 and 2, for the reason that such issues were in conflict with special issue No. 3, cannot be sustained, issue No. 3 being identical with issue No. 2, requested by appellant. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 217 S. W. 420.

That appellant requested instructions relating to question of discovered peril would not estop him from claiming that the question should not have been submitted; appellant, who objected to submission of question, seeking by the requests merely to have views of his counsel presented, should the question be submitted. *Schaff v. Gooch* (Civ. App.) 218 S. W. 783.

Where purchaser, introduced several letters between himself and seller, one of which contained numerous self-serving declarations made by the seller, he cannot complain of the subsequent admission of another letter written by seller containing the same self-serving declarations. *McMahon v. Gunter* (Civ. App.) 219 S. W. 284.

In an action for injuries, where defendants alleged that plaintiff attempted to cross street between the intersection of two other streets, a special issue, submitting in the language of the answer the claim therein made, cannot be objected to by defendants as misleading and obscure. *Merchants' Transfer Co. v. Wilkinson* (Civ. App.) 219 S. W. 891.

Allegation of amended petition that original petition was filed on a given date was sufficient to show the date of filing of such pleading, and plaintiff appellant who made up the record cannot be heard to complain on appeal that the original petition should have been placed in the record. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

Error of instruction in placing the burden of proof on plaintiff, over his objection, is not invited, though plaintiff claimed and was allowed the opening and concluding argument, to which under art. 1953, the party having the burden of proof is entitled. *First Nat. Bank v. Todd* (Com. App.) 231 S. W. 322.

A party, having requested a fuller instruction as to a matter covered in the main charge, could not complain of court's action in giving it. *McAdoo v. McClure* (Civ. App.) 232 S. W. 348.

Art. 2079. [1383] [1380] Appeal from interlocutory order appointing receiver, or trustee, etc.

See *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438; notes to art. 2078.

Cited, *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

Order appointing receiver.—This article, held to authorize appeal only from order adjudicating that property be taken from defendant's possession and appointing a receiver, and not from order appointing a successor, on removal of the first receiver as disqualified. *McFarlane v. Greenmeyer* (Civ. App.) 199 S. W. 304.

An order made by a district court in vacation, removing receivers and appointing their successors, is not appealable in the absence of statutory provision, this article not applying. *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

Time for appeal.—Under this article, appeal bond and not transcript must be filed within 20 days after appeal is perfected. *Merchants' Transfer Co. v. Hildebrand* (Civ. App.) 200 S. W. 551.

In partition suit, where, a receiver was appointed at plaintiff's instance to take possession of the property, and no objection was then made to the order, nor was any appeal prosecuted from it, and the case was not tried on its merits for several months, complaint, on appeal, concerning the receiver's appointment, came too late, in view of this article. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

Stay of proceedings.—See *Blankenship v. Little Motor Kar Co.* (Civ. App.) 224 S. W. 210; notes to art. 2079a.

Art. 2079a. Appeal from interlocutory order overruling motion to vacate order appointing receiver or trustee, etc.

Cited, *Hamilton v. American Nat. Ins. Co.* (Civ. App.) 200 S. W. 259.

Applicability.—In a suit by stockholders against a corporation and its managing trustees, wherein receiver was appointed, motion of intervening successor trustees that the receivership be vacated, dissolved, and terminated held to come within this article, as motion to vacate order appointing receiver, rendering the interlocutory order overruling the motion appealable. *Little Motor Kar Co. v. Blankenship* (Civ. App.) 228 S. W. 318.

Supersedeas.—Notwithstanding an order appointing a receiver under arts. 2079, 2101, may be superseded pending an appeal, art. 2079a, does not contemplate a supersedeas, for the denial in such a case is a mere negation, and it would be improper to temporarily terminate a receivership pending an appeal, where it might well be reinstated thereafter. *Blankenship v. Little Motor Kar Co.* (Civ. App.) 224 S. W. 210.

Art. 2084. [1387] [1387] Appeal perfected, how.

See *Corley v. Renz* (Civ. App.) 25 S. W. 1130; *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

When appeal perfected in general.—Under arts. 2084, 2099, as to how and when appeal is perfected, appeal was not perfected by mere notice of appeal, and appellate court's jurisdiction did not attach until appeal bond was filed. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

Time to appeal in general.—Under this article, the Court of Civil Appeals is without jurisdiction to hear an appeal, unless the appellant gives notice of appeal in open court during term at which final judgment is rendered, and within two days after final judgment overruling motion for new trial. *Davenport v. Kelly* (Civ. App.) 196 S. W. 358.

Where case was tried before special judge and final judgment was rendered July 30th, and motion for new trial was not filed until August 30th, and was presented to the regular judge, who declined to enter any order, a notice of appeal given on August 30th was not given within two days after judgment, or as required by this article. *Sovereign Camp Woodmen of the World v. Shaddox* (Civ. App.) 217 S. W. 1094.

Interlocutory orders.—As under art. 4644, a temporary injunction order may be made in chambers, out of term and without notice or hearing, a notice of appeal is not necessary to give a right of appeal from such order; this article requiring exceptions to the ruling of the trial court and notice of appeal therefrom having no application. *Blaylock v. Slocomb* (Civ. App.) 231 S. W. 864.

Notice of appeal—Necessity.—Proper notice of appeal under this article, is a jurisdictional matter. *Sovereign Camp Woodmen of the World v. Shaddox* (Civ. App.) 217 S. W. 1094; *White v. Day* (Civ. App.) 230 S. W. 843.

In view of this article, it is jurisdictional that the record on appeal discloses that notice of appeal was given in the court below. *Luse v. Parmer* (Civ. App.) 221 S. W. 1031.

To appeal from a final judgment perpetuating an injunction made in open court upon a hearing in term time in a trial upon the merits, exception and notice of appeal required by this article, is necessary, and where no exception was taken and notice given the appeal must be dismissed. *Blaylock v. Slocomb* (Civ. App.) 231 S. W. 864.

Sufficiency.—Certificate of trial judge stating that appellant's attorney came to his office, and stated that he wished to except to judgment and take appeal, does not show proper notice, where it does not show that judge's office was place where court was then being held. *Davenport v. Kelly* (Civ. App.) 196 S. W. 358.

Time for filing bond or affidavit.—To confer jurisdiction upon the appellate court the appeal bond must have been filed within 20 days after the expiration of the term at which judgment was rendered, as required by this article. *Lewis v. McDowell* (Civ. App.) 199 S. W. 1179.

Under art. 2079, regulating appeal from interlocutory order appointing receiver, appeal bond and not transcript must be filed within 20 days after appeal is perfected. *Merchants' Transfer Co. v. Hildebrand* (Civ. App.) 200 S. W. 551.

Where court adjourned March 31st and a new term began April 2d, a motion for appeal and an affidavit in lieu of bond filed April 7th was timely under this article, although the order granting the appeal was not entered until May 5th; the Court of Civil Appeals having, by article 1593, power to ascertain matters of fact touching its jurisdiction. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

Where a cause was tried in the May term, which could not continue more than eight weeks, and which term was adjourned June 28th, an appeal bond filed July 27th was not filed within 20 days after expiration of term, as required by this article, and the Court of Civil Appeals did not acquire jurisdiction. *Edens v. Cleaves* (Civ. App.) 206 S. W. 722.

No appeal was perfected as to an order of sale made by the court on December 14th, at which time exception was taken and notice of appeal given, where the appeal bond was not filed until January 2d. *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

Where trial court adjourned July 1, 1920, and affidavit in lieu of appeal bond was "filed August 19, 1920," the appeal must be dismissed for want of jurisdiction, under this article. *McVey v. McVey* (Civ. App.) 230 S. W. 781.

Where final judgment was January 8, and appeal bond filed on March 20 was not filed in time to confer jurisdiction upon the appellate court under this article. *Southern Surety Co. v. Brown* (Civ. App.) 231 S. W. 144.

— **Nonresident of county.**—An unincorporated association not having its headquarters in county in which it was sued was not required to file appeal bond within 20 days under this article, since such association is an entity in view of arts. 6149-6154, and as such has its residence at the place of the general headquarters of the governing officers and body. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

Where the term of court might have, and did continue more than 8 weeks and some of the defendants did not reside in the county, under this article, defendant appellants were required to file appeal bond within 30 days after their notice of appeal was given to give the Court of Civil Appeals jurisdiction. *Yount v. Fagin* (Civ. App.) 225 S. W. 591.

— **Effect of failure to file in time.**—A motion to set aside a judgment of affirmance and dismiss the appeal, because the appeal bond was not filed within the time fixed by this article, may be made at a subsequent term. *Edens v. Cleaves* (Civ. App.) 206 S. W. 722.

Where appeal bond was not filed in trial court within time allowed by art. 30, subd. 4, and art. 2084, Court of Civil Appeals is without power to hear and determine appeal, which must be dismissed. *Farmer v. McKinley* (Civ. App.) 208 S. W. 408.

Where bond on a cross-appeal is not filed within the time required, a motion to dismiss the appeal will be sustained. *Benton v. Taylor* (Civ. App.) 208 S. W. 704.

Under this article, where trial term must have adjourned September 29th, transcript showing it began September 3d, but not showing date of adjournment, or any order extending term, and appeal bond was not filed until October 26th, court had no jurisdiction of appeal. *Hart Cotton Mach. Co. v. Graham Gin Co.* (Civ. App.) 209 S. W. 269.

Where an appeal bond is not filed in time to give jurisdiction to the appellate court under this article, the appeal must be dismissed. *Fryer v. Headlee* (Civ. App.) 218 S. W. 654.

The Court of Civil Appeals is without power to hear and determine an appeal which was not perfected by filing of an appeal bond within the time required by this article. *White v. Day* (Civ. App.) 230 S. W. 843.

Art. 2085. [1388] [1388] By parties of whom no appeal bond is required.

Dismissal for want of notice.—Where the record on appeal from a judgment dissolving a temporary writ of injunction does not disclose that there was a notice of appeal as provided by this article, the cause must be dismissed from the docket of the Court of Civil Appeals. *Parry Oil Co. v. Michaels* (Civ. App.) 230 S. W. 223.

Art. 2086. [1389] [1389] Writ of error sued out, when.—The writ of error may, in cases where the same is allowed, be sued out at any time within six months after the final judgment is rendered and not thereafter. [Acts 1892, p. 42; Acts 1919, 36th Leg., ch. 85, § 1, amending art. 2086, Rev. Civ. St. 1911.]

Took effect 90 days after March 19, 1919, date of adjournment.

Time for suing out writ of error.—Rev. St. 1879, art. 1389, provided that a writ of error might be sued out within two years. Act 1892, taking effect September 1st. (Gen. Laws 1892, c. 15), provided that a writ of error to the court of civil appeals might be sued out within 12 months. Held, that a writ of error to such court, from a judgment rendered before the date of the taking effect of the act, might be sued out within 12 months of such date, provided that it be done within 2 years from the rendition of the judgment. *Compton v. Ashley*, 4 Civ. App. 406, 23 S. W. 487.

Where the transcript shows that on the day final judgment was rendered the trial court overruled defendants' general demurrer, but the record contains nothing to show that the order was not entered of record as indicated by the transcript on that date, motion to dismiss writ of error cannot be successfully resisted on the ground that time for suing out the writ dates from the time a certain nunc pro tunc order overruling demurrer was subsequently made. *Texas Power & Light Co. v. Healer* (Civ. App.) 216 S. W. 241.

In estimating the time under this article, within which writ of error should be sued out the period should commence with the date of judgment, and not with the date of overruling of motion for new trial. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

Defendant's application for writ of error, filed more than 12 months after entry of judgment where judgment was not thereafter amended or corrected by the court,

under art. 2015, was not in time, though plaintiff had voluntarily filed a remittitur under article 2013, the time within which writ should have been sued out having commenced with the rendition of judgment, and not the date of a voluntary remittitur. *Pope v. Wedgeworth* (Com. App.) 221 S. W. 950, reversing judgment (Civ. App.) *Wedgeworth v. Pope*, 196 S. W. 621.

The time for suing out a writ of error begins with the date of final judgment and not with the date overruling motion for new trial, so that where the petition and bond were filed more than one year after judgment, the proceeding must be dismissed, whether Acts 36th Leg. c. 85, reducing such time to six months or the old law applies. *Lacey v. McClure Co.* (Civ. App.) 223 S. W. 872.

— **Application and effect of Act of 1919.**—Acts 36th Leg. (1919) c. 85, applies to a judgment rendered prior to the amendment. *Orange & N. W. Ry. Co. v. Pruter* (Civ. App.) 220 S. W. 797; *Same v. Fairchilds* (Civ. App.) 220 S. W. 798.

Such act does not, even as to a judgment rendered prior to the amendment, give to plaintiff in error six months after the amendatory act became effective in which to sue out his writ. *Id.*

Where judgment was rendered February 5, 1919, and court adjourned February 7, 1919, a writ of error sued out on January 24, 1920, did not give the appellate court jurisdiction, since such amendatory act went into effect on June 19, 1919; such amendment applying to judgments rendered before as well as those rendered after it went into effect. *Cameron County Irr. Dist. No. 1 v. Bankers' Trust Co.* (Civ. App.) 223 S. W. 249.

Where judgment was rendered May 2d, motion for new trial overruled May 13th, in which notice of appeal was given, application for writ of error, filed in the district court April 13th of the following year, was too late, under this article, as amended by such act, which took effect June 17, 1919, 90 days after the adjournment of the Legislature, March 19th. *Jowell v. A. G. McAdams Lumber Co.* (Civ. App.) 224 S. W. 1114.

Where judgment in suit for partition disposing of the rights of the parties and appointing commissioners was entered on October 24, 1916, and corrected April 16, 1917, and judgment approving the report of the commissioners was rendered October 22, 1918, under such act, petition for writ of error filed August 22, 1919, more than 12 months after the date of either of the judgments, was too late, and the writ will be dismissed. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

Where final judgment in county court was entered against plaintiff in error October 28, 1918, a writ of error sued out October 14, 1919, comes too late, for as more than four months remained when such act went into force June 17, and the time was reasonable, the new law must be deemed to apply from that date, and the time for suing out a writ of error was reduced to two months in accordance with the ratio between the two periods. *Wichita Valley Ry. Co. v. Carter* (Civ. App.) 225 S. W. 592.

Evidence as to time of suing out.—To convince the Court of Civil Appeals that it has jurisdiction because a petition for writ of error was filed in the trial court in due time, the petition being marked by the clerk of court as filed late, the evidence should go farther than merely to show that a petition was mailed which in due course of mail should have reached the clerk 10 days before the date indicated by his file mark, and in time. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

Time for filing bills of exception and statements of fact.—See *Brillhart v. Beever* (Civ. App.) 198 S. W. 973; *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.* (Civ. App.) 227 S. W. 330; notes to art. 2073.

Successive proceedings for review.—See *Thompson v. Anderson*, 82 Tex. 237, 18 S. W. 153; notes to art. 2078.

Art. 2088. [1391] [1391] Requisites of petition.

Requisites of petition—In general.—See *Fouga v. Fouga* (Civ. App.) 221 S. W. 1117; notes to art. 2091.

Under Gen. Laws 1892, p. 20, and Sup. Ct. Rule No. 1, a petition which states the objections made in the district court, and that their determination was necessary to the decision of the court of civil appeals, and that they were specifically called to its attention by a motion for a rehearing, was insufficient. *Texas & P. Ry. Co. v. Wilson*, 85 Tex. 507, 22 S. W. 385.

— **Names and residences of parties.**—In action against the E. "Railroad Company," petition for writ of error naming the defendant as the E. "Railway Company," held not fatally defective, the variance not being material. *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Petition for writ of error containing the judgment in which it was expressly recited that the defendants were corporations, and naming as defendants the same defendants named in such judgment, held to sufficiently show who the defendants are, and that they are corporations, though it would have been better practice to have named the agents upon whom service might be had. *Id.*

To give jurisdiction to the appellate court, there must be substantial compliance with art. 2088, requiring petition for writ of error to state the names and residences of the parties adversely interested, and article 2097, requiring a writ of error bond. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Waiver of defects.—Where parties adversely interested are not made parties to writ of error, defect cannot under rule 9 (142 S. W. xi) be waived except by voluntary appearance of said defendants. *Dunnagan v. East Texas Colonization & Development Co.* (Civ. App.) 198 S. W. 357.

While motion to dismiss writ of error for defect of parties should, under rule 9 (142 S. W. xi), be filed within 30 days, failure so to move does not waive the defect. *Id.*

Parties to writ of error—Necessary parties.—In trespass to try title, with judgment for all defendants, including original defendant and one made a party because it had warranted title, such defendants were adversely interested and necessary parties to writ of error. *Dunnagan v. East Texas Colonization & Development Co.* (Civ. App.) 198 S. W. 357.

When parties adversely interested are not made parties to the writ of error, the Court of Civil Appeals has no jurisdiction. *Id.*

In suit by a daughter against her father and brothers to recover her share of the community estate of her father and deceased mother, plaintiff's two brothers were necessary parties to the father's appeal by writ of error, according to plaintiff daughter's allegations being necessary parties to the suit and interested adversely to plaintiff. *Reilly v. Hanagan* (Civ. App.) 225 S. W. 797.

That, after judgment for plaintiffs, the court made an order awarding half to their attorneys, does not render the judgment divided, so as to give the appellate court jurisdiction to review it, on writ of error sued out by defendant, but not naming some of the other parties in the petition for error or in the error bond. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Art. 2089. [1392] [1392] Error bond.

See *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107; *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Art. 2090. [1393] [1393] Citation in error.

See *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Appearance by party.—Execution by defendant in error of an agreement that plaintiff in error could file the transcript and record and file its briefs at any time before a specified date, and that defendant in error might file his briefs at any time prior to two weeks before submission of the cause, operated as an appearance in the Court of Civil Appeals by defendant in error. *Indemnity Co. of America v. Mahaffey* (Civ. App.) 231 S. W. 861.

Art. 2091. [1394] [1394] Form and requisites of citation.

See *Thompson v. Anderson*, 82 Tex. 237, 18 S. W. 153; *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Effect of defects.—Where the citation in error does not correctly describe the judgment as it was described in the petition in error, as required by Rev. St. 1879, art. 1394, while the suit will not be dismissed if the petition is good, it will be stricken from the docket and another citation issued. *Crane v. Hogan* (Sup.) 7 S. W. 57.

Where there is no return on the citation in error, and the writ fails to state the time within which defendant in error is notified to appear, as required by Acts 1892, p. 44, art. 1394, and defendant in error does not appear, the cause will be stricken from the docket. *Morriss v. Grapevine* (Civ. App.) 25 S. W. 60.

Where, on motion by defendant in error to affirm on certificate, the certificate failed to show that a citation in error, as required by Rev. St. 1879, art. 1394, was issued and served, the motion will be overruled. *Scarborough v. Groesbeck* (Civ. App.) 25 S. W. 687.

Error in making citation in error returnable in 30 days, instead of 10 or 20 days, under this article, held not to require quashing of the citation. *Brillhart v. Beaver* (Civ. App.) 198 S. W. 973.

Where a petition for a writ of error misstated the date of judgment, the number of the cause, and the date new trial was denied, and the citation in error gave a different description of the judgment from that in the petition and failed to properly describe the judgment, as required by this article, the cause will be dismissed on account of such defects in the petition and citation. *Fouga v. Fouga* (Civ. App.) 221 S. W. 1117.

Waiver of defects.—Defendant in error held to waive right to abate citation for mistake in return day by moving to strike out statement of facts and dismiss proceeding in error. *Brillhart v. Beaver* (Civ. App.) 198 S. W. 973.

Art. 2092. [1395] [1395] Service and return of.

See *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Effect of defective service.—Though defendant in error does not appear, the court will of its own motion order the case stricken from the docket for insufficient showing of service of citation in error, the matter being jurisdictional. *Queen City Motor Co. v. Texas Auto Supply Co.* (Civ. App.) 229 S. W. 591.

Waiver of defective service.—Appearance for the purpose of moving to dismiss writ of error, and to strike out parts of the record, "in the event the court should overrule the motion to dismiss," held not a waiver of defective service of the petition for the writ of error. *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Unqualified appearance by defendants in error constitutes a general appearance, and operates as a waiver of any defects in the process. *Id.*

Requisites of return.—Sheriff's return of citation in error held not uncertain. *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330.

Defect in sheriff's return of citation in error served upon defendant in error, if but amendable irregularity, does not deprive appellate court of jurisdiction to determine cause. *Sypert v. Rogers Lumber Co.* (Civ. App.) 201 S. W. 1102.

Return on citation in error, executed by delivering to L., president of T., is insufficient, it not showing what was served or how service was made, under this article. *Queen City Motor Co. v. Texas Auto Supply Co.* (Civ. App.) 229 S. W. 591.

Return showing service of petition for writ of error on named person as agent of the "Rock Island Railroad" held insufficient in an action against the "Chicago, Rock Island & Gulf Railway Company." *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Arts. 2093-2096. [1396-1399] [1396-1399].

See *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Art. 2097. [1400] [1400] Cost bond on appeal or writ of error.

See *Crumley v. McKinney* (Sup.) 9 S. W. 157; notes to art. 2101.

1. **Necessity of bond.**—To give jurisdiction to the appellate court, there must be substantial compliance with art. 2088, requiring petition for writ of error to state the names and residences of the parties adversely interested, and art. 2097, requiring a writ of error bond payable to defendant in error. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

7. **Parties to bond—Obligees.**—Where appeal was taken by one secondarily liable and defendant and cross-complainant was made sole obligee of bond and party primarily liable was no party to appeal, bond was sufficient to give court jurisdiction of appeal. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Where plaintiff dismissed a motion to set aside an order of dismissal, as against certain defendants who had not been served with notice, such dismissal was in legal effect a dismissal of plaintiff's original suit against such defendants, and it was not necessary to make them payees in a writ of error bond in order to have reviewed an order refusing to reinstate as to the other defendant. *Hickman v. Swain* (Civ. App.) 210 S. W. 548.

Defendants, as to whom an action was not dismissed on plaintiff's default, need not be named as payees in a writ of error bond in order to have reviewed an order refusing to set aside the order of dismissal as to other defendants. *Id.*

8. — **Obligors.**—Husband having no interest in subject-matter, being joined with his wife to meet requirements of law, is only "nominal party," and where he alone executes appeal bond appeal will not be considered. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

An appeal bond will bind the living parties who signed it, although the names of two dead parties, named as plaintiffs in instituting the suit, also appeared as signers of the bond. *Farrias v. Delgado* (Civ. App.) 210 S. W. 610.

13. **Conditions of bond.**—Under Gen. Laws Called Sess. 22d Leg. p. 44, art. 1404, a bond conditioned that appellant "shall prosecute this appeal with effect, and, in case the judgment of the said court of civil appeals shall be against the defendants herein, they shall perform the judgment," etc., of said court, and pay damages awarded, is not so defective as to deprive the court of civil appeals of jurisdiction to affirm the judgment below on motion of the appellee. *Davis v. Estes*, 4 Civ. App. 207, 23 S. W. 411.

Bond not conditioned that appellants shall pay all of the costs which have accrued in the court below and which may accrue in the Court of Civil Appeals and the Supreme Court is insufficient as a cost bond. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

14. **Sufficiency of bond—In general.**—Where an appeal bond does not distinctly name the obligees, but does so by reasonable intendment, it gives the appellate court jurisdiction. *Hall v. Hall* (Civ. App.) 198 S. W. 636.

On appeal to a court of civil appeals in cases where the county court exercises original jurisdiction under Const. art. 5, § 6, an appeal bond deficient in any particular required by this article, is sufficient to confer jurisdiction, since it may be amended under art. 2104, when objection is made. *First State Bank & Trust Co. of Santa Anna v. O. D. Mann & Sons* (Civ. App.) 209 S. W. 683.

Since the enactment of art. 2104, authorizing the amendment of any appeal bond however defective, purporting to be an obligation to indemnify appellee, a bond, whether defective in form or substance, is sufficient to give the appellate court jurisdiction. *Newell v. Lafarelle* (Civ. App.) 225 S. W. 353.

18. **Scope and effect of bond.**—In action by administratrix and others, where general demurrer was sustained and petition dismissed, plaintiffs all gave notice of appeal; but, no appeal bond being given, only administratrix is before appellate court. *Cole v. Mallory S. S. Co.* (Civ. App.) 197 S. W. 326.

In trespass to try title, although appeal was taken by giving cost bond only, it continued case until final decision by Supreme Court, so that defendant had 18 months provided by judgment of lower court, and arts. 7764, 7765, to pay for land, after decision by Supreme Court. *Fain v. McCain* (Civ. App.) 199 S. W. 889.

Where defendants appealed merely by giving a cost bond, and plaintiffs commenced garnishment proceedings, the Court of Civil Appeals will not issue writs of injunction and mandamus to restrain enforcement of the garnishment judgment, for the jurisdiction of the Court of Civil Appeals is not involved. *Durham v. Scrivener* (Civ. App.) 228 S. W. 282.

19. **Approval of bond.**—Supersedeas bond, see *Bean v. Polk* (Civ. App.) 226 S. W. 1106; notes to art. 2101.

25. **Waiver of defects.**—Failure seasonably to object to a defective appeal bond is a waiver of the defect. *First State Bank & Trust Co. of Santa Anna v. O. D. Mann & Sons* (Civ. App.) 209 S. W. 683.

27. **Dismissal for failure to give proper bond.**—Where no motion was made by party to dismiss appeal because of defective bond, it is too late for court, after it has rendered judgment, to dismiss it upon its own motion. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

Under Rules of Court of Civil Appeals, rule 8, and art. 2104, held that informalities in appeal bond did not require dismissal of the appeal as to receiver appealing, where the defect was not objected to by motion. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

A motion to dismiss appeal for insufficient bond held to be overruled where it was not filed in time. *Hall v. Hall* (Civ. App.) 198 S. W. 636.

When an appeal bond deficient in any particular mentioned in this article, is seasonably objected to by appellee, and appellant fails to file a new bond within a reasonable time fixed by the court, the appeal will be dismissed. *First State Bank & Trust Co. of Santa Anna v. O. D. Mann & Sons* (Civ. App.) 209 S. W. 683.

Under art. 3632, requiring bonds in appeals from county to district court to be fixed by county court and made payable to county judge, a bond not fixed by county court and made payable to appellee is defective, and appeal should be dismissed, unless bond is amended under art. 2104. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Art. 2098. [1401] [1401] Appeal, etc., by party unable to give cost bond.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Proof before county judge or court in session.—Proof of inability to pay costs required by this article, to be made before court trying the case, must be made before the court, if in session, and it must affirmatively appear it was thus made to give jurisdiction. *Horn v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 201 S. W. 1101.

The judge has no power to hear proof after adjournment for the term. *Id.*

Hearing, while in session, proof of inability to give cost bond in trial court would not cure irregularity in perfecting appeal in hearing proof of inability to pay cost after court has adjourned. *Id.*

Requisites and sufficiency of affidavit.—An affidavit for appeal in lieu of bond under this article, may be made before a notary public who is affiant's attorney, since such affidavit is evidence merely. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

Under this article, an affidavit made before a notary public is insufficient to give the appellate court jurisdiction. *Oliver v. Swift & Co.* (Civ. App.) 220 S. W. 234.

Art. 2099. [1402] [1402]. Appeal or writ of error, perfected, when.

Appeal perfected when.—Appeal from judgment in lower court, where law requires bond to be given, is not perfected until bond is filed, under arts. 2099, 2101. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

Under arts. 2084, 2099, appeal was not perfected by mere notice of appeal, and appellate court's jurisdiction did not attach until appeal bond was filed. *Mahan v. Kyle* (Civ. App.) 211 S. W. 302.

The Court of Civil Appeals acquired jurisdiction of an appeal when appellant filed his supersedeas bond with the clerk of the county court, and settlement of the matters in dispute by the parties would not defeat such jurisdiction. *Hedrick v. Matthews* (Civ. App.) 216 S. W. 424.

Effect of transfer to appellate court—In general.—Where county court at law had jurisdiction of parties in a forcible detainer case and judgment was regular upon its face, district court did not have jurisdiction to enjoin issuance and execution of a writ of possession; an appeal having been taken to appellate court from county court. *Crosby v. Arrietta* (Civ. App.) 209 S. W. 252.

A judgment refusing a permanent injunction does not affect a temporary injunction in force at the time the judgment dissolving the injunction was rendered, so that an appeal from such final judgment leaves the temporary injunction in force. *Ford v. State* (Civ. App.) 209 S. W. 490.

Powers and proceedings of lower court.—As injunction is auxiliary to main suit, and cannot be maintained separately, district court had jurisdiction to grant temporary injunction enjoining persons from voting shares of stock, title to which was being litigated on appeal from district court's judgment. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

The appeal from a judgment in an action to set aside a former judgment deprived district court of authority to proceed with trial on the merits until the appeal was finally disposed of by the Court of Civil Appeals. *Godshalk v. Martin* (Civ. App.) 203 S. W. 1161.

Where defendant brought cross-action against another, and the latter's plea of privilege was sustained, whereupon defendant excepted and gave notice of appeal, it was not error to try the case before determination of the appeal; the only effect of the notice of appeal being to suspend the transfer of the case, under art. 1903, as amend-

ed by Acts 35th Leg. c. 176. *Pittman & Harrison Co. v. Boatenhamer* (Civ. App.) 210 S. W. 972.

A garnishment proceeding should not be dismissed, on motion of the garnishee, on the ground that the main or original suit has been dismissed, but should be continued to await the result of an appeal by the plaintiff in the original suit. *Farmers' State Bank of Merkel v. First Nat. Bank* (Civ. App.) 228 S. W. 268.

Art. 2100. [1403] [1403] Appeal, etc., on cost bond or affidavit does not suspend execution.

Operation and effect.—Judgment of trial court, under this article, never having been suspended upon appeal prosecuted on bond for costs only, and not on supersedeas bond, it can be enforced, notwithstanding appeal, by process issued from trial court. *Kirby v. Morris* (Civ. App.) 198 S. W. 995.

While a sale of property under court process for a greater sum than this court has since held it chargeable with, may have been rendered void, that fact alone could not confer jurisdiction to stay execution, where the cause reached appellate court about a month after sale on a mere cost bond, which does not, under this article, stay the execution, and which appeal has been disposed of and a rehearing denied. *Benavides v. Thomas* (Civ. App.) 224 S. W. 205.

Where defendants perfected their appeal by a cost bond only, thus coming within this article, the trial court has jurisdiction to entertain garnishment proceedings pursuant to art. 271, subd. 3, even if the word "execution," should be taken in its strict sense. *Durham v. Scrivener* (Civ. App.) 228 S. W. 282.

Art. 2101. [1404] [1404] Supersedeas bond.

See *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

When appeal perfected.—See *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051; notes to art. 2099.

Right to supersedeas.—Art. 2079a, relating to appeals from orders denying the vacation of receivership does not contemplate a supersedeas, for the denial in such a case is a mere negation, and it would be improper to temporarily terminate a receivership pending an appeal, where it might well be reinstated thereafter. *Blankenship v. Little Motor Kar Co.* (Civ. App.) 224 S. W. 210.

Amount of bond.—Where judgment decrees foreclosure of lien for a portion of the amount of the judgment, bond stating that judgment was recovered for the amount for which foreclosure was decreed without showing that the appeal is only from such portion of the judgment is insufficient as a supersedeas bond, where amount thereof is less than twice the amount of the entire judgment. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

Conditions of bond.—Under Rev. St. 1879, art. 1404, a bond conditioned that the obligors "shall comply with the judgment, order, or decree of the supreme court upon such writ of error, and pay all such damages as may be awarded against him," does not embrace all the conditions required by the statute, and the writ of error must be dismissed. *Caldwell v. Ballow* (Sup.) 7 S. W. 677.

A bond in an action where judgment is rendered for foreclosure of a lien on land owned by the appellees, for which they were not personally liable, conditioned as provided in Rev. St. 1879, art. 1400, with the additional condition required by art. 1405, is not a supersedeas bond within art. 1404. *Crumley v. McKinney* (Sup.) 9 S. W. 157.

Form and contents of bond.—Where judgment decrees foreclosure of lien for only a portion of the amount of the judgment, and appeal is taken from only such part of judgment, the bond should clearly and distinctly show upon its face that appeal is not from any other portion of the judgment. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

Approval of bond.—Supersedeas bond complying in form and substance with this article, was sufficient to give the Court of Appeals jurisdiction, and should have been approved by the clerk of the district court if the sureties were sufficient. *Bean v. Polk* (Civ. App.) 226 S. W. 1106.

Clerk may not reject supersedeas bond because of form or substance. *Id.*

Scope and effect as stay.—See *Ford v. State* (Civ. App.) 209 S. W. 490; notes to art. 2103.

Accrual of liability on bond.—An appeal is prosecuted "with effect" within supersedeas bond, where it is prosecuted successfully, and appellant succeeds in reversing judgment in material part, such as enforcement of lien in suit on contract to pay money, although entire judgment is not reversed. *Schutze v. Dabney* (Civ. App.) 204 S. W. 342.

Defenses to actions on bonds.—Where the widow sued for community property notwithstanding pendency of administration, and defendant made no objection, the supersedeas bond being made payable to the widow, defendant cannot thereafter in an action on the bond, urge that the widow was without capacity to sue, particularly as the land, being part of the homestead, was not subject to debts. *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

Art. 2102. [1405] [1405] Supersedeas bond, where judgment is for land or other property.

See *Crumley v. McKinney* (Sup.) 9 S. W. 157; notes to art. 2101; *Corley v. Renz* (Civ. App.) 25 S. W. 1130.

Application.—Rev. St. 1879, art. 1405, is not applicable to an appeal from a judgment of a justice of the peace for the possession of personal property, as such appeals are governed by art. 1639. *Batsel v. Blaine* (App.) 15 S. W. 283.

Liability on bond.—A judgment in trespass to try title for the land, but not allowing rentals, does not bar an action for rentals accruing subsequent to the former judgment and secured by a supersedeas bond given under this article, on appeal in the former cause. *Roberson v. Tom* (Civ. App.) 206 S. W. 723.

Art. 2103. [1406] [1406] Judgment stayed and execution superseded.

See *Crumley v. McKinney* (Sup.) 9 S. W. 157.

Scope and effect as stay.—Suit cannot be maintained on a judgment on which appeal is pending, whether on cost or supersedeas bond. *Van Natta v. Van Natta* (Civ. App.) 200 S. W. 907.

In view of arts. 2101, 2103, an appeal from a judgment of any character upon a supersedeas bond does not suspend the judgment, but only stays its execution pending appeal; the judgment itself remaining in full force until reversed. *Ford v. State* (Civ. App.) 209 S. W. 490.

Stay in injunction suits.—In suit for temporary injunction restraining defendant from selling intoxicating liquors at retail, after defendant's appeal from injunction order, he having given bond conditioned as a supersedeas bond, the state, on motion to the Court of Civil Appeals, is entitled to injunction restraining defendant from pursuing the occupation. *Ford v. State* (Civ. App.) 209 S. W. 490.

A judgment, which requires no process to enforce its execution, as a prohibitory injunction, is not affected by an appeal therefrom on a supersedeas bond, as the judgment is not suspended pending the appeal, but execution alone is stayed. *Id.*

Stay on appeal from appointment of receiver.—The legal effect of execution of supersedeas bond by defendant railroad, proceeded against by the state for appointment of receiver, was to suspend order appointing receiver until appeal therefrom had been disposed of, and it became duty of receiver, if he had taken charge of property, to return it to railroad, and to refrain from exercising powers. *Timpson & H. Ry. Co. v. State* (Civ. App.) 222 S. W. 322.

Art. 2103a. Requiring additional supersedeas bond.—In all cases hereafter carried by appeal or writ of error from the District or County Court to the Court of Civil Appeals or to the Supreme Court, in which a supersedeas bond shall be given, and whenever the said bond shall become insufficient by reason of the insolvency of the sureties on such bond, or from any other cause, it shall be the duty of the Court in which the said appeal or writ of error is pending, upon proper showing of such insufficiency being made to require the giving of additional supersedeas bond in like amount as the original, to be approved by the clerk of the Court in which said appeal or writ of error is pending. [Acts 1921, 37th Leg., ch. 117, § 1.]

Explanatory.—Sec. 4 repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

Art. 2103b. Same; execution in trial court on failure to give additional bond; original bond as cost bond; dismissal.—In case of failure to comply with the rule of the Court ordering the execution of said additional supersedeas bond within a period of twenty (20) days after such order is served, the Court in which said appeal or writ of error is pending shall issue an order to the trial court, directing or permitting the issuance of execution on the judgment appealed from; but said appeal or writ of error shall not be dismissed, but continued upon the docket as if said cause had been appealed or writ of error granted upon cost bond, provided the clerk of the court in which said appeal or writ of error is pending is satisfied that the said original bond is still sufficient when considered as a cost bond. But in the event that the said clerk shall consider the said original supersedeas bond insufficient as a cost bond, then the said appeal or writ of error shall be dismissed, unless the appellant or the

plaintiff in error shall within twenty (20) days after notice served by the clerk that the said bond is deemed insufficient for the purposes of the cost bond, shall execute a new bond satisfactory to said clerk, sufficient to secure the payment of the costs theretofore accrued, or that might thereafter accrue in the further prosecution of the said appeal or writ of error. the giving of said additional original bond or bonds shall not release the liability of the sureties on the original supersedeas bond. [Id., § 2.]

Art. 2103c. Same; partial invalidity.—If any paragraph, subsection or section or part of this law shall be held unconstitutional, such invalidity shall not affect any other part of this Act not subject to like objections. [Id., § 3.]

Art. 2104. Amendment of appeal bond.

See *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694; *First State Bank & Trust Co. of Santa Anna v. O. D. Mann & Sons* (Civ. App.) 209 S. W. 683; *Sparkman v. Stout* (Civ. App.) 212 S. W. 526; notes to art. 2097.

Cited, *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473.

Amendment or substitution of bond—in general.—The court will not dismiss a writ of error for insufficiency of the bond, but will give opportunity to amend. *Dunnagan v. East Texas Colonization & Development Co.* (Civ. App.) 198 S. W. 357.

Where supersedeas bond filed is insufficient because it fails to show on its face that the appeal is only from portion of the judgment, appellate court on motion to dismiss will give appellants the right to file a sufficient bond within specified time, under the statute authorizing amendment of appeal bonds. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 211 S. W. 350.

— **Defects that may be cured.**—Under this article, in suit wherein plaintiff died and his executrix was substituted, a defendant's appeal bond, which identified the case, stated the judgment rendered, and was defective only in that it was made payable to the deceased plaintiff, is amendable as purporting to be an obligation to indemnify executrix against loss by the appeal. *Newell v. Lafarelle* (Civ. App.) 225 S. W. 853.

Art. 2105. [1407] [1407] State, county, etc., not to give bond.

See *Pearce v. Tootle*, 75 Tex. 148, 12 S. W. 536.

Art. 2106. [1408] [1408] Of executors, etc.

Cited, *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Persons exempted.—A guardian ad litem, being always appointed by the court, and deriving his authority to act through such appointment alone, comes within the letter of Rev. St. 1879, art. 1408. *Schonfield v. Turner* (Sup.) 6 S. W. 628.

In action against sureties on guardian's bond, appeal bond was necessary to perfect appeal by sureties. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

Though minors are the only children and heirs, and entitled to the whole of the estate, the duly qualified and acting administratrix is entitled, in view of art. 3235, to appeal as administratrix without bond from judgment withdrawing estate from administration. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Under this article, a guardian ad litem, appealing from a judgment against his wards, need not give an appeal bond. *Day v. Henderson* (Civ. App.) 224 S. W. 248.

Appeal in individual capacity.—This article does not apply where guardian or administrator is personally aggrieved, and appeals in his own right. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

Art. 2108. [1410] [1410] Transcript to be made out and delivered.

See *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

Presumption as to performance of duty by clerk.—Where judge's name does not appear in the blank constituting part of the form required by district court rule 48 (142 S. W. xxi), following the judgment copied in the transcript, it will be presumed, for the purpose of giving jurisdiction, in the absence of such attack on the verity of the record as is permitted by law, that the clerk performed his duty in making out and certifying transcript as required by arts. 2108, 2114, and that judgment was entered under direction of judge under art. 1694, since such direction may be oral. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Art. 2109. [1411] [1411] Transcript to contain all proceedings, except, etc.

See *Ward v. Scarborough* (Civ. App.) 223 S. W. 1107.

1. **Duty of appellant as to transcript.**—It is the appellant's duty to see that the transcript is properly made up. *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738.

3. **Matters to be shown by transcript—In general.**—Assignments of error based upon alleged action of court in overruling certain exceptions cannot be considered, where transcript contains no order showing that court ever considered or ruled upon exceptions. *First Nat. Bank of Canadian v. Jones* (Civ. App.) 209 S. W. 468.

An agreement between attorneys that a bill of exceptions was presented and filed at the trial and could be considered by the Court of Civil Appeals as part of the transcript cannot be considered by the Supreme Court for any purpose when not filed in the trial court, authenticated by the trial judge, nor incorporated in the transcript. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Com. App.) 212 S. W. 155.

There being no adequate basis shown for judgment within arts. 2108-2114, as to preparation and contents of transcript, judgment against garnishee containing no recitations that necessary statutory proceedings were had will be reversed, where record contains no writ in the nature of garnishment or a showing that one was issued and no answer to any purported writ or fact authorizing judgment against garnishee in the absence of answer under arts. 271-300. *Van Velzer v. Houston Installment Co.* (Civ. App.) 216 S. W. 469.

4. — **Jurisdiction of lower court.**—See *McMickle v. Texarkana Nat. Bank*, 4 Civ. App. 210, 23 S. W. 428; notes to art. 2110.

On appeal from suit in county court to foreclose debt of \$412.21 where the transcript did not affirmatively show, by allegations in pleadings, the value at time of suit of chattel which was subject of foreclosure, so as to show jurisdiction of lower court, Court of Civil Appeals has no jurisdiction. *Bush v. Campbell* (Civ. App.) 201 S. W. 1055.

The record on appeal, showing no citation to defendant, waiver, or appearance, fails to show the trial court had jurisdiction, as required by arts. 2109, 2110; recital in judgment of due citation not being enough. *Steger v. May* (Civ. App.) 202 S. W. 989.

6. — **Proceedings of intermediate courts.**—In case originating in justice court, where record to Court of Civil Appeals contains no transcript from justice to county court, and justice court's original jurisdiction of the cause of action is not otherwise shown, appeal will be dismissed. *Brotherhood of American Yeomen v. Jagers* (Civ. App.) 199 S. W. 1179.

7. **Scope and contents of transcript.**—The statement of facts contained an agreement that the evidence used in a certain case between the defendant and another party, tried in the same court, and before the supreme court at a former term, "is the same as was offered on the trial of this case, so far as it goes; and that the evidence found in the statement of facts in that case may be used in this, without copying it in the transcript in this case." Held, under Rev. St. 1879, arts. 1411, 1413, 1414, that the evidence referred to could not be considered for any purpose. *Johnson v. Sabine & E. T. Ry. Co.*, 69 Tex. 641, 7 S. W. 379.

Papers purporting to have been filed, and to be the petition for an injunction and the answer thereto, though sent with the transcript, were not entitled to be filed in the Court of Civil Appeals, and could not be considered, under art. 2109 et seq., and court rules 85, 94, and 100 (142 S. W. xxiii, xxiv). *Baker v. Nipper* (Civ. App.) 198 S. W. 596.

In view of Court of Civil Appeals rules 14, 84 (142 S. W. xviii, xxiii), where case was tried and judgment rendered on amended petition, the original petition was improperly included in the transcript. *Jones v. Fink* (Civ. App.) 209 S. W. 777.

9. **Requisites and sufficiency of transcript.**—Where transcript on writ of error to review default judgment does not show that defendants appeared, and does not contain the citation and return, the judgment must be reversed; the mere recital that defendants were duly served being insufficient. *McDaniel v. State* (Civ. App.) 200 S. W. 411.

Where clerk, in preparing transcript, indicated time of filing instruments by date at end of each pleading, court on appeal will take jurisdiction, where there is no file mark following affidavit in lieu of appeal bond, but judgment immediately following is followed by file mark; it being obvious that file mark was intended for affidavit, since judgment is not required to be filed. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Where the transcript showed that guardian ad litem gave notice of appeal, and a supplemental transcript, containing the judgment showed the appointment of the guardian ad litem, the appeal will not be dismissed, on the theory that the record failed to show the guardian's appointment. *Day v. Henderson* (Civ. App.) 224 S. W. 248.

11. **Effect of omissions.**—Where transcript on appeal from a judgment against defendant does not show that there was citation, waiver, or entry of appearance, a judgment by default must be reversed, though it recites that due service was had. *Rhodes v. Coats* (Civ. App.) 215 S. W. 470.

12. **Effect of failure to file proper transcript.**—Where the transcript consisted solely of the order refusing the injunction, the appeal bond, and the clerk's cost bill and certificate, the appeal will be dismissed, as the court could not determine whether the judge erred in refusing the injunction. *Baker v. Nipper* (Civ. App.) 198 S. W. 596.

Court of Civil Appeals refrained from dismissing the appeal where the transcript of the record, not in compliance with Rules for the District and County Courts, No. 90 (142 S. W. xxiii), has its sheets mutilated and fastened together with gem paper clips, running through the perforations, making the use of any sort of seal impossible; appellee not questioning correctness or completeness of transcript. *Johnson v. Mangum* (Civ. App.) 227 S. W. 750.

13. **Correction of transcript.**—Where assignments have been lost or destroyed and have been substituted, as provided by arts. 2157-2163, inclusive, the transcript on appeal can be perfected by certiorari. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

A stipulation whereby defendant, in consideration of an extension of time, agreed that judgment might be taken against him, is a pleading in the nature of a confession

of judgment (art. 2007), and not a matter of evidence, which, when certified as being left out of the transcript by mistake, would have to be certified by the trial court. *Dunne v. Voageley* (Civ. App.) 209 S. W. 197.

20. Presumption as to matters not shown.—Where there is nothing in the transcript to show that the action of the court on special exceptions to the petition was ever invoked, such exceptions are presumed to have been waived. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

Art. 2110. [1412] [1412] Citation and return omitted, when.

Omission of citation and return.—Under arts. 2109, 2110, providing that the transcript on appeal shall contain the citation and return, if the pleadings or judgment do not show an appearance in person or by attorney, it is not enough that the judgment recite that service was had. *McMickle v. Texarkana Nat. Bank*, 4 Civ. App. 210, 23 S. W. 428.

The record on appeal, showing no citation to defendant, waiver, or appearance, fails to show the trial court had jurisdiction, as required by arts. 2109, 2110; recital in judgment of due citation not being enough. *Steger v. May* (Civ. App.) 202 S. W. 989.

Art. 2111. [1413] [1413] Omission of unimportant proceedings, when.

See *Johnson v. Sabine & E. T. Ry. Co.*, 69 Tex. 641, 7 S. W. 379; notes to art. 2109. **Notice of appeal.**—Though Rev. St. 1879, arts. 1413, 1414, provide for an appeal on an agreed statement of the case and the facts proven, omitting from the transcript such portions of the proceedings as are agreed off, where the record fails to show a notice of appeal the appellate court acquires no jurisdiction. *Blount v. Baker* (Civ. App.) 22 S. W. 1005.

Findings.—Findings of fact should not be omitted from transcript unless both parties agree to such omission. *Ben C. Jones & Co. v. State Printing Co.* (Civ. App.) 228 S. W. 619.

Art. 2112. [1414] [1414] Agreed statement of pleadings and proof.

See *Johnson v. Sabine & E. T. Ry. Co.*, 69 Tex. 641, 7 S. W. 379; notes to art. 2109; *Crenshaw v. Montague County* (Civ. App.) 228 S. W. 569.

Agreed case.—An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, is sufficient, under Rev. St. 1879, art. 1293, to authorize a revision of the judgment on matters growing out of such facts, in the absence of a statement of facts, or findings of fact by the court, or an agreed case for appeal, under arts. 1333 and 1414. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

Omission of notice of appeal.—See *Blount v. Baker* (Civ. App.) 22 S. W. 1005; notes to art. 2111.

Art. 2113. [1415] [1415] Transcript must contain what.

Scope and contents of transcript—Assignment of errors.—Where appellant not only did not file a motion for a new trial, but also failed to file assignments of error in the trial court as required by arts. 1612, 2113, appellant was not entitled to complain of the judgment except for error "in law apparent on the face of the record," art. 1607. *Ætna Accident & Liability Co. v. Trustees of First Christian Church of Paris* (Civ. App.) 218 S. W. 537.

Under this article and art. 1612, as amended by Acts 33d Leg. (1913) c. 136, appellant's brief need not present the assignment in the motion for new trial, the statute being simply directory. *Marvin v. Kennison Bros.* (Civ. App.) 230 S. W. 831.

Under Supreme Court rule 101 (142 S. W. xxiv), as amended to conform to art. 1612, Rev. St. 1911, as amended, Acts 33d Leg. (1913) c. 136, appellant could present in his brief, without incorporating in the transcript, an assignment of error relating to the failure of the court after final judgment to file findings of fact and conclusions of law, as requested by appellant. *Id.*

Art. 2114. [1416] [1416] Clerk's certificate and indorsement.

Clerk's certificate and indorsement.—Where judge's name does not appear in the blank following the judgment copied in the transcript, it will be presumed, for the purpose of giving court jurisdiction, in the absence of proper attack on the verity of the record, that the clerk performed his duty in making out and certifying transcript as required by arts. 2108, 2114, and that judgment was entered under direction of judge under art. 1694. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

This article requires the binding of the transcript under the seal and certificate of the clerk, and, where such statute is not complied with, the transcript is incomplete, and appeal must be dismissed on motion. *Collins v. State* (Cr. App.) 230 S. W. 1005.

Where a transcript is not certified by the clerk and the bills of exceptions are not approved by the judge, and the statement of facts is neither signed by the attorneys nor the judge, an appeal must be dismissed without passing upon the merits, under Code Cr. Proc. art. 929; Rev. St. art. 2114. *Ray v. State* (Cr. App.) 231 S. W. 396.

Effect of defects in or lack of certificate and indorsement.—Where this article is not

complied with, the transcript is incomplete, and appeal must be dismissed on motion. *Collins v. State* (Cr. App.) 230 S. W. 1005.

Where it was apparent that a discrepancy in the clerk's certificate to the transcript was the result of some clerical error, an objection to the consideration of the appeal on that ground comes too late, under rules 8 and 9 for the Courts of Civil Appeals (142 S. W. xi). *Garrard v. Cantrell* (Civ. App.) 232 S. W. 911.

Art. 2115. [1417] [1416a] Briefs filed in courts below and notice given.

Necessity of filing.—On appeal from a judgment final on a forfeited bail bond, briefs must be filed by appellants in the lower court as well as in the Court of Criminal Appeals; such appeal being in the nature of a civil appeal. *Grammer v. State* (Cr. App.) 230 S. W. 165.

Excuse for failure to file in time.—Failure to comply with this article, as to time of filing brief, held not excused by custom among the attorneys of the place to waive it and the effects under rule 39 (142 S. W. xiii) of noncompliance. *Missouri, K. & T. Ry. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211; *Reilly v. Hanagan* (Civ. App.) 225 S. W. 797.

Under this article, the fact that one of appellant's three attorneys suffered from hay fever is not ground for postponing submission of case where there is no explanation why brief was not prepared prior to attorney's sickness or by one of the other attorneys, and appeal will be dismissed. *Daniel v. Nixon* (Civ. App.) 225 S. W. 579.

In view of arts. 1613, 1616, held, that appeal would be dismissed for failure to file briefs in time required by article 2115 and the rules of the Court of Civil Appeals, although appellant's leading counsel, being from another state, did not know of the requirement of the rules as to briefs. *West Louisiana Bank v. Terry* (Civ. App.) 229 S. W. 639.

Effect of failure to file or file in time.—Appellant not having filed his brief in the lower court within the time allowed hereby or given excuse therefor, he cannot file briefs in the court of appeals at a time which would delay trial, except on consent of appellee. *Werner v. Kasten* (Civ. App.) 25 S. W. 317.

Appeal will be dismissed under rule 39 (142 S. W. xiii), appellant's brief being filed only four days before time for submission instead of according to this article, and non-compliance not being excused. *Missouri, K. & T. Ry. Co. of Texas v. Jefferson* (Civ. App.) 201 S. W. 211.

Motion, under rule 39 (142 S. W. xiii), to dismiss appeal for noncompliance with this article, held not governed by rule 8 (142 S. W. xi) as to time for motions affecting formalities attending the filing of transcripts. *Id.*

A motion to strike out appellant's brief and assignments of error on the ground that they do not comply with the rules, and were filed too late to afford reasonable time to properly reply, will be overruled, where appellee has filed a comprehensive answering brief. *Ward v. Compton* (Civ. App.) 203 S. W. 129.

Where plaintiff in error did not comply with this article, held that, even though plaintiff in error did file briefs at the time transcript was filed, and defendant failed to file briefs until the day preceding submission, some 18 months later, yet, in view of rule 41a for Court of Civil Appeals (142 S. W. xiv), defendant's briefs will be considered where there was no showing that injury resulted from the delay. *Du Bois v. Tyler* (Civ. App.) 219 S. W. 211.

Where appellant failed to file his brief before filing the transcript of record, as required by this article, and Court of Civil Appeals rule 39, and for four months after the transcript was filed, without excuse, and the brief was finally filed only two days before the case was set down for submission, so that attorneys for appellees did not have sufficient time to prepare a reply brief, the appeal will be dismissed. *Forbes v. Cannon* (Civ. App.) 224 S. W. 944.

Where plaintiff in error, in answer to motion to dismiss for failure to comply with this article, made no effort to show that defendants in error will have ample time within which to brief their case, and without excuse for not making timely answer, plaintiff in error cannot be heard on petition for rehearing or favored on his contention that his violation of the statute and Rule No. 39 (142 S. W. xiii), is without prejudice. *Reilly v. Hanagan* (Civ. App.) 225 S. W. 797.

Where plaintiff in error failed to file briefs in lower court, as required by this article, the writ will be dismissed on defendant in error's motion, pursuant to Rule 39; no excuse having been offered for such failure, and the burden of showing that no injury can result being on plaintiff in error. *Id.*

Under Code Cr. Proc. arts. 497, 962, regulating proceeding on forfeited bail bonds by the rules governing other civil actions, the failure of parties appealing to file briefs in the appellate court or in the trial court as required by District and County Courts Rule 102 (142 S. W. xxiv), and Civil Courts of Appeals Rule 29 (142 S. W. xii), requires dismissal for want of jurisdiction. *Davis v. State* (Cr. App.) 226 S. W. 409.

An appeal from a judgment in a scire facias proceeding upon a forfeited bail bond must be dismissed, where no brief was filed with the record. *Kennedy v. State* (Cr. App.) 226 S. W. 415.

An appeal will not be dismissed for appellant's failure to file brief within time required by this article, where it affirmatively appears that appellee was not injured thereby. *Eastern Texas Electric Co. v. Reagan* (Civ. App.) 228 S. W. 366.

Where a transcript of an appeal has been on file for about 8 months, and the appellant has failed to file briefs as required by law, a motion to dismiss will be allowed

under this article, and Rule 39 (142 S. W. xiii). *Moncrief v. Southard* (Civ. App.) 228 S. W. 1119.

Ruling of Court of Civil Appeals in striking out the briefs of appellant as not filed in the trial court, as required by this article, and rule 29 for the Courts of Civil Appeals (142 S. W. xii), held in conflict with decisions of other Courts of Civil Appeals, entitling appellant to mandamus from the Supreme Court for certification of the question to it. *Texas & P. Ry. Co. v. Conner* (Sup.) 229 S. W. 844.

In case involving many questions where appellant presented copy of brief, to be thereafter printed, to appellee at a time when he would have only 11 days to prepare a reply brief, appellate court will not controvert appellee's sworn statement that they did not have sufficient time to reply, where to do so would require an independent investigation without the aid of appellee's brief, and the appeal will be dismissed. *Loven-skioid v. Casas* (Civ. App.) 229 S. W. 888.

RECORD AND PROCEEDINGS NOT IN RECORD

1. Matters to be shown by record—Jurisdiction of lower court.—The record on appeal, showing no citation to defendant, waiver, or appearance, fails to show the trial court had jurisdiction as required by arts. 2109, 2110; recital in judgment of due citation not being enough. *Steger v. May* (Civ. App.) 202 S. W. 989.

It not appearing from record that county court had jurisdiction of appeal from justice court appeal will be dismissed. *Baker v. Cole* (Civ. App.) 203 S. W. 411.

In action to recover \$169, in the absence of showing that the action was ever tried in justice court, an appeal from the county court will be dismissed; such amount being below the original jurisdiction of the county court. *Oxweld Acetylene Co. v. Cole* (Civ. App.) 203 S. W. 444.

2. — Nature and form of decision.—Where the record fails to disclose any final judgment or appealable order, the Court of Civil Appeals has no jurisdiction, and the appeal will be dismissed. *Roth v. Loftin* (Civ. App.) 218 S. W. 89; *Herrick Hardware Co. v. Beard* (Civ. App.) 199 S. W. 526.

4. — Presentation and reservation of grounds of review.—Where the record does not show that a demurrer or exception was ever submitted to the court or acted upon an assignment of error complaining of the sustaining of the demurrer cannot be reviewed. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670; *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886; *Logan v. Martinez* (Civ. App.) 211 S. W. 624.

Where record does not indicate that pleas of privilege were called to court's attention during two years, they will be considered waived. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

Where record on appeal does not show that demurrer and exception to plaintiff's petition were called to attention or ruled on by trial court, they will be regarded as waived. *Shumaker v. Byrd* (Civ. App.) 203 S. W. 461.

An assignment assailing the sustaining of demurrer to an answer and cross-action should not be considered, where the record contains no indication that the demurrer was acted on, except a bill of exceptions objecting to the overruling of a general demurrer. *Carvel v. Kusel* (Civ. App.) 205 S. W. 941.

Where the record does not contain an order of the court on the plea of special privilege and does not show any exception to the court's action in overruling it, the question cannot be reviewed. *St. Louis, B. & M. Ry. Co. v. Webber*, 109 Tex. 383, 210 S. W. 677.

In absence from transcript of order or judgment sustaining special exceptions to certain items, court cannot consider assignment that, trial court having sustained special exceptions to all of the petition save for \$500, the county, and not the district, court, had exclusive jurisdiction. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

An objection to sustaining special exceptions to certain portions of a petition is not properly preserved, where there does not appear to be any ruling of the court thereon. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

No issue was presented by assignment of error by a defendant that he requested and the court refused an instruction peremptorily directing verdict for him where the record, while containing what purported to be such a charge, did not show that it was ever presented to or acted upon by the court below. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

The fact that the charge excepted to was given is sufficient to show that the court overruled the exceptions, so that no order in the record showing such ruling is necessary. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

5. — Exceptions.—The record must show the reservation and seasonable filing of necessary bills of exception. *Elledge v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 202 S. W. 203.

8. — Taking and perfecting of appeal or other proceeding for review.—In view of art. 2084, it is jurisdictional that the record on appeal discloses that notice of appeal was given in the court below. *Luse v. Parmer* (Civ. App.) 221 S. W. 1031.

It is jurisdictional that it appear from an inspection of the record that proper service of citation in error was made. *Queen City Motor Co. v. Texas Auto Supply Co.* (Civ. App.) 229 S. W. 591.

Where the record on appeal from a judgment dissolving a temporary writ of injunction does not disclose that there was a notice of appeal as provided by art. 2085, the cause must be dismissed. *Parry Oil Co. v. Michaels* (Civ. App.) 230 S. W. 223.

12. **Scope and contents of record—Pleadings and proceedings relating thereto.**—Original answer, having been amended, should have been omitted from the record. *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738.

23. **Defects, objections, amendment, and correction—Time to amend or make objections.**—Under Court Rule 11 (142 S. W. xi), requiring certiorari to perfect the record to be made as required by rule 8 (142 S. W. xi), which requires motion relating to informalities to be filed within 30 days after filing the transcript, where transcript was filed in July, motion for certiorari to perfect the record made on November 17th was too late. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

24. — **Amendment or correction in lower court.**—After decision on appeal, the record cannot be amended by certificate of the trial judge to show an agreement in open court that the court should allow a recovery for an admitted amount, to justify a judgment in excess of the verdict. *Shotwell v. Crier* (Civ. App.) 216 S. W. 262.

If plaintiff in error had desired to correct the record so as to make it show the true date of judgment in order to avoid dismissal of his appeal on the ground that his petition for writ of error was filed later, he should have filed his motion to correct the record in the trial court. *Williams v. Knight Realty Co.* (Civ. App.) 217 S. W. 755.

25. — **Amendment in appellate court.**—The usual rule regarding the necessity for correcting the record in the trial court does not apply where the issue, as whether the petition for writ of error was filed August 12, 1919, or August 22, 1919, as shown by the file mark of the clerk, is one affecting the jurisdiction of the Court of Civil Appeals. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

26. — **Certiorari or other proceedings to bring up record.**—Motion for certiorari to correct record, filed subsequent to submission, alleging that purported petition contained in record was not petition on which judgment was rendered, but was an amended petition not filed until after hearing, held to be denied. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

Under rule 57 (142 S. W. xvi), as to bringing up original papers, an order of the trial court is prerequisite to incorporation of such papers in the record on appeal. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

27. **Conclusiveness and effect, impeaching and contradicting—Conclusiveness of record.**—Where judgment, reciting that upon hearing of the pleadings, proof, and argument the court decided that there was no question to be submitted to the jury, is the only evidence before the court on appeal, contention that no evidence was heard by the court below cannot be sustained. *Andrle v. Fajkus* (Civ. App.) 209 S. W. 752.

28. — **Conflict in record.**—Absolute verity attaches to judgment of district court on appeal from order appointing guardian as it appears on the minutes, and the judgment entry on the minutes cannot be controlled by what appears on the docket, unless the district court correct the minutes. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

29. — **Impeaching or contradicting.**—If a record of a trial court does not speak the truth, the proper place for correction is in that court, and not by affidavits filed in the appellate court. *Chase Hackley Piano Co. v. Clymer* (Civ. App.) 202 S. W. 214.

30. **Questions presented for review—Limitation by scope of record in general.**—Terms of receipt issued by defendant compress company to plaintiff for cotton delivered, not being set out in statement of facts, court on appeal cannot discuss its effect. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

Record held to contain sufficient showing of the time of commencement of the action to warrant the appellate court in holding the action barred by limitations. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

On appeal in trespass to try title, objection as to validity of execution sale relied on by appellee could not be considered where matters alleged as affecting its validity did not appear from the record. *Holmes v. Tennant* (Civ. App.) 211 S. W. 798.

Objections to action of the court below cannot be sustained, where the matters complained of are not shown by the record. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

The question whether the plea of limitations was available against the second amended original petition cannot be considered, where the record did not contain the original pleadings. *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675.

34. — **Pleading.**—In the absence from the record of the ruling on a general demurrer and in the absence of any exception relating thereto, the court's action could not be reviewed. *Houston Tie & Lumber Co. v. Hankins* (Civ. App.) 200 S. W. 237.

Overruling of exceptions to answer filed in the justice court cannot be reviewed where the answer does not appear in the transcript. *Stephens v. Miller* (Civ. App.) 202 S. W. 1051.

35. — **Questions on interlocutory proceedings.**—In a servant's action to set aside an award and for lump sum payment, an objection that the time for making a physical examination as fixed by defendant's motion therefor was not reasonable, and would have delayed the trial, must be overruled, where the record does not support such statement, nor show that the examination was resisted for such reason. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

36. — **Conduct of trial or hearing.**—Assignment with reference to argument of counsel will be overruled, where there is nothing in the record to show any such argument, though there is a statement in motion for new trial that such argument was made. *Southwestern Telegraph & Telephone Co. v. Riggs* (Civ. App.) 216 S. W. 403.

38. — **Sufficiency of evidence.**—An assignment of error to the effect that a finding of the jury was not supported by the evidence and was against the uncontroverted testimony must be overruled, where the appellate court, by reason of the witnesses having referred to maps, etc., cannot determine from the statement of facts that the answers were not sustained. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

39. — **Instructions.**—An assignment of error, merely reciting that it was the duty of the court to instruct the jury as to the law of the case, etc., must be overruled, where there was nothing in the record to show that instructions were not waived. *Dixon v. Haymes* (Civ. App.) 220 S. W. 441.

40. — **Verdict, findings, or decision.**—A letter in evidence, construed as one of agency, not being in the record, the finding of agency, with a circumstance tending to support it, cannot be disturbed, though there is evidence tending to show prior different and inconsistent relation. *Owosso Mfg. Co. v. Chicago, R. I. & P. R. Co.* (Civ. App.) 203 S. W. 815.

Finding against plaintiff, on fact which he had burden of establishing, cannot be disturbed on appeal; record not containing affirmative evidence of fact. *Id.*

Court of Civil Appeals cannot reverse trial court's finding of fact as to extension of lot, where question can be determined only by map, which trial court examined, and which is not presented in the record. *Summit Place Co. v. Terrell* (Civ. App.) 203 S. W. 1110.

41. — **Grounds for new trial.**—Where the evidence heard on a motion for new trial on the ground of newly discovered evidence was not in the record, the appellate court cannot hold that the newly discovered evidence would likely have changed the result. *Rooney v. Porch* (Civ. App.) 223 S. W. 245.

42. — **Judgment.**—A discretionary order or decree of trial court will not be reversed on appeal, unless it clearly appears from record that there has been a disregard of rights of a party. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

43. — **Questions arising after judgment.**—Assignments of error, questioning court's ruling as to whether a judgment was final, cannot be considered, when the original judgment or the pleadings on which it is based are not in the record. *Jones v. Chronister Lumber Co.* (Civ. App.) 204 S. W. 704.

Whether a party is entitled to mineral rights by virtue of stipulations made in deeds subsequent to the filing of the application for writ of error could not be determined by a review of the record. *Moore v. American Lumber Co.* (Com. App.) 231 S. W. 318.

46. **Matters not apparent of record—Matters not included or shown in general.**—The Appellate Court is bound by the record, and a decision cannot be based on matters not shown by the record. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 209 S. W. 186.

47. — **Matters appearing otherwise than by record.**—On appeal in an action to reopen a judgment, the records on appeals in the former case may be considered. *Lee v. British & American Mortgage Co.* (Civ. App.) 200 S. W. 430.

Alleged facts outside of the record may not be considered upon appeal. *Felder v. Houston Oil Co.* (Com. App.) 210 S. W. 797.

Where there is nothing in the record to show that court made a statement because of which a finding was asked, appellate court will not accept the motion for a finding or the motion for new trial asserting such fact as the fact. *Beasley v. Faust* (Civ. App.) 217 S. W. 179.

The citation issued from the justice court is no part of the pleadings, and cannot be looked to in aid of the record in determining the issues presented to the county court on appeal. *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 533.

A letter written by the trial judge, notifying attorneys of action of court in overruling motion for new trial, giving reasons, and commenting on evidence, will not be permitted to be filed on appeal, although accompanied by an affidavit of counsel. *Dumas v. Easley* (Civ. App.) 219 S. W. 866.

48. — **Evidence relating to question involved.**—Court of Civil Appeals can take affidavits in aid of jurisdiction, but can know whether county court had jurisdiction of appeal from justice court only from record sent up from justice court. *Fruit Dispatch Co. v. Independent Fruit Co.* (Civ. App.) 198 S. W. 594.

The Court of Civil Appeals is bound by the record as it appears in the transcript and statement of facts, and extraneous matters shown in affidavit cannot be considered. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

Courts of Civil Appeals will not consider affidavits outside the record tending to show want of jurisdiction in lower court. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

CHAPTER TWENTY-ONE

CERTAIN INTERLOCUTORY PROCEEDINGS, ETC.

Art.		Art.	
	1. MOTIONS	2144.	Receiver to give bond on appeal.
2118.	Motion docket.	2146.	Receiver may sue or be sued without leave; effect of judgment against.
	2. AUDITORS	2147.	Suits against receiver, where brought.
2124.	Auditor appointed when.	2151.	Where there are betterments, general creditors have rights to be protected.
2126.	Shall be admitted in evidence, but, etc.	2152.	Judgments and other claims have preference over mortgage.
	3. RECEIVERS	2153.	Receivership of corporations limited to three years.
2128.	When receivers may be appointed.	2155.	Rules of equity shall govern in receivership proceedings.
2129.	Who disqualified to act as receiver.		
2130.	When appointment void.	4. MASTERS IN CHANCERY	
2132.	Oath and bond of receiver.	2156.	Master in Chancery, qualifications, duties and appointment.
2133.	Receiver's power.		
2135.	Application of funds in hands of receiver, and claims preferred.	5. SUBSTITUTION OF LOST RECORDS AND PAPERS	
2136.	Proceedings in suits where receiver is discharged.	2157.	Lost records and papers supplied, on motion.
2137.	When property in the hands of receiver subject to execution.	2163.	Substituted copies constitute record.
2139.	Persons to whom property delivered liable for debts.		
2140.	Effect of discharge of receiver.	6. DEPOSIT OF MONEY, ETC., IN COURT	
2141.	Property redelivered by receiver without sale still liable for debts; suits do not abate, but new party may be made.	2164.	Custody of money and other articles deposited.
2143.	Receiver and person to whom property is delivered both liable and may be sued for unpaid claim.		

1. MOTIONS

Article 2118. [1456] [1452] **Motion docket.**

See *Irwin v. State Nat. Bank of Ft. Worth* (Civ. App.) 224 S. W. 246.

2. AUDITORS

Art. 2124. [1494] [1471] **Auditor appointed, when.**

In general.—In suit involving a dissolution of partnership, where no auditor was appointed such as is contemplated by statute, but the court simply asked the county auditor to inspect the books and report whether plaintiff partners had been charged with a certain \$12,000 in controversy and defendant partner given the proper credit therefor, such irregularity does not necessitate reversal, there being ample evidence to support the court's judgment; the fact that some auditor after trial audited the books and reached a different conclusion is not ground for reversal on an assignment the court erred in refusing new trial. *Kerwin v. Mead* (Civ. App.) 229 S. W. 677.

Art. 2126. [1496] [1473] **Shall be admitted in evidence, but, etc.**

Operation and effect of report and findings.—An error in submitting the auditor's account to the jury for statement, in disregard of Rev. St. 1879, art. 1473, making such report conclusive unless contradicted by exceptions filed before trial, is not ground for complaint by defendant, when the verdict of the jury for all the items concluded by the report does not aggregate so much as the balance shown by the report to be due plaintiffs. *Aransas Pass Land Co. v. Hanaford*, 4 Civ. App. 286, 23 S. W. 566.

Motion to suppress.—A motion to suppress an auditor's report on the ground that the court had failed to prescribe his powers and duties in the order of appointment held properly overruled. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

3. RECEIVERS

Art. 2128. [1465] **When receivers may be appointed.**

Cited, *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

1½. Constitutionality.—The provision for the appointment of a receiver where a corporation has been dissolved or has forfeited its corporate rights, is not unconstitutional,

and the stockholders and lienholders need not be before the court. *East Line & Red River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690.

2. Nature of remedy.—A receiver cannot be appointed at the instigation of creditors to take charge of the affairs of an irrigation district, and consequently no restraining orders against its directors can be issued. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

The case made by the pleadings being one in which trustees are sued by some of the beneficiaries in behalf of others alleging insolvency of trustees, breach of trust, misconduct, misapplication of trust funds, refusal to account for and pay over income, fraud in executing a fictitious note and mortgage, loss of trust funds, etc., the rules governing cases of trust and appointment of receivers for trust estates apply. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

3. Remedy incidental to other relief.—In a straight suit on a note expressly payable in the county of suit, a receiver may be appointed as an ancillary remedy, although the domicile of the defendant, a corporation, is in another county. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

Receiverships are created only as auxiliary to some ultimate relief for which a suit may be instituted. *Alto Cotton Oil & Mfg. Co. v. Berryman* (Civ. App.) 218 S. W. 513.

5. Existence of other remedy.—Where pledgor of corporate stock could obtain adequate relief by injunction restraining pledgee from disposing of the stock and corporation from transferring it on its books pending litigation, he cannot have a receiver appointed. *Merchants' Transfer Co. v. Hildebrand* (Civ. App.) 200 S. W. 551.

Where corporate stock pledged was wrongfully voted by pledgee, whereby charter amendment was procured authorizing company to embark in hazardous business, pledgor stockholder's remedy by suit for injunction against company or to set aside action by it, was adequate; and there was no ground for receivership. *Id.*

Injunction was adequate remedy for corporate stockholder seeking receivership and complaining contracts were to be made by company to launch into hazardous business authorized by amendment to charter improperly procured by a pledgee's voting stock; hence there was no ground for appointment of receiver. *Id.*

A receiver would not be appointed at the suit of a minority stockholder where it did not appear that an injunction would not properly conserve the interest of the minority stockholders. *Bordages v. Burnett* (Civ. App.) 221 S. W. 326.

In trespass to try title to land on which an oil well had been drilled by defendant, who was in possession, and who was solvent, evidence being conflicting on the question of right to possession, plaintiffs held to have an adequate legal remedy by sequestration, under art. 7094, subd. 4, and equity could not be called upon to give relief by appointment of receiver. *General Oil Co. v. Ferguson* (Civ. App.) 224 S. W. 261.

The appointment of a receiver under subd. 1, on the ground that property was in danger of being lost or destroyed, cannot be attacked on the theory that plaintiffs had an adequate remedy at law; the proceeding being based on the statute, and not general principles of equity. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

7. Discretion of court and review.—The appointment of a receiver rests largely within the discretion of the trial court, and its discretionary act will be reviewed only in case of an abuse. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323; *Davis v. Hudgins* (Civ. App.) 225 S. W. 73.

In action for divorce and for settlement of property rights, the appointment of a receiver of a portion of the property involved rests largely within the discretion of the trial court. *Reum v. Reum* (Civ. App.) 209 S. W. 760.

8. Jurisdiction of court.—Where a suit for partition of property was begun after the death of one owner and before a temporary administrator was appointed for her estate and before application for probate of her will, the district court did not acquire equity jurisdiction to the exclusion of the court of probate, and could not by appointment of a receiver deprive the administrator of control of the property. *Van Grinderbeck v. Lewis* (Civ. App.) 204 S. W. 1042.

District court of one county has no jurisdiction of suit and to compel receiver of irrigation company to supply water upon terms other than those imposed by order of district court of another county appointing receiver, and to have such terms declared unreasonable, and to enjoin enforcement thereof, since an order granting such relief would constitute an interference with the possession, control, and management of the receivers appointed by another court. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

One court has no right to interfere with the possession by another court of property for which it has appointed a receiver. *Id.*

The district court has power to appoint receivers in a proper case on appeal of a will contest from the county court. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

Appointment of receiver of property of a company is void where made before institution of suit. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

10. Grounds of appointment.—Rev. St. 1879, art. 1461, authorizing a judge of any court of competent jurisdiction to appoint a receiver does not empower a stockholder or lien creditor of an insolvent corporation, which is still a going concern, to have a receiver appointed to take charge of the entire assets and convert them into money for general distribution, on the sole ground of insolvency. *Espuela Land & Cattle Co. v. Bindle*, 5 Civ. App. 18, 23 S. W. 819.

Mere denial of plaintiff's interest in accounts, which he claims he and defendant's intestate owned jointly, and intestate agreed to collect and divide the proceeds with him, is not ground for appointment of receiver therefor. *Caognard v. Tarnke* (Civ. App.) 202 S. W. 221.

In a partition suit, where parties were jointly interested in the property and the facts showed that defendant was appropriating the proceeds thereof to her own benefit, rents were in imminent danger of being lost to the heirs, and taxes were accumulating, the appointment of a receiver was clearly authorized by subd. 1. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Under subd. 1, petition in suit against a bank and other parties interested with plaintiff in a trust fund deposited with the bank held sufficient to authorize the court to appoint receiver of the fund. *Temple State Bank v. Mansfield* (Civ. App.) 215 S. W. 154.

Right to have receiver appointed under any of subds. 1-3, is a legal right, not dependent on rules of practice in equity; and, when facts bring case within any of the sections, allegations and proof of insolvency of defendant, inadequacy of legal remedy, or other equitable grounds for receiver, are not required. *Id.*

In an action of trespass to try title to land on which an oil well had been drilled by a solvent defendant, who was in possession, the court erred in granting a receivership prayed for by plaintiff, where the testimony was conflicting, and a verdict and judgment for either party, obtained on a hearing on the merits, would be sustained by the appellate court on the facts, under this article. *General Oil Co. v. Ferguson* (Civ. App.) 224 S. W. 261.

The remedy of a receivership in all cases is to be cautiously applied, and receivers should not be appointed except on clear showing that applicant's rights imperatively demand the remedy. *Davis v. Hudgins* (Civ. App.) 225 S. W. 73.

Petition pleading contract whereby plaintiffs agreed to assist in securing oil and mineral leases to be taken over by a corporation to be organized by plaintiffs and defendants, and whereby defendants agreed that plaintiffs should receive certain amount of stock in such corporation for such services, and alleging that defendants had not formed any corporation, had abandoned the plan to form the corporation, and had disposed of or contracted to dispose of some of the leases, held not to state a cause of action for appointment of a receiver. *Messinger v. McLean* (Civ. App.) 227 S. W. 247.

In a suit against executors for the construction of a will and accounting, etc., evidence held to warrant the appointment of a receiver under subd. 1, on the theory that such appointment was necessary to protect the estate; it being in danger of being lost or injured. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

Though executors offered to allow plaintiffs, who were suing for an accounting, etc., to take possession of funds in hand and collect rents, that is no ground for denying the appointment of a receiver where the estate was liable to be lost or destroyed; receivership having up to that time been opposed. *Id.*

Insolvency of a person in possession or enjoyment of property for which a receiver is sought is not always indispensable to the granting of the order, though the fact of financial irresponsibility may be sufficient to justify the appointment on the ground that a remedy at law for loss or injury would be inadequate. *Id.*

To warrant the appointment of a receiver to protect property from being lost or destroyed, it is not necessary under subd. 1, to show that the persons having custody of the property were insolvent. *Id.*

A strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator displacing his authority. *Id.*

Where after the death of husband and wife the executors paid over portion of the community to the executor and residuary legatee of the wife, and the husband's residuary legatees, asserting rights in the property, sought an accounting, etc., and the appointment of a receiver on the theory that the property was in danger of being lost, the court may appoint a receiver for the whole of the property and take it into custodia legis, though the executor of the husband's estate was not a joint owner of the property, and might not come within the exact terms of subd. 1. *Id.*

In a suit by the residuary legatee against the executor and the executor and residuary legatee of the estate of the testator's wife, who had obtained a division of the community, evidence held to warrant the appointment of a receiver under general principles of equity; it appearing that the estates were not properly cared for and were in danger of being lost or materially injured. *Id.*

Where plaintiffs, the residuary legatees under the will of a husband, sought an accounting by the executors and asserted rights in property delivered to the executor and legatee of the estate of the husband's deceased wife, who was entitled to one-half of the community, held, that the controversy over the property was sufficient to bring the case within subd. 1, authorizing the appointment of a receiver in an action between persons jointly owning or interested in any property, when it is shown that the property is in danger of being lost or destroyed. *Id.*

A court in dissolving a partnership, and fixing the rights of the parties in the partnership property, had the right to appoint a receiver to carry out the judgment by a sale of the property and division of the proceeds. *Leyhe v. McNamara* (Civ. App.) 230 S. W. 450.

11. Application for appointment, requisites of.—Under subd. 2, where property is in danger of being materially injured, etc., a petition alleging generally that defendant was insolvent, and would injure property pending suit, is insufficient to authorize an ex parte appointment of receiver. *Arnold v. Meyer* (Civ. App.) 198 S. W. 602.

Allegation and verification upon information and belief only of facts on which court must rely in determining whether the appointment of receiver for defendant company at plaintiff's instance was proper held insufficient. *Alto Cotton Oil & Mfg. Co. v. Berryman* (Civ. App.) 218 S. W. 513.

12. Notice of application.—That defendant was threatening to withdraw certain money from bank and sell certain personalty would not warrant appointment of a

receiver pending trial of divorce suit, without notice to defendant. *Claunch v. Claunch* (Civ. App.) 203 S. W. 930.

A receiver should not be appointed without notice to the parties adversely interested, unless it is made to appear that plaintiff would suffer some material injury by the delay necessary to give notice. *Alto Cotton Oil & Mfg. Co. v. Berryman* (Civ. App.) 218 S. W. 513.

In suit by stockholders of an oil company, a joint-stock association, against trustees, alleging insolvency and misappropriation of trust funds, etc., held that allegations of petition showed a case within subd. 1, as to the appointment of receivers where partners or others jointly interested show that property or funds are in danger of loss, and authorized court to appoint a receiver *ex parte*. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

14. **Proof, nature and sufficiency of.**—The allegations of a petition to which no answer was filed must be taken as true on hearing a motion of plaintiff to appoint a receiver. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

In an action by minority shareholders in a trust to operate an oil company charging misappropriation of funds against defendant trustees, etc., and asking accounting and dissolution, evidence of defendant trustees' fraud, mismanagement, etc., held insufficient to authorize appointment of receiver. *Davis v. Hudgins* (Civ. App.) 225 S. W. 73.

The question of the credibility of witnesses in support of an application for appointment of a receiver is for the trial court. *Richardson v. McCloskey* (Civ. App.) 228 S. W. 323.

Where the petition for appointment of a receiver, etc., was controverted by a verified answer, the pleadings are not conclusive, and the action of the trial court in appointing the receiver should be tested by the evidence. *Id.*

On appeal from an order appointing receivers to take over the custody of an estate from the executors, evidence held to warrant a finding that books of account were not properly kept for the estate. *Id.*

16. **Order of appointment.**—Where plaintiff receiver, suing a stockholder on a note for his stock subscription, was appointed in a former suit against the corporation, defendant's plea that the suit against the corporation was collusively instituted to avoid frauds practiced on the stockholders was a collateral attack on the order of appointment, and could not be maintained. *Davis v. Mitchell* (Civ. App.) 225 S. W. 1117.

18. — **Duration of receivership in general.**—Where none of the judgments have been executed, and no judgment has been rendered in a suit in intervention against the receiver, there is a necessity for continuing the receivership, although the receivership is no longer necessary for the protection, preservation, and disposition of the insolvent's property. *Lauraine v. First Nat. Bank* (Civ. App.) 204 S. W. 1022.

In suit by stockholders against the corporation and its managing trustees for fraud and dissipation of assets, wherein successor trustees intervened and sought vacation of the receivership, allegations of the interveners held sufficient to admit evidence on which the vacation order prayed for would be authorized, so that the trial court erred in declining to receive the evidence, the court not having exercised his sound discretion in the premises, but having refused to put himself in a position to exercise it by sustaining demurrers instead of hearing the evidence. *Little Motor Kar Co. v. Blankenship* (Civ. App.) 228 S. W. 318.

21. **Operation and effect of appointment in general.**—After appointment of a receiver under subd. 3, in action which contemplates sale of property of insolvent corporation, held, that no one will be permitted to acquire a lien thereon by attachment, judgment, or otherwise. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Broker cannot recover on contract with owners of property, whereby he was to produce buyer at stipulated price, where he knew that a receiver had been appointed to sell the land at the time broker's contract had been entered into; such appointment having terminated owner's right to stipulate terms of sale. *Sligh v. Stanley* (Civ. App.) 204 S. W. 700.

Mere defects in the petition upon which the receiver was appointed would not render the receivership proceedings void. *Lauraine v. First Nat. Bank* (Civ. App.) 204 S. W. 1022.

Easements and water rights of landowners could not be taken and destroyed in receivership proceedings against an irrigation company without the owners having their day in court, such procedure being tantamount to deprivation of property without due process in violation of state and federal Constitutions. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

22. **Right to object to or attack appointment.**—Where a court had jurisdiction to appoint a receiver and administer property of insolvent corporation, creditor having no interest in property at that time could not subsequently acquire a lien and question, in a collateral proceeding, power of court to sell property. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Where petition for appointment of receiver stated a cause of action within the jurisdiction of the court, the judgment, however erroneous, cannot be set aside for defects in the pleading, especially when attacked by parties who actively procured its rendition and acquiesced in subsequent orders. *Lauraine v. First Nat. Bank* (Civ. App.) 204 S. W. 1022.

The failure of defendants to except to the petition or appeal from the order appointing a receiver precludes them, on denial of later motion to vacate the order of

appointment, from complaining on the ground that the petition for appointment was defective and the order improvidently made. *Id.*

23. Wrongful receiverships and liability for damages and costs.—All costs incurred by reason of receivership of a corporation, including the receiver's salary, are taxable against the plaintiff and his sureties where the receivership was improperly granted. *Hook v. Payne* (Civ. App.) 211 S. W. 280.

Art. 2129. [1466] Who disqualified to act as receiver.

Operation and effect in general.—This article is declaratory of the laws applied by courts of equity. *James v. Roberts Telephone & Electric Co.* (Com. App.) 206 S. W. 933.

Person interested.—Where wife sued for divorce and to establish land as her separate property, and husband set up express parol trust in him, it was improper, pending outcome of suit, to commit property to husband's charge, since he was an interested party, in view of this article, notwithstanding broad powers of court, in suits for divorce, to make equitable orders. *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983.

Validity of appointment of improper person.—The objection to the appointment of one who is cashier and stockholder in plaintiff bank as receiver of the defendant debtor corporation because disqualified for interest, where not seasonably urged, was waived. *James v. Roberts Telephone & Electric Co.* (Com. App.) 206 S. W. 933.

Where a bank cashier and stockholder, although disqualified for interest, was appointed receiver for a corporation, the appointment was not void or voidable, under this article, and, where he performed the receiver's duties in good faith without objection benefiting creditors and stockholders, he was entitled to compensation from the corporate funds. *Id.*

The compensation of an improper person appointed as a receiver should be determined by equitable principles. *Id.*

Art. 2130. [1467] When appointment void.

Compensation under void appointment.—Although one appointed as a receiver was not a citizen of the state, the court could lawfully without abuse of discretion compensate him for services and expenses by allowance to his coreceiver. *James v. Roberts Telephone & Electric Co.* (Com. App.) 206 S. W. 933.

Art. 2132. [1469] Oath and bond of receiver.

See *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Art. 2133. [1470] Receiver's power.

Cited, *Mathis v. Fridham*, 1 Civ. App. 58, 20 S. W. 1015; *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

1. Property and rights vesting in receiver.—A bank, as an accommodated party, cannot maintain an action against accommodation makers of note, and the receiver of such bank acquired no better title to the paper than the bank itself. *Brady v. Cobbs* (Civ. App.) 211 S. W. 802.

In suit by the receiver of a bank to enforce stock subscriptions against various subscribers, the subscribers cannot be held liable as partners, for, if they are so liable, it is not on their subscriptions, but for money of depositors received and converted, a liability enforceable by the receiver. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

When court appointing receiver for irrigation company, took into its custody the property of the company, it took the water flowing into the canals as a part thereof. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Subscriber to stock in insurance company, party to transaction whereby his note was accepted in payment for stock, and whereby he received stock, being estopped to deny legality of note in suit of creditors of company, held bound to its receiver for portion of note representing subscription to surplus, not within constitutional inhibition of issuance of stock for notes, particularly in view of fact burden was on him to show invalidity of note. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

5. Authority of receiver in general.—A receiver appointed in partition proceedings becomes invested with the full right to the possession and control of the property. *Sligh v. Stanley* (Civ. App.) 204 S. W. 700.

Where the receiver of a corporation which had conveyed lands, retaining lien to secure the discharge of vendor's lien notes by the grantee, executed a release to which the holder of the vendor's lien notes was not a party, such release is not binding on the holder of the vendor's lien notes, and does not constitute evidence of the intention in the minds of the parties to the conveyance. *Lanham v. West* (Civ. App.) 209 S. W. 258.

Receivers of railroad, who had authority to construct road, and who in so doing were required to build an embankment, had implied authority to excavate in street, in view of arts. 6485, 6494, beyond the limits of the right of way, where the engineers for the receiver testified that such excavation was necessary to get the proper drainage, to secure an underground crossing, and to place road in reasonable state of usefulness. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

Where a town which had two light plants was not large enough to justify the operation of both, and the plant for which a receiver was appointed could not operate

at a profit without additional equipment and extensions, the order of the court authorizing the operation of the plant by the receiver was improvident and an abuse of its discretion. *Ford v. Van Valkenburg* (Com. App.) 228 S. W. 194.

5/2. **Conflict of jurisdiction.**—When a trustee in bankruptcy takes over property in hands of a state receiver, as far as title to property is concerned, the adjudication relates back to the date of the filing of the petition, and makes subject to review only actions of the receiver or the state court appointing him. *Carter-Mullaly Transfer Co. v. Robertson* (Civ. App.) 198 S. W. 791.

Where a petition in bankruptcy is filed within four months of appointment of a receiver by a state court, when the adjudication in bankruptcy occurs, the bankruptcy court succeeds the state court, and the trustee takes over the property. *Id.*

Where, at the time of intestate's death, her property was being administered under receivership, the receiver was entitled to the possession of the property, and to collect the rents, and the administrator of the intestate could not collect them. *Lauraine v. Dickson Car Wheel Co.* (Civ. App.) 198 S. W. 1103.

In view of arts. 2132 and 2133, the district court of one county has no right to interfere with the management and control of the corporation being administered by a receiver appointed by district court of another county. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

8. **Supervision of court in general.**—Court, having appointed receiver for irrigation plant, has the power of fixing the rates and conditions upon which the property should be conducted as a going concern. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

9. **Contracts, authorization or ratification.**—That receiver of insolvent building contractor and subcontractor entered into new contract held not to show intention to absolutely rescind, and subcontractor may not recover on quantum meruit. *Collinsville Mfg. Co. v. Street* (Civ. App.) 196 S. W. 284.

Contracts made by receivers under authority given by the court are in a substantial sense the contracts of the court, and cannot be annulled at the pleasure of the court. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Indirect and meager testimony held to authorize holding that contract, in terms by railroad company, by an agent, to divert grain shipment from original destination, was made for and on behalf of receiver, and so bound him, in absence of testimony that agent was an interloper. *Baker v. Clement Grain Co.* (Civ. App.) 221 S. W. 679.

Receiver of a company, the buyer of cottonseed oil, had authority to use for the acceptance of the oil from the seller company certain cars belonging to another company, so, though he offered no other cars, he did not fail to furnish cars for the shipment. *Tecumseh Oil & Cotton Co. v. Gresham* (Civ. App.) 231 S. W. 468.

9/2. **Receivers' certificates.**—Priorities, see notes under art. 2135.

A corporation, to justify issuance of receiver's certificates on ground that it is a quasi public corporation, must be actually quasi public, and not merely potentially so, and must subserve some appreciable service to the public, and to some reasonable extent meet a public demand and necessity. *Van Valkenburg v. Ford* (Civ. App.) 207 S. W. 405.

An ice and light plant whose average monthly income from ice department during the eight months under receivership was \$451.33, and whose monthly average income from the light department was only \$79.61, will not be deemed a quasi public corporation for purposes of issuing receiver's certificates, the dominant pursuit of such corporation being the furnishing of ice. *Id.*

Court had no power to authorize issuance of receiver's certificates for original construction of plant. *Id.*

12. **Sales, authority and necessity of court to direct.**—Where a court had jurisdiction to appoint a receiver and administer property of an insolvent corporation, it could convey such title as the corporation had when it took possession thereof. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Where a receiver is appointed to take possession of and sell certain real estate, the owners of the property have no right to fix the terms upon which the land is to be sold. *Sligh v. Stanley* (Civ. App.) 204 S. W. 700.

Court, having appointed receiver for irrigation plant, has a right, upon its own motion, to sell and dispose of all assets and properties which it had taken and was administering through its receiver. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

15. — **Rights and liabilities of purchasers.**—Purchaser of railroad property and corporation organized to operate it held charged with contract made by receiver to establish for a valuable consideration division headquarters at particular town. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Where parties to whom an irrigation plant had furnished water for irrigation purposes were made parties to receivership suit wherein the plant was sold at judicial sale, free from all easements, a purchaser at such sale held to have acquired title to the plant free from plaintiff's easements. *McBride v. United Irr. Co.* (Civ. App.) 211 S. W. 498.

In an action to compel a public water supply company to furnish water for irrigation purposes at a stated price, evidence held to show that plaintiff had acquired a right to receive water at a reasonable rate from the plant prior to a receiver's sale wherein plaintiff's easements were alleged to have been sold. *Id.*

In a suit by judgment creditor to establish liability of purchaser of property of debtor, a foreign corporation, sold under receivership proceedings in federal court,

evidence held insufficient to establish that purchaser was a continuation of foreign corporation or was party to any fraud in attempt to defeat claim of judgment creditor. *Advance-Rumely Thresher Co. v. Moss* (Civ. App.) 213 S. W. 690.

Where assets and property of insolvent corporation are transferred to purchaser under federal court decree authorizing sale free of lien, purchaser held not liable on trust fund theory to judgment creditor who obtained judgment after receivership proceedings in a suit pending prior thereto and who had not submitted himself to jurisdiction of federal court. *Id.*

Receiver's sale under order decreeing the property to be sold free of all liens, except the contract liens, held to pass title to all improvements placed on the property by the receiver, and all additions thereto made by him from the net earnings, and to preclude receiver's supply creditors, who did not question sale, and who accepted a part of the proceeds in part payment of claims, from asserting any claim against purchasers based on excess earnings by receiver. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

Purchasers of an irrigation system in receivership proceedings could acquire no higher title than the receiver acquired, and were charged with all obligations of irrigation company and with all its covenants to furnish water. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

17. **Allowance of demands.**—Receiver for railroad company held to have authority to determine claim which accrued before he was appointed and took charge of railroad company's property. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

21. **Liability of receiver in general.**—Though a receiver may not be forced to carry out executory contract, the estate is not, by his rejection of the contract, released from liability for its breach. *Tecumseh Oil & Cotton Co. v. Gresham* (Civ. App.) 231 S. W. 468.

28. **Actions against receivers.**—Parties to actions, see notes at end of ch. 5 of this title.

Where bondholders were not parties to receivership proceeding, but acquiesced therein, receiver's supply creditors, in bringing suit for payment, in which bondholders were joined as defendants, properly instituted an independent proceeding, since their equities as against the bondholders could not be adjusted, except by making the bondholders parties thereto. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

Art. 2135. [1472] Application of funds in hand of receiver and claims preferred.

Construction and validity in general.—Under this article, which subjects to the payment of claims against the receiver of a railroad, on contracts made by him during the receivership, the moneys received by him as such, a shipper may maintain against a receiver an action for damages resulting from injury to goods, and for delay in transporting them. *Yoakum v. Dunn*, 1 Civ. App. 524, 21 S. W. 411.

Priorities of liens and incumbrances.—The power to displace prior liens, and thus to impair the force of contracts, is such an extraordinary one, that, in order to call into exercise such power, the facts justifying it should be clear and unequivocal. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Priority of claims in general—Expenses of receivership.—Vendor's lien is entitled to priority over fees of receiver, his attorney, and master in chancery incurred in receivership proceedings of corporation organized by vendee, where vendor was not a party thereto until his action against vendee on purchase-money notes, in which corporation was not a party, was consolidated with receivership proceedings without consent of vendor, and where such fees were incurred before vendor was made a party. But such fees are superior to chattel mortgage liens on property in receivership, where holders of such liens intervened in receivership proceedings, and voluntarily used such proceedings for collection of their debts. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

— **Debts incurred prior to receivership.**—Intervener recovered a judgment for personal injuries against a railroad company which subsequently went into the hands of a receiver, after which the mortgagee of the road took steps to foreclose its mortgage, which in express terms covered the earnings, and to establish a lien against the earnings in the hands of the receiver. Held, that intervener's claim was entitled to such preference in the distribution of the earnings of the road while in the hands of the receiver, and before the mortgagee took steps to foreclose, for the statute does not impair the mortgage security, since a mortgagee has no lien on earnings that arise prior to his taking possession, though his mortgage expressly covers the earnings of the road. *Giles v. Stanton* (Civ. App.) 24 S. W. 556.

— **Receiver's certificates.**—Court's power to issue receiver's certificates to become a superior lien to the displacement of prior mortgage liens is not an arbitrary capricious one, but can be resorted to only in the exercise of sound judicial discretion. Receiver's certificates improvidently issued, without notice to prior lienholders, and without hearing, will not be given priority as against prior incumbrances or liens, where such improvidence is made to appear on a full hearing, and where ice and light plant during its eight years of existence had never been a success, had been idle much of the time, had competing light plant serving more customers in town of 2,000 population, and during eight months of operation by receiver had continually lost money, so that at end of such time the plant had entirely consumed itself, the issue of receiver's cer-

tificates as superior lien on property was improvident and an abuse of discretion. And the holder of such certificates, who was a stockholder and who secured issuance of the certificates with understanding that no notice was to be given to creditors, and was chief mover in proceedings to procure certificates, no application therefor being made by creditors, holds certificates subject to prior rights of prior lienholder who was not a party to the proceeding, and who was given no notice thereof. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

In the operation of a quasi public corporation the court, in the exercise of a sound discretion, may authorize the issuance of receiver's certificates for operating expenses, even to the displacement of prior mortgage liens, but has no such power, except under the doctrine of estoppel, where the corporation in the hands of the receiver is a private corporation. And receiver's certificates improvidently issued, and made superior lien on property, issued without making prior lienholders parties to the receivership proceedings, will not be given priority over prior liens, where holder of receiver's certificates was stockholder and treasurer of the company when property was being administered by receiver, and must have had full knowledge of hopeless financial condition and impracticability of operation at a profit. Where idle and stagnant ice and light plant was sold by individual, subject to vendor's lien, to one who subsequently organized corporation with quasi public incidents to operate plant, the character of the corporation, upon plant passing into hands of receiver, did not destroy priority of vendor's lien as to receiver's certificates. *Id.*

Receiver's certificates issued for the cost of operating a plant which was unnecessary and could not be operated at a profit, and which were therefore improvidently issued, are not entitled to priority over an existing vendor's lien on the real estate. *Ford v. Van Vanlkenburg* (Com. App.) 228 S. W. 194.

— **Parties entitled to contest priorities.**—Holder of vendor's lien on property being operated by receiver, not having been made a party to receivership proceedings at the time receiver's certificates were issued, and having no notice of issuance thereof, may attack the necessity and wisdom of issuance of such certificates upon subsequently being made party. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Bondholders, having acquiesced in and agreed and consented to the appointment of a receiver, and the operation of the properties of the company through such receiver, made themselves responsible for the cost of such operation, and their contract lien became subject to the payment of the supply creditors. Evidence in action by receiver's supply creditors for payment held to sustain finding that bondholders were privies to, acquiesced in, and agreed and consented to the appointment of such receiver, and the operation of the lumber company through such receivership. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

Liability of parties for whom receivers have been appointed.—As a general rule, a corporation is not liable for any acts of a receiver, who has full possession of its property and entire charge of its affairs. *Ponder v. Crenwelge* (Civ. App.) 203 S. W. 1125.

Art. 2136. [1473] Proceedings in suits where receiver is discharged.

Actions against receivers.—In a negligence action against railroad in hands of receiver, the railway company is neither a proper nor necessary party to such action. *Schaff v. Mason* (Civ. App.) 222 S. W. 288.

Art. 2137. [1474] When property in the hands of receiver subject to execution.

Issuance of execution.—In action against receiver of railroad company, direction of issuance of execution for collection of judgment in favor of plaintiffs was error; plaintiffs being entitled to present their claim evidenced by judgment to court in which receivership proceeding is pending. *Andrews v. Rice* (Civ. App.) 198 S. W. 666.

Enforcement of judgment of one court against property in hands of receiver of another court.—Art. 2146 does not, in view of this article, confer upon one court the right to enforce a judgment out of property in the hands of receiver of another court, or to interfere with the custody and control of such property. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Art. 2139. [1476] Persons to whom property delivered liable for debts.

Operation and effect in general.—On appeal from judgment finding railroad company receiving road after termination of receivership liable for negligence of receiver, burden is on company to show that receiver was appointed by federal court to avoid operation of arts. 2139, 2141, making company liable for negligence of receiver. *Ft. Worth & R. G. Ry. Co. v. Burleson* (Civ. App.) 214 S. W. 617.

Where receiver of railroad company is appointed by state court and not federal court, by express provisions of arts. 2139, 2141, railroad company after termination of receivership is liable for negligence of receiver while operating road. *Id.*

Grounds of liability.—To make carrier liable for injuries to cattle, while railway was in hands of a federal receiver, it must be shown that the receivership has terminated and the railway returned to the corporation with such liability imposed upon it by the decree of the court as a condition to receive it, or that the revenues received by

the receiver were expended by him in betterments. *Beaumont, S. L. & W. Ry. Co. v. Milby* (Civ. App.) 204 S. W. 444.

Art. 2140. [1477] Effect of discharge of receiver.

Cited, *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

Art. 2141. [1478] Property redelivered by receiver without sale still liable for debts; suits do not abate, but new party may be made.

Cited, *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

Liability for unpaid debts and claims.—Railroad to which its property was returned after discharge of receiver held not liable to passenger, injured by trainmen when road was in hands of receiver, where receiver made no earnings while operating road's properties, and no betterments were made thereon while in his hands. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 195 S. W. 625.

Railway company after termination of receivership, was not liable for loss or damages to shipment of household goods occurring during receivership, where it was not shown that receiver operated at a profit, and that sufficient net earnings to pay all claims incurred by receiver had been paid over to the company on termination of receivership, or that court appointing receiver made his debts a charge upon corpus of the property, or that, when receivership terminated, the debts incurred were made a charge against railway company. *Ft. Worth & R. G. Ry. Co. v. Zidell* (Civ. App.) 202 S. W. 351.

Where court ordered railroad to take back its assets from receiver with all receiver's "obligations," word "obligation" included cause of action by an employé for injuries from negligence of the receiver. *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519.

Receipt for property by railroad which "released and relieved" receiver "from all liabilities" was supported by a consideration, and implied a promise to pay liabilities occasioned by negligence of receiver, and could be sued on by injured employé. *Id.*

Railroad not being primarily liable for acts of receiver arising from his negligence, because receiver is an independent agent of the court, in suit against railroad after discharge of receiver to enforce obligation or liability incurred by receiver, a state of facts must be shown creating liability of railroad. *Chicago, R. I. & P. Ry. Co. v. Lopez* (Civ. App.) 209 S. W. 192.

Railroad company held to have assumed all liabilities of its receiver or receivers when it received back its properties pursuant to order of court, in view of decree, in connection with indemnity agreement. *Id.*

In absence of statute, railroad, upon termination of receivership, is not liable for negligence in operation of road during the receivership, unless profits of operation during such time have been paid over to the company or invested in betterments, or the company or its property was made liable for debts of the receivership in the order or decree discharging receivers. *Best & Russell Cigar Co. v. William Reese Co.* (Civ. App.) 210 S. W. 317.

Where receiver of railroad company is appointed by state court and not federal court, by express provisions of arts. 2139, 2141, railroad company after termination of receivership is liable for negligence of receiver while operating road. *Ft. Worth & R. G. Ry. Co. v. Burleson* (Civ. App.) 214 S. W. 617.

Federal court receivership.—Where federal court which appointed receiver for railroad ordered property turned back conditionally on railroad's taking all benefits and assuming all obligations, railroad was bound to pay judgment for damages predicated on tort of servant of railroad while in hands of receiver. *Beaumont, S. L. & W. Ry. Co. v. Daniels* (Civ. App.) 204 S. W. 481.

On appeal from judgment finding railroad company receiving road after termination of receivership liable for negligence of receiver, burden is on company to show that receiver was appointed by federal court to avoid operation of arts. 2139, 2141, making company liable for negligence of receiver. *Ft. Worth & R. G. Ry. Co. v. Burleson* (Civ. App.) 214 S. W. 617.

Judgment.—In a suit against both a receiver and a railroad company on a cause of action accruing during the receivership, the property having been restored to the company, the failure to render judgment against the receiver when judgment is rendered against the company, if error, is not prejudicial. *Bonner v. Blum* (Civ. App.) 25 S. W. 60.

Art. 2143. [1480] Receiver and person to whom property is delivered both liable and may be sued for unpaid claim.

Liability of receiver.—Where railway was in receivership when plaintiff's cause of action for injury to shipment of household goods accrued, and for nearly a year thereafter, receivers should be made parties to his action against railroad for such damage, brought after termination of receivership. *Ft. Worth & R. G. Ry. Co. v. Zidell* (Civ. App.) 202 S. W. 351.

In suit for injuries against railroad and receiver, it being alleged that properties of road had been restored to it (not that receiver was ever discharged), but with assumed liability for all debts and damages during receivership, or that its revenues were expended by receiver in betterments, receiver himself should not be held liable in absence

of showing of details of decree discharging him. *Cozler v. Andrews* (Civ. App.) 206 S. W. 975.

After termination of railroad receivership, receiver cannot be held liable for negligence in operation of railroad during receivership, where he was not personally at fault; the receiver's liability being official, and being terminated upon termination of receivership. *Best & Russell Cigar Co. v. William Reese Co.* (Civ. App.) 210 S. W. 317.

Art. 2144. [1481] Receiver to give bond on appeal.

Constitutionality.—Gen. Laws Tex. 1889, p. 58, purports in its title to be "an act to amend * * * an act for the appointment of receivers, and to define their powers and duties, and to regulate proceedings under such appointment of receivers." Held, that this is not violative of Const. Tex. art. 3, § 35, which provides that "no bill shall contain more than one subject, which shall be expressed in its title." *Dillingham v. Putnam* (Sup.) 14 S. W. 303.

The provision of this article that, before an appeal or writ of error is allowed a receiver, he shall give bond with sureties in a sum double the amount of the judgment, is unconstitutional, as violating Const. art. 1, § 13, in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed for other persons (citing *Dillingham v. Putnam*, 109 Tex. 1, 14 S. W. 303). *National Equitable Soc. v. Alexander* (Civ. App.) 210 S. W. 602.

Art. 2146. [1483] Receiver may sue or be sued without leave; effect of judgment against.

Action against receiver.—In an action against two different railroad companies and their receivers, evidence held to establish that only one of them was acting as receiver when the cause of action arose. *Baker v. Lyons* (Civ. App.) 218 S. W. 1090.

Under this article, a receiver may be sued in a court other than that in which the receivership is pending, for the purpose of establishing and reducing the claim to judgment. *National Equitable Soc. v. Alexander* (Civ. App.) 220 S. W. 184.

Judgment and enforcement.—Art. 2146, authorizing suits against receivers without first obtaining leave of the court appointing such receivers, does not, in view of this article, confer upon one court the right to enforce a judgment out of property in the hands of receiver of another court, or to interfere with the custody and control of such property. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Art. 2147. [1484] Suits against receiver, where brought.

Cited, *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Venue.—Under art. 1830, subd. 24, and this article, the district court of S. county, through which the road of a railroad corporation extended, had authority to appoint a receiver for such corporation, though the principal office of the corporation was in A. county. *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38.

The word "may" as used in this article, is permissive only, and hence does not limit jurisdiction of actions against receivers of corporation to the county where the principal office of the corporation is located. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

Receiver's plea to the jurisdiction on the ground that he was not sued in the county where the principal office of the defendant corporation was located, held properly overruled, where it appeared that he was made a party merely that he might be concluded by the decree and had no real objection to being a party to the litigation. *Id.*

Art. 2151. [1489] Where there are betterments, general creditors have rights to be protected.

Necessity of showing of betterments.—Railroad to which its property was returned after discharge of receiver held not liable to passenger injured by trainmen when road was in hands of receiver, where receiver made no earnings while operating road's properties, and no betterments were made thereon while in his hands. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 195 S. W. 625.

Damages for personal injuries to railroad's servant while railroad is operated by receiver are part of receiver's expenses incurred in operating, payable out of current earnings of railroad, which earnings, if diverted by receiver, and placed in permanent improvements, or turned over to railroad without sale, make it liable to extent of earnings diverted or turned over. *Chicago, R. I. & P. Ry. Co. v. Lopez* (Civ. App.) 209 S. W. 192.

In action by injured servant against railroad previously under receivership, evidence held sufficient to show betterments by receiver, at least prima facie. *Id.*

If railroad unqualifiedly assumed liability of receiver as to injured servant's cause of action and secured discharge of receivership and redelivery to it of all properties without sale, issue of betterments is immaterial in fixing railroad's liability to servant, though he alleges railroad's liability rests upon betterments rather than upon assumption. *Id.*

Evidence held to show that improvements were made upon railway properties by receiver out of earnings while in his hands in excess of amount sued for by one injured by the negligence of the receiver's servants. *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

In absence of statute, neither a railway company nor its property after termination of a receivership is liable for receiver's negligence while operating property, unless receiver operated road at a profit paid over to company at termination of receivership, or sufficient proceeds from operation had been invested by receiver in improvements of company, or its property had been made liable in order discharging receiver. *Ft. Worth & R. G. Ry. Co. v. Burleson* (Civ. App.) 214 S. W. 617.

Art. 2152. [1490] Judgments and other claims have preference over mortgage.

Application in general.—Where a railroad company, in consideration of a right of way, contracts with the grantor for the erection of a tank on his land for its use, to be supplied with water from his spring, and agrees to pay him therefor, a lien to secure such payment exists on the earnings of the road in the hands of a receiver subsequently appointed, and an action for the breach of such contract will lie, and judgment may be rendered against the receiver, under this article. *Howe v. Harding*, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17.

In an action for damages caused by defective construction, the receivers having been appointed after the road was built, the findings did not show earnings in the hands of the receivers when the judgment was rendered. Held, that the judgment would be presumed good, in the absence of any request by defendants for findings to the contrary, or of a statement of the facts before the trial court. *Yoakum v. Richards* (Civ. App.) 24 S. W. 308.

Art. 2153. [1491] Receivership of corporations limited to three years.

Pendency of litigation.—If this article could be held to apply to individual receiverships, it would not authorize termination of receivership of individual, pending litigation. *Lauraine v. First Nat. Bank* (Civ. App.) 204 S. W. 1022.

Art. 2155. [1493] Rules of equity shall govern in receivership proceedings.

Cited, *American Nat. Ins. Co. v. Valley Reservoir & Canal Co.* (Civ. App.) 209 S. W. 438.

Effect as to rules of practice in Supreme Court.—In view of art. 2156, this article does not affect the rules of practice provided by statute and established by the supreme court; and a bill of exceptions approved by a master in chancery, but not approved by the district court, cannot be considered on appeal. *Ballard v. McMillan*, 5 Civ. App. 679, 25 S. W. 327.

Costs.—In receivers' proceedings, held, that petitioner alone was liable for attorney's fees for filing original petition, in view of the agreement for settlement. *J. B. Farthing Lumber Co. v. Greenwood* (Civ. App.) 197 S. W. 313.

Jury trial.—Intervening landowners in receivership proceedings against an irrigation plant have no right to have their water rights determined by jury trial, the court which appointed receiver having right to fix rates, and landowners' remedy being appeal. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

4. MASTERS IN CHANCERY

Art. 2156. [1485] Master in chancery, qualifications, duties and appointments.

In general.—Where duties of master in chancery are not fully set out or indicated by court's appointing order, such duties are to assist court, but in no wise to supersede its action. *Citizens' State Bank of Alvin v. Joplin* (Civ. App.) 198 S. W. 370.

Proceedings before master.—Arts. 2155, 2156, do not affect the rules of practice provided by statute and established by the supreme court; and a bill of exceptions approved by a master in chancery, but not approved by the district court, cannot be considered on appeal. *Ballard v. McMillan*, 5 Civ. App. 679, 25 S. W. 327.

Master in chancery has authority to adjudicate only that which has been referred to by him by order of his appointment. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Report of master.—Where court, on own initiative, appointed master, findings of master, specifically excepted to and presented to court, which heard other testimony, were not binding on the court. *Citizens' State Bank of Alvin v. Joplin* (Civ. App.) 198 S. W. 370.

The report of a referee is a proper basis for a judgment, but is not evidence of an adjudication until it has been accepted and judgment rendered thereon. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

5. SUBSTITUTION OF LOST RECORDS AND PAPERS

Art. 2157. [1498] [1475] Lost records and papers supplied, on motion.

Necessity of substitution.—See *Crenshaw v. Montague County* (Civ. App.) 223 S. W. 569.

Where assignments had been lost or destroyed, it was incumbent on appellant to substitute them as provided by arts. 2157-2163. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

Where the files were lost, and appellant made no attempt to substitute records under arts. 2157-2163, and his bills and assignments showed no error, he was not entitled to remand for new trial "to permit intelligent consideration by the Court of Civil Appeals." *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

Art. 2163. [1504] [1481] Substituted copies constitute record.

Operation and effect in general.—Where assignments have been lost or destroyed and have been substituted for, as provided by arts. 2157-2163, inclusive, the transcript on appeal can be perfected by certiorari. *Hassell v. Rose* (Civ. App.) 199 S. W. 845.

6. DEPOSIT OF MONEY, ETC., IN COURT

Art. 2164. [1462] [1458] Custody of money and other articles deposited.

Applicability in general.—A sheriff made a levy on certain counters and shelving, but did not sell them before the expiration of his term, nor make a formal transfer to his successor. Held, that Rev. St. 1879, arts. 1458-1460 do not apply to the property levied on. *Wolf v. Taylor*, 68 Tex. 660, 5 S. W. 855.

Deposit in court.—All of rice in which plaintiff owned, as claimed, a fifth interest being sold by consent, and four-fifths of proceeds paid to defendant, the other fifth passed into registry of the court, and was properly adjudged to plaintiff. *Blair v. Colorado Canal Co.* (Civ. App.) 203 S. W. 176.

In action to cancel sheriff's deed on ground that purchaser promised owner to reconvey on owner's payment of price paid for land by purchaser, it was not necessary for owner to actually tender the money admitted to be due and owing to purchaser into court; an offer to do equity and to perform such decree as the court may enter being sufficient. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

STIPULATIONS

Construction and operation in general.—In an action in which it was sought to enforce an agreement that the action, with others, should abide the result of a certain pending action and be determined by such result, it was not necessary that the parties plaintiff in the other suits mentioned in the agreement should be joined as parties to the present action. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

It is not essential to the validity of a stipulation between the parties that a pending action shall abide the result of another action and be determined thereby that the stipulation be mutually beneficial. *Id.*

Where by filed agreement of counsel the issues and questions involved in a suit are identical with those involved in another suit, and the briefs filed in the latter case are taken as the briefs in the former case, the decision rendered on appeal in the latter case is applicable on appeal in the former case. *Santa Fé Townsite Co. v. Parker* (Civ. App.) 211 S. W. 274.

In suit to restrain the approval and sale of bonds voted by a school district, an agreement or stipulation that the voters of the district had had actual notice of the bond election, notice of which was not posted as prescribed by statute, in the absence of any words of limitation, must be construed to mean that all the voters of the district had notice. *Mayhew v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 943.

Plaintiffs were not represented by counsel when the case was called, and after granting several short postponements the court began trial after expiration of time fixed for duration of term, but on one of plaintiff's counsel becoming ill the case was by agreement postponed until the following term, at which time testimony introduced on the first trial was reintroduced, held that, although the court may have considered testimony introduced on the first hearing at a time when it had extended the term, plaintiffs, having failed to raise the matter even in their original brief in the appellate court, cannot, as their stipulation contemplated the consideration of evidence heard before postponement, raise it thereafter. *Blair v. Paggi* (Civ. App.) 219 S. W. 287.

In suit by a company to recover from the representative of a buggy company moneys from sale of buggies pending litigation, agreed by defendant to be paid over to plaintiff company if the court held its chattel mortgage lien superior, there being no evidence that defendant obtained the fund by fraud, plaintiff was not entitled to recover attorney's fees. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

Agreement between a company and the representative of a buggy company that, if pending litigation resulted in the determination of the priority of the chattel mortgage

lien of the company on certain buggies sold, the representative of the buggy company would pay the proceeds over to the company, held not without consideration, or illegal, each of the parties having given a promise for a promise, and each having had the right to insist on a strict compliance with the statutory provisions regarding foreclosure of liens and sales thereunder and having each surrendered such right. *Id.*

Agreement of counsel in an action of trespass to try title to use abstracts instead of obtaining certified copies of deeds, etc., and filing the same, did not require defendants to furnish plaintiff their private abstracts, and there was no error in the trial court in refusing to require them to furnish plaintiff their private papers for examination or to use as evidence. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

Where it was agreed at the trial that "the First National Bank is a mere stakeholder, and that the bank has the \$600, which is claimed by the plaintiff, and the defendants B. & H. put up \$300, and the plaintiff put up \$300. The bank does not claim the money. No judgment shall be rendered against the bank except for \$600, which is a mere depository"—the court erred in entering judgment against the bank for \$600, and "for court costs"; the bank never having made any claim to the money and being willing to pay it to the rightful owners, both before and after the suit was filed. *Bal-
lew & Huston v. Blakeny* (Civ. App.) 231 S. W. 495.

Conclusiveness and effect.—The stipulation that a pending action should abide the result of another action and be determined thereby held not subject to repudiation by defendant or its receiver subsequently appointed, after the company had acted upon it and received the benefits contemplated. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

An agreement between counsel that defendant would file an answer in a few days after default day, containing a general demurrer and a general denial, did not preclude it on the same day, and before filing such answer, to file a plea of privilege. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 205 S. W. 158.

Where defendants stipulated as to the title and location of the land which plaintiffs claimed to have acquired by adverse possession, they cannot repudiate the stipulation and defeat recovery on the ground that the land was located elsewhere, etc. *Stark v. Leonard* (Civ. App.) 212 S. W. 677.

A contradictory and confusing stipulation of counsel should be disregarded by the court if it stands in the way of a true determination of the rights of the parties. *Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 221 S. W. 259, 10 A. L. R. 742, answering certified questions (Civ. App.) 159 S. W. 1036. Answers to certified questions conformed to (Civ. App.) 223 S. W. 1118.

CHAPTER TWENTY-TWO

SUIT BY NEXT FRIEND

Art. 2167. When minor may sue by next friend.	Art. 2169. May collect certain personal judgments, etc.
2168. Next friend may compromise.	

Article 2167. [3498u] When minor may sue by next friend.

Actions by next friend of minor.—A parent under this article, can bring an action, if in good faith, as next friend to annul a marriage of a minor son. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

A petition wherein a parent sued to annul the marriage of his minor son, held to have been instituted by the parent as next friend, although the son was named as a defendant and the parent sought certain relief in his own behalf. *Id.*

Suit for a minor may be instituted by his father as his next friend. *Race v. Decker* (Civ. App.) 214 S. W. 709.

A married woman has no legal capacity to sue as next friend on behalf of her minor son, where her husband, who is the minor's stepfather, refuses to sue or join in the suit. *Carroll v. Embry* (Civ. App.) 229 S. W. 575.

The right of a minor to sue by next friend cannot be questioned. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

— **Substitution of guardian.**—See *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

While a minor's guardian may, under this article, represent the ward in all suits filed after his appointment, he has no absolute right to displace the next friend in a case originating prior thereto. *Jones v. Chromister Lumber Co.* (Civ. App.) 204 S. W. 704.

Guardian's allegations that ward was injured while employed in violation of law, and that his father, as next friend, made insufficient and inadequate settlement through ignorance, but that no final judgment was entered, made in an unsworn petition, were insufficient to require the court to substitute the guardian for the father as next friend. *Id.*

— **Judgment.**—It is not an absolute prerequisite to jurisdiction of an action by a minor that he should sue by next friend, but it is a matter of procedure, and the fact that the minor was without representation merely makes the judgment voidable at his instance and not void; consequently a judgment recovered by a minor not suing by next friend need not be enjoined on the independent suit of defendant on the ground that it was wholly void. *Gross v. Griffin* (Civ. App.) 221 S. W. 764.

Though an infant was a party plaintiff by next friend in a suit to partition a decedent's estate, yet the suit being expressly against his interest, and the judgment following the petition arbitrarily and illegally taking from him part of what the will gave him and adding it to what the will gave the others, he may, on attaining majority, attack the judgment as one obtained through the active fraud or collusion of his next friend, whatever her motive and however honest her purpose. *Reynolds v. Prestidge* (Civ. App.) 228 S. W. 358.

Art. 2168. [3498v] Next friend may compromise, etc.

Inadequate settlement as ground for substitution of guardian.—Guardian's allegations that ward was injured while employed in violation of law, and that his father, as next friend, made insufficient and inadequate settlement through ignorance, but that no final judgment was entered, made in an unsworn petition, were insufficient to require the court to substitute the guardian for the father as next friend. *Jones v. Chronister Lumber Co.* (Civ. App.) 204 S. W. 704.

Art. 2169. [3498w] May collect certain personal judgments, etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

CHAPTER TWENTY-THREE

SUITS AGAINST NON-RESIDENTS

Art. 2174. Requisites of pleadings.

Art. 2175. Judgment by default cannot be rendered.

Article 2174. [1504c] Requisites of pleadings.—The pleadings in such case shall set forth the title of the complainant; and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect. [Acts 1893, p. 77; Acts 1919, 36th Leg., ch. 58, § 1, amending art. 2174, Rev. Civ. St.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 2175. [1504d] Judgment by default cannot be rendered.

Personal judgment against non-resident.—Judgment in rem against nonresident by publication after attachment and garnishment proceedings against property in state binds only the property attached, and does not support garnishment proceedings instituted after entry of such judgment in rem. *Burrow-Jones-Dyer Shoe Co. v. Gerlach Mercantile Co.* (Civ. App.) 200 S. W. 250.

Proper judgment in attachment and garnishment proceedings against nonresident not personally appearing would be to limit judgment's execution to specific property attached or garnished. *Id.*

CHAPTER TWENTY-FOUR

ATTORNEY'S FEES, RECOVERY OF

Article 2178. Attorney's fees recoverable in certain cases; procedure; costs.

Constitutionality.—To construe this article, as applying to damage claims arising prior to the act becoming effective, would render it retrospective in its operation, and therefore obnoxious to Const. art. 1, § 16. *Freeman v. W. B. Walker & Sons* (Com. App.) 212 S. W. 637.

Prospective operation.—It must be presumed that the Legislature intended by the use of the word "hereafter" that the statute should be prospective, so that attorney's fees could not be had in a suit upon a claim which arose prior to the act becoming effective. *Freeman v. W. B. Walker & Sons* (Com. App.) 212 S. W. 637.

Street assessments.—Art. 1011, authorizing provision for reasonable attorney's fees in an action on certificates of assessment for improvements, is not limited or affected in any way by this article. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Persons entitled to allowance.—Under art. 5623a, permitting materialmen and laborers to file suit to enforce payment and collection of the indebtedness due them, the suit being against the owner as well as the building contractors, the owner is entitled to recover his attorney's fees against the contractor's surety. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Persons liable.—The Director General of Railroads is a "person doing business in this state" liable under this article, for attorney's fees on recovery of judgment for full amount of claim not paid after presentation. *Hines v. Easterly* (Civ. App.) 224 S. W. 943.

Grounds for allowance in general.—There is no authority under Texas law for assessment of attorney's fees against creditors or sureties on sheriff's indemnity bonds taken under art. 253, when sued for conversion, unless the bonds so provide. *Coppard v. Gardnér* (Civ. App.) 199 S. W. 650.

Under this article, in action against railroad for killing a mule, if plaintiff's claim presented was not for a greater sum than the claim proved he is entitled to recover a sum not exceeding \$20 as attorney's fee, but if the claim presented was for a greater sum than the claim proved, he is not entitled to recover anything as an attorney's fee. *St. Louis Southwestern Ry. Co. of Texas v. Post* (Civ. App.) 220 S. W. 129.

In such action, where plaintiff complied with the statutory condition that plaintiff "shall finally establish his claim * * * as presented for payment," the fact that he did not establish, at the trial, a claim for interest covered by his suit, but which he never presented to defendant for payment, is not a reason why the statute did not operate in his favor. *Id.*

On quashing writ of sequestration, see *Kubena v. Mikulasick* (Civ. App.) 228 S. W. 1105.

Amount and computation.—Where a portion of the homestead has been abandoned, in foreclosing a materialman's lien on such portion there is no legal objection to including the amount of attorney's fees in the foreclosure. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

In a suit by materialmen, subcontractors, and laborers against the owner, the contractors, and the latter's sureties, there was no error in submitting to the jury the question of the amount due the owner's attorney as attorney's fees which the owner was entitled to set off against the balance due the contractors from him and assigned to the sureties. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Proof and allowance.—In action for value of horse killed by train of defendant, plaintiff could not recover attorney's fees, without evidence as to what would be reasonable attorney's fee under statute. *St. Louis Southwestern Ry. Co. of Texas v. Claybon* (Civ. App.) 199 S. W. 488.

As part of amount in controversy.—In action against railroad for \$200 for mule killed and \$20 attorney's fees under this article, where it appeared plaintiff had a right to the attorney's fee claimed, such fee was properly included in determining the amount in controversy, which therefore amounted to \$220. *St. Louis Southwestern Ry. Co. of Texas v. Post* (Civ. App.) 220 S. W. 129.

CHAPTER TWENTY-FIVE

MISCELLANEOUS PROVISIONS

Art.
2180. Process, requisites of.

Art.
2182. Suit consolidated, when.

Article 2180. [1447] [1443] Process, requisites of.

Cited, *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072; *White v. Johnson*, 5 Civ. App. 480, 24 S. W. 568.

Name of state.—The order of the county commissioners for an election to determine whether, within a certain district, the sale of liquor should be prohibited, a copy of which order Rev. St. 1879, art. 3230, requires shall be posted by the clerk at four different places within the proposed election district, is not a "writ" or "process," within article 1443, which requires that all writs and processes shall run in the name of the state. *Gilbert v. State*, 32 Cr. R. 596, 25 S. W. 632.

Date of issuance.—Notation by clerk of date of issue of citation upon back thereof was sufficient, within this article, requiring date of issuance to be noted on same. *Hoff v. Clark* (Civ. App.) 200 S. W. 431.

Art. 2182. [1454] [1450] Suits consolidated, when.

Cited, *Gulf, C. & S. F. Ry. Co. v. Bacon* (Civ. App.) 21 S. W. 783.

Actions which may be consolidated.—Suits by separate plaintiffs, suing for separate demands, each case being dependent on issues entirely disconnected and distinct, are not within this article. *Pena v. Baker* (Civ. App.) 207 S. W. 426.

The district court did not err in consolidating writs of certiorari to review orders of the county court appointing an administrator to collect inheritance tax, approving the contract between the administrator and the attorney for the estate, ordering sale of a small part of the land belonging to the estate to pay the attorney's retaining fee, etc. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Actions against executors and their sureties, one for waste and misapplication of funds, and another to set aside a conveyance of lands of the estate, fraudulently procured, to one of the sureties, with the collusion of the executors, held properly consolidated under this article. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

Discretion of court and review.—The rights of action of a widow and her children for damages for the unauthorized burial of their husband and father are for a tort affecting each individual separately, and, though the court may for convenience permit them to be prosecuted jointly as arising from the same transaction, that is within the court's discretion, and his requirement that they be prosecuted separately is not reversible. *Foster v. Foster* (Civ. App.) 220 S. W. 215.

The ruling or order for consolidation of causes cannot be reviewed; exception not having been taken thereto. *Williams v. Baldwin* (Civ. App.) 202 S. W. 975.

Under this article, whether suits should be consolidated is largely in the trial court's discretion, and this discretion will not be reviewed unless there has been manifest injury. *Pena v. Baker* (Civ. App.) 207 S. W. 426; *Bain v. Coats* (Civ. App.) 228 S. W. 571.

TITLE 38

COURTS—JUVENILE

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| Chap. | Chap. |
| 1. Dependent and neglected children. | 2. Delinquent children. |

CHAPTER ONE

DEPENDENT AND NEGLECTED CHILDREN

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|---|---|
| Art. | Art. |
| 2184. "Dependent child" or "neglected child" defined. | 2189. Adjudication, etc. |
| 2185. County and district courts, etc. | 2190. Child to be ward of custodian, etc. |

Article 2184. "Dependent child" or "neglected child" defined.

Cited, *Gully v. Gully* (Sup.) 231 S. W. 97.

Constitutionality.—Arts. 2184–2190, defining the jurisdiction of juvenile courts and prescribing the procedure as to dependent or neglected children, are not in violation of Const. art. 5, § 8, conferring on the district court original jurisdiction over guardians and minors and general jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or Constitution, when considered in connection with section 16, giving the county court a power to appoint guardians of minors. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Contempt in controversy over custody.—Relator, adjudged guilty of contempt in controversy over custody of dependent child, under arts. 2184–2190, a civil proceeding will not be granted habeas corpus by Court of Criminal Appeals, but relegated to civil courts in view of Const. art. 5, §§ 3, 5, and art. 1529. *Ex parte Little*, 83 Cr. R. 375, 203 S. W. 766.

Art. 2185. County and district courts, etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 2189. Adjudication, etc.

In general.—Rev. St. 1895, arts. 3502a, 3502b, conferred upon the county courts the power to determine the custody of children and to exercise the power through a writ of habeas corpus in cases where guardianship was not involved, while Rev. St. 1911, arts. 2184, 2189, and 2190, provide for the appointment of guardians and make custody in such cases only an incident of the guardianship. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Habeas corpus to review.—Where the county court authorized the probation officer to take charge of a dependent child pending a motion for a new trial, such action, if error, could be corrected only upon motion for new trial or upon appeal, but not by means of writ of habeas corpus. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Art. 2190. Child to be ward of custodian, etc.

See *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

CHAPTER TWO

DELINQUENT CHILDREN

Article 2200.

Repeal.—Code Cr. Proc. 1916, art. 1195, repealing a former provision, leaving a transfer of case of juvenile charged with felony to juvenile court to trial judge's discretion, repealed Rev. Civ. St. art. 2200, containing a similar provision. *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

TITLE 39

CRIMINAL DISTRICT COURTS

[See Code Cr. Proc. art. 97a, et seq.]

CHAPTER ONE

THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY

Art.	Art.
2201e. May grant habeas corpus, etc.	2216-2228. [Superseded.]

Article 2201e. May grant habeas corpus, etc.

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Arts. 2216-2228. [Superseded].

Art. 2224 cited, *Rochelle v. State* (Cr. App.) 232 S. W. 838.

TITLE 40

COURTS—COMMISSIONERS'

Chap.

1. Organization.
2. Powers and duties.

Chap.

3. Terms and minutes of the court.
4. Miscellaneous provisions.

CHAPTER ONE

ORGANIZATION

Art.

2237. Court composed of whom and the presiding officer thereof.

Art.

2238. Three members constitute a quorum, except, etc.

Article 2237. [1533] [1510] Court composed of whom and the presiding officer thereof.

See *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 438.

What constitutes legal court.—Under this article, and arts. 2238, 2276, commissioners' court can legally transact business, though county judge is not present and presiding, notwithstanding Const. art. 5, § 18, providing that the commissioners, "with the county judge as presiding officer," shall compose the commissioners' court. *Dalton v. Allen*, 110 Tex. 68, 215 S. W. 439.

Art. 2238. [1534] [1511] Three members constitute a quorum, except, etc.

Quorum.—Under art. 2237 and this article, three members of the commissioners' court, one of whom must be the county judge, may constitute a quorum, or in his absence all the commissioners are necessary. *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 438.

Where, at a meeting of a commissioners' court from which one commissioner was absent and at which the county judge presided, a verbal order was made increasing the county judge's compensation, there being no proof he voted for such increase, the fact that he so presided did not render the order invalid; for, under art. 2238, providing that "any three members of the said court, including the county judge, shall constitute a quorum," a quorum is constituted by any three commissioners, or by the county judge and any two commissioners, and hence the order was duly passed at a meeting with a quorum present, regardless of the county judge's participation. *Dalton v. Allen*, 110 Tex. 68, 215 S. W. 439.

CHAPTER TWO

POWERS AND DUTIES

Art.

2241. Certain powers of the court specified.

2242. Power to levy taxes.

2245. Power to fill certain vacancies.

2253. May co-operate with cities in such construction.

2268a. Commissioners shall not make contracts in excess of \$2,000 without submission to competition; exception.

Art.

2268b. Contracts made without compliance with act void; injunction; repeal.

2270. May provide building, etc., for county court.

2273a. Court rooms for justices of the peace.

2273b. Soldiers records.

2273c. Same.

2273d. Rest rooms in court houses.

Article 2241. [1537] [1514] Certain powers of the court specified.

Cited, *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Free v. Scarborough*, 70 Tex. 672, 8 S. W. 490.

1. **Limitation of jurisdiction to county business.**—A commissioners' court is not a court of general, but of limited, jurisdiction, having no authority except as expressly or impliedly conferred by law. *Miller v. Brown* (Civ. App.) 216 S. W. 452.

1/4. **Nature of court.**—Under Const. art. 5, § 1, making commissioners' courts part of the judicial system, section 8, giving district court appellate jurisdiction and supervisory control over them, and section 18, specifying their powers, and arts. 2241, 6360, commissioners' courts are not courts of limited and special jurisdiction, but are courts

of general jurisdiction in the sphere of the powers conferred on them. *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

1½. **Jurisdiction not exclusive.**—Const. art. 5, § 13, providing that the commissioners' court shall exercise such power and jurisdiction over all county business as is conferred by the Constitution and laws of the state, does not preclude the Legislature from committing any county business to some other agency, nor does any other provision of the Constitution prohibit the exercise of such legislative power. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

2½. **Fixing time and place of holding justices' courts.**—Const. art. 5, § 19, provides that justices of the peace shall hold their courts at such times and places as may be provided by law. Rev. St. 1879, art. 1514, and art. 1547 as amended by Act 1881, provide that the times and places at which justices of the peace shall hold their terms of court shall be fixed by the county commissioners' court. No order was made by the commissioners' court fixing the time and place of holding court by one B., elected one of the justices of the peace for a certain precinct. But it appeared that such an order had been made in the case of S., a former justice of the peace for such precinct, and that both one who had been justice of the peace for said precinct up to B.'s election, and B., held court at the time and place indicated in such order. Held, that a judgment rendered by B. as justice of the peace was not void as rendered without jurisdiction; it being presumed that the court held by S. was the same court as that held by B., and an order once made fixing the time and place of holding court continuing in force until changed. *Koehler v. Earl*, 77 Tex. 188, 14 S. W. 28.

4. **Construction of roads, bridges, and ferries.**—Under subd. 6 of this article, commissioners' courts may pave a road or street within the limits of a city connecting with a county highway where the city does not object to the county doing so. *Smith v. Cathey* (Civ. App.) 226 S. W. 158.

The powers of commissioners' courts in relation to the building of county roads, except as to the limits of taxation therefor, are governed wholly by general laws, following the command of Const. art. 11, § 2, particularly arts. 605-610, this article and art. 2242, which follows the amendment of Const. art. 8, § 9, limiting the amount of levy. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

By this article, as to powers of commissioners' courts over public roads and highways, such courts are given general jurisdiction. *Jackson v. McAllister* (Civ. App.) 196 S. W. 671.

Where district road bonds are issued under arts. 628, 631, 632, the commissioners' court, as incidental to the express power over roads given by this article, and the "control" and "custody" of the bonds given by article 632, has power to determine the manner and methods to be adopted in order to effect a sale, and when it is not reasonably possible to sell them at par. *Id.*

Courts cannot go into the question of the necessity for improvements made by the commissioners' court, under this article. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

That the Legislature has provided means for procuring a road fund does not impliedly prohibit the commissioners' court from going into debt to build roads, under this article. *Id.*

See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

6. **Contracts in general.**—Although contract between commissioners' court and road contractor made estimates of a certain engineer binding, such court was not precluded from setting aside the estimate as grossly erroneous and unfair to the contractor. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

Statutes authorizing the use of road hands cannot be held to affect or limit the powers given by this article, to the commissioners' court to improve roads by contract. *Id.*

6½. — **Provision for payment.**—Under Const. art. 11, § 7, providing that no debts shall ever be incurred by a county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay it, it is not enough, to provide funds for the payment of the debt after it has been created, as nothing the commissioners' court can do after creating the debt, without so providing, can validate it. *J. I. Case Threshing Mach. Co. v. Camp County* (Civ. App.) 218 S. W. 1.

To make provision for the levy and collection of taxes prior to or at the time of creating a debt as provided by Const. art. 11, § 7, when this has not been done by law, requires some affirmative action on the part of the county authorities with special reference to the particular debt being created or contemplated, it not being sufficient to provide for raising a fund which may or may not be used lawfully for its payment, a fund being necessary which cannot lawfully be diverted for any other purpose by a succeeding commissioners' court. *Id.*

8½. **Lease of highways.**—In view of Pen. Code 1911, art. 812, as to obstructing highways, a commissioners' court has no authority, under this article and arts. 1370, 6359, 6860, 6861, to lease any portion of the public highways for oil and gas wells, which will necessarily be obstructions thereof, notwithstanding such portion of the highway has been acquired by purchase and not condemnation, or the lessee also holds a lease from the owner of the fee of the land over which such portion of the highway runs as a right of way. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

9. **Delegation of authority to construct court house.**—A contract by commissioners' court of a county for the construction of a courthouse in effect making the contractor its agent, with authority to parcel out the contract to subcontractors and thereby releasing him from all liability thereon, was void, because delegating the court's powers. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

10½. **Form of orders.**—The commissioners' court need not go through any particular form in passing its orders, and the suggestion by one member that certain action be taken upon a proposition, and assent by other members, in open session, is sufficient to authorize the entry of such action on the minutes. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

15. **Employment of counsel.**—After the commissioners' court has passed a resolution directing the employment of counsel for a specified purpose, it may delegate to the county judge and chairman of the finance committee ministerial executive duties of selecting the attorney and fixing his compensation. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

22. **Scope of power to establish ferries.**—Under Rev. St. 1879, art. 1514, giving commissioners' courts authority "to establish public ferries whenever the public interests may require it," such courts are authorized to grant a franchise for a ferry across the Rio Grande, which forms a part of the boundary between Texas and Mexico, the franchise extending as far as the political jurisdiction of the state; that is, to the middle of the river. *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120.

26½. **Validity of payments.**—Where an extension of a sea wall was necessary for the protection of the lives and property of inhabitants of a county but the greater part of the wall was built by the federal government, payment by the county to the attorney who secured the government's consent to the construction and procured title to the right of way to other land desired by the government was not invalid as a grant to the government. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

29. **Power to build court house and jail.**—The county commissioners' court being by this article, and art. 2270, the only body empowered to authorize contracts for the erection of county buildings, injunction will not lie to restrain the issuance of bonds in payment for a county jail, to be constructed under an alleged contract made by one of the judges of the commissioners' court, not only without the authority, but directly contrary to the resolution, of that court. Such bonds would be utterly void in the hands of all purchasers. *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

29½. **Power to issue warrants.**—The commissioners' court of a county can, under subd. 8 of this article, issue interest-bearing warrants maturing annually in future years, limited only by Const. art. 11, § 7, in spite of arts. 605, 610, relating to bonds. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

This article empowers the commissioners' court of county which has not adopted art. 6966 to build a road and create an indebtedness to be paid by interest-bearing warrants in future years, although a bond issue under articles 605, 610, for such purpose has been voted down in an election. *Id.*

A sum contracted to be paid a contractor for work on roads, to be paid for in interest-bearing warrants, is a "debt" within Const. art. 11, § 7, restricting and limiting county debts. *Id.*

Const. art. 11, § 7, prohibiting incurring of debt unless a tax is provided for interest and sinking fund, is a restriction and also a limitation on county debts. *Id.*

Without special authority, the commissioners' court of a county is without power to issue negotiable securities, depriving the county of true defenses against the original creditor, and such power is not to be implied, but must be expressly conferred. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

30. **Allowance of claims.**—The duty of the county commissioners to audit all claims against the county, and to order paid only those found to be just, as imposed by subd. 8 of this article, is judicial, and its performance cannot be delegated to another. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Where a county judge approved fictitious claims against the county, on which the county clerk issued warrants on which, in turn, the county treasurer issued checks, which, after payees' signatures were forged, the county depository bank paid, and the county commissioners, after discovery of the fraud, took no steps to hold the bank accountable, the bank's payment was not the sole proximate cause of loss, and all such officers are jointly and severally liable therefor. *Id.*

Since the duty of the county commissioners to audit all claims against the county is judicial and nondelegable, they are without authority to ratify the acts of the county judge in approving such claims. *Id.*

As the special road laws of Henderson county provide that all moneys received from sale of bonds shall be held by the treasurer and paid out on orders of the commissioners' court, and as the last special road law (Sp. Acts 1918, c. 24, § 15k) makes it the duty of the treasurer to hold the funds and pay them out as in other cases, a judgment, in an action by an engineer against the commissioners' court to recover compensation for services rendered in supervising construction of highways, is not, in view of Const. art. 5, § 8, and this article, erroneous in directing the commissioners' court to draw warrants on the treasurer who held funds belonging to the road district. *McDonald v. Axtell* (Civ. App.) 218 S. W. 563.

Under art. 1509, prohibiting payment by county treasurer, except on certificate or warrant from some officer authorized by law to issue it, and subd. 8 of this article, commissioners' court having refused to allow such an account, the district court, though under Const. art. 5, § 8, having jurisdiction and general supervisory control over the commissioners' court, cannot, by original and direct mandamus proceeding against such treasurer, compel him to pay the claim. *Id.*

Where the commissioners' court refuses to allow a claim against the county, the remedy is by direct suit against the county. *Id.*

31. — **Conclusiveness of order allowing claim.**—Allowance of claims by a commissioners' court is a judicial act which cannot be revoked at a subsequent term. *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

32. — **Collateral attack.**—Allowance of claims by a commissioners' court cannot be collaterally attacked, but can only be revised, if at all, by appeal or other appropriate proceedings instituted for that purpose. *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

In prosecution of county judge for passing forged check issued upon an account approved and ordered paid by commissioners' court, the judgment of the court approving such account does not preclude proof of forgery upon ground that no collateral attack can be made upon commissioners' court's judgment, since if payee named was fictitious the proceeding was void, and since the county judge, if guilty of forgery, was disqualified, such disqualification invalidating proceedings. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

Art. 2242. [1538] Power to levy taxes.

See *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

Cited, *Free v. Scarborough*, 70 Tex. 672, 8 S. W. 490.

In general.—The grant of taxing power to any county or district by the Legislature should be construed with strictness, the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Limitation of levy.—Where commissioners levied tax for building fund of county, with intent to swell general fund beyond limit of 25 cents on \$100, as provided by Const. art. 8, § 9, levy was void. *Veltmann v. Slator* (Civ. App.) 200 S. W. 539.

The powers of commissioners' courts in relation to the building of county roads, except as to the limits of taxation therefor, are governed wholly by general laws following the command of Const. art. 11, § 2, particularly Rev. St. 1895, arts. 877-881, Rev. St. 1911, arts. 605-610, 2241, and this article, which follows the amendment of Const. art. 8, § 9, limiting the amount of levy. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Under Const. art. 8, § 9, and this article, commissioners' court may levy and collect a special tax for the repair of the courthouse and jail. *Sanders v. Looney* (Civ. App.) 225 S. W. 280.

Diversion of funds.—As it would be unlawful to transfer taxes levied and collected for public building fund to general county fund, when that fund exhausted constitutional limit, such transfer could be enjoined. *Veltmann v. Slator* (Civ. App.) 200 S. W. 539.

Unlawful intent of commissioners to transfer tax levied for county building fund to general fund was material issue of fact, and district judge had authority to enjoin collection of tax until such issue had been determined. *Id.*

Levy of taxes in guise of one fund, with intent to use for another, which thereby would exceed constitutional limit, is illegal and void. *Id.*

Art. 1440, empowering the commissioners' court to transfer money from one fund to another, held to apply only to statutory funds classed by art. 1438, and not to those raised by taxation under Const. art. 8, § 9. *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

Const. art. 8, § 9, as to taxes for various purposes, held not only to control the raising but the expenditure of the funds; and so not to allow transfer of those raised for one purpose to another purpose. *Id.*

In suit by taxpayers to enjoin the commissioners' court and tax collector from collecting the public building and improvement tax for a year as having been levied under a subterfuge, etc., admission by defendants that at least \$600 of the special improvement fund had been used for general expenses authorized peremptory instruction by the court that part of the fund had been used for general purposes. *Veltmann v. Slator* (Civ. App.) 219 S. W. 530.

In suit by taxpayers to enjoin the commissioners' court and tax collector from collecting the public building and improvement tax for a year as having been levied under a subterfuge, etc., evidence held sufficient to sustain finding either that no improvements were contemplated when the levy for improvements was made, or that the commissioners made levy with intent to transfer all or part of the fund to general revenue. *Id.*

Art. 2245. [1541] [1518] Power to fill certain vacancies.

Vacancy by involuntary absence as soldier.—In the existing absence of any statute or constitutional provision that the involuntary absence from the county of one of its officials engaged as a private soldier in the Army of the United States shall create a vacancy in his office, the commissioners' court has no authority to declare that such absence constitutes a vacancy. *Hamilton v. King* (Civ. App.) 206 S. W. 953.

The mere absence of a county officer while involuntarily in the military service of the United States, with no showing as to the probable duration of his absence, does not create a "vacancy" in his office. *Id.*

Art. 2253. May co-operate with cities, etc.

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

Art. 2268a. Commissioners shall not make contracts in excess of \$2,000 without submission to competition; exception.

Submission to competition.—Under arts. 2268a, 2268b, the commissioners' court, which on the day advertised for receiving bids and upon adjournment resolved to erect a courthouse, employed an architect, adopted his tentative plans, and contracted for its construction subject to modifications, did not comply with the statute. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Under arts. 2268a, 2268b, the commissioners' court must be prepared to present to bidders some independent and concrete statement of work required to be done and must take such steps as are reasonably and fairly calculated to carry out the act. *Id.*

The commissioners' court, having authority to contract for construction of courthouses, etc., subject to arts. 2268a, 2268b, in absence of constitutional or statutory prohibition, may make necessary changes in details by which price is increased or diminished. *Id.*

A contract between a county and a contractor, whereby the latter was to supervise the construction of a county courthouse, and to receive a stipulated sum payable in daily installments, is not within the exception to the requirement of competitive bids for county contracts of work done under the direct supervision of the county commissioners and paid for by the day. *Ashby v. James* (Civ. App.) 226 S. W. 732.

This article held not applicable to county's contract with civil engineers for professional services in connection with the construction and maintenance of public highways and roads in proceedings under tit. 18, c. 2, as amended in 1917, in view of arts. 640, 1460-1498, 2571, 5535, 5972, and 1498c, and in view of the purpose of the statute, and the absurdity of letting contracts for professional services of a technical nature through competitive bidding. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

Notice of letting of contract.—Under arts. 2268a, 2268b, where published notice inviting bids on February 14th, but where recorded copy thereof fixed the date as February 4th, an award of contract on February 13th did not comply with statute, and contract was void for want of notice. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Where the notice for bids to erect a county courthouse called for bids for the erection in accordance with plans and specifications on file, a contract with a bidder on the cost plus basis, whereby the contractor was not to be liable for the material and labor furnished, but was merely to supervise the construction and receive compensation for such supervision, is illegal, as made without the notice required by this article, and art. 2268b. *Ashby v. James* (Civ. App.) 226 S. W. 732.

Art. 2268b. Contracts made without compliance with act void; injunction; repeal.

See *Ashby v. James* (Civ. App.) 226 S. W. 732; *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

Art. 2270. [1548] [1521] May provide building, etc., for county court.

County jail.—The county commissioners' court being by Rev. St. 1879, arts. 1514, 1521, the only body empowered to authorize contracts for the erection of county buildings, injunction will not lie to restrain the issuance of bonds in payment for a county jail, to be constructed under an alleged contract made by one of the judges of the commissioners' court, not only without the authority but directly contrary to the resolution of that court. Such bonds would be utterly void in the hands of all purchasers. *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

Art. 2273a. Court rooms for Justices of the Peace.—Hereafter the Commissioners' Courts of the respective counties affected hereby, shall provide and furnish suitable places in the Court House of their respective Counties for the holding of Court by Justices of the Peace in the Precinct where such Court House is situated, where there are more than seventy-five thousand inhabitants in such Justice Precinct. [Acts 1919, 36th Leg., ch. 94, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 2273b. Soldiers records.—The commissioners' court of each county of this State is hereby authorized, and it shall be their duty, to purchase out of the general fund of the county a well bound book, to be used by the county clerk in recording the official discharge of each soldier, sailor or other person resident of the county, serving at home or abroad in the army or navy of the United States in the war with Germany and Austria Hungary lately concluded by armistice. [Acts 1919, 36th Leg., ch. 96, § 1.]

Took effect March 20, 1919.

Art. 2273c. Same.—It is hereby made the duty of the county clerk of each county to record in a well bound book the official discharge of each soldier, sailor or other person resident in the county who served at home or abroad in the army or navy forces of the United States in the war with Germany and Austria-Hungary lately concluded by armistice; and for such services the county clerk shall be allowed by the commissioners' court, out of the general fund of the county, not to exceed fifteen cents for each one hundred words so recorded. [Id., § 2.]

Art. 2273d. Rest rooms in court houses.—The commissioners' court in each county in this State may maintain a rest-room for women in the court house, or if for any reason a suitable rest-room for women cannot be had in the court house, they may maintain a rest-room at some convenient place near the court-house. The rest-room may be comfortably furnished with lounge, chairs, mirror, lavatory, tables and such other furnishings as may be needed to make the room attractive and comfortable for women who may be in attendance on the court or who may for other reasons be in town.

The commissioners' court may assist the business and professional men, the various women's clubs and other organizations in paying the salary of a matron for the rest-room; providing the county judge shall appoint such matron with the consent of the commissioners' court; providing that in counties having a population according to the last United States census of less than 25,000, the expense and furnishing of the rest room shall not exceed \$125.00, nor shall the commissioners' court expend more than \$15.00 per month for the maintenance of the rest-room, including the compensation paid by the county to the matron; counties having a population according to the last United States census of more than 25,000 and less than 50,000 may expend not to exceed \$200.00 in furnishing a rest-room and may expend for its maintenance not to exceed \$25.00 per month, including the compensation paid by the county to the matron; and those counties having more than 50,000 may expend in furnishing a rest-room not to exceed \$300.00, and may expend for its maintenance, including the compensation paid by the county to the matron, any amount not to exceed \$50.00 per month. [Acts 1919, 36th Leg., ch. 102, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 68, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

CHAPTER THREE

TERMS AND MINUTES OF THE COURT

Article 2276. [1554] [1527] Minutes of the court.

Cited, *King v. Marion County* (Civ. App.) 202 S. W. 1052.

In general.—Under arts. 2237, 2238, and this article, commissioners' court can legally transact business, though county judge is not present and presiding, notwithstanding Const. art. 5, § 18, providing that the commissioners, "with the county judge as presiding officer," shall compose the commissioners' court. *Dalton v. Allen*, 110 Tex. 68, 215 S. W. 439.

Varying effect of by parol.—See notes under art. 3687.

CHAPTER FOUR

MISCELLANEOUS PROVISIONS

Article 2278. [1556] [1529] Seal of the court.

Commissioners' courts are courts of record.—Commissioners' courts, which are required by this article to authenticate all official acts under seal, are "courts of record." *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

TITLE 41

COURTS—JUSTICES'

Chap.	Chap.
1. Election and qualification of Justices.	11. Appearance and trial.
2. Powers and jurisdiction.	12. Trial by jury.
3. Terms of the court.	13. The judgment.
5. Venue.	14. New trials, etc.
7. Parties.	17. Appeal.
8. Process and service.	18. General provisions.
9. Pleadings.	

CHAPTER ONE

ELECTION AND QUALIFICATION OF JUSTICES

Art.	Art.
2286. Two justices in certain precincts.	2289. Nearest justice to hold court, when.
2287. Commission and qualification.	

Article 2286. [1563] [1534] Two justices in certain precincts.

Cited, *Stone v. Hill*, 72 Tex. 540, 10 S. W. 665.

Art. 2287. [1564] [1535] Commission and qualification.

Signature to jurat.—Under this article a jurat to an affidavit signed, "J. J. L., J. P. Precinct No. 5, Bell County, Texas," sufficiently shows the officer's official capacity. *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411.

Art. 2289. [1566] [1537] Nearest justice to hold court, when.

Cited, *Hamilton v. King* (Civ. App.) 206 S. W. 953.

CHAPTER TWO

POWERS AND JURISDICTION

Art.	Art.
2291. Jurisdiction in civil cases.	2295. Other jurisdiction conferred by law.

Article 2291. [1568] [1539] Jurisdiction in civil cases.

See *Crawford v. Sandridge*, 75 Tex. 383, 12 S. W. 853.

1. **In general.**—The exclusive jurisdiction given a justice court in certain classes of cases was not intended to limit or restrict the equity jurisdiction of the district court to give relief against wrong and injustice, when the justice court does not possess adequate power to grant such relief. *Houston Heights Water & Light Ass'n v. Gerlach* (Civ. App.) 216 S. W. 634.

Where any matter of practice and procedure is prescribed in the statutory title governing such matters in the justice court, it is exclusive, and can be applied only in such courts. *Fears v. Fish* (Civ. App.) 218 S. W. 507.

2. **Pleading jurisdictional facts.**—Where plaintiffs in good faith, in suit to foreclose mortgage on two mules, alleged that they were of the value of \$180, allegation should be treated as conclusively establishing that to be their value, so far as question of jurisdiction was concerned. *J. F. Turner & Bro. v. Gable* (Civ. App.) 195 S. W. 348.

If plaintiff's allegations are susceptible of construction which will support jurisdiction of justice court rendering judgment, that construction will be adopted. *Sikes v. Keller* (Civ. App.) 197 S. W. 311.

In a suit for conversion, jurisdiction of justice court is determined by plaintiff's allegations as to value of the property and damage claimed, in the absence of a special plea charging that it was so alleged for fraudulent purpose of wrongfully conferring jurisdiction. *Id.*

The jurisdiction of a justice of the peace in a mortgage foreclosure must generally be settled by the pleadings of the plaintiff, who must allege the value of the property, and where this has been done in good faith, and there is no effort to show fraud, jurisdiction upon the ground of amount cannot thereafter be raised by proof of greater value. *Brown v. Green* (Civ. App.) 204 S. W. 357.

The amount in controversy in replevin will be assumed to be that fixed in the complaint in determining the jurisdiction until the contrary is shown. *Stripling v. Mooney* (Civ. App.) 208 S. W. 229.

It is not sufficient that the value of property in controversy is more than stated in the complaint and beyond the justice's jurisdiction, unless plaintiff falsely stated the value for the purpose of conferring jurisdiction. *Id.*

Jurisdiction is fixed by allegations of existence of a lien in favor of plaintiff farm laborer, and not lost by failure to prove them. *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

3. **Actions involving title to real property.**—Justice court had jurisdiction of an action by a purchaser of land to recover moneys paid to a third person to perfect title. *Hilburn v. Matheny* (Civ. App.) 227 S. W. 746.

5. **Amount or value in controversy.**—Where complaint prayed for actual damages less than \$200, without any prayer for interest or general relief, justice court had jurisdiction. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Justice court held to be without jurisdiction to try the issue of lump sum settlement under the Workmen's Compensation Act, where the amount involved exceeded the jurisdiction of the court. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

7. — **Enforcement of liens on personal property.**—In suit to recover \$151.89 rent and to foreclose landlord's statutory lien on crop, that the property levied upon exceeded \$200 in value would not deprive justice court of jurisdiction. *Williams v. King* (Civ. App.) 206 S. W. 106.

In view of art. 2000, value of property against which farm laborer's lien is asserted, if greater than the debt, controls in determining jurisdiction, a rule applying to common law and statutory liens as well. *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

Facts that lien existed on oats, and that cattle had been sold prior to filing for record of plaintiff farm laborer's account, held immaterial on issue of value of property against which he asserted lien. *Id.*

Where plaintiff sought the collection of a debt and asserted a lien and sought foreclosure on personal property of an agreed value exceeding \$200, asking foreclosure of lien against all of the property, and not merely so much as to pay the debt, the justice court was without jurisdiction. *Childress Oil Co. v. Wood* (Sup.) 230 S. W. 143.

8. — **Mortgage foreclosure.**—In view of Const. art. 5, § 19, the justice court would have no jurisdiction of foreclosure of mortgage on two mules, if their value exceeded \$200. *J. F. Turner & Bro. v. Gable* (Civ. App.) 195 S. W. 348.

In mortgage foreclosure, where the value of mortgaged property exceeds \$200, the justice court has no jurisdiction, even though the debt sued for is for a less amount. *Brown v. Green* (Civ. App.) 204 S. W. 357.

9. — **Interest, costs, and attorney's fees.**—Jurisdiction of justice court cannot be defeated by adding interest to alleged value of converted property, thereby extending plaintiff's claim beyond \$200, where no interest is asked for or adjudged. *Sikes v. Keller* (Civ. App.) 197 S. W. 311.

In action on note in justice court, court had jurisdiction to enter judgment for the note and accumulated interest as provided in the note, even if amount exceeded \$200; principal of the note being \$100. *Wilson v. Thompson* (Civ. App.) 202 S. W. 341.

In an action for value of steers killed by defendant's trains, in the amount of \$195, brought in justice court, interest thereon is not recoverable *eo nomine*, but only as an item of damages, and must be pleaded, or otherwise it is not a matter in controversy, to be added to the amount sued on in determining jurisdiction. *Hufstutler v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 216 S. W. 495.

As amount recoverable from a railroad for stock killed does not include interest, *eo nomine* or as damages, action against railroad on claim for mule killed, in which the complaint alleged the mule's value was \$200, did not appear, because of any element of interest recoverable, to be for more than \$200, of which the justice court alone had jurisdiction. *St. Louis Southwestern Ry. Co. of Texas v. Post* (Civ. App.) 220 S. W. 129.

In action against railroad for \$200 for mule killed and \$20 attorney's fees under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2178, where it appeared plaintiff had a right to the attorney's fee claimed, such fee was properly included in determining the amount in controversy, which therefore amounted to \$220. *Id.*

Attorney's fees, expressly contracted for in a note and sought to be recovered in a suit, are a part of the contract, and must be considered in estimating the amount in controversy, in determining the jurisdiction of justice court. *Jones v. McKinney* (Civ. App.) 224 S. W. 720.

11. — **Reduction of amount to give jurisdiction.**—In order for a demand to be liquidated, one party must have obligated himself to pay the other a specific sum of money, either absolutely or upon the happening of a specified contingency. *Wm. Cameron Co. v. Santikos* (Civ. App.) 195 S. W. 984.

Where plaintiff agreed to furnish certain materials at specified price, and later furnished a bill of extras without naming the price, the demand was unliquidated, and the plaintiff, when the account as originally made showed a balance in excess of jurisdiction of the justice court, could remit the excess so as to confer jurisdiction. *Id.*

Plaintiff could not on day of trial admit credit of \$40 owing defendant on another transaction than that involving particular mare sued for, in order to bring controversy within jurisdiction of justice's court, there being no pleading or suggestion on institution of suit or at any time before trial when admission was made of partial payment, or that plaintiff would admit a credit to bring case within jurisdiction. *Wischkaemper v. Allen* (Civ. App.) 221 S. W. 1037.

Where buyer brought suit in a justice court with jurisdiction limited to \$200, for the unliquidated sum of \$325.50 damages for seller's breach in failing to deliver, crediting defendant with \$150 liquidated demand for goods received, but without alleging agreement to accept the last-named sum as payment to claim sued on, the \$325.50 was the amount in suit, and was beyond jurisdiction. *Russell v. Saffold* (Civ. App.) 225 S. W. 281.

Where plaintiff had a liquidated demand of \$302.50 against defendant on open account for goods, wares, and merchandise, he could not give jurisdiction of an action thereon to the justice's court by renouncing all in excess of \$199.75 without any consideration, where the part renounced was not severable. *Hooper Lumber Co. v. Texas Fixture Co.* (Sup.) 230 S. W. 141.

15. **Foreclosure of attachment lien.**—Under art. 268, a justice court possesses authority to enforce by express foreclosure a lien acquired on land by levy of attachment from the court, decreeing the foreclosure, although there is no valid objection to the method provided by said article for enforcement of attachment lien by mere judgment recital of issuance and levy of attachment, followed by execution. *Baker v. Pitluk & Meyer*, 109 Tex. 237, 205 S. W. 982.

Under article 268, a justice court, in suit within its jurisdiction, has authority to decree a foreclosure of attachment lien on real estate, and direct an order of sale of the land; Const. art. 5, § 8, not conferring exclusive jurisdiction on district courts. *Id.*

16. **Reconvention.**—In ascertaining whether the justice's court has jurisdiction of a plea of reconvention, the amount in controversy is determined by considering plaintiff's claim and defendant's claim separately, and not by adding one to the other. *Ft. Smith Couch & Bedding Co. v. George* (Civ. App.) 222 S. W. 335.

18½. **Equitable jurisdiction—Injunction.**—The district court of one county has jurisdiction of a suit to enjoin execution on a justice's judgment rendered in another county from which appeal has been taken to the district court of such county notwithstanding art. 4653, requiring writs of injunction to be returnable to the court where the suit is pending; a justice court not having jurisdiction of injunction suits. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Art. 2295. [1572] [1543] Other jurisdiction, etc.

Cited, *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

CHAPTER THREE

TERMS OF THE COURT

Art.
2298. Monthly terms.

Art.
2299. Times and places of holding.

Article 2298. [1575] [1546] Monthly terms.

Cited, *Stone v. Hill*, 72 Tex. 540, 10 S. W. 665.

Art. 2299. [1576] [1547] Times and places of holding.

Cited, *Galveston, H. & S. A. Ry. Co. v. Ware* (Sup.) 11 S. W. 554.

In general.—Const. Tex. art. 5, § 19, provides that justices of the peace shall hold their courts at such times and places as may be provided by law. Rev. St. 1879, art. 1514, and art. 1547 as amended by Act 1881, provide that the times and places at which justices of the peace shall hold their terms of court shall be fixed by the county commissioners' court. No order was made by the commissioners' court fixing the time and place of holding court by one B., elected one of the justices of the peace for a certain precinct. But it appeared that such an order had been made in the case of S., a former justice of the peace for such precinct, and that both one who had been justice of the peace for said precinct up to B.'s election, and B., held court at the time and place indicated in such order. Held, that a judgment rendered by B. as justice of the peace was not void as rendered without jurisdiction; it being presumed that the court held by S. was the same court as that held by B., and an order once made fixing the time and place of holding court continuing in force until changed. *Koehler v. Earl*, 77 Tex. 188, 14 S. W. 28.

CHAPTER FIVE

VENUE

Art. 2308. Suits to be brought in the county of defendant's residence, except, etc.	Art. 2312. Where justice is disqualified. 2313. Change of venue on affidavit.
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Article 2308. [1585] [1556] Suits to be brought in the county of defendant's residence, except, etc.

See *Trousdale v. Southern Rice Growers' Ass'n* (Civ. App.) 221 S. W. 322; *Southern Plow Co. v. Dunlap Hardware Co.* (Civ. App.) 221 S. W. 1020; *Perkins v. Texas Bank & Trust Co.* (Civ. App.) 230 S. W. 736.

Cited, *State v. Waller* (Civ. App.) 211 S. W. 322; *E. L. Witt & Sons v. Stith* (Civ. App.) 212 S. W. 673.

In general.—Although defendant was originally alleged to reside in H. county, if in fact he had removed to county where suit was brought, process could be issued by justice of latter county, and if properly served would support judgment by default. *Hooks v. Pate* (Civ. App.) 197 S. W. 613.

Where defendant company was served with citation and filed a plea of privilege, the justice court had jurisdiction of its person; the plea of privilege raising only a question of mere venue privilege, so that the judgment, the court having jurisdiction over the subject-matter, was not void. *Price & Beaird v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478.

Should any question arise in justice court with reference to venue not covered by this article, the court must be governed by any provision of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1830, applicable thereto. *Fears v. Fish* (Civ. App.) 218 S. W. 507.

This article applies to suits in courts of justices of the peace, and not to county courts. *Texas Supply Co. v. Clarke* (Civ. App.) 220 S. W. 573.

Contracts.—Where contract subject to confirmation was signed in L. county, and telegram of corporation confirming same, accepted there, contract was completed in such county, and action was properly brought against corporation in such county, under this article, subds. 4, 10, although it resided in another county. *Wright v. M. M. Graves Co.* (Civ. App.) 198 S. W. 998.

The amendment to this article, subd. 4, providing that suits for labor performed may be "maintained" where such labor was performed, applies to cases pending then in county where services were performed, since "maintained" refers to cases already in existence. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

This article, subd. 4, fixing venue of suits to recover for "labor" actually performed, applies to suit seeking recovery of commissions for selling real estate. *Id.*

An action by an attorney to recover fees, brought in the county court, is controlled as to venue by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1830, relating to special proceeding in such courts, and it was therefore error, in overruling defendant's plea of privilege, to base the decision upon this article, subd. 4, relating to venue in justice courts, and providing that in all suits to recover for labor actually performed suit may be maintained where such labor is performed, whether contract is oral or in writing. *Fears v. Fish* (Civ. App.) 218 S. W. 507.

This article, subd. 4, providing that in all suits to recover for labor actually performed suit may be brought and maintained where such labor is performed, applies only to suits brought in the justices' courts. *Randall v. Harris* (Civ. App.) 218 S. W. 509.

This article, subd. 4, as amended by providing that suits for labor performed "may be brought and maintained" where labor was performed, held not applicable to cases pending at the time the amendment became operative. *Walker v. Alexander* (Civ. App.) 227 S. W. 696.

This article, subd. 4, has no application to an action on a contract of sale and purchase for the value of the articles. *Tidwell v. Kelly* (Civ. App.) 230 S. W. 470.

Under this article, subd. 4, where plaintiff threshed several hundred bushels of grain for defendant during threshing season at stipulated sum per bushel and owned the threshing machine and employed laborers, he could not resist plea of privilege (citing *Words and Phrases*, Second Series, "Labor"). *Reece v. Langley* (Civ. App.) 230 S. W. 509.

Rents.—Where the court found that the defendant was at no time a resident of the county of venue, and that the contract between plaintiff and defendant was a pasturage contract only, and that defendant did not rent plaintiff's land, this article, subd. 5, did not authorize plaintiff to sue in such county (citing *Words and Phrases*, First and Second Series, *Rent*). *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

Art. 2312. [1589] [1560] Where justice is disqualified.

Disqualification of justice.—Under *Rev. St. 1879*, art. 1560, a suit could be brought in the proper precinct though the justice therein was disqualified, by reason of his relation to one of the parties, and then transferred to the nearest justice. *Morris v. Foreaker* (App.) 15 S. W. 37.

Art. 2313. [1590] [1561] Change of venue on affidavit.

Statutes liberally construed.—Statutes relating to change of venue to county of defendant's residence should be liberally construed to effect such purpose. *Brooks v. Wichita Mill & Elevator Co.* (Civ. App.) 211 S. W. 288.

CHAPTER SEVEN**PARTIES****Article 2320. [1597] [1567] Same rules as to parties, etc.**

Assignees.—A justice of the peace cannot render a judgment binding on the assignees of labor claims sued for in the name of the assignors, unless the assignees are made parties. *Pena v. Baker* (Civ. App.) 207 S. W. 426.

CHAPTER EIGHT**PROCESS AND SERVICE**

Art.	Art.
2321. Process of justice's court, requisites of.	2322. Citation to be issued, when. 2323. Citation shall contain what.

Article 2321. [1598] [1568] Process, etc.

Cited, *White v. Johnson*, 5 Civ. App. 480, 24 S. W. 568.

Art. 2322. [1599] [1569] Citation to be issued, when.

Cited, *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 538.

Art. 2323. [1600] [1570] Citation shall contain what.

Requisites and sufficiency of citation.—Rev. St. 1879, arts. 1568, 1570, under the title of "Justices' Courts," requires a citation to be made returnable at the first day of "some" term of court. Held, that such citation need not be made returnable at the "next" term of court. *White v. Johnson*, 5 Civ. App. 480, 24 S. W. 568.

CHAPTER NINE**PLEADINGS**

Art.	Art.
2326. Pleadings oral but entered on docket.	2327. Pleadings to be in writing and under oath.

Article 2326. [1603] [1573] Pleadings oral but entered on docket.

Pleadings in general.—The technical rules of pleading do not apply to the manner of forming issues in justice courts in ordinary suits. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

A petition before justice of the peace in a suit on a note and for foreclosure of a chattel mortgage falling to allege the jurisdictional amount held cured by the averments of the answer. *Hranicky v. Sell* (Civ. App.) 199 S. W. 315.

In view of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2326, particularity required in written pleadings is not necessary in oral statements in justice court. *Fidelity Lumber Co. v. Bean* (Civ. App.) 203 S. W. 732.

Pleadings are as essential to make an issue in justice court as in the district court. *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 538.

A liberal rule as to pleading is applied to cases in justice courts. *Watson v. D. A. Paddleford & Son* (Civ. App.) 220 S. W. 779, certified questions answered 110 Tex. 525, 221 S. W. 569.

Petition or complaint.—In justice court, where account sued on and complaint referred to contract of lease, which gave names of partners, pleadings were sufficient,

although members were not named therein. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

— **Plea or answer.**—An answer alleging a bona fide controversy over the amount due, that defendant sent its draft with a letter saying it was in full payment, which draft plaintiff collected, under the rules applicable to justice and county courts, sufficiently pleads accord and satisfaction. *Miller Bros. & Co. v. H. Lesinsky Co.* (Civ. App.) 202 S. W. 992.

— **Conclusiveness of written pleading.**—In view of this article, authorizing oral pleading in justice's court, where plaintiff filed written petitions, both in the justice and in the county court, and the record failed to show that they were not supplemented by oral amendment, curing alleged fatal defects, the petitions will be held sufficient. *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886.

Docket entry of pleadings—Necessity and sufficiency.—Statement of plaintiffs' cause of action on docket of justice of peace: "Suit upon damages for \$150.00 of date _____ due _____ interest _____ per cent."— was not as full a statement of plaintiffs' cause of action as defendant was entitled to. *Kelly v. Collins* (Civ. App.) 198 S. W. 396.

Art. 2327. [1604] [1574] Pleadings to be in writing and under oath.

Verification.—Where the account filed by plaintiff was not verified, defendant is not required to verify his answer under this article or art. 3712. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

Plea of privilege.—That defendant's plea of privilege was filed December 30th, during the December term of justice court, and was not called to the attention of the justice or passed without prejudice, is insufficient to show a waiver of plea; it not appearing when term expired, or that there was an opportunity to procure a hearing on the plea during said term. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

Where case was pending in justice's court for several months, and five continuances were had, and no plea of privilege was ever called to attention of justice and ruling procured with respect thereto, the plea was waived. *Beall v. Moore* (Civ. App.) 210 S. W. 622.

CHAPTER ELEVEN

APPEARANCE AND TRIAL

Article 2330. [1607] [1577] Appearance day.

Cited, *Davis v. Robinson*, 70 Tex. 394, 7 S. W. 749.

CHAPTER TWELVE

TRIAL BY JURY

Article 2361. [1638] [1608] Mode of proceeding on trial before jury, etc.

Charge to the jury.—Under this article, and art. 2400, it is permissible for the county court to deliver a general charge in a case appealed from justice court, but where such charge is waived by both parties, the county court after refusing their requested peremptory charges, may in its discretion refuse to permit defendant's counsel to read a decision to the jury. *Hedrick v. McLaughlin* (Civ. App.) 214 S. W. 985.

CHAPTER THIRTEEN

THE JUDGMENT

Art.
2366. Judgment.

2368. Judgment for specific articles.

2370. No judgment without citation, unless.

Art.

2373. Same rules as govern district courts, etc.

Article 2366. [1643] [1613] Judgment.

Collateral attack.—The decree of a justice court does not foreclose a subsequent inquiry into jurisdictional facts. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

Res Judicata.—For the judgment of a justice court to be *res adjudicata* of the issues submitted to it, such court must have jurisdiction both of the parties and of the subject-matter. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

Art. 2368. [1645] [1615] Judgment for specific articles.

In general.—While not recognizing common-law forms of action, yet, where personal property is sued for, the legal principles governing the action of detinue must be resorted to and the judgment in such an action, as well as under this article, is in the alternative for the recovery of the property or its value, and where plaintiff's petition entitled recovery of possession of specific personal property, and there was a prayer for general relief, a motion to quash a writ of sequestration should have been denied. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

Art. 2370. [1647] [1617] No judgment without citation, unless.

See *Gulf, C. & S. F. Ry. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430.

Service by publication.—Under Rev. St. 1879, art. 1572, providing that all rules governing the service of citations issued out of the district courts, except when otherwise provided by law, shall govern also the justices' courts in so far as they are applicable, art. 1577, fixing appearance day after publication of process from justice's court, art. 152, providing that justices may issue attachments where defendant is not a resident of the state, and this article, process from justices' courts may be served by publication under the same rules governing district courts. *Davis v. Robinson*, 70 Tex. 394, 7 S. W. 749.

Service of nonresident notice.—Service may be had in garnishment suit under this article, by service of nonresident notice issued out of justice court. *National Bank of Commerce of Amarillo v. A. Walker Brokerage Co.* (Civ. App.) 198 S. W. 174.

Art. 2373. [1650] [1620] Same rules as govern district courts, etc.

Judgments conclusive.—Justices' courts have special and exclusive jurisdiction under Constitution, and other courts cannot review trials therein except upon appeal, and, where no appeal is allowed, judgments rendered therein are conclusive. *Mann v. Brown* (Civ. App.) 201 S. W. 438.

CHAPTER FOURTEEN

NEW TRIALS, ETC.

Art.		Art.	
2374.	Judgments by default, etc., may be set aside.	2375.	New trials may be granted.
		2379.	But one new trial to either party.

Article 2374. [1651] [1621] Judgments by default, etc., may be set aside.

Injunction and motion for new trial.—Where an appeal does not lie from judgment by default in a justice court, the losing party is not entitled to an injunction restraining the execution of the judgment unless he has exhausted his legal remedy provided by this and following articles for securing a new trial, by showing on such motion that he was not in default in permitting the case to go to judgment in his absence, and also that he has a meritorious defense to the cause of action. *Zickefoose v. Richardson* (Civ. App.) 227 S. W. 532.

Refusal of justice of the peace to file defendant's motion to set aside default judgment did not warrant district court to enjoin execution of the judgment where his motion for a new trial had previously been denied; his right to have the default judgment set aside having been determined against him by the denial of the motion for new trial. *Id.*

Art. 2375. [1652] [1622] New trials may be granted.

Form of motion.—Allegation in motion for new trial that default judgment of justice of the peace was "contrary to law and the evidence" held not a sufficient showing of a meritorious defense; the allegation being a mere legal conclusion. *Zickefoose v. Richardson* (Civ. App.) 227 S. W. 532.

Art. 2379. [1656] [1626] But one new trial, etc.

Cited, *Gulf, C. & S. F. Ry. Co. v. King*, 80 Tex. 681, 16 S. W. 641.

CHAPTER SEVENTEEN

APPEAL

Art.	Art.
2391. Appeal may be taken.	2396. Duty of justice in case of appeal.
2393. Bond for appeal; appeal perfected.	2397. Transcript, etc., to be transmitted to county court.
2394. Affidavit of inability to give bond.	
2395. When appeal perfected on affidavit.	

Article 2391. [1668] [1638] Appeal may be taken.

Final judgments.—A judgment of the justice court in favor of plaintiff may be final and appealable, although it does not dispose of defendant's counterclaim or cross-action for damages. *Watson v. Corley* (Civ. App.) 226 S. W. 481.

Amount or value in controversy.—If the justice court did not have jurisdiction of the mortgage foreclosure, because the value of the mules exceeded \$200, the county court did not, by appeal to it, acquire jurisdiction. *J. F. Turner & Bro. v. Gable* (Civ. App.) 195 S. W. 348.

County court on appeal from justice has jurisdiction to adjudicate claim for additional damages from deterioration of attached goods since appeal, though this raised amount involved above \$200. *Hegman v. Roberts* (Civ. App.) 201 S. W. 268.

If the justice court did not have jurisdiction of action because the value of the property exceeded \$200, the county court had no jurisdiction on appeal. *Stripling v. Mooney* (Civ. App.) 208 S. W. 229.

In replevin action brought in the justice court, upon appeal to the county court, it was error to exclude evidence that plaintiff's attorney stated that he knew the automobile's value was beyond the justice court's jurisdiction, but lowered it in the complaint because he could get quicker trial in the justice court. *Stripling v. Mooney* (Civ. App.) 208 S. W. 229.

Though the jury on appeal found the value of personalty in controversy to be \$300, it must be held that plaintiff's allegation of value to be \$195 was made in good faith, where there was no request for finding on plaintiff's good faith. *Id.*

Art. 1903, making verified plea of privilege prima facie proof of defendant's right to change of venue, and providing procedure for contesting plea and that either party may appeal from a sustaining or overruling judgment, is subordinate to and must be construed in harmony with this article, which limits appeals from justice court to county court to cases where the controversy exceeds \$20. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

A county court acquired no jurisdiction on plaintiff's appeal from a justice court judgment for defendant in an action involving more than \$200, and the appellate court could acquire no jurisdiction of the case by plaintiff's appeal from the judgment in the county court for defendant. *Jones v. McKinney* (Civ. App.) 224 S. W. 720.

Where the justice court had no jurisdiction of plaintiff's demand, the county court had none on appeal, so that the cause must be dismissed, but where defendant's counterclaim was within the jurisdiction of both courts, and was substantially admitted, and its amount ascertained by the jury, judgment should be rendered therefor. *Russell v. Saffold* (Civ. App.) 225 S. W. 281.

A cause of action in the justice court being not only for debt, but for foreclosure of a lien on personal property, its jurisdiction was dependent upon such property's value, and where its value admittedly exceeded the court's lawful jurisdiction, the county court was without jurisdiction on appeal, and plaintiff's abandonment of the lien in the county court did not give such court jurisdiction. *Childress Oil Co. v. Wood* (Sup.) 230 S. W. 143.

Jurisdiction dependent on jurisdiction of justice court.—The jurisdiction of the county court in cases appealed from justice court depends absolutely on the jurisdiction of the latter; for, while the case is tried de novo in the county court, its power is not original, and it cannot have jurisdiction where the justice court had none. *Childress Oil Co. v. Wood* (Sup.) 230 S. W. 143.

Motion for new trial as essential to appellate jurisdiction.—A motion for new trial is not essential to confer jurisdiction on county court on appeal from justice court. *American Nat. Ins. Co. v. Frankel* (Civ. App.) 199 S. W. 1132.

Right of appeal.—Under art. 1903, prescribing the duties of the judge or justice of the peace when a plea of privilege is entered and authorizing an appeal from a judgment sustaining or overruling the plea, the right of appeal is given from an order overruling the plea of privilege made by a justice of the peace the same as from that made by any other court. *McKay v. King-Collie Co.* (Civ. App.) 228 S. W. 991.

The fact that the county court could not command any justice's court to which the case was transferred to proceed with the trial of the case on its merits after an appeal on a plea of privilege does not defeat the right of appeal. *Id.*

Art. 2393. [1670] [1639] Bond for appeal; appeal perfected.

In general.—Under art. 2396, providing that upon appeal to the county court the justice shall certify and transmit a copy of his docket entries to the county court, and art. 2397, relating to time of transmission of transcript and papers, and this article,

where defendant did not appear until the appearance term, he did not waive his plea of privilege. *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

Bond on appeal—Necessity.—Plaintiff, who recovered in justice court against one of the joint defendants, but lost against the other, had a right to appeal without bond to the county court. *S. Samuels & Co. v. Morgan & Friedlander* (Civ. App.) 207 S. W. 335.

In view of this article, and art. 2395, and Const. art. 5, § 19, appeal will not be perfected so as to confer jurisdiction on the appellate court until a sufficient bond or affidavit in lieu thereof be given. *Piquero & Smith v. Carlin* (Civ. App.) 208 S. W. 956.

Where judgment in the justice court was in plaintiff's favor except for costs, plaintiff could appeal without filing a bond. *Watson v. Corley* (Civ. App.) 226 S. W. 481.

The Director General of Railroads being sued for death of cattle on track could not appeal to the county court from judgment for plaintiff in a justice court without executing an appeal bond, notwithstanding Director General's General Orders Nos. 50 and 50a, providing that no appeal bond shall be required in such proceedings; the Director General having no authority under Act March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p), to make such a regulation. *Bryson v. Payne* (Civ. App.) 232 S. W. 362.

U. S. Comp. St. § 1661, exempting the United States government and the heads of its different departments from giving an appeal bond held inapplicable to Director General of Railroads' appeal from the justice court to the county court, having reference only to proceedings in the federal courts. *Id.*

— **Form, requisites, and sufficiency.**—Under this article and art. 2394, a bond, on appeal from a justice of the peace, conditioned that "appellant shall prosecute his appeal with effect, and shall pay all costs," is a compliance with neither section, and the appeal must be dismissed. *Pace v. Webb*, 79 Tex. 314, 15 S. W. 269.

This article does not require a description of the judgment or its amount to be in the bond. *Perry v. Cullen*, 6 Civ. App. 178, 25 S. W. 1043.

— **Time of filing.**—Where appeal bond was not filed in justice court until 16 days after judgment, county court had no jurisdiction on appeal. *Fruit Dispatch Co. v. Independent Fruit Co.* (Civ. App.) 198 S. W. 594.

Liability on bond.—On defendant's appeal from justice court to county court, judgment being rendered against defendant, as a matter of law it followed against the sureties on his appeal bond. *C. J. Gerlach & Bro. v. Du Bose* (Civ. App.) 210 S. W. 742.

Sureties on a bond given on appeal from justice court to county court are not relieved from liability by the fact that the appealing principal and his adversary agree upon a judgment against the principal with stay of execution, and that such agreement is made without the knowledge or consent of the sureties; the sureties' obligation being presumably assumed with a view to control by the principal of the litigation on the appeal. *Id.*

Judgment on appeal—Default judgment.—On an appeal by the plaintiff from a justice of the peace, no judgment by default is authorized unless the defendant has entered an appearance, or been served with notice of the appeal, under this article, providing that no judgment by default shall be rendered against an appellee who has not entered an appearance, unless notice of such appeal has been served on the appellee, his agent or attorney, at least five days before the first day of the term. *Parks v. Igo* (App.) 14 S. W. 1069.

Art. 2394. [1671] [1639a] Affidavit of inability to give bond.

Cited, *Pace v. Webb*, 79 Tex. 314, 15 S. W. 269.

Sufficiency of affidavit.—Affidavit by one member only of plaintiff partnership held sufficient on appeal from justice to county court to entitle plaintiffs to prosecute cause as upon pauper's oath under statute. *Davidson v. Jones, Sullivan & Jones* (Civ. App.) 196 S. W. 571.

Right to appeal in forma pauperis.—The question on contest of right, under this article, to appeal in forma pauperis from a justice of the peace, is of inability to give security for, as well as pay, costs. *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

The question for the county court on hearing of petition for mandamus to a justice of the peace to allow appeal in forma pauperis is, not whether the justice erred in refusing such appeal on the evidence before him, but whether on the further evidence before the court there is a right thereto. *Id.*

Art. 2395. [1672] [1639b] When appeal perfected on affidavit.

Cited, *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664; *Piquero & Smith v. Carlin* (Civ. App.) 208 S. W. 956.

Art. 2396. [1673] [1640] Duty of justice in case of appeal.

In general.—Under this article, art. 2397, and art. 2393, relating to appeal bond and requiring appearance at the "next term of court to which the case has been appealed," where defendant did not appear until the appearance term, he did not waive his plea of privilege. *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

On appeal from justice court to county court, if the transcript did not conclusively show that the case was within the jurisdiction of the justice court as originally filed, it was error for the trial court to refuse to hear oral testimony as to what the oral pleadings were below. *Hufstutler v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 216 S. W. 495.

Transcript—Amendment.—While it would be a better practice to correct a transcript before the parties proceed to trial in county court on an appeal from justice court, such correction at such time is not imperative, and certainly not where the alleged jurisdictional defect is not pointed out specifically until the motion for a new trial is filed. *Hufstutler v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 216 S. W. 495.

— **Compelling transmission or perfecting of record.**—Although, under this article, upon granting appeal to county court, justice shall immediately make and transmit transcript, and under art. 2395 appeal is perfected upon filing bond, appellant must cause transcript to be filed as required by art. 2397. *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

Abandonment of appeal.—Where attorney for appellant obtained possession of appeal bond, etc., and failed to redeliver them to justice until more than six terms of county court had expired, held, that appeal would be considered abandoned and execution could issue on justice's judgment notwithstanding duty of justice to file such papers in county court. *Cross v. Flewellen* (Civ. App.) 199 S. W. 500.

Dismissal of appeal—Want of prosecution.—Upon failure of justice of peace to make and transmit transcript upon appeal to county court, as required by this article, and within time required by art. 2397, appellant must compel same, failure to do which for several subsequent terms is negligence justifying dismissal. *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

— **Effect of court's failure to file transcript.**—When plaintiff's appeal from the justice court to the county court was perfected, jurisdiction of the suit was thereby vested in the county court, and it was not destroyed by the failure of the justice to forward to the county court a transcript of his proceedings, as required by this article, and failure of the justice to file such transcript, though it continued for more than two terms, will not warrant dismissal. *Imperial Motor Sales Co. v. Brannon* (Civ. App.) 217 S. W. 761.

Art. 2397. [1674] [1641] Transcript, etc., to be transmitted to county court.

See *Girvin v. Gulf Refining Co.* (Civ. App.) 211 S. W. 330.

In general.—On appeal from a justice's judgment, where a bond was not filed within the time required by this article, but upon motion to dismiss a substitute bond to replace an alleged lost original bond was filed, such bond was not sufficient to confer jurisdiction of appeal, where it did not appear that the justice had approved the original bond nor that the substitute bond was identical therewith. *Piquero & Smith v. Carlin* (Civ. App.) 208 S. W. 956.

Compelling transmission or forfeiting of record.—Mandamus to compel a justice to send up a transcript on appeal will not be granted on petition filed during the first term after the appeal was perfected, where such petition does not allege that it was practicable for the justice to have sent it up when the petition was filed. *Rev. St. 1879, art. 1641. Raley v. Jones* (Civ. App.) 25 S. W. 144.

Upon failure of justice of peace to make and transmit transcript upon appeal to county court, as required by art. 2396, and within time required by this article, appellant must compel same, failure to do which for several subsequent terms is negligence justifying dismissal. *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

Although, under art. 2396, upon granting appeal to county court, justice shall immediately make and transmit transcript, and under art. 2395 appeal is perfected upon filing bond, appellant must cause transcript to be filed as required by this article. *Id.*

While it was the duty of the justice of the peace under this article, and art. 2396, to transmit transcript to county court on appeal, it was also the duty of appellant to prosecute his appeal with reasonable diligence, and, if necessary to that end, resort to proper means to compel the justice to make up and transmit transcript to county court. *Clark v. Maund* (Civ. App.) 216 S. W. 257.

Dismissal.—Under this article, an appeal which is not perfected until the first day of a term of the county court is not returnable to that term, and it is error to dismiss it because the transcript is not filed in the county court on the first day of the next succeeding term. *Foos Mfg. Co. v. Prather* (App.) 16 S. W. 865.

Where an appeal from a justice of the peace has been perfected by service of the notice of appeal, and the execution and filing in the district court of a proper appeal bond, the justice's failure to make out and transmit to the district court a transcript of his record before the first day of the second term next succeeding the rendition of judgment, as required by arts. 2393-2397, is no ground for dismissing the appeal. *Petty v. Miller*, 5 Civ. App. 308, 24 S. W. 330.

Failure to file appeal transcript from justice with county court within time prescribed in this article, will not always be ground for dismissal, since art. 2400 provides mode of procedure in district and county courts shall control in justice's courts, unless procedure is otherwise prescribed, where for good cause more than 90 days may be allowed. *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

Where the transcript on appeal from justice's court has not been filed within the prescribed time, the appeal has not been perfected, and, if the delay is not explained or excused, the case will be dismissed on motion seasonably made. *Piquero & Smith v. Carlin* (Civ. App.) 208 S. W. 956.

Where justice of the peace did not comply with this article, and art. 2396, requiring in case of appeal to county court, transmission of transcript on or before the first day

of the next term, or on or before the first day of the second term of the county court, and defendant appellant did not cause transcript to be filed until the last day of the third term, held, county court did not abuse its discretion in dismissing appeal for want of prosecution. *Clark v. Maund* (Civ. App.) 216 S. W. 257.

DECISIONS RELATING TO APPEAL IN GENERAL

3. Pleadings in justice's court—Presumptions.—In view of art. 2326, authorizing oral pleading in justice's court, where plaintiff filed written petitions, both in the justice and in the county court, and the record failed to show that they were not supplemented by oral amendment, curing alleged fatal defects, the petitions will be held sufficient. *Heidenheimer, Strassburger & Co. v. Houston & T. C. R. Co.* (Civ. App.) 197 S. W. 886.

Where plaintiffs in justice court pleaded orally, as it was their privilege to do, it would be presumed that such pleadings, though not shown, were sufficient to cure the defect, if any, in the written pleadings. *Watson v. D. A. Paddleford & Son* (Civ. App.) 220 S. W. 779, certified questions answered 110 Tex. 525, 221 S. W. 569.

4. Pleadings on appeal.—Evidence as to a written contract was admissible in county court, although written contract was not pleaded in justice court, no pleadings being required by statute in the latter court or on appeal in the county court. *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408.

Pleadings on appeal from justice to county court are governed by rules applicable to justice courts, and parties are entitled to replead, without complying with rules of pleading applicable to cases originating in county courts. *Fidelity Lumber Co. v. Bean* (Civ. App.) 203 S. W. 782.

By delaying making of plea in abatement setting up pendency of prior suit until case had been appealed from the justice court to the county court, defendant waived any right of abatement to which she might have been entitled had timely objection been made. *Arrietta v. Crosby* (Civ. App.) 213 S. W. 987.

Where, on an appeal to the county court from the justice court, the transcript showed no pleadings in the justice court, and no pleadings were filed or made orally in the county court, an exception on this ground should have been sustained. *Texas & N. O. Ry. Co. v. Sims* (Civ. App.) 227 S. W. 694.

5. — Amendments in general.—On appeal from justice to county court, pleadings being oral in justice court, amendment may be made orally, and pleadings need not comply strictly with rules of pleading, as when case originates in county court. *Cameron Automobile Co. v. Berry* (Civ. App.) 198 S. W. 411.

Where district court on appeal from a justice of the peace heard evidence and took case under advisement, a party was properly denied leave at date fixed for rendition of judgment to file amendment to petition. *Cross v. Flewellen* (Civ. App.) 199 S. W. 500.

Where plaintiff in justice court could not have added interest without exceeding the jurisdiction of the justice court, she cannot amend in the county court by claiming interest, so as to bring the amount in controversy within the appellate jurisdiction of the Court of Civil Appeals. *Dunn v. Wilkerson* (Civ. App.) 203 S. W. 59.

In action for value of plaintiff's mare killed by defendant's log train, plaintiff's oral justice court pleading as orally amended in county court held sufficient to permit evidence that mare was negligently killed by defendant. *Fidelity Lumber Co. v. Bean* (Civ. App.) 203 S. W. 782.

Where pleadings in justice court are oral, amendments in county court may also be oral. *Id.*

Where defendant filed cross-action in justice court for \$200, he could not, on appeal to county court, increase amount of his cross-action to \$500, as appellate jurisdiction cannot exceed in amount jurisdiction of justice court. *West v. McMahon* (Civ. App.) 208 S. W. 674.

The right conferred by statute and rules on either party to amend pleadings extends to jurisdictional matters, so that, on appeal from justice court to county court, plaintiff had a right to amend his petition by reducing the amount of his damages, so as to cure the defect as to jurisdiction. *Hufstutler v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 216 S. W. 495.

6. — New cause of action.—In county court on appeal from justice court, it was not permissible for plaintiff to allege new promise of defendant's, renewing account sued on, defendant having pleaded limitations; such new promise not having been pleaded in justice court. *Cameron Automobile Co. v. Berry* (Civ. App.) 198 S. W. 411.

Where judgment for the plaintiff in justice court shows on its face that it was founded on a written contract, defendant cannot contend on appeal to the county court that plaintiff is seeking for the first time to recover on a written contract. *Ellerd v. Newcom* (Civ. App.) 203 S. W. 408.

In action for value of mare killed by defendant's log train, plaintiff's oral plea in county court on appeal from justice's court held not subject to objection that it essentially changed cause of action. *Fidelity Lumber Co. v. Bean* (Civ. App.) 203 S. W. 782.

Where plaintiff in an action commenced in justice court based his cause of action on notes, he could not recover in county court on a liquidated account. *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 538.

Where plaintiff appealed from a justice court judgment in his favor recovered on a contract renting land, an additional claim on appeal for the value of seed cane as rent under the contract did not constitute an amendment setting up a new cause of action or authorize striking the appeal. *Watson v. Corley* (Civ. App.) 226 S. W. 481.

In suit in justice court by a bank on a check against the maker and the payee who

had deposited the check for collection, it having been lost, the maker refusing to give a new one, so that the bank charged back the payee's account, the evidence showing that defendant maker was liable on the check to defendant payee, and both the bank and the payee having secured judgments against him, by amending his pleadings in the county court, asking judgment in his favor against defendant maker for the amount of the check, defendant payee sought neither to enlarge nor change defendant maker's liability, and the amendment was proper under art. 759. *R. W. Taylor & Co. v. Ferguson* (Civ. App.) 226 S. W. 1102.

9. — **New defenses.**—Defendant cannot rely on a defense not pleaded in county court, action having been appealed to that tribunal from justice's court. *Neely v. Dublin Fruit Co.* (Civ. App.) 199 S. W. 827.

12. — **Demurrers or exceptions on appeal.**—On appeal from justice's judgment, statement of plaintiffs' cause of action having been imperfect, county court correctly refused to sustain defendant's motion to strike transcript and dismiss appeal; defendant's remedy being by special demurrer to statement of cause of action. *Kelly v. Collins* (Civ. App.) 198 S. W. 396.

14. **Trial de novo.**—The county court, on appeal from an order of the justice of the peace denying a plea of privilege, hears the plea of privilege de novo, and if he sustains it he can render an order changing the venue to the proper justice court of the county of defendant's residence, and if he overrules the plea he can order the records transmitted to the justice court where the case originated. *McKay v. King-Collie Co.* (Civ. App.) 228 S. W. 991.

16. **Dismissal of appeal—Motion for.**—Upon appeal from justice of peace to county court, appellee cannot file motion to dismiss until transcript has been filed. *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

18. — **Grounds for dismissal.**—If on appeal from justice to county court, transcript fails to show jurisdiction in county court, appeal will be dismissed. *Fruit Dispatch Co. v. Independent Fruit Co.* (Civ. App.) 198 S. W. 594.

An appeal from the justice to the county court will not be dismissed, because appellant, before disposition of the appeal, filed a second action in the county court on the same cause, where such second action was thereafter dismissed by appellant; the institution of the second action not being an abandonment of the first. *Imperial Motor Sales Co. v. Brannon* (Civ. App.) 217 S. W. 761.

19. — **Effect of dismissal.**—Dismissal by county court of appeal from judgment of justice for less than \$100 for want of jurisdiction because appeal bond had not been approved within time required was final and revived judgment of justice. *Womack v. Phillips* (Civ. App.) 200 S. W. 607.

Dismissal by county court of appeal from judgment of justice for less than \$100 for want of jurisdiction because appeal bond has not been approved within time required being final and reviving judgment of justice, it could not be attacked in suit to restrain execution thereon. *Id.*

22. **Presumptions on appeal.**—It is presumed that the issues made by the pleadings were consistent with the orders or rulings of the trial court, as found in the transcript in all cases originating in the justice court where oral pleadings are allowed. *Caffarelli Bros. v. Lyons Bros. Co.* (Civ. App.) 199 S. W. 685.

26. **Determination of cause on appeal.**—Where plaintiffs abandoned their claim of right to have mortgage foreclosed after cause by appeal was transferred from justice to county court, they were not entitled to judgment of foreclosure in county court. *J. F. Turner & Bro. v. Gable* (Civ. App.) 195 S. W. 348.

CHAPTER EIGHTEEN

GENERAL PROVISIONS

Article 2400. [1677] [1644] Rules governing district courts, etc., to apply, except, etc.

See *Allison v. Gregory* (App.) 15 S. W. 416; *Fears v. Fish* (Civ. App.) 218 S. W. 507. Cited, *Houston & T. C. R. Co. v. Aycock* (Civ. App.) 201 S. W. 664.

Charge to jury.—Under Rev. St. art. 2361, and this article, providing that procedure in justice court shall be the same as in the county court, except that the justice shall not deliver any charge, it is permissible for the county court to deliver a general charge in a case appealed from justice court; but where such charge is waived by both parties, the county court after refusing their requested peremptory charges, may in its discretion refuse to permit defendant's counsel to read a decision to the jury. *Hedrick v. McLaughlin* (Civ. App.) 214 S. W. 985.

TITLE 43

DENTISTRY

Art.	Art.
2403. Practice of dentistry or dental surgery without license unlawful; exceptions.	2410. [Superseded.]
2404. Extracting teeth unlawful, when.	2411. [Superseded.]
2405. Board of examiners; qualifications of applicants for license.	2411a. Persons desiring to practice dentistry, etc.
2406. Same; appointment; terms of office; vacancies.	2412. [Superseded.]
2407. Same; oath of office.	2413. License issued by board to be filed for record.
2408. [Superseded.]	2414. Revocation of license.
2408a. Board of examiners; record; organization; meetings; quorum.	2414a. Exhibition of license.
2409. Persons desiring to practice dentistry, what is required of.	2415. Compensation and expenses of board
	2416. Disposition of fines collected.
	2416a. Partial invalidity of law.

Article 2403. Practice of dentistry or dental surgery without license unlawful; exceptions.—It shall be unlawful for any person to practice or offer, or attempt to practice dentistry or dental surgery in the State of Texas, without first having obtained a license from the State Board of Dental Examiners, as provided for in this Act; provided that physicians and surgeons may, in the regular practice of their profession, extract teeth or make application for the relief of pain, and provided further that nothing in this Act shall apply to any person legally engaged in the practice of dentistry in the State of Texas at the time of the passage of this Act, except as hereinafter provided. [Acts 1897, ch. 97, § 1; Acts 1889, p. 91; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 1.]

Explanatory.—Took effect 90 days after March 19, 1919, date of adjournment.

Acts 1919, 36th Leg., ch. 31, supersedes title 43, Rev. Civ. St. 1911. It also supersedes chapter 7 of title 12 of Revised Penal Code 1911, except art. 770 of such chapter.

Art. 2404. Extracting teeth unlawful, when.—It shall be unlawful for any person or persons to extract teeth or perform any other operation pertaining to dentistry or dental surgery, for pay, (or for the purpose of advertising, exhibiting or selling any medicine or instrument) unless such person or persons shall first have complied with the provisions of this act. [Acts 1889, p. 91; Acts 1897, ch. 97, § 2; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 2.]

Art. 2405. Board of examiners; qualifications of applicants for license.—A Board of Examiners, consisting of six practicing dentists of acknowledged ability as such, is hereby created, and shall have authority to examine all persons making application for license to practice dentistry in Texas, and to issue license to any person in the practice to dentistry or dental surgery in the State of Texas; provided such applicant shall be not less than twenty-one years of age, and shall have complied with all the requirements of this Act, and shall have passed a satisfactory examination before such Board. [Acts 1889, p. 91; Acts 1897, ch. 97, § 3; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 3.]

Art. 2406. Same; appointment; terms of office; vacancies.—The members of the said Board shall be appointed by the Governor of the State of Texas, and shall serve two years, except that the members of the Board first appointed shall be made as follows:

Three for one year and three for two years respectively, after which

each member shall be appointed for two years; and until his successor is duly appointed. In case of a vacancy occurring in said Board by resignation, removal from the State or by death or otherwise, such vacancy may be filled for its unexpired term by the Governor; provided, however, that no person shall be eligible to appointment on the Board unless he has been actively engaged in the legal practice of dentistry in the State of Texas for a period of not less than three years next preceding his appointment. [Acts 1889, p. 91; Acts 1897, ch. 97, § 4; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 4.]

Art. 2407. Same; oath of office.—Before entering upon the duties of his office, each and every member of the Board shall make oath before any officer authorized to administer oaths, and who shall be empowered to use a seal of office, that he will faithfully and impartially discharge the duties incumbent upon him to the best of his ability; said oath of office shall be filed with the County Clerk of the County in which affiant resides, and the Clerk of said County shall duly record the same on the records of his office, and shall receive a fee of fifty cents for said service. [Acts 1889, p. 91; Acts 1897, ch. 97, § 4a; Acts 1905, p. 144; Acts 1919, 36th Leg., ch. 31, § 5.]

Art. 2408.

Superseded by Acts 1919, 36th Leg., ch. 31 (arts. 2403-2416a).

Art. 2408a. Same; record; organization; meetings; quorum.—Said Board shall keep a record, in which shall be registered the name and residence or place of business of all persons authorized under this Act to practice dentistry or dental surgery in this State. It shall elect one of its members President and one Secretary, and it shall meet at least twice in each year, and as much oftener and at such times and places as may be necessary. A majority of the members of said Board shall constitute a quorum, and the proceedings thereof shall be open to the public. Provided further that said Board shall examine and grade all papers submitted by applicants for license and report thereon to such applicant or applicants within thirty days from the time of meeting of said Board. [Acts 1889, p. 91; Acts 1897, ch. 97, § 5; Acts 1905, p. 144; Acts 1919, 36th Leg., ch. 31, § 6.]

Art. 2409. Persons desiring to practice dentistry, what is required of.—Any person desiring to commence the practice of dentistry or dental surgery within the State of Texas, after the passage of this Act, shall, before commencing such practice, make application to said Board, and upon payment of \$25.00, which shall not be returned to said applicant, and upon presentation of satisfactory evidence of his or her good moral character, and upon presentation of a diploma from a reputable dental college, and upon undergoing a satisfactory examination before said Board, on all the subjects pertaining to dentistry, or upon such subjects as the Board may in its judgment deem necessary, and having complied with all other requirements of this Act, shall be granted a license to practice dentistry or dental surgery in the State of Texas; provided that any person upon presentation of satisfactory evidence before the Board that he or she has been regularly engaged in the legal practice of dentistry in any State in the United States, for a period of three years next preceding said application, and upon complying with other requirements of this Act, shall be entitled to an examination without the presentation of a diploma; provided further that such colleges shall be considered reputable within the meaning of

this Act, whose entrance requirements and courses of instruction are as high as those adopted by the better class of dental colleges of the United States; and provided that the Board appointed under this Act shall be the final judges of a reputable dental college. [Acts 1889, p. 91; Acts 1897, ch. 97, § 7; Acts 1905, p. 144; Acts 1919, 36th Leg., ch. 31, § 7.]

Arts. 2410, 2411.

Superseded by Acts 1919, 36th Leg., ch. 31 (arts. 2403-2416a).

Art. 2411a. Same.—Any person who has heretofore been licensed, authorized, or granted permission to practice dentistry or dental surgery under the laws of this State, and who has so practiced under said license, authorization or permit, previous to the passage of this Act, and who desires to obtain a license of authority from the Board created under this Act, under presentation and surrender to the Board of said license, authorization or permit, and an affidavit that he is the same person to whom same was originally granted, shall be granted a license under this Act, for which the Board shall receive a fee of \$1.00. Provided, however, that no person shall be required to surrender an old license for a new one except he so desires. Provided, also, that if any license issued under this or any previous Act, in Texas, shall be lost or destroyed, the holder of said license may present his application to the Board for a duplicate license, together with his affidavit that the old license has been so lost or destroyed, and upon further affidavit that he is the same person to whom said license was issued, shall be granted a license under this Act. Provided that if the records of said Board fail to show that such person has ever been granted a license, the Board may have the power to exercise its discretion in granting such duplicate license, and for each duplicate license granted the Board shall receive a fee of \$1.00. [Acts 1919, 36th Leg., ch. 31, § 8.]

Art. 2412.

Superseded by Acts 1919, 36th Leg., ch. 31, set forth herein as arts. 2403-2416a.

Art. 2413. License issued by board to be filed for record.—Every person to whom license is issued by the Board of Examiners, shall, before beginning the practice of dentistry in this State, present the same to the County Clerk of the County in which he or she resides or expects to practice; who shall officially record said license in a book provided for that purpose, and said clerk shall receive a fee of fifty cents for each license so recorded. [Acts 1889, p. 91; Acts 1897, ch. 97, § 9; Acts 1905, p. 144; Acts 1919, 36th Leg., ch. 31, § 9.]

Art. 2414. Revocation of license.—It shall be the duty of any member of the Board of Examiners under this Act, when it shall be made to appear to said member by satisfactory evidence from a creditable witness that any person who has been granted a license to practice dentistry or dental surgery in this State has been convicted of a felony, or has been guilty of any fraudulent or dishonorable conduct or malpractice, or any deception, or misrepresentation of facts for the purpose of soliciting or obtaining business, to report the same to the county or district attorney of said county, whose duty it shall be, if in his judgment the evidence is sufficient, to file a complaint in the District Court of said County, requiring the person so accused to appear before said court, at a regular term of said court, and upon the

trial of said cause, if the defendant is found guilty of said charge, it shall be the duty of said District Court to revoke the license of said defendant, provided no one shall be required to stand trial, unless a copy of said charges shall have been furnished him or her at least ten days before said trial; and provided further that he shall be cited to appear under the same rules as govern other civil cases in said court. And if any person whose license has been revoked under this section shall practice or attempt to practice dentistry or dental surgery after such a license has been revoked, he or she shall be punished as provided in Section 14 [Penal Code, Art. 768] of this Act. [Acts 1889, p. 91; Acts 1897, ch. 97, § 10; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 10.]

Art. 2414a. Exhibition of license.—Any person authorized to practice dentistry or dental surgery, in this State, either under this Act or any previous Act of any legislature of Texas, shall place his or her license on exhibition in his or her office where said license shall be in plain view of patients, and any person who shall do any operation in the mouth of a patient, or treat any lesions of the mouth or teeth, without having said license exhibited in his or her office in plain view, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in Section 14 of this Act [Penal Code, Art. 768]; and each day so engaged shall constitute a separate offense; provided that nothing in this Act shall apply to students of a reputable dental college, who perform their operations without remuneration except for actual cost of materials, in the presence of, and under the direct personal supervision of a demonstrator or teacher, who has complied with the provisions of this Act, or has been legally authorized to practice dentistry in Texas under some other Act of the Legislature of Texas. Provided further that nothing in this Act shall apply to persons doing laboratory work on inert matter only. [Acts 1919, 36th Leg., ch. 31, § 11.]

Sec. 12 of the act is set forth, post, as art. 767a, Penal Code.

Art. 2415. Compensation and expenses of board.—Each member of the Board of Examiners shall receive for his services \$5.00 per day for each day actually engaged in the duties of his office, together with all legitimate expenses incurred in the performance of such duties. Provided that all expenses of said Board shall be paid from money received by the Board from applicants, as provided for in this Act, and no money shall ever be paid to any member of the Board from any fund in the State Treasury. Provided further that any excess money remaining in the hands of the Board, after all expenses in the performance of their duty have been paid, shall be kept in the hands of the Secretary for the proper enforcement of this Act, and for other legitimate expenses of the Board. The Secretary shall be required to give bond payable to the Board in such sum as the Board may require for the faithful performance of his duty in the safe keeping of and proper delivery of said money. [Acts 1889, p. 91; Acts 1897, ch. 97, § 12; Acts 1905, p. 143; Acts 1919, 36th Leg., ch. 31, § 13.]

Sec. 14 is set forth, post, as art. 768, Penal Code.

Art. 2416. Disposition of fines collected.—All fines collected under the provisions of this Act shall be turned into the common school fund of the county in which said fine is collected, and no part of such fine shall be collected or used by the Board of Examiners. [Acts 1889, p.

91; Acts 1897, ch. 97, § 12; Acts 1905, p. 145; Acts 1919, 36th Leg., ch. 31, § 15.]

Art. 2416a. Partial invalidity of law.—Should any section, or any part of this Act, be declared unconstitutional, it shall not affect any other part of this Act. [Acts 1919, 36th Leg., ch. 31, § 16.]

Sec. 17 of Acts 1919, 36th Leg., ch. 31, repeals all conflicting laws.

TITLE 44

DEPOSITORIES

- Chap.
1. State depositories.
2. County depositories.

- Chap.
3. City, etc., depositories.
4. Suspension of depository bank.

CHAPTER ONE

STATE DEPOSITORIES

- | Art. | | Art. | |
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| 2417. | State Depository Board; quorum; State Treasurer to act as secretary. | 2429. | Designation of depositories as receiving depositories; deposit of funds with. |
| 2418. | Soliciting bids for keeping state funds. | 2430. | Receipts to be issued for deposits; excess of deposits. |
| 2419. | Contents of bids. | 2431. | All state funds to be deposited in depositories. |
| 2420. | Opening and listing bids. | 2432. | Equalization of deposits among depositories; investment of excess funds in United States Treasury certificates of indebtedness. |
| 2421. | Further solicitation of bids. | 2433. | Depositories to collect checks, etc., for state and to issue drafts on "Reserve Banks." |
| 2422. | Selection of banks and notice there-to to qualify. | 2434. | Rules and regulations for depositories. |
| 2423. | Qualification by banks selected; deposit of bonds; giving of surety bond. | 2435. | Advertisement for bids from banks to act as clearing houses, etc., for state funds. |
| 2424. | Failure of bank selected to qualify; liquidated damages. | 2435a. | Extension of time of payment on change of depository. |
| 2425. | Deposit of funds in depositories; interest on deposits; failure of State Treasurer to deposit. | 2435b. | Extension of time for payment of drafts or demands; contract and bond; suspension of deposits. |
| 2426. | Custody and disposition of securities deposited by depositories; additional security. | 2436-2439. | [Superseded.] |
| 2427. | Payment of interest on deposits. | | |
| 2428. | All funds to be paid into State Treasury or state depositories; forfeiture for failure. | | |

Article 2417. State Depository Board; quorum; State Treasurer to act as secretary.—The State Treasurer, the Attorney General, and the Commissioner of Insurance and Banking, are hereby constituted the State Depository Board, and any two of such members shall constitute a quorum. The State Treasurer shall also perform the duties of Secretary of the board. [Acts 1905, p. 387; Acts 1907, p. 183; Acts 1911, p. 2; Acts 1919, 36th Leg., ch. 145, § 1.]

Explanatory.—Arts. 2417-2439, as contained in Revised Statutes 1911, consisted of Acts 1905, p. 387, and Acts 1907, p. 183. Some of these articles were subsequently amended by Acts 1911, p. 2; Acts 1911, 1st C. S., ch. 15; Acts 1913, p. 330, and Acts 1915, 34th Leg., ch. 30. Acts 1918, 35th Leg., 4th C. S., ch. 3, sec. 1, added article 2439a. Acts 1919, 36th Leg., ch. 145, sec. 1, amends all of the articles in this chapter. The enacting clause of said Acts 1919, 36th Leg., ch. 145, reads as follows: "That Chapter 1, of Title 44, embracing articles 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438 and 2439 of the Revised Civil Statutes of 1911, and all amendments thereto be amended so as to hereafter read as follows." This amending act contains only articles 2417-2435, leaving articles 2436-2439 uncared for. The text of these articles as contained in said Acts 1919, ch. 145, does not correspond to the same articles as contained in Revised Civil Statutes

1911; but the subject matter of the articles as contained in said Acts 1919, ch. 145, covers all of the subject matter of the articles as contained in Revised Civil Statutes 1911, and the subsequent amendments thereto. The effect of this amendment is to supersede all of the articles as contained in Revised Civil Statutes 1911, and the subsequent amendments thereto, and to substitute therefor articles 2417-2435, as set forth here. Section 2 of said Acts 1919, 36th Leg., ch. 145, repeals all conflicting laws.

Constitutionality.—Assuming that Const. art. 8, § 6, providing that no “money shall be drawn from the treasury” but in pursuance of specific appropriations made by law, prohibits any loan to or investment with a bank of any state funds, and that money is drawn from the treasury if withdrawn from the official custody and control of the state treasurer, it is not contravened by the State Depository Law, the deposits authorized by the act not constituting a “loan” or “investment,” and not taking the funds out of the official custody and control of the treasurer, they being subject to withdrawal at any time, except that 10 days’ notice must be given where more than a fifth of the funds in a depository are to be withdrawn; and safety of the funds, as well as profit by way of interest, being one of the chief purposes of the act. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

The mere temporary deposit of special funds of the state in depositories, while awaiting investment or disbursement, does not interfere with their application as directed by the various provisions of the Constitution relating thereto, so that the State Depository Law, by authorizing such deposit, does not contravene Const. art. 8, § 6, as to diversion of such funds. *Id.*

Suit to enjoin depositing.—A taxpayer and citizen may not sue public officers acting under color of authority to restrain their action, without showing special damages to himself, whether they are alleged to be acting merely ultra vires or under unconstitutional law, and therefore cannot sue to prevent the carrying out of the State Depository Law by the State Depository Board; its provisions being beneficial to him through decreased taxes on account of profits therefrom to the state. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Art. 2418. Soliciting bids for keeping state funds.—It shall be the duty of the State Treasurer, between the first and fifth day of January next after each general election, to mail to each state and national bank doing business in this State a circular letter soliciting bids for keeping state funds, for a term of two years next after the succeeding March 1, upon the condition prescribed in this chapter. Said circular letter shall state the conditions to be complied with by the bidders as hereinafter provided, and what each bid shall set forth. The State Treasurer shall make three certified lists of the banks to which such letter was mailed, each to be accompanied by a copy of such letter, one of which he shall deliver to the Attorney General, one to the Commissioner of Insurance and Banking, and the other he shall keep on file in his office for the inspection of any person desiring to see the same. [Acts 1919, 36th Leg., ch. 145, § 1.]

Art. 2419. Contents of bids.—Said bids shall state the amount of paid up capital stock of said bank, the maximum of State funds, to be not less than ten thousand dollars, it will accept, the rate of interest it will pay on the average daily balance to the credit of the State Treasurer in such bank, and shall contain a provision that the books and accounts of such bank, if designated as a State Depository, shall be open at all times, to the inspection of the State Depository Board, any member, or any accredited representative thereof.

Said bid shall be sealed in an envelope, marked “Bid for keeping of State Funds,” and shall be mailed to the State Treasurer in time to reach his office on or before noon of the succeeding first Monday in February. [*Id.*]

Art. 2420. Opening and listing bids.—When the State Treasurer receives such bids he shall endorse thereon the date of receipt of same, and shall on the first Monday in February open the same in the presence of the State Depository Board; and thereupon said board shall make a list of said banks, in the order of the rate of interest offered; that is, the bank offering the highest rate of interest shall be listed first, the one offering the next highest rate next, and so on until

all such banks are listed, provided that said board may reject any or all bids, and no bids for less than three percent on the average daily balance of State funds shall be considered. [Id.]

In general.—The State Depository Law passed March 31, 1919, in view of the declared emergency from the fact that the depository laws are inadequate to meet "present conditions," there being at the time in the state treasury several million dollars more than could be placed in the then existing depositories, will be held intended to become operative at once, and the act declaring it the duty of the state treasurer, during the first days of January next after each general election to mail a circular to all state and national banks in the state, soliciting bids for keeping state funds for a term of two years next after the succeeding March 1, was intended to prescribe a permanent and uniform standard, to be observed after the next general election, and not to require a postponement in the meantime of the selection of depositories for the excess funds during the interim. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Art. 2421. Further solicitation of bids.—In case at any time the banks being used as State depositories, as provided in this chapter, are not sufficient to handle all of the funds of the State, and no other bank that has offered an accepted rate of interest has qualified according to the provisions of this chapter, then such board may cause the State Treasurer to send out a circular letter embodying the requirements prescribed in Article 2418 above, to all banks authorized to bid, not then acting as State depositories, giving the date when bids must be in the hands of the State Treasurer, which shall not be less than thirty days from the date of mailing such letter, and bids shall be received, and opened, on the date set out in said letter, in the same manner and upon the same conditions, and a list of the banks bidding shall be made in the order of the rates of interest offered, as provided in the preceding article. [Id.]

Art. 2422. Selection of banks and notice thereto to qualify.—After such list has been made said board shall select from the list the number of banks offering the highest rate of interest on average daily balance that will in the judgment of said board be necessary to keep all State funds, and notify them to qualify as prescribed in this chapter; and if, at any time, it should develop that more depositories are required, said board shall select another list of banks next in order on said list and notify them to qualify as depositories under this chapter, or, in its discretion, said board may advertise for bids as provided in the preceding article. [Id.]

Art. 2423. Qualification by banks selected; deposit of bonds; giving of surety bond.—When a bank has been notified to qualify as a depository it shall, within thirty days after such notice, deposit with the State Treasurer, in an amount one-fifth greater than the maximum amount of state funds said bank proposes to keep, United States, State, Federal Land Bank, located in Texas, county, independent school district, common school district, or municipal bonds, or vendor's lien or mortgage lien notes, secured by a first lien on real estate of value at least double the amount of said notes exclusive of improvements; or shall execute a bond signed by some surety company, authorized to do business in Texas in an amount not less than double the amount of State funds deposited in said bank, said bond to be payable to the State Treasurer and to be in such form as may be provided by the depository board and subject to the approval of said board, but before any State, county, independent school district, common school district, or municipal bonds, shall be received as collateral security, they shall be submitted to the Attorney General and by him approved, and such bonds shall be registered under the same rules and regulations as required for bonds in which the permanent school funds are invested, and

provided that such bonds, except United States bonds, shall be worth not less than par. In case vendor's lien or mortgage notes are offered for deposit they shall be accompanied by an abstract of title to the land securing the payment thereof, and an opinion of a reputable attorney, residing in the county where such land is located, approving such title and the Depository Board shall make such investigation in regard to the value of the land securing the payment of such notes as is deemed proper, and it may require such payment or deposit as is deemed proper to cover the expense of investigating the title to and value of the land securing the payment thereof. Said Depository Board shall have the right to reject with or without cause any abstract, opinion thereon, or any notes, or other securities that may be offered. Provided that a bond executed by any surety company may in its discretion be rejected by the board whenever in the judgment of said board the same should be rejected, and the action of the board in rejecting said bond shall not be subject to revision. [Id.]

Art. 2424. Failure of bank selected to qualify; liquidated damages.—In case any bank that has submitted a bid for keeping State funds shall fail to qualify within thirty days after being notified to do so, it shall forfeit to the State, as liquidated damages, the difference between the interest rate offered and the lowest rate of interest the State is compelled to receive on its funds, under the provision of this chapter for six months, on the maximum amount that said bank proposed to keep, provided that no bank shall be compelled to qualify, or be subject to any penalty, that was not notified to qualify within four months after the bid was opened. [Id.]

Art. 2425. Deposit of funds in depositories; interest on deposits; failure of State Treasurer to deposit.—After the depositories have qualified as provided in the preceding articles, it shall be the duty of the State Treasurer to deposit the funds belonging to the State in such depositories, and he shall at all times keep the funds in the bank or banks in the order of the rate of interest offered, so that the State shall receive the highest rate of interest possible on such funds; provided that the depositories selected in the beginning of a biennium shall retain their preference over depositories subsequently selected. No depository shall be entitled to keep on deposit more than its paid up capital stock, and permanent surplus. If the State Treasurer shall fail to deposit said funds in accordance with the provisions of this chapter, he shall be liable to the State for five per cent a month on the funds he fails to deposit; provided that he may retain in the State Treasury from time to time with the express consent of said board, sufficient funds to meet the current demands on the Treasury. [Acts 1905, p. 388; Acts 1911, ch. 3, § 1; Acts 1911, 1st C. S. ch. 15, § 1; Acts 1913, p. 330, § 1; Acts 1915, 34th Leg., ch. 30, § 1; Acts 1919, 36th Leg., ch. 145, § 1.]

Art. 2426. Custody and disposition of securities deposited by depositories; additional security.—The securities above mentioned shall be delivered to the State Treasurer and receipted for by him and retained by him in the vaults of the State Treasury and if, in any case or at any time, such bonds are not satisfactory security, in the opinion of the State Depository Board, for the deposits made under this chapter, they may require such additional security to be given as will be satisfactory to them; and said State Depository Board shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults

of the State Treasury; and in the event that said bank or banks selected as state depositories shall fail to pay deposits or any part thereof, on the check of the State Treasury, he shall have power to forthwith convert such bonds into money, and disburse the same according to law upon the warrants drawn by the State Comptroller upon the funds for which said bonds are security. Any bank making deposit of bonds with the State Treasurer under the provisions of this chapter may cause such bonds to be endorsed or stamped, as they may deem proper, so as to show that they are deposited as collateral, and are not transferable, except upon the conditions of the chapter. [Acts 1905, p. 388; Acts 1919, 36th Leg., ch. 145, § 1.]

Right to convert bonds on default.—It being the province of the court to decide only questions affecting substantial rights, it will not, in advance of any applicable conditions, determine whether due process clause of the Fourteenth Amendment would be violated by an exercise of the authority given the state treasurer, by this article, on failure of a depository to pay over state funds on his check, to forthwith convert the securities deposited by such depository and disburse the money for account of the state funds. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Art. 2427. Payment of interest on deposits.—Any State Depository receiving State funds under the provisions of this chapter shall pay to the State Treasurer at the end of each month, interest on the average daily balances for said month at the rate of interest agreed on, which shall in no event be less than the rate of three per cent per annum, which interest shall become part of the general revenue. [Acts 1919, 36th Leg., ch. 145, § 1.]

Constitutionality.—Provision of the State Depository Law that interest on all funds deposited in depositories shall become part of the general revenue will be construed as limited to general funds, to avoid conflict with Const. art. 8, § 6, as to special funds; for "interest" is an accretion to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof and interest earned by deposit of special funds is an increment accruing to such special fund. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Art. 2428. All funds to be paid into State Treasury or State Depositories; forfeiture for failure.—All officers of this State charged with the collection of, or who shall come into the possession of State funds or other funds required to be kept by the State Treasury shall remit, or pay such funds into the State Treasury or the State Depository designated by the State Treasury as herein provided daily as the same are collected and any officer failing to so deposit such funds shall forfeit to the State five per cent per month on the amount of such funds for the time such funds are withheld as liquidated damages, and shall be subject to all other penalties now prescribed by law; provided that such officers as are required by law to remit to some other officer or department, shall instead of remitting to the State Treasury remit as is required by law, within the time herein fixed for making remittances to the State Treasury. [Id.]

Art. 2429. Designation of depositories as receiving depositories; deposit of funds with.—The State Depository Board may in its discretion designate certain depositories as receiving depositories and authorize such officers and other persons who come into possession of funds belonging to the State to deposit such funds in any such depositories as are found most convenient for the State Treasurer, but unless specially authorized to deposit in such depositories such persons shall remit such funds to the State Treasury. In either event, such funds may be remitted in cash by registered letter, by post office money order, express money order of any express company doing business in Texas, or by check or draft on any bank, provided the liability of the persons so remitting shall not cease until the cash proceeds of such re-

mittances, or cash, if sent by registered letter, is actually received by the Treasurer or the duly authorized State Depository in the due course of business. [Acts 1905, p. 388; Acts 1919, 36th Leg., ch. 145, § 1; Acts 1919, 36th Leg. 2d C. S. ch. 25, § 1.]

Explanatory.—Sec. 2 of Acts 1919, 36th Leg. 2d C. S. ch. 25, repeals all conflicting laws. The act took effect 90 days after July 22, 1919, date of adjournment.

Art. 2430. Receipts to be issued for deposits; excess of deposits.—In all cases where State funds are deposited in State depositories by the persons paying the same, such depository shall issue and deliver to such person a triplicate receipt thereof, one of which shall be preserved by the party making such deposit and the others shall be forwarded to the State Treasurer and the Comptroller respectively, and if any State depository shall receive or have on hand State funds in excess of the amount of deposit awarded it by the provisions of this chapter, the same shall be considered in computing the average daily balances and draw the same interest; but such depository shall on the first business day of each month and oftener if requested by the State Treasurer, remit all State funds in excess of the amount it is entitled to keep to the State Treasury; and in case any State depository shall fail or refuse to remit this excess, or in case it shall fail to remit any other funds on deposit when requested to do so by the State Treasurer under the provisions of this Act shall forfeit its right to act as State Depository and the State Treasurer shall at once close his account with said depository and notify all collectors and others charged with the duty of collecting public funds for the State of Texas, and the Attorney General of the State shall cause such action to be taken, if any, as shall be necessary to protect the State's interest in the premises. [Acts 1905, p. 388; Acts 1919, 36th Leg., ch. 145, § 1.]

Art. 2431. All state funds to be deposited in depositories.—All state funds shall be deposited and kept in State depositories designated under this chapter, subject to the regulations of this chapter; provided that the State Treasurer may with the consent of the Depository Board retain in the State Treasury at Austin sufficient funds to meet the current expenses of the government in case he finds it advisable to do so. [Acts 1919, 36th Leg., ch. 145, § 1.]

Cited, *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Art. 2432. Equalization of deposits among depositories; investment of excess funds in United States Treasury certificates of indebtedness.—It shall be the duty of the State Treasurer to keep the funds in the depositories paying the highest rate of interest and to maintain as nearly as possible a fair and equal balance of money on hand in all state depositories paying the same rate of interest in proportion to the amount each is entitled to receive, by drawing warrants alternatively thereon or by apportioning the warrants so drawn. The State Depository Board is hereby authorized and empowered whenever there are excess funds in the State Treasury for which there is no immediate use to subscribe for such amount of United States Treasury Certificates of Indebtedness as their judgment may dictate, and the interest earned thereon shall become part of the general revenue fund. [Acts 1918, 35th Leg. 4th C. S., ch. 3, § 1; Acts 1919, 36th Leg., ch. 145, § 1.]

Art. 2433. Depositories to collect checks, etc., for state and to issue drafts on "Reserve Banks."—All State depositories shall collect without cost to the State all checks, drafts and demands for money and on the demand of the State Treasurer shall issue to him or his order,

free of charge, a draft or exchange on a bank designated by the United States or State Authorities as a "Reserve Bank" in any banking center of this State, which draft may be in any sum designated by the State Treasurer not exceeding the amount of the State deposit in said depository, provided that the said Treasurer shall give to such depository ten days notice of his intention to draw on funds therein, before drawing more than one fifth of the amount such depository is entitled to keep, but this limitation shall not apply to deposit made during the preceding thirty days. [Acts 1919, 36th Leg., ch. 145, § 1.]

Art. 2434. Rules and regulations for depositories.—The State Depository Board of the State of Texas shall have the right to make such rules and regulations governing the establishment and conduct of State depositories, and the handling of funds therein as the public interest may require, not inconsistent with the provisions of this chapter, which said rules and regulations shall be in writing and entered upon the minutes of said board. [Id.]

Cited, *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Art. 2435. Advertisement for bids from banks to act as clearing houses, etc., for state funds.—If in the opinion of the State Depository Board it is advisable to have the State's business cleared through a bank other than one of the regular State Depositories, it may advertise for bids, from all state and national banks having a capital stock of not less than fifty thousand dollars, for the clearing and safe keeping of State funds, in the manner herein prescribed for the selection of State depositories, and the bank offering the highest rate of interest, to be not less than two per cent per annum, on the average daily balances on deposit shall be selected and notified to qualify by the deposit of securities or the giving of bond in an amount to be fixed by the Depository Board in the manner herein prescribed for the qualification of other depositories, and collections and clearings may be handled through such depository, and after giving such depositories a reasonable time for clearing and collection, the State Treasurer shall transfer such funds to available depository paying the highest rate of interest on average daily deposits. [Id.]

Took effect March 31, 1919.

Art. 2435a. Extension of time of payment on change of depository.—That during the existence of any general financial or industrial depression at the end of any biennial depository period after new depositories have been selected by the State Depository Board, if it should be found by the State Depository Board that any of the then existing old depositories have not been or will not be selected as depositories for the next two-year period under the bids submitted, and that the withdrawal of the entire amount of State funds in any particular depository on March first will create a demand on such old depository which it will not be able to meet, though otherwise solvent, then the State Depository Board shall have the discretion and authority to extend the time of payment of such funds into the State Treasury from time to time: provided, however, that such extension shall not be made unless and until such old depository executes a new contract and bond or gives security, as in the first instance, for such period of time as the State Depository Board may designate, and at such rate of interest as the State Depository Board may find to be not less than the approximate average rate of interest which the State will receive under the bids submitted for the current biennial depository period into which

such extension of time is made. [Acts 1921, 37th Leg., ch. 14, § 1, amending Acts 1919, 36th Leg., ch. 145, by adding thereto art. 2435a.]
Took effect Aug. 5, 1921.

Art. 2435b. Extension of time for payment of drafts or demands; contract and bond; suspension of deposits.—That during the existence of any general financial or industrial depression prior to March 1, 1923, if it should be found by the State Depository Board that any State depository is not able to pay the drafts or demands made upon it by the State Treasurer in the ordinary operation of the State Depository Law without closing its doors and ceasing to exist as a going concern, though otherwise solvent, then the State Depository Board shall have the discretion and authority to extend the time for payment of the funds on deposit in such State Depository into the Treasury from time to time; provided, however, that such extension shall not be made unless and until such depository and the sureties, if any, on its depository bond, execute a contract of extension or give bond or security as in the first instance for such period of time as the State Depository Board may designate. The State Depositories to which extensions of time are granted under this Act shall not receive any additional funds on deposit from the State Treasury until the demands of the State Treasurer as to previous existing funds have been met. [Acts 1921, 37th Leg. 1st C. S., ch. 3, § 1, amending Acts 1919, 36th Leg., ch. 145, by adding art. 2435b.]

Arts. 2436–2439. [Superseded.]
See note to art. 2417 ante.

CHAPTER TWO.

COUNTY DEPOSITORIES

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| <p>Art.
2440. Commissioners' court to receive proposals from banks; advertisement.</p> <p>2441. Bids when and how presented; to state what; deposit; failure to comply with bid.</p> <p>2442. Bids to be opened when, etc.; award; interest how computed and paid; disposition of proceeds; return of deposits.</p> <p>2443. Bond of depository; surety com-</p> | <p>Art.
pany; substitute security; venue of suits.</p> <p>2444. Order designating depository, etc.</p> <p>2447. Treasurer's checks payable at county seat, penalty.</p> <p>2449. Warrants how paid, etc., and charged; statements, bonds, etc.</p> <p>2452. Treasurer not responsible for negligence of depository, but, etc.</p> |
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Article 2440. Commissioners' court to receive proposals from banks; advertisement.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Selection of depository discretionary.—The authority to select a depository for the funds of a county is vested in the commissioners' court, and in making such selection it has a discretion, the exercise of which, unless abused, is not subject to be reviewed or controlled by the district court, under this article, and arts. 2441, 2442. *Hurley v. Citizens' Nat. Bank of Sour Lake* (Civ. App.) 229 S. W. 663.

Priority of county's claim for deposits.—Under this and following articles, and the Bank Deposit Guaranty Law, a county which deposited its funds in bank held not entitled to assert any superior claim over other creditors in distribution of assets of bank after its insolvency. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Art. 2441. Bids when and how presented; to state what; deposit; failure to comply with bid.

See *Hurley v. Citizens' Nat. Bank of Sour Lake* (Civ. App.) 229 S. W. 663.

Art. 2442. Bids to be opened when; award of contract; interest how computed and paid; disposition of proceeds; return of deposits.

Selection of depository discretionary.—It was not the intention of the Legislature by this article to compel the commissioners' court of a county to select as depository of county funds the one "offering to pay the largest rate of interest per annum for said funds," and such court may select any bidder unless it abuses its discretion by acting with some improper motive. *Hurley v. Citizens Nat. Bank of Sour City* (Civ. App.) 229 S. W. 663.

Art. 2443. Bond of depository; surety company; substitute security; venue of suits.

Cited, *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Indemnity bond in general.—In view of circumstances under which a bond was given to indemnify a county for bank deposits, held, that bond covered only deposits of "good roads" money. *McHaney v. People's State Bank of Longview* (Civ. App.) 196 S. W. 997. Bonding company had a right to limit its liability under common-law bond covering county deposits, to fractional part of total loss. *Id.*

The mere fact that a bonding company was a bank's surety did not in law make it a creditor of the bank with which the county had deposited funds. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Art. 2444. Order designating depository, etc.

Cited, *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Art. 2447. Treasurer's checks, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2449. Warrants, how paid, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Cited, *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Art. 2452. Treasurer not responsible for negligence of depository, etc.

Treasurer's liability.—This article, providing that the treasurer shall not be liable for loss caused through the negligence of any depository, does not excuse a treasurer for his negligence in issuing checks on unauthorized warrants, contributing, with the depository's negligence, to loss to the county through the depository's payment of such checks. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Where a county treasurer negligently issued checks to fictitious persons upon unauthorized warrants, which checks the county depository bank paid upon forged indorsements, the treasurer could not be subrogated to the county's rights against the bank, since public policy forbids that he profit by his own negligence. *Id.*

CHAPTER THREE

CITY, ETC., DEPOSITORIES

Article 2454. Council to take bids, etc.

Cited, *City of Corpus Christi v. Mireur* (Civ. App.) 214 S. W. 528.

CHAPTER FOUR

SUSPENSION OF DEPOSITORY BANK

Art.

2460 $\frac{1}{2}$. Selection of special depository on suspension of regular depository; assumption of obligations of suspended depository; how paid; bond; interest.

Art.

2460 $\frac{1}{2}$ a. Arrangement as to state funds; interest.
2460 $\frac{1}{2}$ b. May proceed against suspended depository.

Article 2460 $\frac{1}{2}$. Selection of special depository on suspension of regular depository; assumption of obligations of suspended depository;

how paid; bond; interest.—When any bank, which is a county, city or district depository, of public funds under the laws of this State, suspends business or is taken charge of by the Comptroller of the Currency or the Commissioner of Insurance and Banking, as the case may be, the lawful county, city or district authorities, authorized to select the depository in the first instance, shall have the discretion and authority to select by contract a special depository for the public funds in such suspended bank. Such special depository shall assume the payment of the amount of public funds due by the suspended bank on the date of its suspension, including interest to that date, and shall pay the same to the lawfully designated public authority in accordance with the contract entered into by such special depository. The contract shall be for the performance of the agreement entered into between the proper public authorities designated above and the special depository, and shall require the payment of the deposit in such installments as may be agreed upon, the last of which shall be paid not exceeding three years from the date of the contract; the installments, or the amount due, may be evidenced in the discretion of the contracting parties, by negotiable certificates of deposit or cashier's checks, payable at specified dates, if made a part of the contract; the performance of the contract and the payment of funds described therein shall be secured by bond, or by several bonds in case of installments, to be given by the special depository with the same character of sureties as is required by regular depository bonds. The contracts and bonds of special depositories shall be approved by the authority authorized by law to approve contracts and bonds of regularly selected depositories. The rate of interest which funds placed in a special depository hereunder shall bear shall be fixed by the contract, or such funds may, in the discretion of the contracting parties, be non-interest bearing. [Acts 1921, 37th Leg., ch. 27, § 1.]

Took effect March 12, 1921.

Art. 2460½a. Arrangement as to state funds; interest.—If any State funds are in the county depository which has failed, the amount thereof shall be ascertained by the State Comptroller, who shall be authorized in his discretion to enter into a contract for the custody and payment of the same, with the special depository selected by the county authorities in the same manner that the county authorities are herein authorized so to do, and to take and approve contracts and bonds therefor; providing, however, that State funds thus placed in such special depository shall bear the average rate of interest received by the State on State funds placed with the regularly selected state depositories. [Id., § 2.]

Art. 2460½b. May proceed against suspended depository.—Nothing in this Act shall require the State, county, city or district authorities to select any special depository as is herein permitted, but they may proceed by their lawful remedies against the failed bank, if, in their discretion, it is best for the public interest so to do. [Id., § 3.]

TITLE 45

DESCENT AND DISTRIBUTION

Art.		Art.	
2461.	Where intestate leaves no husband or wife.	2467.	Advancement brought into hotchpotch.
2462.	Where intestate leaves husband or wife.	2469.	Rule as to community estate.
2465.	No corruption of blood, forfeiture of estate, etc.	2470.	Passes charged with debts.
2466.	Persons not in being.	2471.	Jus accrescendi abolished.
		2472.	Illegitimate children and issue of void marriages.

Article 2461. [1688] [1645] Where intestate leaves no husband or wife.

See *Southwestern Surety Ins. Co. v. Vickstrom* (Civ. App.) 203 S. W. 389; *American Indemnity Co. v. Zyloni* (Civ. App.) 212 S. W. 183; *Young v. Gray*, 60 Tex. 541.

In general.—"Heir" means the person applied by law to succeed to a decedent's estate in the case of intestacy. *Ladd v. Whitledge* (Civ. App.) 205 S. W. 463.

Inheritable estate.—The laws of descent and distribution govern only what the person owns at his death, and cannot touch what he has disposed of during his life, so that a person has heirs only as to property which he holds at his death, and not as conveyed away during his lifetime. *Runge v. Freshman*, (Civ. App.) 216 S. W. 254.

Representation.—In Texas, when children of deceased child inherit from parent of such child, under statutes of descent, they take, not through or by representation of parent, but directly from deceased. *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317.

Application of statute to determine "legal beneficiaries" under Workmen's Compensation Act.—See *Vaughan v. Southwestern Surety Ins. Co.* (Civ. App.) 195 S. W. 261.

Art. 2462. [1689] [1646] Where intestate leaves husband or wife.

Cited, *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312.

In general.—A wife devised to her husband her half of the homestead for life, "with remainder to my legal heirs," and also certain property "in trust for my legal heirs," and directed the revenue of the property paid "to my legal heirs, with remainder after my husband's death, or the relinquishment of said trust, * * * to my legal heirs." The husband was authorized to sell any of the property, and reinvest the proceeds as he might deem beneficial to her legal heirs. The wife had no descendants at her death. Her father, mother, brothers, and sisters survived her. Held, that the husband did not take, under the will, as "legal heir," under Rev. St. 1879, art. 1646. *Peet v. Commerce & E. S. Ry. Co.*, 70 Tex. 522, 8 S. W. 203.

Application of statute to apportion compensation among dependents under Workmen's Compensation Act.—See *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

Right of wife who killed husband to insurance on his life.—See *Murchison v. Murchison* (Civ. App.) 203 S. W. 423.

Art. 2465. [1692] [1649] No corruption of blood, forfeiture, etc.

Right of wife who killed husband to insurance on his life.—Despite Const. art. 1, § 21, and this article, providing no conviction shall work forfeiture of estate, beneficiary in life insurance policy, who kills insured to accelerate due date and collect money, cannot recover proceeds against insurance company. *Murchison v. Murchison* (Civ. App.) 203 S. W. 423.

Under article 2462 and this article, where wife, beneficiary of her husband's life insurance policy, feloniously killed such husband, who died intestate and without children, to accelerate due date of policy and obtain money, liability of insurance company to husband's estate not being canceled, and proceeds of policy being personalty, wife was entitled to them. *Id.*

Art. 2466. [1693] [1650] Persons not in being.

See *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Children of adopted child who died before death of adopter.—This article appears to expressly forbid recognizing any right in children of adopted child who died before the adopter, to inherit from adopter's ancestor. *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317.

Art. 2467. [1694] [1651] Advancements brought into hotchpotch.

Advancement.—Under this article, where father made advancement to son, son held to have no interest in the estate on the father's death subject to execution, though there was no record evidence that he was excluded. *Butler v. Lollar* (Civ. App.) 199 S. W. 1176.

Facts held to warrant finding that son received land from father as an advancement and had no further interest in his father's estate. *Id.*

Where a father conveyed to children of his first marriage, 175 acres of a parcel which was his separate estate, retaining 200 acres therein, and the jury found that the 175 acres conveyed was of the value of the parcel retained which was subject to the second wife's life estate, held that, as the two children of the first marriage were bound to account for the advancement under this article, the child of the second marriage, who took the land at the death of her mother, was entitled to it free from claims of the other children; the value of the mother's estate being computed at more than one-half of the value of the land. *Rutherford v. Deaver* (Civ. App.) 218 S. W. 31.

Where a parent who had married a second time conveyed to children of the first marriage 175 acres of a parcel of land which he owned as his separate property, held that such conveyance will be deemed an advancement, and hence the grantees must account for the advancement in settlement of the parent's estate. *Id.*

If payments to plaintiffs by the temporary administrator of their father were in satisfaction of an indebtedness of the father to them, it could not be urged as a defense to plaintiffs' suit to recover their undivided interest in the homestead. *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

If money paid plaintiffs by their father's temporary administrator might be recovered back in a proper suit against them or against the temporary administrator and his bondsman, it could not be recovered in a suit by plaintiffs to recover their undivided interest in the homestead. *Id.*

Art. 2469. [1696] [1653] Rule as to community estate.

Cited, *Murchison v. Murchison* (Civ. App.) 203 S. W. 423; *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079.

Rights of children or heirs.—On death of husband, half interest in community property of himself and wife descended to nine children of husband, subject to homestead rights of wife and her minor son. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

Where husband paid consideration for deed in his name only, and subsequently died, devising all property in equal shares to wife, stepson, and four children, the property having been community property, a son, who purchased the rights of all the children, would be legally regarded as having acquired title by purchase from the grantor in the deed to a one-half undivided interest, and was entitled to sixteen twenty-fourths, the widow to seven twenty-fourths, and the stepson to one twenty-fourth of the land. *Aldredge v. Aldredge* (Civ. App.) 204 S. W. 355.

If a father recognized the interest of his children in land purchased with community property, and there was no repudiation of such interest, the statutes of limitation did not begin to operate until his death, nor was the suit to establish a trust in the land a stale demand when brought within a very few years after the father's death. *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010.

Under Const. art. 16, §§ 50 and 52, and this article, where the homestead was community property, the husband's undivided one-half interest passed on his death to his children subject only to the homestead right of the widow and minor children; there being no indebtedness of the character specified in art. 3427. *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

Where land was purchased as the community property of plaintiff and his wife and the deed was made to her and subsequently her name was erased and that of D. substituted, D. took no title in himself, and the deed was simply destroyed, so that, notwithstanding deed by D. to children of plaintiff and his wife, the title remained in plaintiff's wife and upon her death the land passed one half to plaintiff and the other half to the children then living, under this article; and whatever opinion plaintiff might have had as to the alteration as putting title in D., or the deed from D. to the children as conveying title to them, and however long or much he might have acquiesced in the supposed condition of the title would not effect a conveyance of the title to the children. *Nabors v. Nabors* (Civ. App.) 230 S. W. 1109.

— **Grandchildren.**—As to a person who died before the amendment to Rev. St. 1879, art. 1653, passed March 30, 1887, her grandchildren inherited no part of an estate held by her and her husband in common. *McKinney v. Moore*, 73 Tex. 470, 11 S. W. 493.

Under Rev. St. 1879, art. 1653, a surviving child inherits all of a deceased parent's half of the community estate, to the exclusion of grandchildren. *Pegues v. Haden*, 76 Tex. 94, 13 S. W. 171.

— **Adopted children.**—Words "child" or "children of deceased or their descendants," as used in this article, cannot be interpreted to include adopted heirs and their issue. *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317, reversing judgment (Civ. App.) 166 S. W. 674.

Rights of survivor.—Land, being part of community estate of husband and wife under this article, passed on dissolution of marriage by wife's death to husband as survivor, unless descendants of child or children of wife survived her. *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317, reversing judgment (Civ. App.) 166 S. W. 674.

If land conveyed to second wife was community property of second marriage, a divorced first wife claiming in right of son after his father's death was owner of undivided half interest, subject to the second wife's right to use property as her homestead. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Under the statutes defining community property, surviving spouse takes an undivided one-half interest in the entire estate, not as an heir, but as an owner. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

Upon death of mother, the interest of the father and daughter, who has become of age, in the community estate of the mother and father, is that of tenants in common. *Carl v. Settegast* (Civ. App.) 211 S. W. 506.

Where a husband took all of the money he and his wife owned, about \$2,500, two mules, and a wagon, and abandoned her, leaving her, however, in possession of 400 acres of land and other property, there was no partition of the community estate which would prevent the husband, after the wife's death, from recovering a portion of the land. *Hardin v. Hardin* (Civ. App.) 217 S. W. 1108.

— **Sale, mortgage or conveyance by survivor.**—The widow of an intestate, for herself and his minor heirs, in consideration of the finding of a lost land certificate which was community property, locating it, and procuring a patent therefor, without an order of the probate court conveyed one-half of the land so located. In an action against the minor heirs to remove the cloud from the title, held, that under this article the widow had no right to make such conveyance. *Stone v. Ellis*, 69 Tex. 325, 7 S. W. 349.

Where property of deceased was left to an executor in trust without action of the probate court, a deed of testator's half of community property by the survivor, before the executor qualified, was ineffective. *Nations v. Neighbors* (Civ. App.) 201 S. W. 691.

Where a wife died prior to her husband and their estates were combined, persons claiming under sale by the executor or administrator of the husband's estate, in order to establish title to the interest of the heirs of wife, must prove the existence of the community debts at date of the sale. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Where plaintiffs proved the existence of community debts established by suit, classified in the estate of deceased husband and one-half thereof paid out of the consolidated estates of the deceased husband and deceased wife, the lands being sold prior to the opening of administration on the wife's estate and not inventoried as a part thereof, and the proceeds of the sale formed assets of the consolidated estates and entered into the amount distributed to the heirs of both, held, in view of the record, that the sale by the executor of the estate of deceased husband was valid, vesting purchaser with title of both of the estates. *Id.*

— **Divorce.**—Divorced wife, whose property rights were not disposed of in divorce decree and whose interest in community fund was not subject to any debts contracted by her husband, held entitled to recover one-half from the husband's administratrix. *Jones v. Frazier* (Civ. App.) 201 S. W. 445.

Subsequent marriage of survivor.—Where community of which third wife was member made deferred payments on land purchased by community of husband and second wife, it was entitled to be subrogated to rights of vendor lienholder against land, whose claim it satisfied, or husband's heirs in partition could seek reimbursement equal to their inherited interest in funds expended in discharging debts against common property. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

That land unconditionally conveyed to a man during his first marriage was paid for during his second and third marriages does not disturb the title of the first community; but, subject to reimbursement of the second and third communities for their funds used, the children of the first marriage are entitled to their mother's interest, and to share equally in the remainder with the children of the other marriages. *Hughes v. Robinson* (Civ. App.) 214 S. W. 946.

Administration.—Under this article, husband's share of the community estate passed to his children or their descendants on his death, subject to the administrative right of the surviving wife to control, manage, and dispose of the community property under article 3600, and the action of the wife in qualifying as survivor did not divest the children of the title so acquired. *Miller v. Miller* (Civ. App.) 227 S. W. 737.

Application of statute to apportion compensation among dependents under Workmen's Compensation Act.—See *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

Art. 2470. [1697] [1654] Passes charged with debts.

See *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Art. 2471. [1698] [1655] Jus accrescendi abolished.

See *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534.

Art. 2472. [1699] [1656] Illegitimate children and issue of void marriages.

In general.—Children of a common-law marriage could not be deprived of their interest in their father's estate after his death merely because they failed for many years before his death to proclaim to his second wife that they were the children of his first marriage—that is, the one at common law—and that as such they intended to assert their interest in his estate whenever he should die, since they could have no inherited interest until after his death. *Cunningham v. Cunningham* (Civ. App.) 227 S. W. 221.

Slaves.—The completion of a marriage of slaves after emancipation, and the husband's subsequent recognition of their child who was born in slavery, rendered the child legitimate, and capable of inheriting from either of them under Rev. St. 1879, art. 1656. *Cumby v. Henderson*, 6 Civ. App. 519, 25 S. W. 673.

TITLE 47

DRAINAGE

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|-------|--|-------|--|
| Chap. | | Chap. | |
| 2. | Drainage by counties, separately; taxation. | 4. | Drainage by districts, one or more in each county—Bonds. |
| 3. | Drainage by districts, included in one or more counties—Bonds. | 5. | Dissolution of drainage districts. |

CHAPTER TWO

DRAINAGE BY COUNTIES, SEPARATELY—TAXATION

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|-------|--|-------|-------------------------------------|
| Art. | | Art. | |
| 2524. | Election to be ordered, etc. | 2540. | Contractor, etc. |
| 2533. | Assessment and collection of tax, etc. | 2541. | Commissioners to audit claims, etc. |

Article 2524. Election to be ordered, etc.

Strict construction of taxing power.—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Art. 2533. Assessment and collection of tax, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2540. Contractor, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2541. Commissioners to audit claims, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

CHAPTER THREE

DRAINAGE BY DISTRICTS, INCLUDED IN ONE OR MORE COUNTIES—BONDS

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|-------|--|-------|--|
| Art. | | Art. | |
| 2550. | Appeal to county court; procedure and issues on. | 2556. | Tax, improvement, for interest and sinking fund. |

Article 2550. Appeal to county court, etc.

Cited in dissenting opinion, *San Antonio & A. P. R. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 2556. Tax, improvement, for interest and sinking fund.

Power to tax.—Drainage districts being departments of government, the purpose of taxation by them is a public purpose and among the powers given by the general provisions of the Constitution to the Legislature. *Ogburn v. Barstow, Ward County, Tex., Drainage Dist.* (Civ. App.) 230 S. W. 1036.

CHAPTER FOUR

DRAINAGE BY DISTRICTS, ONE OR MORE IN EACH COUNTY—BONDS

Art.	Art.
2568. Petition for drainage district; notice.	mates; sale of remaining bonds; readjustment of funds; investment of sinking fund.
2571. If finding for petitioners, civil engineer appointed; assistants; pay.	2604. Additional tax books; assessment of property in drainage district; compensation; penalty forfeiture.
2576. Hearing before county commissioners; notice.	2605. Collector charged with assessment rolls; compensation; bond required; penalty for failure to give.
2579. Notices of election.	2606. Collector to report delinquents to commissioners' court, duty of court.
2584. Drainage districts may sue and be sued; judicial notice of.	2608. Treasurer's bond; compensation.
2585. Drainage commissioners appointed; qualifications; pay; terms; elected when.	2608b. Levy of annual tax for maintenance of improvements; limitation of amount.
2590. Right of eminent domain, etc.	2623. Drainage commissioners to keep canals, drains, etc., in repair.
2592. Civil engineer; salary; term; to make map and profiles; requisites.	
2601. Bond of county judge before sale; compensation.	
2603. Tax for interest, and sinking fund and expenses; reports and esti-	

Article 2568. Petition for district; notice.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

Art. 2571. If finding for petitioners, civil engineer appointed; assistants; pay.—After the hearing of the petition as provided in Sections 3 and 4 of this Act [Vernon's Sayles' Ann. Civ. St. 1914, arts. 2569, 2570], if the court should find in favor of the petitioners for the establishment of a district according to the boundaries as set out in said petition or as modified by said court, then the court shall appoint a competent civil engineer, who shall be entitled to such assistants as may be necessary; and, for doing the work required of said engineer under this Act, he and his assistants shall receive such compensation and allowances for transportation, supplies, etc., as may be agreed on between him and the drainage commissioners with the approval of the commissioners court. [Acts 1911, p. 245, § 5; Acts 1920, 36th Leg. 3d C. S., ch. 34, § 1 (§ 5).]

Took effect 90 days after June 18, 1920, date of adjournment.

Competitive bidding on contracts for services.—Art. 2263a, requiring commissioner's court, before entering into a contract requiring the expenditure of \$2,000 or more, to submit the contract to competitive bids, held not applicable to county's contract with civil engineers for professional services in connection with the construction and maintenance of public highways and roads in proceedings under Rev. St. tit. 18, c. 2, as amended in 1917, in view of this article, and arts. 640, 1460-1498, 5535, 5972, and 1498c, and in view of the purpose of the statute, and the absurdity of letting contracts for professional services of a technical nature through competitive bidding. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

Art. 2576. Hearing before county commissioners; notice.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

Art. 2579. Notice of election.

See 1918, Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

Art. 2584. Drainage districts may sue and be sued, etc.

Suit by county.—Although drainage districts are the owners of funds and may sue and be sued under this article, the county may sue the county tax collector therefor, in view of arts. 2533, 2540, 2541, 2603, 2605, 2606, but a county cannot recover under allegations that such funds belonged to the county. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2585. Drainage commissioners appointed; qualifications; pay; term; elected when.—After the establishment of any drainage district as

herein provided, the Commissioners' Court shall appoint three drainage commissioners, all of whom shall be residents of the county or an adjoining county, who shall be freehold taxpayers of the district and legal voters of the county of their residence, whose duty shall be as herein-after provided, and who shall each receive for their services the sum of not more than \$2.50 per day for the time actually engaged in the work of said district; provided the compensation, if any, shall have been definitely fixed in the order of the court; and before any amount shall be paid said commissioners, or either of them, shall make a detailed report to the Commissioners' Court of the time actually consumed in the work for said district, and of the work done, and such report shall be audited and approved by the Commissioners' Court. Said drainage commissioners shall hold office for the term of two years, and until their successors have qualified, unless sooner removed by a majority vote of the County Commissioners for malfeasance or nonfeasance in office. Upon expiration of the term of office of said drainage commissioners, or in case of the resignation of any such commissioners, the Commissioners' Court shall appoint their successor by a majority vote; provided that after the election establishing a drainage district, is [if] a majority of the real property-tax-payers of such district residing in such county, present a petition to the County Commissioners' Court, praying for an election in said district for the purpose of electing three drainage commissioners therefor, the County Commissioners' Court shall immediately order an election to be held in said district for said purpose at the earliest legal time, and an election shall be held and the returns thereof made as hereinbefore provided for other elections, and the same qualifications hereinbefore provided for voting at other elections shall apply in said election. The Commissioners' Court shall canvass said returns and declare the result at their next regular or special session, and the three persons receiving the highest number of votes shall be declared elected. In the event the third highest vote be tied, the Commissioners' Court shall elect the third drainage commissioners from among those receiving the third highest vote. Such Commissioners so elected, when duly qualified by this Act, shall be the legal and rightful Drainage Commissioners for such district within the full meaning, intent and purpose of this law. All Drainage District Commissioners elected as herein provided shall hold their offices, until the next regular election for State and County officers, and shall then and thereafter be elected every two years at such general election. [Acts 1911, p. 245, § 17, superseding Art. 2585, Rev. Civ. St. 1911; Acts 1918, 35th Leg. 4th C. S., ch. 54, § 1, amending art. 2585, Rev. Civ. St. 1911.]

Took effect April 2, 1918.

Election.—In suit contesting election of drainage commissioners, party challenging voter has burden to prove vote was illegal. *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656.

In such suit, evidence held to sustain court's finding that voter was qualified to vote, voter living in county and paying poll tax there. *Id.*

In such suit, evidence held to sustain finding that voter was not qualified because he had not resided within district for six months preceding election. *Id.*

Art. 2590. Right of eminent domain, etc.

Restraining construction.—In view of this article, and arts. 6504, 6530, 6531, as to condemnation by railroads, and Const. art. 1, § 17, as to payment of condemnation damages, an insolvent drainage district in suit to enjoin it from damaging land by flowage could not in its answer seek to condemn the lands by making offer to pay the damages determined. *Matagorda County Drainage District No. 5 v. Borden* (Civ. App.) 195 S. W. 308.

Art. 2592. Civil engineer; term; to make map and profiles; requisites.—After the establishment of any such district the drainage commissioners shall appoint a competent civil engineer, who shall be entitled

to such assistants as may be necessary; and, for doing the work required of said engineer under this Act, he and his assistants shall receive such compensation and allowances for transportation, supplies, etc., as may be agreed on between him and the drainage commissioners with the approval of the commissioners court; and said engineer shall proceed to make a map of such district, showing the boundary lines thereof, with the original surveys therein, and also to make maps and profiles of the several canals, drains, ditches and levees located in such district, which maps and profiles shall also show any part of any such canals, drains or ditches extending beyond the limits of such district, made necessary in order to procure necessary outlets for any such canals, drains or ditches; but a copy of the land office map of the county, as it applies to such district, showing the name and number of each survey, and showing the area or number of acres contained in such district shall be a sufficient compliance with such order in so far as making a map of the district is required, and any recognized map of any city or town which may be embraced within the boundaries of said district shall be sufficient as to such city or town. Provided, however, that where boundary lines of such drainage district or any of them cross an original survey the map shall show how many acres of such original survey are included within such drainage district. [Acts 1911, p. 245, § 21; Acts 1920, 36th Leg. 3d C. S., ch. 34, § 2 (§ 21).]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 2601. Bond of county judge before sale; compensation.—After the drainage bonds have been registered as provided in the preceding Sections of this Act, the County Judge shall at once execute a good and sufficient bond, payable to the commissioners of such drainage district, to be approved by such drainage commissioners, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duties; provided, in the event said bond is executed by a satisfactory surety company, the drainage district may pay a reasonable amount as premium on said bond, which amount shall be paid out of the construction and maintenance fund of the drainage district, upon presentation of the bill therefor to the drainage commissioners, and should there be any controversy as to the reasonableness of the amount claimed, as such premium, such controversy may be determined by any court of competent jurisdiction. The County Judge shall be allowed one-half of one per cent of the amount received on the sale of any bonds sold by him in full payment of his services in that behalf, only where under the present law he is entitled to such commission; provided, the premiums paid by the drainage district on the County Judge's bond may be deducted by the drainage commissioners from his said compensation. [Acts 1911, p. 245, § 29; Acts 1913, S. S., p. 89, § 1 (§ 29); Acts 1921, 37th Leg., ch. 83, § 1 (§ 29).]

Took effect 90 days after March 12, 1921, date of adjournment.

Compensation.—Art. 3881, declaring that the maximum amount of fees of all kinds that may be retained by a county judge shall not exceed \$2,000 per annum, etc., includes all commissions allowed by law for the performance of official duty, and so includes the commissions paid the judge for making a sale of drainage bonds. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Where a county judge has retained fees up to the maximum allowed by art. 3881, he cannot retain commissions for making a sale of drainage bonds on the ground that he would, if not allowed to retain such commissions, be required to perform extra duties imposed by the drainage act without compensation, nor on the ground that the commissions were paid out of the funds of the drainage district, and not the county; it being permissible for the Legislature to require payment by the drainage district of such commissions to aid the county. *Id.*

Art. 2603. Tax for interest, sinking fund, and expenses; reports and estimates; sale of remaining bonds; readjustment of funds; investment of sinking fund.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Power to levy taxes.—Drainage districts being departments of government, the purpose of taxation by them is a public purpose and among the powers given by the general provisions of the Constitution to the Legislature. *Ogburn v. Barstow, Ward County, Tex., Drainage Dist.* (Civ. App.) 230 S. W. 1036.

The Legislature had constitutional authority to pass art. 2608b and this article, providing for levy of taxes for the upkeep of drainage ditches, and such power was not taken away by the 1917 amendment to the Constitution, adding to article 16, section 59, designated section 59a. *Id.*

Art. 2608b and this article, providing for levies for the upkeep of drainage ditches, are not violative of Const. art. 8, § 9, article 3, § 52, and article 16, § 59, as attempting to levy a tax in excess of that prescribed therein. *Id.*

Art. 2604. Additional tax books; assessment of property in drainage district, etc.

Compensation of assessor.—Amounts paid county assessor for assessing taxes, for drainage and school districts under this article, and art. 2862, held "fees," within arts. 3881, 3883, 3889, fixing the maximum of "fees," and not compensation for "ex officio services," within art. 3893, making such maximum fee statutes inapplicable to compensation for ex officio services. *Nichols v. Galveston County* (Civ. App.) 228 S. W. 547.

Art. 2605. Collector charged with assessment rolls; compensation; bond required, etc.

Bond.—Taxes in hands of the tax collector are secured by his general county bond and not the bond required by this article, "to secure the collection of said taxes." *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2606. Collector to report, etc.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2608. Treasurer's bonds, etc.

In general.—Where a county treasurer defaulted, and it is impossible to ascertain which funds were depleted, his successor cannot be compelled by mandamus to pay the full amount of funds due to a drainage district although he may have wrongfully paid orders from other funds; art. 700 and this article, being inapplicable. *Nueces County Drainage Dist. No. 2 v. Garrett* (Civ. App.) 202 S. W. 1000.

Recovery of illegal commissions.—Commissions collected and retained by the county treasurer in his capacity as treasurer for drainage and navigation districts, if illegally retained, are not voluntarily paid by the county so as to bar their recovery. *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

Art. 2608b. Levy of annual tax for maintenance of improvements, etc.

Constitutionality.—The Legislature had constitutional authority to pass this article, and art. 2603, providing for levy of taxes for the upkeep of drainage ditches, and such power was not taken away by the 1917 amendment to the Constitution, adding to article 16, section 59, designated section 59a. *Ogburn v. Barstow, Ward County, Tex., Drainage Dist.* (Civ. App.) 230 S. W. 1036.

This article, and art. 2603, providing for levies for the upkeep of drainage ditches, are not violative of Const. art. 8, § 9, article 3, § 52, and article 16, § 59, as attempting to levy a tax in excess of that prescribed therein. *Id.*

Art. 2623. Drainage commissioners to keep canals, drains, etc., in repair.

Cited, *Ogburn v. Barstow, Ward County, Tex., Drainage Dist.* (Civ. App.) 230 S. W. 1036.

CHAPTER FIVE

DISSOLUTION OF DRAINAGE DISTRICTS

Art.
2625c. Notice of election; posting.

Art.
2625k. Presentation and allowance of
claims; notice.

Article 2625c. Notice of election; posting.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

Art. 2625k. Presentation and allowance of claims; notice.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

TITLE 48

EDUCATION—PUBLIC

"A"—STATE INSTITUTIONS

Chap.

1. University of Texas.
- 2a. School of mines and metallurgy.

"B"—THE PUBLIC FREE SCHOOLS

9. Available fund.
- 9a. State aid.
10. State Board of Education.
- 11a. County school trustees.
12. County superintendent and other officers.
13. Scholastic census.
- 13a. Compulsory education.
14. Teachers' certificates and examinations.

Chap.

15. Common school districts.
- 15a. Public high school in common school districts.
16. Independent districts.
17. Exclusive control by cities and towns—Independent districts.
18. Independent district school trustees.
19. General provisions.
- 19a. Public school buildings.
- 19b. Free text books in school districts.
- 19c. Free text books throughout the state.
20. The Texas State Text Book Commission.
23. Vocational education.

CHAPTER ONE

UNIVERSITY OF TEXAS

Art.

2633a. Lease or destruction of buildings on land acquired.

Art.

2637. [Superseded.]

Article 2633a. Lease or destruction of buildings on land acquired.
 —Upon the acquisition of the lands above described by the Board of Commissioners herein created, and the delivery of the same to the Board of Regents, the said Board of Regents and their successors shall have the right to lease the buildings and improvements situated upon the land acquired for such sum and for such period of time as in their judgment is best and the revenues derived therefrom shall be deposited and become a building fund and shall be expended for no purpose other than to construct permanent buildings to be used for the purposes of the University. It is expressly provided, however, that no lease of any of said property shall be for a longer term than five years. The board of Regents is hereby expressly empowered to dismantle, tear down and dispose of, or remove any and all improvements from such land as may be acquired under the provisions of this Act. [Acts 1921, 37th Leg., ch. 137, § 6.]

Explanatory.—The above provision is a part of section 6 of Acts 1921, 37th Leg., ch. 137, authorizing the purchase of additional lands for the use of the University. It is inserted here as being permanent in its nature. The other provisions of the act are omitted, because they are local and temporary in their nature. The act took effect April 1, 1921.

Art. 2637.

Superseded. See Arts. 4042a-4042c.

Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

CHAPTER TWO A

SCHOOL OF MINES AND METALLURGY

Article 2681bb. Branch of University of Texas.—The School of Mines and Metallurgy, established by Chapter 178 Acts of the General Laws of the 33rd Legislature of 1913, located in the City of El Paso, El Paso County, Texas, be and the same is hereby made and constituted a branch of the University of Texas for instruction in the arts of mining and metallurgy as now provided for by law. The University of Texas through its Board of Regents shall take over the management and control of said School of Mines and Metallurgy and its properties and shall assume and pay off all of its debts and obligations, if any. [Acts 1919, 36th Leg., ch. 53, § 1.]

Took effect March 3, 1919.

CHAPTER NINE

AVAILABLE PUBLIC FREE SCHOOL FUND

Art. 2725. What shall constitute school fund.	Art. 2726a-2726j. [Expired.]
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Article 2725. What shall constitute school fund.

Penalties on taxes.—Under Ft. Worth Charter, c. 15, § 13, which took effect in 1909, and Charter of 1907, c. 10, § 156, penalty moneys collected on school taxes by the city of Ft. Worth became when collected a part of the school fund, and belonged to the board of trustees of the independent school district of Ft. Worth. American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth (Civ. App.) 224 S. W. 292; City of Ft. Worth v. Same (Civ. App.) 224 S. W. 294.

Arts. 2726a-2726j.

Explanatory.—This act has spent its force by lapse of time. Acts 1919, 36th Leg. ch. 65, made appropriation for the biennial period ending August 31, 1921. The current act on the subject is set forth, post, as arts. 2726¼-2726¼i.

CHAPTER NINE A

STATE AID

Art. 2726¼. Appropriation.	Art. 2726¼dd. Extraordinary conditions.
2726¼a. Schools entitled to aid.	2726¼e. General powers of the State Board of Education.
2726¼b. Districts having no special tax and receiving donations.	2726¼f. Duties of State Superintendent of Public Instruction.
2726¼c. Additional aid.	2726¼g. Second aid.
2726¼d. Disposition of funds not expended as provided by previous articles.	2726¼h. Warrants and reports.
	2726¼i. Apportionment privileges.

Article 2726¼. Appropriation.—For the purpose of promoting the public school interests of rural schools and those of small towns and of aiding the people in providing adequate school facilities for the education of their children, there is hereby appropriated out of any money in the State Treasury not otherwise appropriated \$1,500,000.00 or such part thereof as may be necessary for the school year ending August 31, 1922, and \$1,000,000 or such part thereof as may be necessary for the school year ending August 31, 1923, and to be used in accordance with the pro-

visions of this Act in aiding rural schools and those of small towns; provided that none of the money appropriated by this Act shall be allotted to any independent or common school district in which property belonging to the State of Texas is located unless said district is entitled to receive same under the provisions of this Act; and it is further provided that none of the money appropriated by this Act shall be expended for the purpose of disseminating by any means information intended to influence voters in any election whatsoever. [Acts 1917, ch. 80; Acts 1919, ch. 65, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 20; Acts 1921, 37th Leg. 1st C. S., ch. 43, § 1.]

Took effect Aug. 31, 1921.

See *County Trustees of Navarro County v. Bell Point Common School Dist.* (Civ. App.) 229 S. W. 697.

Art. 2726 $\frac{1}{4}$ a. Schools entitled to aid.—State aid under the provisions of this Act may be distributed in such way as to assist all schools of not more than 500 scholastic enrollment to maintain the school for such length term, not to exceed nine months, as may be desired by the district board of school trustees. Provided further that not more than one thousand dollars for any one year shall be granted to any one school district under the provisions of this Act, the granting of such aid to be subject to the following conditions:

(1) A Common School District: or independent school district receiving this aid must have had an average attendance the preceding year of at least twenty times as many scholastics as the number of teachers employed, and must maintain during the year in which aid is received, an average attendance of at least 75 per cent of the enrollment during the time that the school is in session unless cause for such non-attendance, satisfactory to the State Board of Education can be shown.

(2) Any Common School District or Independent school district receiving this aid must make such heating and ventilating arrangements, provide such sanitary closets, and keep the school premises in such condition, as can be approved by the rural school inspector, sent by the State Department of Education.

(3) No Common school district or independent school district which refuses to conform to a plan of consolidation formulated by the county superintendent, and approved by the county board of trustees and by the State Superintendent shall receive aid from this fund for any school session following the school year in which such refusal is made.

School districts in sparsely settled communities where consolidation is impracticable are to be exempted from this provision of this Act; provided that the decision as to whether such consolidation is not advantageous shall rest with the county board of trustees and shall be approved by the State Superintendent: It is expressly provided that in case of schools where compliance with the preceding conditions is impossible, or would work undue hardships, the State Superintendent shall have power with the approval of the State Board of Education, to grant funds to such schools.

(4) No common or independent school district which has received special State aid under the provisions of this or previous similar Acts for one scholastic year, shall be granted such aid a second time unless it shall provide for the maintenance of its schools by voting a local school tax of fifty cents on the hundred dollars of property valuation; and in no case shall the assessed valuation for common school districts be less than the valuation of the county assessor; and in no case shall the assessed valuation in towns be less than the assessed valuation of town property for other purposes.

Schools of not more than 500 scholastic enrollment, complying with the foregoing conditions, shall send to the State Superintendent, on blanks provided by the State Department of Education, a list of teachers employed in the schools, with a statement as to the monthly salary of each teacher, and a list of expected receipts and other expenditures, it being shown on this blank that the trustees lack sufficient funds to maintain the school for the desired length of term. The State Superintendent of Public Instruction with the approval of the State Board of Education may then grant to the school such an amount of this fund as may be necessary to maintain the school for the desired length of term; provided that this period be not longer than nine scholastic months, and provided that such aid be not granted in excess of any amount sufficient to pay the teachers the maximum salary permitted by State law to those holding certificates of the grades held by teachers of the school district to which such aid is granted. It is expressly hereby provided that all school districts meeting the requirements of this Act, and not having sufficient available school funds to maintain their school six months in the year shall be given preference in the distribution of this fund, until all the public schools in the State can be maintained at least six months in the year. [Acts 1921, 37th Leg. 1st C. S., ch. 43, § 2.]

Art. 2726 $\frac{1}{4}$ b. Districts having no special tax and receiving donations.—Any common or independent school district which has no special tax, but where private donation is made for the benefit of the school, either by person or a corporation, then that district shall be entitled to the same proportion of the State aid as any other district that is provided for under this law. [Id., § 2a.]

Art. 2726 $\frac{1}{4}$ c. Additional aid.—In addition, State aid to the amount of not more than \$500 for any one district may be granted from the appropriation authorized by this Act, to school districts under the following conditions:

(1) Location: Each such school receiving this State aid shall be well located on a plot of ground not less than one acre in extent, properly drained and suitably laid out.

(2) School House: There shall be provided a suitable school house, erected in accordance with the school house building law of Texas or meeting substantially the requirements thereof.

(3) Equipment: Each such school shall be provided with necessary desks, seats, and black boards; and with such library, books, maps, and globes as are recommended in the State bulletins, as in the opinion of the State Superintendent the said school may be able to purchase.

(4) Teachers: Teachers employed in country or small town schools shall furnish to the State Superintendent satisfactory evidence of professional training to their credit, and all teachers must render efficient services of a high grade.

(5) Attendance: In order to receive State aid under these conditions, the school must have a scholastic enrollment of not more than 500 scholastic enrollment, exclusive of transfers, and must maintain an attendance record during the year in which it receives such aid of not less than seventy-five per cent of the enrollment unless causes for such non-attendance satisfactory to the State Board of Education can be shown.

(6) Local Tax: A school district, to be eligible to special State aid, under the provisions of this Act, if it has received special State aid under the provisions of this or other similar Acts, for a period of one

scholastic year, must be levying and collecting a local school tax of not less than fifty cents on the one hundred dollars of property valuation.

(7) Course of Study: Each country school or small town school receiving State aid under the provisions of this Act shall teach the common school subjects as prescribed by law, and shall follow the State courses of study, and shall be required to observe the school laws, especially as to care of text books. [Id., § 3.]

Art. 2726¹/₄d. Disposition of funds not expended as provided by previous articles.—Such part of this fund as may not be expended under the preceding provisions of this Act may be granted to schools of not more than 500 scholastic enrollment for the following purposes:

(1) Schools making provisions for transportation of pupils to and from consolidated schools may be granted from this fund a sum equal to one-half of the total cost of transportation provided that the provisions of the contract for said transportation be approved by the State Superintendent.

(2) State aid from this fund may be granted in accordance with rules approved by the State Board of Education, for the purpose of providing for an annual increase of salary to teachers of rural schools and schools of small towns, who remain in the same position, provided, (1) that such aid shall not exceed one-half of the amount of the annual increase paid by the school, (2) that such teachers shall furnish recommendations as to satisfactory work from their local boards, (3) that in each such year, when increase is granted from State aid funds, such teachers receiving the increase shall attend a summer school for at least two months, completing work under terms prescribed by the State Superintendent of Public Instruction, (4) and that the maximum salary paid such teachers shall not exceed the average of the salary paid to such teachers of similar acquirements and experiences in the three largest cities of the State; provided that in no event shall any teacher in any school to which State aid is granted be paid more than the following amounts; to a teacher holding a second grade certificate sum of \$100.00 per month, a teacher holding a first grade certificate \$150.00 per month and a teacher holding a permanent certificate \$175.00 per month.

(3) Any school eligible to State aid under the provisions of this Act, which acquires by purchase, or by gift an addition to its library, of the value of \$50 or more, consisting of unused books approved by the regulations of the State Department of Education, may receive from this fund, a sum not exceeding one-half of the value of said library; providing that no school may receive for its library more than \$200 per year; and provided that all funds granted for libraries must be spent for additional library books for the school; provided that funds for the purchase of books for a school library may not be granted to any school which has not provided proper facilities for the care of such books, such facilities to be defined by the State Superintendent of Public Instruction. [Id., § 4.]

Art. 2726¹/₄dd. Extraordinary conditions.—In the case of extraordinary and unusual conditions, the State Board of Education may arrange for the support of a school from State aid funds, for a period not exceeding six months, if otherwise pupils would be deprived entirely of all school privileges. [Id., § 5.]

Art. 2726¹/₄e. General powers of the State Board of Education.—The State Board of Education shall be authorized and it shall be their duty to take such action and to make such rules and regulations not

inconsistent with the terms of this Act, as, in its opinion may be necessary to carry out the provisions and intentions of this Act. They shall have the power to impose such other conditions and regulations as to the granting of State aid, that do not conflict with the provisions herein specified, as, in their judgment may be for the best interest of the schools for whose benefit the funds are appropriated. [Id., § 6.]

Art. 2726 $\frac{1}{4}$ f. Duties of State Superintendent of Public Instruction.—It shall be the duty of the State Superintendent of Public Instruction to go in person or to send one of the rural school supervisors authorized by this Act to assist the school committees who may desire the privileges of this Act in their efforts to meet the necessary requirement in order that they may participate in the distribution of the funds herein appropriated.

Before approving any application, he or she shall make a thorough investigation in person, or through representatives approved by the State Board of Education, of the grounds, buildings, equipment, and possibilities of each school applying for State aid under the provisions of this Act, and aid shall not be granted to any school unless it be shown that such aid is actually needed for efficiency of school work and for the desired length of term. In case where exceptional conditions, or lack of efficient supervisory force renders personal inspection by the Department of Education, impossible, in time to grant State aid to some schools, the State Superintendent shall pursue such course in regard to final granting of State aid to such schools, as, on his recommendation, may be approved by the State Board of Education. In such case, the State Superintendent shall provide for the visitation of such schools, after the aid has been granted, and in future grants to such schools, shall be governed by the eligibility of such schools as shown when so visited. [Id., § 7.]

Art. 2726 $\frac{1}{4}$ g. Second aid.—Before State aid shall be granted a second time to the same district it shall be necessary that all reports as required of the school officials of said districts shall have been received and approved; that the State Superintendent of Public Instruction or one of the rural school supervisors shall have visited said district and the State Superintendent of Public Instruction shall have advised the State Board of Education that in his judgment the school officials of such district have made diligent efforts to meet the requirements and standards as set forth in this Act, that the district receiving State aid has made satisfactory progress, under existing conditions, and that, in his opinion, further aid would prove a good and desirable investment for the State in promoting the educational interests of the people of such district; provided that no school shall be granted State aid a second time until all applications on file for first aid from schools entitled to aid under this Act shall have been acted upon. [Id., § 8.]

Art. 2726 $\frac{1}{4}$ h. Warrants and reports.—Warrants for all money granted under the provisions of this Act shall be transmitted by the State Superintendent of Public Instruction to treasurers or depositories of school districts to which State aid is granted in the same manner as warrants for State apportionment are now transmitted, and it shall be the duty of all treasurers or depositories to make annually itemized reports, under oath, to the State Superintendent of Public Instruction of the expenditure of all money granted under the provisions of this Act. [Id., § 9.]

Art. 2726¹/₄i. Apportionment privileges.—Country schools and small town schools shall be entitled to share in the distribution of State and county available school funds, and in all other school funds in the same manner as other school districts, and in case high school grades are maintained the community shall still be entitled to participate in the distributions of any State aid that may be extended by the Legislature of Texas for vocational or industrial purposes to high schools of the State, though it accept the provisions of this Act. [Id., § 10.]

CHAPTER TEN

STATE BOARD OF EDUCATION

BOARD AUTHORIZED TO INVEST SCHOOL FUND

Article 2737. Duties of parties offering bonds for sale.

Approval by attorney general.—In view of this article, where bonds voted for and issued were approved by the Attorney General, their validity was unimpeachable. *Walling v. Malone Independent School Dist.* (Civ. App.) 195 S. W. 671.

CHAPTER ELEVEN A

COUNTY SCHOOL TRUSTEES

Art. 2749a. Powers of trustees; election; tenure, etc.	Art. 2749c. Subdivision of county into school districts, etc.
2749b. Classification of schools; course of study for schools.	2749d. Supervisory powers of district court. 2749h. Appeals. 2749i. Repeal; partial invalidity.

Article 2749a. Powers of trustees; election; tenure, etc.

Constitutionality.—This chapter held not violative of Const. art. 3, § 35, when liberally construed, as relating to subject not expressed in title, or as embracing two subjects in the same act; arts. 2749b, 2749d being germane to general purpose of act. *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Consolidation without petition.—Under this article, and article 2749c, board of county school trustees had power to consolidate common school districts already organized without petition of electors. *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623.

High schools.—Under this chapter, the county trustees alone have authority to establish high schools, and district trustees will be enjoined from attempting to select the site. *Woodson v. Stanley* (Civ. App.) 201 S. W. 659.

Art. 2749b. Classification of schools; course of study for schools.

See *Woodson v. Stanley* (Civ. App.) 201 S. W. 659; *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Cited, *Lovelady v. County Board of School Trustees* (Civ. App.) 214 S. W. 622.

Art. 2749c. Subdivision of county into school districts, etc.

See *Hooker v. State* (Civ. App.) 197 S. W. 481; *Woodson v. Stanley* (Civ. App.) 201 S. W. 659; *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Cited, *Lovelady v. County Board of School Trustees* (Civ. App.) 214 S. W. 622.

Powers conferred.—Under this chapter, the board of school trustees became vested with the power of the commissioners' court under Rev. St. 1911, art. 2816, to change the boundaries of any independent school district and to consolidate such districts. *Hill County School Trustees v. Melton* (Civ. App.) 199 S. W. 1142.

Dividing district.—Neither the fact that rural high school in part of a district would enhance values and trade of that part, nor that children of other part could not attend high school, nor that majority of school trustees would be elected by majority of district voters, tended to show that trustees' refusal to divide district was an abuse of power. *Schulz v. Davis* (Civ. App.) 207 S. W. 634.

In suit to require county school trustees to divide a school district, where it was alleged that the two-mill tax was sufficient to maintain both elementary schools in district without a division, allegations that maintenance tax rate was to be raised, or the fact that one elementary school had the money and the other the children, was no reason for a division. *Id.*

Without an allegation, in suit to require trustees to divide a district, that any official action was being taken to inaugurate a system of transportation in a school district, it could not be anticipated that officials might attempt a wrongful act, where, if attempted, a division of district was not the remedy. *Id.*

That the surplus of three-fifths of the taxes in part of a district would be used for benefit of the three-fourths of the children in another part thereof, would not indicate any abuse of power by board of county trustees in refusing to divide district. *Id.*

Consolidation.—In view of this article, contention on appeal that order of consolidation of common school districts was a nullity because not made upon petition of majority of electors of such districts will not be considered, where there was no allegation that consolidation was to establish a high school. *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623.

Apportionment.—Where apportionment of part of consolidated school district to an independent district would make it impossible for children of the affected territory to attend school during wet weather because of bad roads, the county board of trustees, in ordering such apportionment, abused its discretion. *Hill County Board of School Trustees v. Bruton* (Civ. App.) 217 S. W. 709.

Art. 2749d. Supervisory powers of district court.

Powers of court.—Under arts. 2866, 2749c, and this article, district court held authorized to review change of boundary line between independent school districts by county board of school trustees. *Hooker v. State* (Civ. App.) 197 S. W. 481.

This article does not give district courts supervisory control of management or abolition of elementary schools within established districts, nor of establishment or maintenance, of rural high schools; such duties, under the law, resting on district school trustees, with successive appeals to county trustees, to state superintendent of public instruction, and to state board of education. *Schulz v. Davis* (Civ. App.) 207 S. W. 634.

Under this article, district court held to have jurisdiction to hear and determine issues presented in petition of plaintiffs suing to enjoin consolidation of school districts for high school advantages, notwithstanding art. 2749h providing for appeals. *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Under this article, court had power to determine whether order of county board, apportioning part of consolidated district to an independent district, was for the public good, where the evidence was contradictory. *Hill County Board of School Trustees v. Bruton* (Civ. App.) 217 S. W. 709.

District court's power to try a cause to enjoin county school trustees from apportioning part of consolidated district to an independent district, and to correct any error or mistake made by the county board of trustees under this article, is absolute. *Id.*

Abuse of discretion.—Under this article, the district court's supervisory control of action of board of county school trustees in creating and changing school districts will be exercised to prevent or correct their action only when they have exercised that power in a harsh and arbitrary manner amounting to an abuse of discretion. *Schulz v. Davis* (Civ. App.) 207 S. W. 634.

The matter of establishing and maintaining school districts is left largely to the discretion of the county board of education, and, unless it is clearly shown that such discretion has been abused, the courts will not interfere. *Baker v. Davis* (Civ. App.) 227 S. W. 534.

Direct appeal from order of trustees.—Construing, so as to give effect to the provisions of all, this article, and art. 2749h with art. 4510, as to appeal to higher from lower school officers, appeal to higher school officials from refusal of school trustees to form school district from parts of other districts is a condition precedent to remedy in the district court. *Jennings v. Carson* (Com. App.) 220 S. W. 1090, reversing judgment (Civ. App.) 184 S. W. 562.

Restraining action of trustees.—The law giving district courts general supervisory control of the action of county school trustees in creating, changing, and modifying school districts, does not authorize the issuance of an injunction against the abolition of a district and the consolidation of its territory with other districts until appeals have been taken to the State Superintendent of Public Instruction and State Board of Education under art. 4510, though the school building may be destroyed during the delay involved in such appeals. *County Trustees of Navarro County v. Bell Point Common School Dist.* (Civ. App.) 229 S. W. 697.

Art. 2749h. Appeals.

See *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Appeals to district court.—Construing, so as to give effect to the provisions of all, art. 2749d and this article, with art. 4510, as to appeal to higher from lower school officers, appeal to higher school officials from refusal of school trustees to form school

district from parts of other districts is a condition precedent to remedy in the district court. *Jennings v. Carson* (Com. App.) 220 S. W. 1090, reversing judgment (Civ. App.) 184 S. W. 562.

Art. 2749]. Repeal, etc.

See *Woodson v. Stanley* (Civ. App.) 201 S. W. 659.

CHAPTER TWELVE

COUNTY SUPERINTENDENT AND OTHER OFFICERS

Art.		TREASURERS OF SCHOOL FUNDS
2750.	Office established.	Art.
2758.	Salary.	2767.
2760.	Application of parent or guardian.	Treasurers to keep funds in depos-
2761a.	Emergency transfers.	itories.
COUNTY JUDGE EX OFFICIO COUNTY		2771.
SUPERINTENDENT		Treasurer of independent districts;
		best bidder of interest on average
2763.	County judge shall be, when.	daily balances; tenure; bond.
2765.	Compensation.	2772.
		Purposes for which funds may be
		expended.
		2773.
		Treasurers shall make reports.

Article 2750. Office established.

In general.—The office of county superintendent of public instruction depends for its existence, under this article, on the condition of the scholastic census at each general election, no election to such office being valid in a county having a scholastic population of less than 3,000, as shown by the preceding census, except in counties where the office has been created by an election held for that purpose. *Miller v. Brown* (Civ. App.) 216 S. W. 452.

Since it was not the purpose of this article, to create the office of county superintendent of public instruction, nor authorize the election to the same, in counties having a scholastic population of less than 3,000 as shown by the preceding census, except in counties where such office has been created by an election held for that purpose, one elected to such office in a county having a scholastic population of less than 3,000, where such office was not created by an election held for that purpose, even if termed a *de facto* officer, is not entitled to the emoluments of the office for the term for which elected. *Id.*

Art. 2758. Salary.—The county superintendents of public instruction herein provided for shall receive from the available school fund of their respective counties annual salaries as follows: In every county that has a scholastic population of three thousand or less in which the office of county superintendent has been created or may be created after this Act shall have gone into effect, the county superintendent shall receive an annual salary of sixteen hundred dollars; in every county that has a scholastic population of more than three thousand or less than four thousand, the county superintendent shall receive an annual salary of eighteen hundred dollars; in every county that has a scholastic population of more than four thousand and less than five thousand, the county superintendent shall receive an annual salary of nineteen hundred dollars; in every county that has a scholastic population of more than five thousand and less than six thousand, the county superintendent shall receive an annual salary of two thousand dollars; in every county that has a scholastic population of more than six thousand and less than seven thousand, the county superintendent shall receive an annual salary of twenty-two hundred dollars; in every county that has a scholastic population of more than seven thousand and less than eight thousand, the county superintendent shall receive an annual salary of twenty-four hundred dollars; in every county that has a scholastic population of more than eight thousand and less than nine thousand, the county superintendent shall receive an annual salary of twenty-five hundred dollars; in every county that has a scholastic population of more than nine thou-

sand and less than ten thousand, the county superintendent shall receive an annual salary of twenty-six hundred dollars; in all counties that have a scholastic population of ten thousand or more, the county superintendent shall receive an annual salary of twenty-eight hundred dollars; provided, that in making the annual per capita apportionment to the schools, the county school trustees shall also make an annual allowance out of the State and county available funds for salary and expenses of the office of the county superintendent of public instruction, and the same shall be prorated to the schools coming under the supervision of the county school superintendent. The compensation herein provided for shall be paid monthly upon the order of the county school trustees; provided, that the salary for the month of September shall not be paid until the county superintendent presents a receipt from the State Superintendent of Public Instruction showing that he has made all reports required of him.

The county board of trustees may make such further provision as it deems necessary for office and traveling expenses for the county superintendent of public instruction and any assistant he may have; provided that expenditures for office and traveling expenses shall not exceed three hundred dollars, and the county board of trustees may make provision for the employment of a competent assistant for the county superintendent of public instruction, who shall, in addition to his duties, act as attendance officer; and said board are hereby authorized to fix the salary of such assistant and pay the same out of the same funds from which the salary and expenses of the county superintendent are paid. [Acts 1905, p. 263, § 40; Acts 1907, p. 210; Acts 1918, 35th Leg. 4th C. S., ch. 41, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 57, § 1.]

Took effect 90 days after June 18, 1920, date of adjournment. Sec. 3 of the act repeals all laws in conflict.

See *Miller v. Brown* (Civ. App.) 216 S. W. 452.

Art. 2760. Application of parent or guardian.

Transfer of funds.—A county superintendent of schools is authorized, if not required, by law to effect transfer of fund arising from transfer of school children from common schools to independent school district, and can draw checks and orders for purpose of doing so. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

Art. 2761a. Emergency transfers.—In the case of conditions resulting from public calamity in any section of the State such as serious floods, prolonged drouth, or extraordinarily border disturbances, resulting after the scholastic census has been taken, in such sudden changes of the scholastic population of any county as would work a hardship in the support of the public free schools of the said county, the State apportionment of any child of school age may, on the approval of the State Board of Education, be ordered by the State Superintendent of Public Instruction to be transferred to any other county or independent school district in any other county of the State; provided that the facts warranting such transfer shall be sent to the State Superintendent by the county or district board of trustees of schools to which transfer is to be made with a formal request for the transfer before the first of August of the year in which such unusual conditions occur. The State Superintendent shall in such case notify the County Superintendent of the county to which the funds are to be transferred and the County Superintendent of the county from which the funds are to be transferred that final apportionments of school funds cannot be made under these circumstances before August 15th. All arrangements for said emergency transfers must be completed by the fifteenth of August following the unusual conditions causing the emergency. Children whose state funds are thus

transferred to any county shall be included in the number of children for whom the county school apportionment of the said county is made. Any county Judge serving as ex officio county superintendent, county superintendent, district, city or town superintendent or other school officer who refuses to comply with the provisions of this Act shall be deemed guilty of a misdemeanor and shall on conviction, be fined in any sum not less than \$50.00 nor more than \$500.00, or shall be confined in the county jail for not more than sixty days, or shall be punished by both such fine and imprisonment. [Acts 1919, 36th Leg. 2d C. S., ch. 36, adding § 91b to Acts 30th Leg., ch. 150.]

Took effect July 25, 1919.

COUNTY JUDGE EX OFFICIO COUNTY SUPERINTENDENT

Art. 2763. County judge shall be, when.

See *Miller v. Brown* (Civ. App.) 216 S. W. 452.

Art. 2765. Compensation.—In a county where the county judge acts as superintendent of public instruction, he shall receive for his services as superintendent such salary as may be provided by the commissioners court, not to exceed the sum of nine hundred dollars per annum. [Acts 1905, p. 263, § 44; Acts 1920, 36th Leg. 3d C. S., ch. 57, § 2.]

Took effect 90 days after June 18, 1920, date of adjournment. Sec. 3 of the act repeals all laws in conflict.

In general.—The fact that the county judge, elected November, 1910, served during his entire first term till 1912 without an order fixing his salary as ex officio superintendent of public schools, and for more than a year on his second term after re-election in November, 1912, without such an order, during all of which time he drew \$87.50 per quarter for such service, and the fact that the accounts were approved by the commissioners' court, amounted to an agreement between him and the court that the ex officio salary of \$87.50 per quarter as fixed for his predecessor applied to him until changed, since otherwise he drew \$700 illegally during his first term with the knowledge and consent of the commissioners' court. *Dalton v. Allen* (Civ. App.) 218 S. W. 73.

TREASURERS OF SCHOOL FUNDS

Art. 2767. Funds must be kept in depositories.

Suit for school taxes.—A county has no authority to receive or sue tax collector for taxes collected for either independent or common school districts and not accounted for, under this article, and arts. 2822, 2836, 2861, 2862; such taxes being payable to district treasurers which districts are the ones to sue. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2771. Treasurer of independent district; best bidder of interest on average daily balances; tenure; bond.

Selecting depository.—The board of trustees of an independent school district has a discretionary power in selecting the depository, under this article, and in view of arts. 2850-2852, vesting the trustees with power and discretion in selecting depository. *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

Though school officers selected as depository a bank offering a lower rate of interest than that offered by a bank which had previously acted as depository, but which had not accounted for funds, as required by art. 2773, and had not tendered bond as required by this article, the selection cannot be deemed an abuse of discretion. *Id.*

Art. 2772. Purposes for which funds may be expended.—The public free school funds shall hereafter not be expended except for the following purposes:

(a) The State and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents, when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year.

(b) Local school funds from district taxes, tuition fees of pupils not entitled to free tuition and other local sources may be used for the purposes enumerated for State and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employes, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools to be determined by the Board of Trustees, the accounts and vouchers for county districts and communities, to be approved by the County Superintendent; provided, that when the State available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months, and leave a surplus, such surplus may be expended for the purposes mentioned herein. [Acts 1905, p. 263, sec. 83; Acts 1919, 36th Leg., ch. 122, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Diversion of funds.—Rev. St. 1895, art. 4041, validating title to minerals in purchasers of public lands, when treated as a validating act, is not in violation of Const. art. 7, § 4, as to Legislature not having power to grant relief to purchasers of school lands, or section 5, forbidding appropriation of school funds to a foreign purpose. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

Art. 2773. Treasurers shall make reports.—Each treasurer receiving or having control of any school fund of an independent school district shall keep a full and separate itemized account with each of the different classes of school funds coming into his hands, and shall on or before the first day of October of each year, file with the Board of Trustees of such independent school district and with the State superintendent of Public Instruction an itemized report of the receipts and disbursements of the school funds for the preceding school year ending August 31st, which report shall be on a form prescribed and furnished by the Department of Education. The Board of Trustees shall notify the Superintendent of Public Instruction of their approval of said report within thirty days after receipt of same, should same be approved, and the State Superintendent of Public Instruction shall notify the Board of Trustees of objections or of recommendations concerning same should he desire to make any. All vouchers showing items of the report shall be filed with the Board of Trustees and the State Superintendent of Public Instruction may demand same when passing on said report or for the purpose of investigating same. [Acts 1905, p. 263, sec. 49; Acts 1919, 36th Leg., ch. 149, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Failure to make report.—Under this article, and Pen. Code Supp. 1918, art. 1513h, relating to reports required of depositories of school funds, etc., an information, charging defendant, a cashier of a bank which was a depository, with failure to make a report, not alleging that defendant occupied any position mentioned in the statute, stated no offense. *Ex parte Ballard*, 87 Cr. R. 460, 223 S. W. 222.

Though school officers selected as depository a bank offering a lower rate of interest than that offered by a bank which had previously acted as depository, but which had not accounted for funds, as required by this article, and had not tendered bond as required by art. 2771, the selection cannot be deemed an abuse of discretion. *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

CHAPTER THIRTEEN

SCHOLASTIC CENSUS

Article 2774. Time and manner of taking census.

See *Miller v. Brown* (Civ. App.) 216 S. W. 452.

Cited. *State v. Eidson*, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

CHAPTER THIRTEEN A
COMPULSORY EDUCATION

Art.
2779b. Exemptions.
2779bb. Instructions to census trustees;
reports and rolls.

Art.
2779bbb. Admission of deaf, dumb, and
blind children to institutions;
inadequacy certificate; children
included within compulsory law.
2779e. Attendance officer, etc.

Article 2779b. Exemptions.—The following classes of children are exempt from the requirements of this Act:

(a) Any child in attendance upon a private or parochial school or who is being properly instructed by a private tutor.

(b) Any child whose bodily or mental condition is such as to render attendance inadvisable, and who holds definite certificate of a reputable physician specifying this condition and covering the period of absence.

(c) Any child who is feeble-minded, for the instruction of whom no adequate provision has been made by the school district.

(d) Any child living more than two and one-half miles by direct and traveled road from the nearest public school supported for children of the same race and color of such child, and with no free transportation provided.

(e) Any child more than twelve years of age who has satisfactorily completed the work of the fourth grade of a standard elementary school of seven grades, and whose services are needed in support of a parent or other person standing in parental relation to the child, may, on presentation of proper evidence to the County Superintendent of Public Instruction, be exempted from further attendance at school. [Acts 1915, 34th Leg., ch. 49, § 2; Acts 1921, 37th Leg., ch. 125, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Vaccination.—Resolution of board of education for exclusion from schools of unvaccinated children held not invalid as in conflict with Compulsory Education Law. *Staffel v. San Antonio School Board of Education* (Civ. App.) 201 S. W. 413.

An ordinance, denying school children the right to attend school unless vaccinated for smallpox, was not inconsistent with the law for compulsory education exempting from its requirement "any child whose bodily condition is such as to render attendance inadvisable." *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S. W. 303.

Art. 2779bb. Instructions to census trustees; reports and rolls.—It shall be the duty of the County Superintendent to issue instructions to the school census trustees to make adequate entry upon the rolls and summaries of the various trustees which are now required by law to be filed with the county superintendent in his office, of each and every child within the scholastic age which is either deaf or blind. Upon receipt of said census reports and rolls the county superintendent shall immediately compile a complete list of names, ages, and information contained on the census report of each child deaf or blind, certify thereto and forward same to the respective officers, the deaf to the Superintendent of the Texas Deaf and Dumb School, the blind to the Superintendent of the School for the Blind. [Acts 1921, 37th Leg., ch. 125, § 2.]

Art. 2779bbb. Admission of deaf, dumb, and blind children to institutions; inadequacy certificate; children included within compulsory law.—The certificate made above shall constitute an application to the institution to which it is directed for the maintenance, care and education of all such children, and it shall be the duty of the Superintendent of the Deaf and Dumb and the School for the Blind respectively to per-

mit the entrance, provide for the maintenance, care and education of said applicants under such rules and regulations as may be prescribed by him in so far as the facilities now or hereafter be provided are adequate in such institutions.

In the event that all of said applicants or any part thereof cannot be received it shall be the duty of the superintendents of the respective institutions to issue and mail to the parents of all children for whom there is no adequate facilities, a certificate to be known as an Inadequate Instructional Facilities Exemption. This exemption shall contain thereon the fact of the application and that there is now no means by which the State may maintain, care for and instruct the person to whom said certificate is given, and such other information as may be prescribed by the Superintendents of the Deaf and Dumb School and the School for the Blind.

All deaf children between the ages of seven and twenty-one years of age inclusive, and all blind and partially blind children between the ages of six and fourteen years of age inclusive, whose vision is not sufficient to enable them to attend the public schools shall be subject to all the provisions of the law with reference to the compulsory school attendance, provided, however, that such children as hold a certificate of exemption as above described shall be exempted from such laws and shall not be subject to any of the penalties now provided for failing to attend school. [Id., § 3.]

Art. 2779e. Attendance officer, etc.

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

CHAPTER FOURTEEN

TEACHERS' CERTIFICATES AND EXAMINATIONS

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| <p>Art.
2781. Salaries of teachers.
2781a. Salaries of women teachers.
2785a. Operation of certificate law.
2785b. Repeal.
2786. County board of examiners.
2787. Applicant for certificate.
2788a. Limitations as to age.
2797. Kinds of certificates.
2797a. Same.
2798. County superintendent to keep record of certificates, etc.
2799. Examination for first and second grade certificates; certificates, how long valid.
2799a. Elementary certificates; high school certificates of second class.
2802. Examination for state permanent primary certificate; holder may build to permanent certificate; holder of state first grade may build to state permanent primary; examination, etc.
2804. Building to higher grade certificates.
2804a. Certificate holders eligible to teach in what grades, etc.
2804b. Duration of permanent certificates.</p> | <p>Art.
2804bb. Collegiate credits substitute for examinations; double counts.
2804bbb. Experience in teaching as basis for issuance of certificate or extension.
2804bbbb. Building on elementary certificate; examinations.
2804c. Extension of certificates of persons serving in army.
2805. [Repealed.]
2805a. Summer normal institutes; certificates, etc.
2805b. Certificates to persons completing normal school, university or college courses; high school certificates, value of certificates; terms defined; duration of certificates; classification of institutions of learning.
2806-2808. [Repealed.]
2809. Certificates based on diploma or certificate from other states.
2810. City certificates.
2811. Special certificates.
2814a. Outstanding certificates not affected; power of cities.</p> |
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Article 2781. Salaries of teachers.—Trustees in making a contract with a teacher shall determine the salary to be allowed or the wages to be paid. Provided a teacher holding a permanent State certificate shall not receive wages in excess of one hundred and fifty dollars per month

out of the public free school fund; a teacher holding a first grade certificate shall not receive as wages from the public free school fund more than one hundred and twenty-five dollars per month, and a teacher holding a second grade certificate shall not receive as wages from the public free school fund more than one hundred dollars per month; provided that the salary limits herein specified shall not apply to any school district which levies and collects a local tax for school purposes, and provided further that all contracts heretofore made with teachers and which are not in conflict with this Act are hereby validated. [Acts 1905, p. 262, § 73; Acts 1920, 36th Leg. 3d C. S., ch. 27, § 1; Acts 1921, 37th Leg., ch. 108, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 2781a. Salaries of women teachers.—All women teaching in the State Schools of the State of Texas shall be paid the same compensations as are paid to men for performing the same kind, grade and quantity of service, and that all women performing public service for the State of Texas shall be paid the same compensation for their service as is paid to men performing the same kind, grade and quantity of service, and that there shall be no distinction in compensation on account of sex. [Acts 1919, 36th Leg., ch. 89, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 2785a. Operation of certificate law.—That provisions of the certificate law in force January 1, 1921, relating to certification through examinations, shall continue in force until September 1, 1923; and provisions of the said law, relating to building on a certificate of lower grade secured before September 1, 1923, to a certificate of higher grade, shall continue in force until September 1, 1925, after which date certificates shall be granted only in accordance with the provisions of this new Act.

Certification of teachers in accordance with the provisions of this Act shall be in force from the time that this Act takes effect and applicants shall exercise a choice as to the law under which they may secure a certificate, until September 1, 1923. After this date they may complete building already begun. Those who have not begun building under the old law by this date, must receive certification under the terms of this Act. [Acts 1921, 37th Leg., ch. 129, § 1.]

Explanatory.—Sections 2 to 7, inclusive, of the above act, are set forth, post, as arts. 2787, 2797a, 2799a, 2804bbbb, 2805b, 2811. The act took effect 90 days after March 12, 1921, date of adjournment.

Art. 2785b. Repeal.—That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed; provided that, nothing in this Act shall be construed as invalidating or in any way affecting any certificates issued prior to September 1, 1925, or affecting or limiting the rights and privileges of the holders thereof. [Id., § 8.]

Art. 2786. County board of examiners; appointment, etc.; county superintendent to forward examination papers, etc.; fees; issuance of second-grade certificates; examinations; duties of state superintendent.—There shall be in each organized county in this State a county board of examiners composed of two persons to be appointed by the county superintendent or the ex-officio county superintendent. A person to be eligible to appointment on the county board of examiners must be the holder of a teacher's first grade State certificate or a State certificate of higher grade. The members of the county board of examiners shall serve during the pleasure of the county superintendent, and shall meet at

the call of the county superintendent. The State Superintendent may, for cause approved by the State Board of Education, require the county superintendent to dismiss appointees from the county board of examiners. In such cases the vacancy must be filled by an appointee approved by the State Board of Education. The county superintendent shall promptly forward to the State Superintendent to be submitted to the State Board of Examiners, the examination papers of applicants for certificates, together with the reports of the county board of examiners on a prescribed form furnished by the State Department of Education, with a fee paid to him by each of the applicants.

The passage of this law shall not be construed to prohibit the county board of examiners from issuing county second grade certificates provided the examination shall meet the requirements for second grade certificates. After August 31, 1920, no county certificate shall be granted for a term longer than one year. A county certificate may be extended one year, provided the applicant produces evidence of having taken eight weeks professional training at a State Normal College or at any school recognized by the State Department of Education as a first class university or junior college. Such applicant must have made a passing grade on at least three of the subjects studied.

The State Board of Examiners shall, at their next meeting after the receipt of said papers and reports, together with the fees, examine the papers and shall make a report to the State Superintendent recommending that certificates be issued or be not issued, according to the grades made.

The county board of examiners of each county shall hold an examination, if there be applicants, on the first Friday and Saturday following in the months of April, June, July, September and December of each year, and the State Superintendent of Public Instruction may authorize such other examinations as may be necessary to secure an adequate force of certified teachers. Said board of examiners shall use the questions prescribed by the State Department of Education and shall conduct the examination in accordance with the rules and regulations prescribed by the State Department of Education and the county superintendent of public instruction.

To each applicant who has made the required grades the State Superintendent shall forward the report, together with the certificate recommended by the State Board of Examiners; and to each applicant who has failed to make the required grades, the State Superintendent shall forward the report of the State Board of Examiners without a certificate. [Acts 1911, p. 189, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 122).]

Art. 2787. Applicant for certificate; examinations in writing and English language.—Any person desiring to be examined for a teacher's certificate authorizing him or her to contract to teach in the public free schools of Texas, shall make application to the County Superintendent, stating the class of certificate desired, and shall present to the County Superintendent a statement of three good and well known citizens, or such proof as he may require of his qualifications, except the examination grades required for the class of certificate desired. After investigation, the County Superintendent shall give the applicant a written recommendation to the county board of examiners requiring them to examine the applicant for a certificate of the class mentioned; but no person shall receive such recommendation without first depositing with the County Superintendent the sum of four dollars as an examination fee, and the recommendation given by the County Superintendent shall show the re-

ceipt of said fee. The county board of examiners shall not permit any person to enter the examination who does not first present the written recommendation of the County Superintendent; provided, that all examinations provided for herein and elsewhere in the Texas School Laws shall be conducted in writing and in the English language. The County Superintendent shall forward promptly to the State Superintendent, all papers of applicants applying for State certificates, these to be submitted to the State Board of Examiners, together with the reports of the county board of examiners, on a prescribed form, furnished by the State Department of Education, with a fee of two dollars from the fee paid to him by each of the applicants applying for State certificates; provided that, until shipment of papers to the State Superintendent of Public Instruction, papers of applicants for a State certificate shall be deposited in some safe or vault at the county court house. [Acts 1911, p. 189, § 1; Acts 1921, 37th Leg., ch. 129, § 7 (§ 105).]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 2788a. Limitations as to age.—No certificate shall be granted to a person under sixteen years of age. After August 31, 1920, no certificate shall be granted to a person under seventeen years of age; and after August 31, 1921, no certificate shall be granted to a person under eighteen years of age. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 124).]

Art. 2797. Kinds of certificates.—Teachers' certificates authorizing the holders thereof to contract to teach in the public free schools of this State shall be of two kinds, as follows: (1) temporary certificates; (2) permanent certificates.

Temporary certificates shall be of the following classes:

(1) a second grade certificate; and (2) a first grade certificate.

Permanent certificates shall be of the following classes:

(1) a State permanent certificate; (2) a State first grade permanent certificate; and (3) a State permanent primary certificate. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 107).]

Art. 2797a. Same.—In accordance with the conditions and the dates specified in the preceding Section (Section one [art. 2785a,]), the following provisions shall be in force after the passage of this Act:

Teachers' certificates authorizing the holders thereof to contract to teach in the public free schools of this State shall be of three kinds, as follows: (1) Elementary Certificates, (2) High School Certificates, (3) Special Certificates.

Elementary Certificates shall be of the following classes: (1) Elementary Certificates of the second class, (2) Elementary Certificates of the first class, and (3) Elementary Permanent Certificates.

High School Certificates shall be of the following classes: (1) High School Certificates of the second class, (2) High School Certificates of the first class, and (3) High School Permanent Certificates.

Special Certificates granted to teachers of kindergarten and special branches of study shall be of two classes: (1) temporary and (2) permanent. [Acts 1921, 37th Leg., ch. 129, § 2, adding § 107a.]

See arts. 2785, 2785b, 2787, 2799a, 2804bbbb, 2805b, 2811.

Art. 2798. County superintendent to keep record of certificates; payment to person without certificate prohibited.—The county superintendent shall keep a record of all certificates held by persons teaching in the public schools of the common school districts and of the independent school districts of his county. Any person who desires to teach

in a public free school of a common school district shall present his certificate for record, before the approval of his contract. Any person who desires to teach in the public schools of an independent school district shall present his certificate to the county superintendent for record before his contract with the board of trustees of the independent school district shall become valid. A teacher or superintendent who does not hold a valid certificate shall not be paid for teaching or work done before the granting of a valid certificate, except for teaching in such branches as are exempted under the terms of this Act; * * * [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 123).]

Explanatory.—The latter part of this article is set forth, post, as art. 105b, Penal Code.

Art. 2799. Examinations for first and second grade certificates; certificates, how long valid.—After October 1, 1920, an applicant for a second grade certificate shall be examined in spelling, reading, writing, arithmetic, English grammar, elementary physiology and hygiene with special reference to narcotics, school management and methods of teaching, Texas history, United States history, and in addition, on any three of the following subjects: elementary agriculture, elementary composition, geography, drawing, and music. An applicant for a first grade certificate shall be examined in the subjects prescribed for a second grade certificate, or any three of the optional subjects prescribed for a second grade certificate, and in addition thereto, on civil government, higher English composition, elementary psychology applied to teaching, and on any four of the following subjects: algebra, physical geography, ancient history, modern history, elements of plane geometry, botany, American literature.

In taking examination for a second grade certificate, no applicant shall be permitted at any one series of examinations to take examinations on more than twelve subjects, nine prescribed, and three optional, and in taking the additional examination for a first grade certificate, no applicant shall be permitted at any one series of examinations, to take examinations on more than seven subjects, three prescribed, and four optional, as set forth in the preceding paragraph. Second and first grade certificates shall be valid, unless canceled by lawful authority, until the fourth anniversary of the thirty-first day of August of the calendar year in which the examination was held, and to receive such certificates applicant shall make on examination on all subjects an average grade of not less than seventy-five per cent and on each subject a grade of not less than fifty per cent; provided, that if the applicant makes a general average on all subjects of not less than eighty-five per cent, and on each subject a grade of not less than fifty per cent, a first grade certificate shall be valid unless canceled by lawful authority until the sixth anniversary of the thirty-first day of August of the calendar year in which the examination was held. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 108).]

Art. 2799a. Elementary certificates; high school certificates of second class.—In accordance with conditions and the dates specified in Section 1 [art. 2785a], the following provisions shall be in force after the passage of this Act.

An elementary certificate of the second class may be obtained by examination only. An applicant for an elementary certificate of the second class shall be examined in spelling, reading, writing, arithmetic, English grammar, elementary physiology and hygiene (with special reference to narcotics), school management and methods of teaching,

descriptive geography, Texas history, United States history, Texas school law relating to teachers and pupils, and, in addition, on any two of the following subjects: elementary agriculture, elementary composition, drawing, and music.

In taking examination for an elementary certificate of the second class, no applicant shall be permitted at any one series of examinations to take examinations on more than thirteen subjects—eleven prescribed and two optional. An elementary certificate of the second class shall be valid, unless cancelled by lawful authority, until the second anniversary of the thirty-first day of August of the scholastic year in which the examination was held, and to receive such a certificate an applicant shall make on examination on all subjects an average grade of not less than seventy-five per cent and on each subject a grade of not less than fifty per cent; provided that if the applicant makes a general average on all subjects of not less than eighty-five per cent and on each subject a grade of not less than sixty per cent, he may receive an elementary certificate of the second class valid, unless cancelled by lawful authority, until the third anniversary of the thirty-first day of August of the calendar year in which the examination was held.

A high school certificate of the second class may be secured by examination only.

An applicant for a high school certificate of the second class shall be examined in the subjects prescribed for an elementary certificate of the second class, on any two of the optional subjects prescribed for an elementary certificate of the second class, and in addition thereto, on civil government, higher English composition, elementary psychology applied to teaching, and on any four of the following subjects; algebra, physical geography, ancient history, modern history, elements of plane geometry, botany and American literature.

A high school certificate of the second class shall be valid unless cancelled by lawful authority until the second anniversary of the thirty-first day of August of the calendar year in which the examination was held; provided that the applicant shall make an examination on all subjects an average grade of not less than seventy-five per cent and on each subject a grade of not less than fifty per cent; provided that if the applicant makes a general average on all subjects of not less than eighty-five per cent and on each subject a grade of not less than sixty per cent, he shall be entitled to receive a high school certificate of the second class valid, unless cancelled by lawful authority, until the third anniversary of the thirty-first day of August of the calendar year in which the examination was held. [Acts 1921, 37th Leg., ch. 129, § 3, adding § 108a.]

Art. 2802. Examination for state permanent primary certificate; holder may build to permanent certificate; holder of state first-grade may build to state permanent primary; examination, etc.—After October 1, 1920, an applicant for a State permanent primary certificate shall be examined in the subjects prescribed for a second grade certificate, in any three of the optional subjects prescribed for a second grade certificate, and, in addition thereto, the subjects of civil government, higher English composition, methods of teaching applied to elementary branches, history of education, and any three of the following subjects: American literature, English literature, physical geography, English history, botany and zoology.

After October 1, 1920, the holder of a State permanent primary certificate may build to a State permanent certificate during the first six years of the validity of said certificate, by taking examinations in any

eight of the prescribed or optional subjects required for a permanent certificate, which were not included in the examinations on which the permanent primary certificate was secured; provided that a person holding a State permanent certificate secured by building on a State first grade certificate may build to a State permanent certificate by taking examinations in any four of the prescribed or optional subjects required for a State permanent certificate which were not included in the examinations on which the permanent primary certificate was granted.

After October 1, 1920, the holder of a State first grade certificate may build to a State permanent primary certificate by taking the examination in history of education, methods of teaching applied to the elementary branches of study, and on any two of the following subjects: English literature, English history, physical geography, botany, and zoology.

The applicant in building from a State first grade certificate to a State permanent primary certificate, shall take the examination in one or more of the additional subjects at the same examination. Any applicant for a permanent primary certificate, in order to receive such a certificate, shall make a general average of eighty-five per cent on all the subjects and a grade of not less than fifty per cent on each subject.

An applicant in building from a permanent primary to a State permanent certificate, if this was obtained by building on a State second grade certificate, shall not be permitted at any one series of examinations, to take the examination in more than eight additional subjects; and if this was obtained by building on a State first grade certificate, shall not be permitted at any series of examinations to take the examination on more than four additional subjects.

After October 1, 1920, an applicant for a State permanent certificate shall be examined on the subjects prescribed for a second grade certificate, on any three of the optional subjects prescribed for a second grade certificate, on the additional subjects prescribed for a first grade certificate, on any four of the optional subjects prescribed for a first grade certificate, and, in addition thereto, on the history of education, methods of teaching as applied to the elementary branches of study, and on any six of the following subjects: English literature, chemistry, solid geometry, physics, plane trigonometry, elementary double-entry bookkeeping, economics, biology, school administration, geology, child-study, advance grammar. The applicant, in order to receive such certificate, shall make on all subjects an average grade of not less than eighty-five per cent and a grade of not less than fifty per cent on each subject. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 109).]

Art. 2804. Building to higher grade certificates.—A person holding a second grade certificate may build to a first grade certificate or to a permanent primary certificate during the validity of the said second grade certificate by taking the examination in the additional subjects and making the required grades, said person having the privilege of being examined in one or more subjects at any one examination in building on his second grade certificate. A permanent record of his examination shall be made in the State Department of Education, and upon the surrender of the lower class certificate the higher class certificate shall be issued.

The holder of a first grade certificate may build to a State permanent primary certificate or to a State permanent certificate during the validity of the said first grade certificate by taking the examination in the additional subjects, said person having the privilege of being ex-

aminated in one or more subjects at any one examination in building on a first grade certificate. A permanent record of his examination shall be made in the State Department of Education, and upon surrender of the first grade certificate, the State permanent or State permanent primary certificate, as the case may be, shall be issued.

The holder of a State permanent primary certificate may build to a State permanent certificate during the first six years of the validity of said State permanent primary certificate by taking the examination in the additional subjects, and making the required grades, said person shall have the privilege of being examined in one or more of the subjects at any one examination in building on his State permanent primary certificate. A permanent record of his examination shall be made in the State Department of Education, and upon the surrender of the lower class certificate the higher class certificate shall be issued. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 110).]

Art. 2804a. Certificate holders eligible to teach in what grades, etc.—The holder of a second grade certificate or of a permanent primary certificate shall be eligible to contract to teach only the elementary grades of the public schools of Texas; that is, in the grades one to seven, inclusive. The holder of a State first grade certificate, or a State permanent certificate shall be eligible to contract to teach in any public free school of Texas. [Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1, adding § 110a.]

Art. 2804b. Duration of permanent certificates.—A State permanent primary certificate or a State permanent first grade certificate, or a State permanent certificate shall be valid during the life of the holder, unless canceled by lawful authority. [Id., § 1, adding § 110b.]

Art. 2804bb. Collegiate credits substitute for examinations; double counts.—An Applicant for examination for any certificate, may present, in lieu of an examination on any subject required for that certificate, one year's credit in that subject taken in any university, normal college, or junior college, which is classed by the State Department of Education as a university or junior college of the first class. In this event, the applicant must present an official statement of the grade on this subject given him by the said university or college, which grade shall be counted, for his average; among the grades obtained by examination. A course which has once been counted toward a State certificate, shall not again be counted for a State certificate. [Id., § 1, adding § 110c.]

Art. 2804bbb. Experience in teaching as basis for issuance of certificate or extension.—A person who for fifteen consecutive years or more, has been the holder of a State first grade certificate, and who can furnish evidence of successful experience in teaching for fifteen or more consecutive sessions of school shall be entitled to receive a State permanent first grade certificate.

Provided further, that a teacher who has taught successfully for five years on a first grade State certificate, if this certificate has expired may, on recommendation of the county school board and the county superintendent, have this first grade State certificate extended for a period of one year; provided that no extension of certificates under the provisions of this Act shall apply after the session of 1921-1922. [Id., § 1, adding § 110d.]

Art. 2804bbbb. Building on elementary certificate; examinations.—The holder of an elementary certificate of the second class may during

the validity of said certificate build to a high school certificate of the second class by taking examination in the additional subjects required for a high school certificate of the second class and in any four of the optional subjects prescribed for a high school certificate of the second class.

An applicant who, at one series of examinations, takes examinations on all of the subjects required for a high school certificate of the second class, shall not be permitted to take examination, at any one series of examinations, on more than twenty subjects, fourteen required and six optional, as specified in the requirements, respectively, for the issuance of elementary and a high school certificate of the second class. An applicant who takes at one series of examinations all of the examinations necessary to raise an elementary certificate of the second class to a high school certificate of the second class, shall not be permitted to take examinations, during any one series of examinations on more than seven subjects, three prescribed, and four optional. [Acts 1921, 37th Leg., ch. 129, § 4, adding § 110e.]

Art. 2804c. Extension of certificates of persons serving in army.—All teachers' certificates held by persons who are enlisted or may hereafter be enlisted in the United States army service during the war with Germany or any other foreign foe shall, upon honorable discharge be extended by the State Superintendent of Public Instruction, upon proper application, for a period equal to that in which the applicant was engaged in the army service. [Acts 1918, 35th Leg. 4th C. S., ch. 65, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 2805. [Repealed.]

Explanatory.—Acts 1921, 37th Leg. ch. 129, § 5, repeals sections 114, 116, 117, and 119 of ch. 96, Acts 32d Leg., as amended by Acts 3d Called Session, 36th Leg., ch. 61, and enacts as a substitute therefore the provision set forth below as art. 2805b.

Art. 2805a. Summer normal institutes; certificates, etc.

In general.—Where plaintiff, who held a first grade teachers' certificate and had taught for 10 years, was designated as one of the faculty for a summer normal institute for colored teachers, the holding of which was authorized by the state superintendent of public schools, plaintiff was qualified to be a member of the faculty within this article, and, where no reason appeared to the contrary, he was entitled to his pro rata of the tuition collected. *Williamson v. Carr* (Civ. App.) 219 S. W. 1116.

Art. 2805b. Certificates to persons completing normal school, university or college courses; high school certificates; value of certificates; terms defined; duration of certificates; classification of institutions of learning.—An applicant who completes the first year course of a Texas State normal school shall be entitled to receive an elementary certificate of the first class, which shall be valid unless cancelled by lawful authority until the second anniversary of the thirty-first day of August of the calendar year in which the certificate was issued.

An applicant who completes the second-year course of a Texas State normal school shall be entitled to receive an elementary certificate of the first class, which shall be valid, unless cancelled by lawful authority, until the third anniversary of the thirty-first day of August of the calendar year in which the certificate was issued.

A person who has satisfactorily completed five full courses in any Texas State Normal College, or in any university, senior college, junior college, or normal college which are ranked as first class by the State Superintendent of Public Instruction shall be entitled to receive from the State Department of Education an elementary certificate of the first class, which shall be valid unless cancelled by lawful authority, until the

fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued; provided that the five courses shall include at least one course in education dealing especially with elementary education, at least one course in English, and that not more than two courses may be taken in one subject; and provided further that all of these five courses must be those only which the college recognizes as credit towards its diploma or degree.

An applicant who has satisfactorily completed the second year of college work in a Texas State Normal College, and who has specialized in the materials of elementary education, including a minimum of thirty-six recitation hours of practice teaching in the elementary grades, under the supervision of a critic teacher, shall be entitled to receive a permanent elementary certificate.

An applicant who has satisfactorily completed the second year's work of a university, or senior or junior college, other than a Texas State Normal College, which is classified as first class by the State Superintendent of Public Instruction, in which work shall be included two courses of professional training, shall be entitled to receive an elementary certificate of the first class, valid until the sixth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued; provided that the holder of this certificate shall, upon completion of five years of successful elementary teaching, be granted a permanent elementary certificate; provided further that the satisfactory completion of any year's work at any Texas State Normal College, or any university, senior college, junior college, or normal college, which are ranked as first class by the State Superintendent of Public Instruction, may be substituted for a year's successful teaching, if this attendance at college take place after the issuance of the certificate.

A high school certificate of the first class, valid until the second anniversary of the thirty-first day of August of the scholastic year in which the certificate is issued, shall be granted to a student who has satisfactorily completed five full courses in any Texas State Normal College, or in any university, senior college, junior college or normal college, which is ranked as first class by the State Superintendent of Public Instruction; provided that the five courses shall include at least one course in education, and at least one course in English, and that not more than two courses may be taken in any one subject; and provided further that all these five courses must be those only which the college recognizes as credit towards its diploma or degree.

A high school certificate of the first class, valid until the fourth anniversary of the thirty-first day of August of the scholastic year in which the certificate is issued, shall be issued to a student who completes two years of college work in any Texas State Normal College, or in any University, senior college, junior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, provided that this work shall include two courses in education, one of which shall bear upon training for high school teaching.

A high school certificate of the first class, valid until the sixth anniversary of the thirty-first day of August of the scholastic year in which the certificate is issued shall be granted to a student who completes three years of college work in a Texas State Normal College or in any university, senior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, provided that this work shall include three courses in education, one course of which must include a minimum of thirty-six recitation hours of practice teach-

ing and one course of which shall bear upon training for high school teaching.

A permanent high school certificate shall be granted to a student who has satisfactorily completed a four year course, leading to a degree, in a Texas State Normal College or in any university, senior college, or normal college, classified as first class by the State Superintendent of Public Instruction, provided that this work shall include four courses in education, one of which shall bear upon high school teaching and one of which shall consist of study of methods, observation of methods, and practice in teaching, one of which shall bear upon high school teaching.

Any person who holds a diploma conferring upon him the degree of Bachelor of Arts, or any equivalent Bachelor's degree, or any higher academic degree, from any Texas State Normal College, or any University, senior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, who has not had four full courses in education, but who furnishes satisfactory evidence of having completed two full courses in education, one of which shall bear upon high school teaching, and of having had not less than three years' successful experience in teaching, aggregating not less than twenty-seven months, subsequent to the taking of the degree, shall be entitled to receive from the State Department of Education, a permanent high school certificate, which shall be valid anywhere in the State, unless cancelled by lawful authority; provided that a person on receiving such a diploma and degree from any Texas State Normal College, or any university, senior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, who has taken two full courses in education, one of which shall bear upon high school teaching, and who has not had three years' successful experience in teaching, may be granted a temporary high school certificate, valid until the fourth anniversary of the thirty-first day of August of the scholastic year in which the diploma is issued.

An elementary certificate of the second class shall be valid in elementary schools, grades one to seven, inclusive.

A high school certificate of the second class shall be valid in elementary schools, grades one to seven, inclusive, and in third class high schools, and unclassified high schools, but not in first and second class accredited high schools.

An elementary certificate of the second class shall be valid only in elementary schools, grades one to seven, inclusive; provided that, the holder of an elementary certificate based upon the completion of two years of college work in a Texas State Normal College, or in any university, senior college, junior college, or normal college, ranked as first class by the State Superintendent of Public Instruction, may contract to teach in unclassified high schools, and in high schools of the third class.

A high school certificate of the second class shall be valid in elementary schools, grades, one to seven, inclusive, and in third class high schools, and unclassified high schools, but not in first and second class accredited high schools.

A two-year high school certificate of the first class shall be valid in the elementary grades, one to seven, inclusive, in third class high schools, and unclassified high schools, but not in accredited high schools of the first and second class.

A high school certificate of the first class, valid for four years or six years, shall entitle the holder to contract to teach in any elementary grade or in any high school.

The term course as relating to college work, wherever it occurs in this Act is to be taken as designating not less than the equivalent of 108 recitation hours of work.

The term scholastic year is herein specified as meaning from the first day of September to the thirty-first day of the following August.

In all cases of elementary, high school, or special certificates, granted on college work, the validity of the certificate shall begin with the date of the completion of the work on which the certificate is granted, and shall expire on the thirty-first day of August of the scholastic year, for the specified length of time for which the certificate was issued.

The State Board of Examiners shall on application of institutions to be recognized as colleges or universities of the first class, make investigations as to the courses of study and the standards of such institutions, and shall make recommendations to the State Superintendent of Public Instruction, who shall give them such rating as the standards of their work may justify. Any school applying for approval under the provisions of this Act shall pay a fee of twenty-five dollars, and each applicant for teacher's certificate on college credentials shall pay a fee of one dollar to cover the expenses of inspection and standardization of approved colleges.

It shall be the duty of the State Superintendent of Public Instruction to appoint a suitable person or persons of recognized college standing, who shall make a thorough inspection of the equipment and standards of instruction maintained in each school applying for approval under this Act, and who shall make a detail report to the State Board of Examiners for their consideration. The State Board of Examiners shall make recommendation to the State Superintendent of Public Instruction in regard to the classification of schools applying for approval under the provisions of this Act, and shall give to them such rating as the standards of their work may justify.

The State Superintendent shall have each school receiving the benefits of this Act thoroughly inspected from year to year as to its standards and facilities of instruction, and he shall have authority to suspend any school from the benefits of this Act which fails for any reason to maintain the approved standards of classification. [Acts 1911, p. 189, § 1 (§§ 114, 116, 117, 119); Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1; Acts 1921, 37th Leg., ch. 129, § 5.]

Explanatory.—Acts 1921, 37th Leg., ch. 129, § 5, repeals sections 114, 116, 117, 119, of Acts 1911, ch. 96, as amended by Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1, and as a substitute therefor enacts the provision as above set forth. The act took effect 90 days after March 12, 1921, date of adjournment.

Arts. 2806–2808. [Repealed.]

Explanatory.—Repealed by Acts 1921, 37th Leg. ch. 129, § 5, and the provisions of such articles re-enacted in a single section set forth, ante, as art. 2805b.

Art. 2809. Certificates based on diplomas or certificates from other states.—The holders of diplomas or certificates from other States, who desire certificates valid in Texas, shall present such diplomas or certificates to the State Superintendent, who shall require the State Board of Examiners to make investigations as to the value of such diplomas or certificates as measured by the standards for certificates in this State; and the State Superintendent of Public Instruction shall have the power to issue to the holder of a diploma or certificate from another State such Texas certificate as, in his judgment, the holder is entitled to receive, when the value of his diploma or certificate is estimated by the standards required for Texas certificates; provided that

no certificates may be issued, if the said diploma or certificate is not estimated to equal the lowest State certificate issued in Texas. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 120).]

Art. 2810. City certificates.—A city or a town which has a scholastic population of one thousand or more and has become an independent school district and which levies a local tax for educational purposes or which maintains a system of free schools for nine months in each year, and which has employed a superintendent of city schools may have a city Board of Examiners. Said Board of Examiners shall in all cases consist of the City Superintendent, of the City Schools; together with two other persons who shall be appointed by him, and who shall be teachers. The City Board of Examiners is hereby authorized to issue certificates valid only in the city in which they are issued, such certificates shall be temporary.

Temporary city certificates shall be of three classes, as follows: Second Grade, First Grade, and High School. A temporary city certificate shall be good for two years, unless cancelled by lawful authority, and a Second City certificate shall not be issued to any person. The further regulation of the issuance of such certificates shall be provided for by the board of trustees of such cities or towns; provided, that no city or town shall make the requirements for a temporary certificates inferior to the requirements provided by law for county or State certificates of the corresponding grades. Nothing in this chapter shall interfere with the validity of outstanding certificates in such cities or towns. Cities and towns authorized by the provisions of this chapter to have a City Board of Examiners may at the discretion of the Superintendent of City Schools, employ a teacher of any special branch not included in the requirements of a state certificate without requiring an examination or a teacher's certificate; and nothing in this chapter shall prevent the Board of Trustees of any city or town from recognizing the certificate issued in any other such city or town in this State and validating the same in the city or town so recognizing.

A superintendent of schools in any city or town of this State shall be required to be the holder of a State First Grade or State permanent certificate, and no school board may legally contract with any superintendent who is not the holder of a State first grade or State permanent certificate, provided, however, this certificate requirement shall not apply to a Superintendent who has held a position as city or town superintendent for a period of ten consecutive years in the school in which he or she is employed. [Acts 1911, p. 189; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (118); Acts 1921, 37th Leg., ch. 93, § 1 (118).]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 2811. Special certificates.—Special certificates may be issued authorizing the holders to teach in a kindergarten or to teach the special subjects specified in this Section of this Act.

A person who has satisfactorily met the college entrance requirements of any Texas State Normal College or any university or senior college, junior college, or normal college, ranked as first class by the State Superintendent of Public Instruction and who has satisfactorily completed one years training in a kindergarten training school for teachers which has been classified by the State Superintendent of Public Instruction as a kindergarten training school of the first class, shall be entitled to receive a kindergarten certificate valid for two years, and the holder thereof on completing the equivalent of three courses of

additional work at a kindergarten training school classified as first class by the State Superintendent of Public Instruction, shall be entitled to have this certificate extended for one year.

A person who has satisfactorily met the college entrance requirements of any Texas State Normal College or any university, or senior college, junior college, or normal college ranked as first class by the State Superintendent of Public Instruction and who has satisfactorily completed a two-year college course in kindergarten training school for teachers, classified by the State Superintendent of Public Instruction as a kindergarten training school of the first class, shall be entitled to receive a kindergarten certificate valid for four years. The holder of such certificate, after three years of satisfactory experience in teaching in a kindergarten, shall be entitled to receive a permanent kindergarten certificate; provided that it shall be illegal for a person to teach in a public school kindergarten, unless he or she is the holder of a kindergarten certificate.

Certificates authorizing the holders to teach the special subjects of agriculture domestic art, domestic science, commercial subjects, public school drawing, expression, manual training, physical training, public school music, vocal music, instrumental music, industrial training, or foreign languages may be granted to applicants as follows:

An applicant who has met the college entrance requirements of any Texas State Normal College, or any university or senior college, junior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, and, in addition thereto, has satisfactorily completed ten college courses, at least one of which shall be in English, at least one of which shall be in education, and at least one of which shall be in the special subject on which the certificate is issued, these courses to be taken in any Texas State Normal College, or any university, or senior college, junior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, shall be entitled to receive a special certificate authorizing him to make contract to teach his special subject, which special certificate shall be valid until the third anniversary of the thirty-first day of August of the scholastic year in which the certificate was issued; provided that one of these courses must include special methods of teaching the subject on which the certificate is granted.

An applicant who has met the college entrance requirements of any Texas State Normal College, or any university, senior college, or normal college, which is ranked as first class by the State Superintendent of Public Instruction, and in addition thereto has satisfactorily completed fifteen college courses, at least one of which shall be in English, at least one of which shall be in education, and at least three of which shall be in the subject on which the certificate is granted, these courses to be taken in any Texas State Normal College, or any university, or senior college, or normal college, ranked as first-class by the State Superintendent of Public Instruction, shall be entitled to receive a certificate entitling him to contract to teach his special subject, which certificate shall be valid until the fourth anniversary of the thirty-first day of August of the scholastic year in which the certificate is granted.

It is especially herein provided that the holder of a special kindergarten certificate, or a special certificate in commercial subjects, public school music, public school drawing, or physical training, on the completion of three years of teaching the special subject during the validity of his certificate or certificates, shall be entitled to receive a permanent

special certificate in his subject, valid for use in the public schools, unless cancelled by lawful authority.

An applicant who has met the college entrance requirements of any Texas State Normal College or any university or senior college, or normal college, ranked as first class by the State Department of Education, and in addition thereto, has completed twenty college courses, at least one of which shall be in English, at least one of which shall be in education, and at least four of which shall be in his special subject, these courses to be taken in any Texas State Normal College, senior college, or normal college, ranked by the State Superintendent of Public Instruction as a college of the first class, shall be entitled to receive a permanent certificate in his special subject, valid for life unless cancelled by lawful authority; provided that the college courses shall include special methods of teaching the subject on which the certificate is issued.

After September 1, 1925, teachers who devote the major portion of their time to teaching or supervising special subjects, shall be required to hold a high school certificate or a special certificate, as provided for in this Act, on the special subject in which they give instruction or supervise work.

For the scholastic year of 1920-21, Texas universities and colleges shall have the right, if preferred, to continue their former laws granting privileges on which they have made pledges to their students, to fulfill the pledges authorized by these former laws. [Acts 1911, p. 189; Acts 1921, 37th Leg., ch. 129, § 6 (121).]

Explanatory.—Acts 1921, 37th Leg., ch. 129, § 6, repeals section 121, ch. 96, Acts 32d Leg., and enacts as a substitute therefor the provision as above set forth. The new act took effect 90 days after March 12, 1921, date of adjournment. See art. 2785a.

Art. 2814a. Outstanding certificates not affected; power of cities.—Nothing in this Act shall be construed to impair the validity of outstanding city, county, or State certificates, cities and towns may, at the discretion of the superintendent, employ a teacher of any special branch not included in the requirement for a State certificate, without requiring a teacher's certificate. [Acts 1920, 36th Leg. 3d C. S., ch. 61, § 3.]

The act took effect 90 days after June 18, 1920, date of adjournment. Sec. 4 of the act repeals all laws in conflict.

CHAPTER FIFTEEN

COMMON SCHOOL DISTRICTS

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SCHOOL PROPERTY

2844. Trustees to contract for building.
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2849. Title to property.

Article 2815. Establishment of districts.

Cited, *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623.

Legislative control.—Under Const. art. 7, § 3, as to school districts, the Legislature can exercise the same authority over a school district through a special law, without notice, as through a general law. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

Application.—A school district created prior to 1905 was not required to contain nine square miles, and, its area never having been reduced, this article has no application. *Mayhew v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 943.

Change of lines.—The boundaries of a school district may not be changed, so as to reduce the taxable value of the property included in it after the district has issued bonds which are outstanding obligations, under this article, by appeal to the injunctive power of the court, since the court cannot do indirectly what cannot be done directly by the commissioners' court. *Harbin Independent School Dist. v. Denman* (Com. App.) 222 S. W. 538, reversing judgment (Civ. App.) 200 S. W. 176.

Art. 2815a. Common county line districts.

Venue of suit against district.—Suit to oust defendants, trustees of a county line school district under control of C. county, in which defendants resided, from exercising or asserting any corporate right, franchise, privilege, or jurisdiction over that portion of the school district taken from a district in G. county, was an attack upon the corporate existence of the district, and the district, through its trustees, had the privilege of being sued in C. county, the situs of the district fixed by this article, and art. 2815b. *State v. Waller* (Civ. App.) 211 S. W. 322.

This article contemplated that the domicile of a school corporation shall be in the county which is given control and management of the public schools in the county line districts. *Id.*

Art. 2815b. Rights, powers and privileges of common county line districts; management; taxes; bonds, etc.

See *State v. Waller* (Civ. App.) 211 S. W. 322.

Art. 2815c. Land taken into city or town constituting independent school district to constitute part of city district; adjustment of bonded indebtedness, etc.—Whenever the limits of any incorporated city or town within this State, which city or town constitutes an independent school district shall be so extended or enlarged, or shall have been so extended or enlarged, as to embrace within the limits of such incorporated city

or town the whole or any part of any independent or common school district adjacent to such incorporated city or town, that portion of such adjacent independent or common school district so embraced within the corporate limits of such incorporated city or town, shall thereafter become a part and portion of the independent school district constituted by such incorporated city or town.

Provided, however, that if such independent or common school district so brought, in whole or in part, within the limits of such incorporated city or town, shall have an outstanding bonded indebtedness, then such incorporated city or town shall become bound and liable for the payment of such proportion of the bonded indebtedness of such independent or common school district as the assessed value of the portion of such independent or common school district so brought within the incorporated limits of such city or town, shall bear to the whole assessed value, of such independent or common school districts so encroached upon, as such assessed values are shown upon the last preceding county tax assessment rolls; and thereafter, such incorporated city or town shall pay either directly or through the officer of such independent or common school district, the proportion of the interest and principal of such bonded indebtedness for which they so become liable.

If within the portion of such independent or common school district so brought within the limits of an incorporated city or town there should be situated any real property belonging to such independent or common school district, such city or town may acquire the same upon such terms as may be mutually agreed upon between the city council of such city and the authorities of such independent or common school district.

Provided, further, however, that none of the provisions of this article shall be applicable where it shall be determined at an election held within such incorporated city or town by majority vote of those voting thereon that the territory or any portion thereof to be taken into the limits of such incorporated city or town shall not thereby become a part and portion of the independent school district constituted by such incorporated city or town, but shall be taken into the city limits for municipal purposes only, and shall remain for school purposes, a portion of the adjacent independent or common school district as though said city limits had not been extended. [Acts 1917, 35th Leg. 1st C. S., ch. 28, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 44, § 1.]

Took effect July 25, 1919.

Art. 2815d. Town or village incorporated for free school purposes only liable for proportion of bonded indebtedness of part of common school district within limits.—In all cases where any town or village has heretofore been incorporated or may hereafter be incorporated for free school purpose only and which shall include within the limits thereof any portion or portions of any common school district which has an outstanding bonded indebtedness, then such town or village, incorporated for school purposes only, shall become bound and liable for the payment of such proportion of the bonded indebtedness of the common school district as the assessed value of the portion of such common school district included within the limits of the district so incorporated for free school purposes only, shall bear to the entire assessed value of the common school district from which the same was taken, as such assessed values are shown upon the last preceding county tax assessment roll; and thereafter such incorporated town or village shall pay either directly or through the officers of such common school district, the proportion of the interest and principal of such bonded indebtedness for which it is

liable. [Acts 1917, 35th Leg. 1st C. S., ch. 28, § 1a; Acts 1919, 36th Leg. 2d C. S., ch. 44, § 1a.]

Took effect July 19, 1919.

Art. 2816. Commissioners' Court may change district lines.

Cited, *Mathis v. Pritchard* (Civ. App.) 196 S. W. 623; *Lovelady v. County Board of School Trustees* (Civ. App.) 214 S. W. 622.

Power of board of school trustees.—Under title 48, ch. 11A, the board of school trustees became vested with the power of the commissioners' court under Rev. St. 1911, art. 2816, to change the boundaries of any independent school district and to consolidate such districts. *Hill County School Trustees v. Melton* (Civ. App.) 199 S. W. 1142.

Art. 2817. Court shall give metes and bounds of each district.

Order establishing boundaries.—Order of county school trustees, apportioning a part of consolidated district to an independent district, held to insufficiently comply with Rev. St. 1911, art. 2817, requiring land affected to be described by metes and bounds. *Hill County Board of School Trustees v. Bruton* (Civ. App.) 217 S. W. 709.

Art. 2817b. Validation of districts.—All common school districts in this State heretofore laid out and attempted to be established by the proper officers of any county, and heretofore recognized by said county authorities as school districts of said county, are hereby validated in all respects as though they had been duly and legally established in the first instance. [Acts 1920, 36th Leg. 3d C. S., ch. 7, § 1.]

Took effect June 8, 1920.

Art. 2817c. Same.—All common school districts containing less than nine square miles in which an election for the purpose of issuing bonds has been held subsequent to July 1, 1919, or may hereafter be held, are hereby validated as common school districts and are hereby authorized to issue bonds in the same manner as common school districts containing more than nine square miles. [Acts 1920, 36th Leg. 3d C. S., ch. 55, § 1.]

Took effect June 18, 1920.

Art. 2817d. Bond elections validated.—All elections for the purpose of issuing bonds in common school districts containing less than nine square miles, and which said elections have been held subsequent to June 1, 1919, and in which the proposition to issue bonds was carried by legal majority of the qualified voters, voting at said election, as required in districts containing more than nine square miles, are hereby validated, and the same are in all things validated from and after the first day of July, 1919; provided said election or elections were ordered by the commissioners court, and in its order correct field notes of said district were contained and the correct boundaries of said district recorded in the minutes of said court in said order, although the petition for election may have been presented to the commissioners court prior to the establishment of the exact boundaries of said district; and all bonds authorized by said election or elections are hereby validated and shall have the same force and effect and shall be payable in the same manner as if said district contained more than nine square miles and the field notes thereof properly defined prior to the presentation of the petition for the election and said bonds shall be issued in the same manner as now provided by law for the issuance of bonds in common school districts containing more than nine square miles. [Id., § 2.]

Art. 2817e. Act cumulative.—This Act shall be cumulative of all laws on the subject of issuing bonds in common school districts now in effect, and not in conflict herewith. [Id., § 3.]

CONSOLIDATION OF DISTRICTS FOR SCHOOL PURPOSES

Art. 2817 $\frac{1}{4}$. **Petition to county judge; order for election; canvass of returns; declaration of consolidation; consolidation of common school districts with independent districts; procedure; district defined.**—When any number of contiguous Common School Districts within this State, desiring to consolidate for school purposes, present a petition to the county judge of the county wherein such districts are situated, signed by twenty or a majority of the legally qualified voters of each district so desiring to consolidate, the county judge shall issue an order for an election to be held in each of the Common School Districts so petitioning, which elections shall be held on the same date. The county judge shall give notice of the date of such elections by publication of the order in some newspaper published in the county, for twenty days prior to the date on which such elections are order, or by posting a notice of such elections in each of the districts, or by both such publication and posted notices.

The Commissioners' Court of the county in which such elections are held shall at its next meeting canvass the returns of such elections, and if the votes cast in each and all districts show a majority in favor of the consolidation of such common school districts, the Commissioners' Court shall declare such common school districts consolidated, said districts being contiguous territory.

It is herein provided that in the same manner as is described in Section 1, common school districts may be consolidated with contiguous independent School Districts, and that when common school districts are so consolidated with an independent school district, the district so created shall be known by the name of the independent school district included therein, and the management of the new district shall be under the existing board of trustees of the Independent District, and that all the rights and privileges granted to independent districts by the laws of this State shall be given to the consolidated independent districts created under the provisions of this Act.

The term "District" as hereinafter used shall be construed to mean "consolidated common school district" or "consolidated independent school district," as the case may be. [Acts 1919, 36th Leg. 2d C. S., ch. 65, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

Art. 2817 $\frac{1}{4}$ a. **Assumption of outstanding bonds and tax levy therefor; election to determine.**—If at the time of such proposed consolidation there are outstanding bonds of any one or more of the districts proposed to be consolidated, then at an election held for that purpose on some future day, there shall be, or at the election held for the purposes of consolidation, there may be submitted to the qualified tax paying voters of such proposed consolidated district the question as to whether or not the said consolidated district shall assume and pay off the said outstanding bonds and whether or not a tax shall be levied therefor, provided that if said election on the question of assuming said outstanding bonds is held on the day upon which the election on the question of consolidation is held, in that event, there shall be separate notices, ballots, and ballot boxes and tally sheets for the two separate elections. If a majority of said voters should vote at either of said elections to assume and pay off said bonded indebtedness, then said bonded indebtedness shall become valid and subsisting obligations of said consolidated district, and the proper officers thereof shall annually thereafter levy sufficient taxes

to pay the interest thereon as it accrues and to create a sinking fund which in addition to the sinking funds already accumulated in the original bonded district or districts will pay off and retire the said outstanding bonds when they shall become due. [Id., § 2.]

Art. 2817 $\frac{1}{4}$ b. Trustees of consolidated district; appointment; election; terms and oath of office; officers of board; vacancies.—The Board of County School Trustees at its next meeting after such consolidation of school districts is declared shall appoint a board of seven trustees for the consolidated district. The terms of office of three of the trustees so appointed shall expire on the first day of May next following their appointment, and the terms of office of the other four trustees shall expire on the first day of May of the succeeding year, the trustees so appointed to determine by lot which three trustees shall serve the short term and which four of their number shall serve the long term, and each year thereafter alternately three trustees and four trustees shall be elected by the qualified voters of the district on the first Saturday of April of every year, which trustees so elected shall enter upon the discharge of their duties on the first day of May next following. District trustees shall qualify by taking the oath of office required of all State Officers in this State, which oaths shall be filed with the county superintendent of the county wherein the district is situated. The board of trustees after being qualified shall immediately organize by electing one of their number president and another secretary, a report of which organization shall be filed with the county superintendent. Trustees so elected shall each serve for two years from the first day of May of the year in which they are elected or until their successors are elected and qualified, and in case a vacancy is created in any board of district trustees by resignation or otherwise, the board of county school trustees shall fill such vacancy by appointment, which appointment shall extend to the time of the next regular election for district trustees. [Id., § 3.]

Art. 2817 $\frac{1}{4}$ c. Officers to conduct election of trustees; compensation; notice of holding of election; qualifications of trustees.—The board of trustees of the district shall appoint three persons, qualified voters of the district, to hold election for district trustees, who shall make returns thereof to the board of trustees of the district within five days after such election shall have been held, the three persons holding such election shall receive as compensation for their services the sum of two dollars each, to be paid out of the general fund of the county in which said election was held. The board of trustees when ordering such election and appointing persons to hold election shall give notice of the time and place where such election will be held, which notice shall be posted in three public places in the district twenty days prior to the date in which such election is ordered to be held. If at the time and place for holding such election, any or all of the persons so appointed to hold such election are absent or refuse to act, then the electors present may select of their number a person or persons to act in the place of those absent or refusing to act.

No person shall be eligible to serve as school trustee who is unable to read and write the English Language understandingly, and who has not been a resident of the State one year and of the district six months prior to the election for trustees. [Id., § 4.]

Art. 2817 $\frac{1}{4}$ d. District superintendent; election; term of office; duties; teachers; employment; term; contracts.—The board of trustees so elected shall employ a district superintendent for the district.

who shall be elected for one year or for two years as the trustees may determine, and who, in addition to his duties as superintendent, shall be a teacher in one of the elementary schools or the high school of the district. Acting in collaboration with the district superintendent, the board of trustees shall employ teachers for the several elementary schools of the district, or for the departments of the high school, which teachers shall be elected for one year or two years as the trustees decide, and they shall serve under the direction and supervision of the district superintendent. Contracts between the trustees and the district superintendent and teachers shall be in writing and subject to the approval of the county superintendent of the county wherein such district is situated. [Id., § 5.]

Art. 2817 $\frac{1}{4}$ e.—Visitation of schools by district superintendent; records and reports.—It shall be the duty of the district superintendent to visit personally and inspect the several schools of the district and advise with the teachers therein, and he shall be responsible to the district trustees and to the county superintendent for the proper conduct of the school work and the management of the schools of the district. The district superintendent shall spend at least one-fourth of his time in visiting and inspecting the schools of the district, and he shall make recommendations from time to time to the district trustees and to the county superintendent for any changes which in his judgment are necessary for the proper management of the schools of the district. The district superintendent shall keep such records and make such reports as are required of him by the district trustees and the county superintendent, and the county superintendent shall refuse to approve vouchers drawn against the school funds of the district until such reports are made by the district superintendent. [Id., § 6.]

Art. 2817 $\frac{1}{4}$ f. Establishment of elementary schools; instruction in.—The district trustees shall recognize or establish elementary schools within the bounds of the district as the need for such elementary schools shall appear. They shall, in so far as is practicable, provide uniform school buildings and equipment for the several elementary schools so recognized or established, and they shall arrange an annual wage schedule for the teachers employed in such elementary schools as nearly uniform as is possible. It is herein expressly provided that the instruction in the elementary schools of the district shall embrace, not more than the first seven grades or years of work as outlined in the course of study issued by the State Superintendent of Public Instruction for this State, and approved by the County Superintendent of the county wherein such elementary schools are situated. [Id., § 7.]

Art. 2817 $\frac{1}{4}$ g. Establishment of high schools; courses of instruction; transportation of pupils.—The trustees of the district may recognize or establish not more than one high school for white children and one high school for colored children within the limits of the district, which high schools shall be located with reference to the convenience of the majority of the high school pupils of either race. It is herein provided that the instruction in such high schools may embrace any or all of the four years or grades or work above the seventh grade, as outlined by the State Superintendent of Public Instruction for this State and approved by the county board of trustees of the county wherein such high schools are situated. It is herein further provided that such high school may be located and conducted in connection with some of the

elementary schools of the district as may be decided by the trustees of the district.

When in their judgment it is deemed necessary or expedient, the trustees of the district may provide for the transportation of pupils to and from any elementary school or high school of the district whereupon such pupils may be in attendance, and trustees are hereby empowered to employ transportation vehicles and drivers for such service, paying the cost thereof out of the local maintenance fund of the district or out of such other funds as may be appropriated for this purpose. [Id., § 8.]

Art. 2817¹/₄h. Taxing and bonding powers of consolidated district; free text books; appeals from such districts.—It is herein expressly provided that taxing and bonding powers as are provided for elsewhere in the laws of this State are hereby guaranteed to the district consolidating under the provisions of this Act, either common school districts or independent school districts, and it is further provided that rural school aid shall be extended to any or all of the schools of the districts so consolidating which comply with the laws and rulings governing the distribution of State aid to rural schools and independent districts. It is further guaranteed that the law providing free text books to the free schools of this State shall apply to the districts consolidating under the provisions of this Act. Appeals from consolidated common school districts shall be made to the county superintendent and Board of Education. [Id., § 9.]

Sec. 10 repeals all conflicting laws.

TRUSTEES

Art. 2819. Election officers; returns; compensation; notice of election; appointment of substitutes; eligibility of school trustees.

Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

Art. 2820. Returns of election.

Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

Art. 2822. District trustees a body corporate.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Residence of trustees is domicile of corporation.—In view of the act creating school districts, and declaring that trustees thereof are to be a body politic and corporate in law, the board of trustees is to all intents and purposes the corporation, and where they have their residence or place of business would be the domicile of the corporation. *State v. Waller* (Civ. App.) 211 S. W. 322.

Art. 2824. Make contracts for the district.

In general.—In action against school trustees for not accepting lowest bid for school-house, answer of two trustees that they had delegated to third defendant authority to receive bids does not render him individually liable to his codefendants. *Stapleton v. Trussell* (Civ. App.) 198 S. W. 269.

Location of schools.—In view of article 2749i, this article, declaring that district trustees shall determine how many schools shall be maintained in their district and at what points they shall be located, applies only to elementary schools; the later act having given county trustees authority to locate high schools and repealed all conflicting acts. *Woodson v. Stanley* (Civ. App.) 201 S. W. 659.

Art. 2826. Check for payment of teacher.—The amount contracted by trustee to be paid a teacher shall be paid on a check drawn by a majority of the trustees, on the county treasurer, and approved by the county superintendent. [Acts 1905, p. 263, § 74; Acts 1921, 37th Leg., ch. 126, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

LOCAL TAX

Art. 2827. Special tax authorized.—The commissioners' court of any county in this State shall have the power to levy a special tax for the further maintenance of public free schools and the erection and equipment of a school building or school buildings within and for each common school district located in such county; providing a majority of the qualified property tax-paying voters of the district, voting at an election held for that purpose, shall vote such tax not to exceed in any one year one dollar on the one hundred dollars valuation of the taxable property in such district; and provided further that all property assessed for school purposes in such districts shall be assessed at the rate of value of property as said property is assessed for state and county purposes. [Acts 1905, p. 263, § 57; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 1, repealing art. 2827, Rev. Civ. St. 1911.]

The act took effect March 5, 1921. See arts. 2857-2866; 2902a, 2902b, post.

Taxing power strictly construed.—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Constitutional authorization.—By Const. art. 7, § 3, as amended in 1909, the Legislature is authorized by general or special law not only to create school districts, but to provide for the assessment and collection of taxes therein and for the management and control of their schools, and to authorize the levy and collection of additional ad valorem taxes, not only in such districts as then existed, but those thereafter formed. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

Amount of tax.—That one of the two elementary schools in a district needed repairs and ornamentation justified an increase of the revenue from the district within the legal limits. *Schulz v. Davis* (Civ. App.) 207 S. W. 634.

Art. 2828. Petition for tax election.—It shall be the duty of the county judge, upon the presentation of a petition signed by twenty, or more, or a majority, of the property tax-paying voters of the district, to order an election to be held in said district for the purpose of levying a tax to supplement the State school fund apportioned to said district and to determine whether such tax shall be levied; provided, said petition shall designate either the specific rate of tax to be levied, or a rate of tax not exceeding one dollar on the one hundred dollars valuation of the taxable property of the district. The order of the county judge shall state the time and place or places of holding such election and the rate of tax to be voted on, or the proposition may be for a school tax not exceeding one dollar on the one hundred dollars valuation of taxable property of the district. The county judge shall order the sheriff to give notice of such election by posting three notices in the district for three weeks prior to said election, and the sheriff shall obey such order. Not more than one such election shall be held within a year from the date of such election. The manner of holding said election shall be governed by the provisions of Articles 2829, 2830, 2831, and 2832, Revised Civil Statutes of Texas of 1911. [Acts 1905, p. 263, § 38; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 2, repealing art. 2828, Rev. Civ. St. 1911.]

See 1918 Supp., arts. 6016½-6016¾c, as to publication in newspaper instead of posting.

Art. 2836. Levy of tax.—The county commissioners' court, at the time of levying taxes for county purposes, shall also levy upon all the taxable property within any common school district the rate of school maintenance tax said district has voted upon itself, or if the proposition shall have been for a school tax not exceeding one dollar on the one hundred dollars valuation of taxable property in the district, the commissioners' court shall levy such a rate within that limit as shall

have been determined by the board of trustees of said district and the county superintendent and certified to said court by the county superintendent. [Acts 1905, p. 263, § 66; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 3, repealing art. 2836, Rev. Civ. St. 1911.]

Suit to recover tax.—A county has no authority to receive or sue tax collector for taxes collected for either independent or common school districts and not accounted for, under this article, and arts. 2767, 2822, 2861, 2862; such taxes being payable to district treasurers which districts are the ones to sue. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Art. 2836a. Assessment of tax; lien; when special tax shall be levied; collection; commissions; disposition of taxes collected.—It shall be the duty of the tax assessor to assess said tax as other taxes are assessed and to make an abstract showing the amount of special taxes assessed against each school district in his county and to furnish the same to the county superintendent on or before the first day of September of the year for which such taxes are assessed, and the taxes levied upon the real property in said districts shall be a lien thereon, and the same shall be sold for unpaid taxes in the manner and at the time of sales for State and county taxes. A special tax voted in any district after the levy of county taxes shall be levied at any meeting of the commissioners' court prior to the delivery of the assessment rolls by the assessor. The tax assessor shall assess and the tax collector shall collect said district taxes as other taxes are assessed and collected. The tax assessor shall receive a commission of one-half of one per cent for assessing such tax and the tax collector a commission of one-half of one per cent for collecting the same. The tax collector shall pay all such taxes to the county treasurer, and said treasurer shall credit each school district with the amount belonging to it and pay out the same in accordance with the law. [Acts 1905, p. 263, § 66; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 4.]

SCHOOLHOUSE BONDS

Art. 2837. Election for issuance of bonds.—Upon the petition of twenty, or more, or a majority, of the qualified property tax-paying voters of a common school district, to the county judge, the judge shall have the power, and it is hereby made his duty to order an election to be held in such district to determine whether or not the bonds of such district shall be issued as indicated in the petition, and the annual levy of a tax sufficient to pay the current interest on said bonds and provide a sinking fund sufficient to pay the principal at maturity. The petition and the order and notice of election must distinctly specify the amount of the bonds, the rate of interest, the time in which they are to run, and the purpose for which the bonds are to be used; but it shall not be necessary to vote upon a specific rate of tax but the rate shall be determined in the manner provided by Section 11 of this Act. [Art. 2841.] [Acts 1905, p. 263, § 76; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 5, repealing art. 2837, Rev. Civ. St. 1911.]

Proof of notice of election.—When the statute prescribing the mode of notice of a school district bond election has not been complied with, it rests upon him asserting the legality of the election to prove satisfactorily that sufficient notice was given the voters, that they in fact had actual notice, and that failure to give the prescribed notice did not affect the result. *Mayhew v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 943.

Residence of voters.—In order to vote at an election to determine whether bonds shall be issued to build a schoolhouse, one must reside in and own property in the school district. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

In contest of school election, evidence held insufficient to show that one denied right to vote resided within the school district. *Id.*

Art. 2837a. Notice of election; conduct of election.—The county judge shall order the sheriff to give notice of such election by posting three notices in the district for three weeks prior to said election, and the sheriff shall obey such order; provided, that the manner of holding said election and making returns thereof shall be as in other school elections in accordance with the laws of this State. [Acts 1921, 37th Leg., ch. 24, § 6.]

See 1918 Supp. arts. 6016½-6016½c.

Art. 2838. Ballots.—The county judge shall prepare proper ballots for use in such school district bond election, and the county shall bear the expense of having such ballots printed; and all voters who favor the proposition to issue the bonds and the levy of the tax therefor shall have written or printed on their ballots the words: "For the issuance of bonds and the levying of the tax in payment thereof"; and those opposed shall have written or printed on their ballots the words: "Against the issuance of bonds and the levying of the tax in payment thereof." [Id., § 7, repealing art. 2838, Rev. Civ. St. 1911.]

Art. 2839. Issuance of bonds.—If, after the result of said election is known, it shall appear to the Commissioners' Court of the county in which such school district is located that a majority of the votes cast at such election were in favor of the issuance of the schoolhouse bonds, it shall be the duty of the Commissioners' Court, as soon thereafter as practicable, to issue said bonds on the faith and credit of the said common school district. [Id., § 8, repealing art. 2839, Rev. Civ. St. 1911.]

Art. 2839a. Interest on and terms of bonds.—Such bonds shall bear not more than six per cent (6%) interest per annum and may mature, serially or otherwise, not exceeding forty years from the date thereof; provided, that when the houses are to be built of wood, the time of the bonds herein provided for shall not be more than twenty years from their date. [Id., § 9.]

Art. 2840. Form of bonds; approval and registration; disbursement of proceeds; investment of school fund in bonds.—The said school district school house bonds shall express on their face: The State of Texas, the name of the county, and the number or corporate name of the district issuing said bonds. Such bonds shall be signed by the County Judge of the county in which the school district is located and countersigned by the County Clerk and registered by the County Treasurer of such county in accordance with the General Law relative to county bonds; and such bonds shall be examined by the Attorney General of Texas and registered by the Comptroller of Public Accounts of Texas, and when so issued they shall be sold to the highest bidder at not less than their par value, and the purchase money shall be placed in the county depository to the credit of said school district. Such funds shall be disbursed upon warrants issued by the district trustees approved by the County Superintendent in payment of accounts legally contracted in buying, building, equipping or repairing the school house or school houses for such district, or in the purchase of sites therefor. The Commissioners' Court may invest the county permanent school fund in such common school district schoolhouse bonds and the State Board of Education shall have the right to purchase such bonds on the same conditions as it may purchase other bonds. [Id., § 10, repealing art. 2840, Rev. Civ. St. 1911.]

Art. 2841. Levy of bond tax.—When the Commissioners' Court shall provide for the issuance of such bonds, and each year thereafter so long as the bonds, or any of them, are outstanding, the said Court shall levy a tax not to exceed fifty cents (50c) on the one hundred (\$100.00) dollar valuation of taxable property of said school district sufficient to pay the interest on the bonds and to produce a sinking fund, which, together with the interest thereon, when placed at interest, shall be sufficient to pay the principal of said bonds at maturity. The rate of such tax shall be determined by the trustees of the district and the county Superintendent and certified by the County Superintendent to the Commissioners' Court; provided that the rate of bond tax, together with the rate of special local tax of the district for the maintenance of schools therein shall never exceed one dollar on the hundred dollars valuation of taxable property of said school district; but if the rate of bond tax certified by the County Superintendent to the Commissioners' Court, together with the rate of maintenance tax previously voted in the district, shall at any time exceed one dollar on the hundred dollars valuation, such bond tax shall operate to reduce the maintenance tax to the difference between the rate of the bond tax and one dollar. Said school district bond tax shall be assessed and collected in the manner provided by law for the assessment and collection of special local tax for the maintenance of public free schools; provided that the rate of school tax certified to the Commissioners' Court by the County Superintendent shall be the rate to be levied by the Commissioners' Court in the school district until a change in such rate shall be recommended by the County Superintendent and board of trustees of the district within the limit herein prescribed. [Id., § 11, repealing art. 2841, Rev. Civ. St. 1911.]

Art. 2842. Tax continued until bonds are paid.—After said bonds shall have been issued and sold and said tax shall have been levied sufficient to pay said bonds and the interest thereon, as provided above, it shall not be lawful to hold an election in said district to determine whether or not said tax shall be discontinued or lowered until said bonds, together with the interest thereon, shall have been fully paid, nor shall the limits and boundaries of said common school district ever be decreased by the county board of school trustees until all of said bonds and the accrued interest thereon shall have been fully paid. [Id., § 12, repealing art. 2842, Rev. Civ. St. 1911.]

Boundaries not to be decreased after bond issue.—The boundaries of a school district may not be changed, so as to reduce the taxable value of the property included in it after the district has issued bonds which are outstanding obligations, under art. 2815, by appeal to the injunctive power of the court, since the court cannot do indirectly what cannot be done directly by the commissioners' court. *Harbin Independent School Dist. v. Denman* (Com. App.) 222 S. W. 538, reversing judgment (Civ. App.) 200 S. W. 176.

SCHOOL PROPERTY

Art. 2844. Trustees to contract for building.

See *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608.

In general.—Where jobber handled for manufacturer order for water-closets of contractors to erect schoolhouse, contractors were not agents of plumber after they had filed voluntary petition in bankruptcy. *Sanitary Mfg. Co. v. Gamer* (Civ. App.) 201 S. W. 1068.

Neither architect of school building nor superintendent of schools could be held to be agent of jobber who took order for water-closets of contractors to build school and handled it with manufacturer. *Id.*

Lowest bidder.—Petition, alleging that tax had been levied for building schoolhouse, and that school district trustees had not accepted lowest bid, states no cause of action:

this article not arbitrarily requiring acceptance of lowest bid. *Stapleton v. Trussell* (Civ. App.) 196 S. W. 269.

Bond of contractor—In general.—In action on a school building contractor's bond, payments in good faith on architect's certificates, as required by contract, are conclusive. *Texas Fidelity & Bonding Co. v. Rosenberg Independent School Dist.* (Civ. App.) 195 S. W. 298.

Under a school building contract providing that contractor should forfeit certain amount daily for delay in completing work, the surety is liable for such sum, especially where entire delay resulted from contractor's fault before he abandoned work. *Id.*

A school building contractor's default made inoperative contract provisions requiring district to pay upon architect's certificates, to retain certain amounts for paying materialmen's claims, and requiring contractor be given written notice of default before owner supplies materials, etc., so far as liability of contractor's surety is concerned. *Id.*

— **Construction.**—A school building contractor's bond broadly binding surety to carry out contract's design, true spirit, etc., will not be strictly construed in surety's favor. *Texas Fidelity & Bonding Co. v. Rosenberg Independent School Dist.* (Civ. App.) 195 S. W. 298.

The rule that parties' intent is dominant test in construing a contract applies to a bond of a school building contractor. *Id.*

Art. 2845. Lien may not be acquired.

See *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608.

Right to lien.—Under this article, where school trustees, pursuant to written contract, gave schoolhouse to a contractor, there was severance, and plaintiff, who furnished material for reconstruction of schoolhouse, was entitled to lien, although contractor sold interest in building, sale not becoming effective until after materials were furnished. *R. B. Spencer & Co. v. Brown* (Civ. App.) 198 S. W. 1179.

Art. 2846. Sale of school property.

See *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608.

Application.—This article, requiring order of commissioners' court for sale of school property, relates to common school districts, and is inapplicable to independent school districts. *R. B. Spencer & Co. v. Brown* (Civ. App.) 198 S. W. 1179.

Art. 2849. Title to property.

Deed "for school purposes."—A deed to a county judge "for school purposes," wherein the habendum clause was, "To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said C., county judge, his successors in office, heirs and assigns, forever," held a conveyance of the fee-simple title to the judge in trust for the school or schools of the district in which it is situated; the words therein "for school purposes" simply designating the beneficiaries, and not expressing conditions, especially in view of arts. 1106, 1107. *Wilson v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 669.

The nature and extent of a trust created by a deed in trust for schools may be arrived at as any other fact. *Id.*

A deed "for school purposes" to the county judges, wherein the habendum clause was, "To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said county judge and his successors (of Merriman school district) of Eastland county, Texas, heirs and assigns forever," etc., held a conveyance of the fee-simple title to the judge in trust for the school or schools of the district in which the land is situated. *Taylor v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 670.

County judge as grantee.—County judge is a sufficiently definite grantee in a conveyance of a fee-simple title in trust for the schools of the district in which it was situated. *Wilson v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 669.

Power to abandon.—Land conveyed in fee simple to the county judge, in trust for schools of the district in which it was situated, could not be abandoned. *Wilson v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 669.

Where the fee-simple title of land is conveyed to county judge in trust for schools, the school trustees cannot abandon it. *Id.*

CHAPTER FIFTEEN A

PUBLIC HIGH SCHOOLS IN COMMON SCHOOL DISTRICTS

Art.
2849a. [Superseded.]
2849b. Classification of high schools.

Art.
2849c-2849o. [Superseded.]

Article 2849a. [Superseded.]

Explanatory.—This article constitutes section 1 of ch. 26, Acts 1911. Chapter 26 of Acts 1911 is amended by Acts 1915, ch. 36, so as to read as set forth in the 1918 Supplement (Articles 2749a-2749f, 2849b, 2849bb). This would seem to supersede this article and articles 2849b-2849o as they appeared in Vernon's Sayles' Civ. St. 1914. Sections 5 and 6 of the amendatory act related specifically to high schools, and those two sections are set forth in the 1918 Supplement as articles 2849b, 2849bb.

Cited, *Jennings v. Carson* (Com. App.) 220 S. W. 1090.

Art. 2849b. Classification of high schools.

Establishment.—Under arts. 2749a-2749c, 2749f, and this article, amending Acts 32d Leg. c. 26, the county trustees alone have authority to establish high schools, and district trustees will be enjoined from attempting to select the site. *Woodson v. Stanley* (Civ. App.) 201 S. W. 659.

Arts. 2849c-2849o. [Superseded.]

See note under art. 2849a.

CHAPTER SIXTEEN

INDEPENDENT DISTRICTS

Art.
2850. Application to county judge for elections.
2851. Incorporation.
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2857. Local taxes; bonds.
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2860f. Order for election; ballots.
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2860h. Election on question of revoking, modifying or increasing tax; proviso.
2860i. Repeal.
2861. Collection of taxes.
2862. Assessment and collection of taxes by county officer.
2863. [Repealed.]
2864. Refunding bonds.
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CHANGE OF BOUNDARIES

2865. Extension of boundaries.
2866. Change in boundaries by commissioners' court.

Article 2850. Application to county judge for elections.

Cited, *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

District not a "person."—An independent school district is not a "person" within the meaning of the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond. *Devine Independent School Dist. v. Koehler* (Civ. App.) 212 S. W. 238.

Special law.—In view of Const. art. 7, § 3, as amended September 24, 1909, authorizing the Legislature to form school districts by general or special law, the enactment of a

general law did not exhaust the Legislature's power, so that Loc. & Sp. Acts 35th Leg. c. 39, creating the Wilson independent school district is constitutional. *Cain v. Lumsden* (Civ. App.) 204 S. W. 115.

Art. 2851. Incorporation.

See *Cain v. Lumsden* (Civ. App.) 204 S. W. 115; *Ammerman v. Bourland* (Civ. App.) 230 S. W. 304.

Cited, *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

In general.—Slight inaccuracies in description of boundaries of a school district are insufficient to render its incorporation void. *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176.

Collateral attack on organization.—In suit to enjoin assessment of taxes on plaintiff's land by defendant school district, on ground that land was in another lawful district, defendant's answer that incorporation of latter district was void was a "collateral attack" upon its corporate existence. *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176.

Petition to enjoin assessment and collection of taxes in school district, on ground that plaintiff's land was within boundaries of another legal district, was not a collateral attack on incorporation of defendant district. *Id.*

A suit to enjoin assessment of taxes on plaintiff's land by defendant school district, on the ground that the land was in another district and that the incorporation of the former district was void, in that it encroached on the latter district when it included plaintiff's land, was collateral attack upon the corporate existence of the defendant district, and not maintainable by an individual. *Harbin Independent School Dist. v. Denman* (Com. App.) 222 S. W. 538, reversing judgment (Civ. App.) 200 S. W. 176.

Former law.—Rev. Civ. St. 1879, art. 507, declares that if the inhabitants of certain towns and villages desire to be incorporated, a given number of voters shall file an application with the county judge, "stating the boundaries of the proposed town or village;" and a prior statute, similar to this article, allowed towns to incorporate for free school purposes only, and to hold an election under the same provisions, and provided that the county judge should cause a record of the election to be made, upon which the town should be regarded as duly incorporated for school purposes. Held, that if a petition presented to the county judge for incorporation for school purposes failed to give the boundaries of the proposed incorporation, the proceeding was void, though an order of the county judge, duly recorded, designated the boundaries, and an election was held thereon. *Furrh v. State*, 6 Civ. App. 221, 24 S. W. 1126.

Art. 2851a. Schools in independent district assumed or controlled by city or town within district; order for election to determine.—When a town or village incorporated for free school purposes only under the general law, and hereinafter designated as an "Independent School District," and a city or town forming a part of such Independent School District which is incorporated for municipal purposes, under the general law, and hereinafter referred to as an "Incorporated city or town," shall be desirous of having the public schools within such independent district assumed by or under the control of such city or town, the same shall be done in the following manner to-wit:

Whenever as many as fifty or a majority of the resident qualified voters of such Independent School District shall petition the Board of Trustees of such Independent School District to order an election for the purpose of voting on the proposition of whether or not the public free schools in said district shall be assumed and controlled by such incorporated city or town, said board of trustees shall order an election, to be held at the usual voting place or places, within such independent school district and which election shall be ordered and held in conformity with the law governing bond and tax elections in independent school districts, except the qualified electors voting thereat need not be property tax payers, but must be qualified to vote under the laws of this State regulating general elections; provided that the petition on which said election is ordered shall be signed by a majority of the qualified voters of such district living without the limits of such incorporated town or city. [Acts 1919, 36th Leg., 2d C. S., ch. 9, § 1.]

Art. 2851b. Ballots to be used at election.—All persons voting at such election in favor of the incorporated city or town assuming con-

trol of the schools of such independent school district shall have written or printed on their ballots the words "for assuming control of the public free schools of Independent School District by the city of Texas," and all persons voting at such election not in favor of the incorporated city or town assuming control of the schools shall have written or printed on their ballots the words "against assuming control of the public free schools of Independent School District by the city of Texas." [Id.]

Art. 2851c. "Assuming control of the schools" defined.—The term "assuming control of the schools" as used in this act shall be held to mean the assumption of the control and management of the schools of such independent school district by the incorporated city or town in conformity with the provisions and requirements of Chapter 17, Title 48, Revised Civil Statutes 1911, except as herein otherwise provided. [Id.]

Art. 2851d. Certificate of result of election; ordinance assuming control; extension of boundaries of city or town for school purposes; assumption of bonded indebtedness; tax levy to pay.—In the event a majority of the qualified voters voting at the election in such independent school district, shall vote in favor of the incorporated city or town assuming control of the schools of such independent school district, it shall be the duty of the Board of Trustees of such district to certify the results of such election to the City Council, City Commission or other governing authority of such incorporated city or town, together with a certified copy of the record showing all the proceedings had in the incorporation of such independent school district and all boundary extensions thereto, if any, together with a well defined map accurately showing the territory described in such record, and if upon investigation by the City Council, City Commission or other governing authority of such incorporated city or town, it is found that the election for assuming control of the schools of such independent school district has been in all respects lawfully held and the returns thereof duly and legally made, then the said City Council, City Commission or other governing authority shall, by ordinance duly passed and entered of record assume control and management of the public free schools within its limits; provided, that if the boundaries of such independent school districts do not coincide with the boundaries of the incorporated city or town, then the City Council, City Commission or other governing authority, shall on the same day pass an ordinance extending its corporate line for school purposes only so that the same shall coincide with and embrace the same territory within such independent school district, and provided further, that if such independent school district shall have an outstanding bonded indebtedness, then the incorporated city or town shall become bound and liable for the payment of such bonded indebtedness and the City Council, City Commission, or other governing authority thereof, shall levy and cause to be assessed and collected, upon all property subject to taxation within the limits of such incorporated city or town or within the limits of such corporation as extended for school purposes only if the boundaries of the former independent school district were not the same as the boundaries of the incorporated city or town, taxes for the purpose of paying the interest on such bonds and provide a sinking fund sufficient to redeem the same at maturity, and such tax thereafter shall be annually levied and collected so long as such bonds, or any of them, are outstanding

and unpaid; and provided further that the assumption of the control of the schools of such independent school district shall not abrogate or affect any maintenance tax theretofore authorized in such independent school district and such tax shall thereafter be annually levied, assessed and collected by the proper authorities of such incorporated city or town, until increased or changed by the qualified voters in conformity with the provisions and requirements of Chapter 17, Title 48, Revised Statutes 1911, as amended by Chapter 169 Acts Regular Session Thirty-fifth Legislature. [Id.]

Art. 2851e. Existing trustees.—Nothing in this Act shall be construed as affecting the term or terms of office of any trustee previously elected in such independent school district and serving as such at the time of the assumption of the control of the district schools by the incorporated city or town, as herein provided, and such trustees shall be vested with the same authority as is conferred by law upon school trustees in cities and towns constituting separate and independent school districts, and shall thereafter be elected in the same manner as school trustees for such cities and towns, in accordance with the provisions of Chapter 18, Title 48, Revised Statutes 1911. [Id.]

Art. 2852. Board of trustees.

Cited, *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

Attempted election under act not yet effective.—In order for there to be a de facto officer there must be a de jure officer, and hence an attempted election of trustees for an independent school district, under an act which had not yet become effective, was not only irregular and informal, but void. *Gray v. Ingleside Independent School Dist.* (Civ. App.) 220 S. W. 350.

A school district created by law has no authority to elect a board of trustees under the act creating it before the act has gone into effect, and an election of trustees under Local & Special Laws 1919, passed by the Thirty-Sixth Legislature, c. 35, creating the Ingleside Independent School District, held before June 17, 1919, was void; such law not becoming effective until such date. Id.

Art. 2853. Powers of the board.

See *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

In general.—The act of two members of a school board in promising to procure a guaranty from the board of a materialman's bill for brick used in the construction of a school building was not binding on the board, it never having been ratified in regular session. *Elgin-Butler Brick & Tile Co. v. Hillsboro Independent School Dist.* (Civ. App.) 205 S. W. 942.

Power to require vaccination of pupils.—Charter of independent school district authorizing board of education to establish, manage and control schools held to authorize board to prescribe vaccination as condition of admission to schools if requirement is not unreasonable. *Staffel v. San Antonio School Board of Education* (Civ. App.) 201 S. W. 413.

Resolution of board of education for exclusion of unvaccinated children from the schools held not to violate Const. art. 1, § 19, as to due course of the law. Id.

Resolution of board of education for exclusion from schools of unvaccinated children held not in violation of Const. art. 7, §§ 1, 2, 3, 4, and 5, or Rev. St. 1911, §§ 2899-2901, as to public free schools. Id.

Resolution of school board excluding unvaccinated children from schools held not unreasonable where there was smallpox within the district and danger that it would spread and be communicated from one person to another. Id.

Power to select depository.—The board of trustees of an independent school district has a discretionary power in selecting the depository, under art. 2771, providing that the depository or treasurer shall be that person or corporation who offers a satisfactory bond and the best bid of interest, and in view of articles 2850-2852. *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

Lien of tax.—This article and art. 2861 did not make applicable to independent school districts that part of article 958 making taxes levied and assessed by cities and towns lien on personal property against which tax is assessed. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

In view of arts. 957, 958, 961, 7626-7628, under this article, an independent school district by levy of tax by the collector acquired a lien on personal property within the district. *Mission Independent School Dist. v. Armstrong* (Com. App.) 222 S. W. 201, reversing judgment (Civ. App.) *Armstrong v. Mission Independent School Dist.*, 195 S. W. 895.

Lien on personalty created by an independent school district's assessment under this article, having attached, was not divested by sale under a deed of trust, but the buyer took the property subject to the right of the district through its collector to enforce collection by levying on and advertising the property for sale to satisfy the lien. *Id.*

Under this article, in view of article 958, incorporated by reference, which does not fix a specific date when the lien of taxes on personalty shall attach, the lien created by a school district's tax levy attached and became an incumbrance on the property as soon as the assessment was made. *Id.*

Art. 2856. General laws apply to all districts

Cited, *Cain v. Lumsden* (Civ. App.) 204 S. W. 115.

Art. 2856b. Change or abolishment of district.

No abolishment by nonuser.—Where school district was declared duly incorporated, etc., and was operated for some time, held, it could only be abolished by election, as provided by arts. 1077, 1078, and this article, and not by nonuser. *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176.

Special law.—Sp. Act April 1, 1913 (Loc. & Sp. Acts 33d Leg. c. 138), repealing all laws in conflict therewith, etc., cannot be held invalid as conflicting with this article, although special act created a new school district, and included therein a district already indebted. *Eagle Lake Independent School Dist. v. Hoyo* (Civ. App.) 199 S. W. 352.

TAXES AND BONDS

Art. 2857. Local taxes; bonds.—The trustees of any independent school district that has been, or may hereafter be incorporated under general or special laws, for school purposes only, shall have the power to levy and collect an annual ad valorem tax not to exceed one dollar on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax not to exceed fifty cents on the one hundred dollars for the purpose of purchasing, constructing, repairing, or equipping public free school buildings within the limits of such district, and the purchase of the necessary sites therefor; provided, that the amount of maintenance tax, together with the amount of bond tax of the district, shall never exceed one dollar on the one hundred dollars valuation of taxable property; and provided further that no such tax shall be levied, and no such bonds issued, until after an election shall have been held wherein a majority of the tax-paying voters, voting at said election, shall have voted in favor of the levying of said tax, or the issuance of said bonds, or both, as the case may be, and which election shall be held in accordance with the subsequent sections of this Act. [Acts 1905, p. 263, § 154; Acts 1909, p. 17; Acts 1921, 37th Leg., ch. 24, § 13, repealing art. 2857, Rev. Civ. St. 1911.]

Took effect March 5, 1921. See arts. 2902a, 2902b, post.

In general.—Taxes assessed against cotton oil company on personalty by independent school district were not lien on personalty and not personal obligation against purchaser of personalty in good faith at sale under trust deed. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

Since the Legislature has express power to form school districts by both special and general laws and to authorize taxes to erect, equip, and maintain school buildings, it has implied authority to purchase the land upon which to erect buildings and establish schools. *Cain v. Lumsden* (Civ. App.) 204 S. W. 115.

Any failure of Loc. & Sp. Laws 35th Leg. (1917) c. 37, creating the Sinton independent school district, to prescribe ways and means for assessment and collection of taxes, does not require the general laws as to taxation to be consulted, but is covered by section 30 of the act providing that, as to all matters not provided for in the act, the board of trustees shall have the powers conferred on independent school districts. *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

Taxing power strictly construed.—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Validity of provision of special law.—Loc. & Sp. Laws 35th Leg. (1917) c. 123, creating Stanton independent school district without specially providing for the ordering of an election to determine whether there shall be levied a maintenance tax under Const. art. 7, § 3, this article, and art. 2877, held to confer upon trustees the right to call such an

election, under section 19 of the act of 1917, making it trustee's duty to levy and collect maintenance tax, and section 23, conferring upon trustees the rights, powers, privileges, and duties imposed upon boards of trustees of independent school districts by the general laws of the state. *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

As Loc. & Sp. Laws, 35th Leg. (1917) c. 128, creating the Stanton Independent School District, provides in section 19 that the trustees may themselves levy an annual maintenance tax, the trustees, notwithstanding section 23 declares that in all matters not provided for that shall be vested with the rights, powers, and privileges conferred and imposed by the general laws, have no authority to call an election for levy of a maintenance tax pursuant to the general laws, for the local act superseded the general laws, and hence is void, violating Const. art. 7, § 3, declaring that the Legislature may authorize an additional ad valorem tax to be levied and collected in all school districts, provided that a majority of the qualified property taxpaying voters voting at an election to be held for that purpose shall vote such tax, and a tax sought to be levied pursuant to the election should be enjoined. *Millhollon v. Stanton Independent School Dist.* (Com. App.) 231 S. W. 332.

Assessments.—The fact that county tax assessor assessed school district for school taxes in previous years could not affect the validity of a district assessment. *Blewett v. Richardson Independent School Dist.* (Civ. App.) 230 S. W. 255.

The fact that valuations for county and state purposes were lower than those later fixed by school district assessor could not affect the validity of the later assessments; school district not being bound to follow the valuations made by the county assessor, and having the right in the exercise of reasonable and proper discretion to fix them at a different figure. *Id.*

Validity of tax.—Where a school bond is voted for and issued, the tax made to provide a sinking fund to pay interest is necessarily valid if the bonds are valid. *Walling v. Malone Independent School Dist.* (Civ. App.) 195 S. W. 671.

Though maintenance tax levied for newly created district was in part applied to debts of old district included in new district, such fact does not warrant taxpayers in refusing to pay assessment, but at most gives an action for unlawful diversion of school fund. *Eagle Lake Independent School Dist. v. Hoyo* (Civ. App.) 199 S. W. 352.

Discrimination.—The levy of a 50-cent maintenance tax on \$100 valuation of property of newly added portion of school district as against the levy of a 35-cent maintenance tax on property in old district held discriminatory against newly added portion, though an additional 15-cent tax was levied on property in old district for sinking fund to retire bonds of old district. *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

Validity of bonds.—That an independent school district, which has voted a bond issue, does not have a property valuation sufficient to sustain such issue does not make the election invalid, but the proportion of the voted bonds that can be protected by a legal tax on the present valuation of property within the school district may be legally issued. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

The fact that bonds issued and sold by a school district had not been presented to the Attorney General for his approval does not invalidate the bonds so as to invalidate a levy to pay the interest and provide a sinking fund. *Love v. Rockwall Independent School Dist.* (Civ. App.) 225 S. W. 263.

Special law.—The special act creating the Charco independent school district is not invalid as prescribing a notice of election for bonds different from that prescribed in this article and art. 2859. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

Art. 2857a. Issuance of bonds; limitation; interest and maturity; election.—All independent school districts providing for public free school improvements as contemplated by the preceding section, shall have the power to issue coupon bonds of the district, in such sum or sums as may be authorized at an election held therein in accordance with the provisions of this Act for the purpose of purchasing, constructing, repairing or equipping public free school buildings within the limits of such district, and the purchase of the necessary sites therefor; provided that the aggregate amount of bonds issued for such purposes shall never reach an amount where a tax of fifty cents on the one hundred dollars valuation of taxable property will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity; provided further that such bonds shall bear interest not exceeding six per cent per annum, and may be made payable, serially or otherwise, not exceeding forty years from their date, but when the school buildings are to be of wood material, the bonds herein provided for shall not run for a longer period than twenty years from their date; and provided further that the specific rate of tax to be levied for the pay-

ment of such bonds need not be determined at the election. [Acts 1921, 37th Leg., ch. 24, § 14.]

Art. 2858. Petition for election.—Where any independent school district desires to issue bonds for school building purposes, there shall be presented to the board of trustees of such district a petition signed by twenty, or more, or a majority, of the qualified property tax-paying voters of the district, praying for the issuance of bonds to an amount stated and for the levy of a tax in payment thereof. The petition shall further state the rate of interest to be borne by such bonds, the time of maturity, and the purpose for which the bonds are to be issued, and pray that an election be ordered within and for such district to determine whether or not the bonds of such district shall be issued for the purpose above indicated and whether or not a tax shall be levied upon all taxable property within such district in payment thereof. [Acts 1905, p. 263, § 157; Acts 1921, 37th Leg., ch. 24, § 14a repealing art. 2858, Rev. Civ. St. 1911.]

Art. 2858a. Order for election; ballots; polling places, officers, etc.—Upon the presentation of such petition, the board of trustees shall make and cause to be entered of record upon the minutes of said board an order directing that an election be held within and for such independent school district at a date to be fixed in the order, to be not less than thirty days after the date of such order, for the purpose of determining the proposition mentioned in such petition. At such election those desiring to vote in favor of the issuance of the bonds and levy of the tax in payment thereof, shall have written or printed upon their ballots: "For the issuance of the bonds and the levying of the tax in payment thereof," and those opposed to the proposition, shall have written or printed upon their ballots: "Against the issuance of the bonds and the levying of the tax in payment thereof." When the election is ordered, the board of trustees shall fix the polling place or places for the holding of such election and name a judge and two clerks at each polling place, or more judges and clerks if deemed necessary. [Acts 1921, 37th Leg., ch. 24, § 15.]

Art 2859. Notice of election.—When the order for the bond election has been made, the secretary of the board of trustees shall forthwith issue a notice stating in substance the contents of such election order and the time and place or places of such election, and it shall be the duty of such secretary to post a copy of such notice at three different places within the boundaries of such district, which posting shall be done not less than three weeks prior to the date fixed for said election. [Acts 1905, p. 263, § 158; Acts 1921, 37th Leg., ch. 24, § 16, repealing art. 2859, Rev. Civ. St. 1911.]

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.
Validity of special act prescribing different notice of election.—See *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

Art. 2860. Conduct of election; ballots; qualifications of voters.—The manner of holding an independent school district bond election shall be governed, as near as may be, by the General Election Laws of this State, except as modified hereby, and the board of trustees shall furnish all necessary ballots and other election supplies requisite to such election. None but qualified property taxpaying voters of such district shall vote at any such election to authorize the issuance of

such bonds. [Acts 1905, p. 263, § 159; Acts 1921, 37th Leg., ch. 24, § 17, repealing art. 2860, Rev. Civ. St. 1911.]

Qualifications of voters.—Owner of property subject to taxation could vote in an election held in an independent school district to determine whether or not the district should levy an additional school tax, although being 70 years old, he was not subject to poll tax, and he had never been called upon to list his property and it had never been assessed for taxes. *Winters v. Independent School Dist. of Evant* (Civ. App.) 208 S. W. 574.

One otherwise qualified to vote at an election in an independent school district to determine whether or not the district should levy an additional school tax is a "tax-paying voter," if liable for taxes on property, whether or not his property has been assessed for taxes. *Id.*

Ballots.—In spite of this article, ballots at school bond election reading, "For the Bond" or "Against the Bond," held not to invalidate the election. *Walling v. Malone Independent School Dist.* (Civ. App.) 195 S. W. 671.

Art. 2860a. Return and canvass.—Immediately after the bond election the officers holding the same shall make returns of the result thereof to the board of trustees of the district, and return the ballot boxes to the secretary of such board, who shall safely keep the same and deliver them together with the returns of the election to the board of trustees at its next regular or special meeting, and said board shall at such meeting canvass the vote and returns and if it be found that the proposition for the issuance of bonds and levy of the tax has been adopted by a majority of the qualified property tax-paying voters of such district voting at said election, then the board shall declare that it resulted in favor of the issuance of bonds and the levy of the tax in payment thereof, and if the result be against the issuance of the bonds and tax, then it shall declare that the result was against the issuance of bonds and the levy of the tax in payment thereof. [Acts 1921, 37th Leg., ch. 24, § 18.]

Art. 2860b. Order for issuance of bonds; form and terms of bonds.—Where a bond election in an independent school district shall have resulted in favor of the issuance of bonds and levy of the tax in payment thereof, the board of trustees of the district, after such result has been declared, shall make an order directing the issuance of the bonds of such district and provide for the levy and collection of a tax annually of sufficient amount with which to pay the interest and provide a sinking fund with which to pay such bonds at maturity; and such bonds shall state upon their face the purpose for which they are issued. Said bonds shall be issued in the name of the independent school district, shall be signed by the president of the board of trustees of such district, and shall be countersigned by the secretary of such district, and the seal of the district shall be affixed to each bond. [Id., § 19.]

Art. 2860c. Approval of bonds by Attorney General.—Before such bonds are offered for sale there shall be forwarded to the Attorney General of Texas a certified record of all proceedings had with reference to the issuance of the bonds of the district, together with such other information as the Attorney General may require. Whereupon it shall be the duty of the Attorney General to carefully examine the said bonds in connection with the facts and the Constitution and laws of the State of Texas governing and controlling the execution of such bonds, and if as the result of the examination the Attorney General shall find that such bonds are issued in conformity with the Constitution and laws and that they are valid and binding obligations upon said independent school district, he shall so officially certify; and when said bonds have been approved by the Attorney General, they shall be

registered by the Comptroller of Public Accounts in the same manner as other bonds. [Id., § 20.]

Art. 2860d. Sale of bonds; disposition of proceeds.—When said bonds shall have been approved and registered, as provided in this Act, they shall continue in the custody of and under the control of the board of trustees and shall be sold by said board for cash to the highest and best bidder, either in whole or in parcels, at not less than their par value, and the purchase money therefor shall be placed in the depository of such independent school district. Such funds shall be paid out by the treasurer of such district upon warrants drawn on such funds by the president of the board of trustees of the district and countersigned by the secretary of said board. [Id., § 21.]

Art. 2860e. Petition for election on question of levy of annual tax.—Whenever the qualified property tax-paying voters of an independent school district shall desire to be submitted, at an election for that purpose, the question of the levy and collection of an annual ad valorem tax on the one hundred dollars valuation of taxable property of the district for the maintenance of the schools therein, a petition signed by twenty, or more, or a majority, of the qualified property tax-paying voters of such district shall be presented to the board of trustees, praying for an election upon the question so desired to be submitted, and it shall be the duty of the board of trustees to order an election substantially as in case of a bond election, and all other proceedings in respect to the question so submitted shall be in accordance with the provisions of this Act relative to independent school district bond elections; provided said petition shall designate either the specific rate of tax to be levied, or such rate of tax not exceeding one dollar on the one hundred dollars valuation of all taxable property within the district; and provided further that when a proposition to levy such a tax shall be defeated no election for that purpose shall be ordered until after the expiration of one year from the date of the election. [Id., § 22.]

Art. 2860f. Order for election; ballots.—The order of the board of trustees ordering the election, and the election notice, shall state the time and place or places of holding such election and the rate of maintenance tax to be voted on, or the proposition may be for such rate of tax not exceeding one dollar on the one hundred dollars valuation of taxable property of the district as indicated in the petition. The ballots at such election shall read “for Maintenance Tax,” or “Against Maintenance Tax.” [Id., § 23.]

Art. 2860g. Levy of tax.—If a majority of the tax-paying voters, voting at said election, shall have voted in favor of the levying of said tax, the board of trustees of the district shall thereafter annually levy and cause to be assessed and collected upon the taxable property in the limits of the district for the maintenance of the public free schools of the said district such ad valorem tax as the qualified voters of such district authorized at the election held for that purpose; provided that if the proposition shall have been for such rate of tax not exceeding one dollar on the one hundred dollars valuation of taxable property of the district as authorized at the election, the board of trustees shall levy such a rate each year within that limit as such board may deem judicious. [Id., § 24.]

Art. 2860h. Election on question of revoking, modifying or increasing tax; proviso.—Where a maintenance tax has been voted no election to revoke, modify or increase the same shall be held until two years from the date of the election authorizing such maintenance tax. An election to revoke, modify or increase such maintenance tax, when permissible, may be obtained and held substantially as herein provided for an election to authorize such tax; provided, however, that no change or modification in such maintenance tax shall ever affect any bond tax authorized by such district; and provided further, that if the rate of bond tax, together with the rate of maintenance tax voted in the district, shall at any time exceed one dollar on the one hundred dollars valuation, such bond tax shall operate to reduce the maintenance tax to the difference between the rate of the bond tax and one dollar. [Id., § 25.]

Art. 2860i. Repeal.—All laws and parts of laws in conflict herewith are hereby repealed, and Articles 2827, 2828, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2857, 2858, 2859, 2860, 2863, Revised Civil Statutes of Texas of 1911, and Section 5, of Chapter 100, Acts of the Regular Session of the Thirty-second Legislature, are hereby particularly repealed. [Id., § 26.]

Art. 2861. Collection of taxes.

Who may be assessor and collector.—That one is city assessor and collector when appointed assessor and collector for a school district is no impediment to taking the district office, though because, under the Constitution, two offices may not be held, acceptance thereof may vacate the city office. *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

Recovery of tax paid under protest.—Involuntary payment of independent school district's taxes on personalty, by purchaser thereof in good faith at sale under deed of trust, after property had been seized by district, did not prevent purchaser from recovering taxes before money paid by him under protest and duress was disbursed by collector. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

Suit to recover tax.—A county has no authority to receive or sue tax collector for taxes collected for either independent or common school districts and not accounted for, under this article and arts. 2767, 2822, 2836, 2862; such taxes being payable to district treasurers, which districts are the ones to sue. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Lien for taxes.—Art. 2855 and this article did not make applicable to independent school districts that part of article 958 making taxes levied and assessed by cities and towns lien on personal property against which tax is assessed. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

Art. 2862. Assessment and collection of taxes by county officers.

See *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

Assessor's fees.—Amounts paid county assessor for assessing taxes, for drainage and school districts under art. 2604 and art. 2862, held "fees," within arts. 3881, 3883, 3889, fixing the maximum of "fees," and not compensation for "ex officio services," within art. 3893, making such maximum fee statutes inapplicable to compensation for ex officio services. *Nichols v. Galveston County* (Sup.) 228 S. W. 547.

Equalization.—Discrimination in raising the valuation of the lands is not evinced by the fact that the board of equalization of a school district acted "under a deliberately adopted policy and concerted scheme or plan." *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106. *232 Au. 330*

The board of equalization of a school district are not guilty of discrimination in not raising the valuation of personal property, but only that of all the acreage property. Id.

Art. 2863. [Repealed.]

Explanatory.—Repealed by Acts 1921, 37th Leg., ch. 24, § 26. See art. 2860i, ante.

Art. 2864. Refunding bonds.

Validity of levy of tax for interest on refunding bonds.—Where an issuance of bonds to refund an outstanding issue had been authorized, but the refunding bonds had not been issued because the holders of the original bonds had only recently been located and their agreement to a substitution of the bonds or their payment in cash secured, a levy of the tax to pay the interest on the refunding bonds is legal. *Love v. Rockwall Independent School Dist.* (Civ. App.) 225 S. W. 263.

Art. 2864a. [Repealed.]

Explanatory.—Repealed by Acts 1921, 37th Leg., ch. 24, § 26. See ante, art. 2860L.

CHANGE OF BOUNDARIES

Art. 2865. Extension of boundaries.

In general.—Powers granted in this article, and article 2866, held different, in that a petition for the change of school districts is required by the former article. *Hill County School Trustees v. Melton* (Civ. App.) 199 S. W. 1142.

Enlargement.—Where a new school district was formed by adding territory to a former district, the indebtedness of the former district for the construction of the school buildings which became the property of the new district may be lawfully made a charge upon the new district, including the lands added thereto. *Love v. Rockwall Independent School Dist.* (Civ. App.) 225 S. W. 263.

Redistricting.—Order of commissioners' court establishing a new independent school district held not a redistricting under statute, so as to place plaintiff's land, located in another district, in such new district for purposes of taxation, though the designated boundaries of the new district, by mistake included plaintiff's land. *Harbin Independent School Dist. v. Denman* (Civ. App.) 200 S. W. 176.

That Attorney General approved issue of bonds for defendant school district, the description of the boundaries of which in the order of the commissioners' court establishing it erroneously included plaintiff's lands located in an established district, did not have the effect of redistricting under the statute. *Id.*

Art. 2866. Change in boundaries, etc.

Change of boundaries without petition.—Under this article, the county commissioners' court may change the boundaries of any independent school district on its own initiative for the public good without any petition to the board of trustees. *Hill County School Trustees v. Melton* (Civ. App.) 199 S. W. 1142.

Review of change.—Under this article, and arts. 2749c, 2749d, district court held authorized to review change of boundary line between independent school districts by county board of school trustees. *Hooker v. State* (Civ. App.) 197 S. W. 481.

CHAPTER SEVENTEEN

EXCLUSIVE CONTROL BY CITIES AND TOWNS—INDEPENDENT DISTRICTS

Art.	Art.
2867. City or town may assume control of schools.	2876. Election for levy of annual tax for maintenance buildings; discontinuance of tax.
2868. Same.	2877. Levy of tax.
2871. General laws shall govern.	2878. Levy in city or town assuming exclusive control of school.
2872. Property vested in trustees.	2879. Levy in city or town constituting independent school district.
2873. Sale of property.	2880. Repeal.
2874. Schoolhouse bonds to be issued by city council.	2882. Funds to be turned over to school treasurer.
CITY SCHOOL TAXES	
2875. Local maintenance tax.	

Article 2867. City or town may assume control of schools.

In general.—Where a school district was formed and included a city which had assumed control of its schools, the Legislature could make obligation of the city district binding on the new district, under Const. art. 7, § 3, although it might not be proper to pay them out of local taxation. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Art. 2868. Same.

See *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

Art. 2871. General laws shall govern.

See *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

City has dual character.—Under Const. art. 11, § 10, empowering the Legislature to constitute any town or city an independent school district, and Rev. St. 1911, art. 2871, making a city taking over the control of its schools such a district, there is conferred on the city a dual character and with such character dual powers as strictly a municipality

and as a duly constituted independent school district. *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Art. 2872. Property vested in trustees.

Constitutionality.—Neither this article, changing title of school property from the mayor of cities to the school trustees, nor the special act creating the Gonzales Independent School District, and extending the boundaries and changing the title to its trustees, violated Bill of Rights, §§ 16, 19, as infringing on the proprietary rights of the city of Gonzales, which had assumed control of its schools under Rev. St. 1879, art. 3792. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Art. 2873. Sale of school property.

See *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608.

Consent of state board.—Under this article, requiring consent of State Board of Education to sale of school property, held order of board made in October related back to contract of sale of old schoolhouse by school board in August, making sale effective. *R. B. Spencer & Co. v. Brown* (Civ. App.) 198 S. W. 1179.

Under resolution of State Board of Education, giving school trustees power to sell part or all of 10-acre tract, upon which was located an old schoolhouse, trustees could sell schoolhouse alone. *Id.*

This article, requiring deed from school board to recite resolutions of trustees and State Board of Education as to sale, is directory, and failure to incorporate such resolutions does not nullify conveyance. *Id.*

Art. 2874. Schoolhouse bonds to be issued by city council.

Power to issue bonds.—This article gives the power to provide for schools by issuance of bonds if necessary. *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Control of fund from bonds.—A city which has assumed the control of the public schools within its limits dedicates to the use of the public the property it then owns which is being used for school purposes, and all property thereafter acquired; but, where it votes a bond issue to erect a school building, it owns the fund derived from the sale of the bonds, and has exclusive control thereof, and cannot be compelled to expend any funds on hand at the time the city is taken into a new school district. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

CITY SCHOOL TAXES

Art. 2875. Local maintenance tax.

Taxing power strictly construed.—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 320.

Special act.—Where independent school district was created by special act, and included a city school district still legally required to levy some school taxes, the fact that the new district was authorized to levy the constitutional limit would not render the act invalid, because the district was not required to levy to the limit. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Art. 2876. Election for levy of annual tax for maintenance and buildings; discontinuance of tax.

Limitation of indebtedness.—Under Const. art. 7, § 3, exempting from the limitation on the amount of school district tax incorporated cities or towns constituting independent districts, and art. 925, authorizing cities constituting independent districts to levy such tax as their electors may determine under this and the four following articles, a city acting as independent school district can issue bonds for school buildings exceeding the amount of city indebtedness limited by Const. art. 8, § 9. *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Art. 2877. Levy of tax.

See *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Cited, *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Calling election.—Loc. & Sp. Laws 35th Leg. (1917) c. 123, creating Stanton independent school district without specially providing for the ordering of an election to determine whether there shall be levied a maintenance tax under Const. art. 7, § 3, and art. 2857, and this article, held to confer upon trustees the right to call such an election, under section 19 of the act of 1917, making it trustee's duty to levy and collect maintenance tax, and section 23, conferring upon trustees the rights, powers, privileges, and duties imposed upon boards of trustees of independent school districts by the general laws of the state. *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

Art. 2878. Levy in city or town assuming exclusive control of schools.

Cited, *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Art. 2879. Levy in city or town constituting independent school district.

Cited, *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Art. 2880. Repeal.

Cited, *City of Rockdale v. Cureton* (Sup.) 229 S. W. 852.

Art. 2882. Funds to be turned over to school treasurer.

Diversion of funds.—Under Ft. Worth City Charter 1909, c. 15, § 13, and Ft. Worth City Charter 1907, c. 10, § 156, the municipal corporation of the city of Ft. Worth had no power over moneys collected for school purposes, and could not lawfully divert any part thereof to its own reimbursement for the expense of maintaining its tax machinery by means of which all taxes in the city were required to be assessed, equalized, levied, and collected. *American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth* (Civ. App.) 224 S. W. 292; *City of Ft. Worth v. Same* (Civ. App.) 224 S. W. 294.

DECISIONS RELATING TO SUBJECT IN GENERAL

Validity of special law.—Sp. Laws (1st Call. Sess.) 1913, c. 14, creating the Gonzales independent school district, which included the incorporated city of Gonzales, and passing title to school property heretofore vested in the city, is not invalid, as working a deprivation of property without due process of law, for the beneficial title of the property at all times is in the people. *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

CHAPTER EIGHTEEN

INDEPENDENT DISTRICT SCHOOL TRUSTEES

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| Art. | Art. |
| 2886. Board of seven trustees. | pensation; election, how held; |
| 2887. Board of school trustees shall order | cavass. |
| elections; election officers, com- | 2889. Terms of office. |

Article 2886. Board of seven trustees.

See *Trustees of Independent School Dist. No. 57 v. Elbon* (Civ. App.) 223 S. W. 1039.

Art. 2887. Board of school trustees shall order election; election officers, compensation; election, how held; cavass.

See 1918 Supp., arts. 6016½-6016¾c. as to newspaper publication instead of posting. Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

Art. 2889. Term of office of school trustees.

See *Trustees of Independent School Dist. No. 57 v. Elbon* (Civ. App.) 223 S. W. 1039. Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

CHAPTER NINETEEN

GENERAL PROVISIONS

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| Art. | Art. |
| 2899. Where children may attend school. | 2904aaa. Flags and flag poles for buildings. |
| 2902a. Provisions of tax bond elections act, | 2904aaaa. Duties of school officers. |
| how applicable. | 2904aaaaa. English language to be used |
| 2902b. Partial invalidity. | exclusively in school work |
| 2904aa. Instruction in patriotism and civ- | and text-books. |
| ics. | |

Article 2899. Where children may attend school.

Requiring vaccination.—Resolution of board of education for exclusion from schools of unvaccinated children held not in violation of Const. art. 7, §§ 1, 2, 3, 4, and 5, or this and the two following articles, as to public free schools. *Stoffel v. San Antonio School Board of Education* (Civ. App.) 201 S. W. 413.

Art. 2902a. Provisions of tax and bond elections act, how applicable.—The provisions of this Act (arts. 2827, 2828, 2836–2842, 2857–2860i, 2902b), relative to tax and bond elections in common school districts shall also apply to common county line school districts; and the provisions hereof relative to tax and bond elections in independent school districts shall also apply to all such incorporated districts having each fewer than one hundred and fifty scholastics according to the latest census. [Acts 1921, 37th Leg., ch. 24, § 27.]

Took effect March 5, 1921.

Art. 2902b. Partial invalidity.—In case it shall be declared by the courts that any part of this Act [Arts. 2827, 2828, 2836–2842, 2857–2860i, 2902a], is unconstitutional, such decision shall not impair other parts and provisions of this Act. [Id., § 28.]

Art. 2904aa. Instruction in patriotism and civics.—The daily program of every public school in this state shall be so formulated by the teacher, principal, or superintendent as to include at least ten minutes for the teaching of lessons of intelligent patriotism, including the needs of the State and Federal Governments, the duty of the citizen to the State, and the obligation of the State to the State to the citizen. [Acts 1918, 35th Leg. 4th C. S., ch. 17, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 38, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 2904aaa. Flags and flag poles for buildings.—That the board of trustees of each and every common, independent or municipal school district be and is hereby required to provide for a suitable United States flag and flag pole for each school building in the district, and the expense incurred in carrying out this provision of the law shall be paid out of the funds of the district. [Acts 1918, 35th Leg. 4th C. S., ch. 17, § 2; Acts 1918, 35th Leg. 4th C. S., ch. 38, § 2.]

Art. 2904aaaa. Duties of school officers.—It shall be the duty of the State Superintendent of Public Instruction to issue to each county and city superintendent of Public Instruction in this State the necessary instructions as to the enforcement of this law, and it shall be the duty of the county and city superintendents of Public Instruction in every county in this State to see that the provisions of this law and the instructions of the State Superintendent of Public Instruction relative to this law are carried out. The county Superintendent of Public Instruction shall not approve for payment any vouchers drawn on the funds of the district until such district shall have complied with the provisions of this Act; nor shall the president of any school board of any independent or municipal school district in this State approve vouchers for the payment of any account until the provisions of this law have been complied with in every particular. [Acts 1918, 35th Leg. 4th C. S., ch. 17, § 3; Acts 1918, 35th Leg. 4th C. S., ch. 38, § 3.]

Art. 2904aaaaa. English language to be used exclusively in school work and text-books.—Every teacher, principal, and superintendent employed in the public free schools of this state shall use the English language exclusively in the conduct of the work of the schools, and all

recitations and exercises of the school shall be conducted in the English language, and the trustees shall not prescribe any texts for elementary grades not printed in the English language; provided, that this provision shall not prevent the teaching of Latin, Greek, French, German, Spanish, Bohemian, or other language as a branch of study in the high school grades as outlined in the state course of study. [Acts 1918, 35th Leg. 4th C. S., ch. 80, § 1.]

Explanatory.—Sec. 2 of the act is set forth, post, as art. 420i, Penal Code. The act took effect 90 days after March 27, 1918, date of adjournment.

CHAPTER NINETEEN A

PUBLIC SCHOOL BUILDINGS

Art.
2904n. Building permits.

Art.
2904o. Payments before permit unauthorized.

Article 2904n. Building permits.

Necessity of permit.—This article, and art 2904o, requiring a certificate as a condition precedent to erection of a school building, which are general statutes, do not take away the authority given the city of Dallas by its charter granted by Sp. Acts Thirtieth Leg. (1907) c. 71, art. 5, § 1, to construct necessary school buildings. *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699.

Failure of trustees of school district to comply with arts. 2740, 2771, and this article, and art. 2904o, relating to securing of building permits, sale of bonds, and deposit of proceeds, etc., did not affect liability on school building contractor's bond. *Board of Trustees of Robstown Independent School Dist. v. American Indemnity Co.* (Com. App.) 228 S. W. 105.

Art. 2904o. Payments before permit unauthorized.

Cited, *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699; *Board of Trustees of Robstown Independent School Dist. v. American Indemnity Co.* (Com. App.) 228 S. W. 105.

CHAPTER NINETEEN B

FREE TEXT BOOKS IN SCHOOL DISTRICTS

Articles 2904r-2904w.

Note.—See arts. 2904¼-2904¼x, post, establishing a general system for the distribution of free text books. This chapter may still be operative in case of a failure of the general scheme to give complete satisfaction.

CHAPTER NINETEEN C

FREE TEXT BOOKS THROUGHOUT THE STATE

Art.
2904¼. Purchase of text books by State Board of Education and distribution of same for use in public free schools without cost.

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2904 ¹ / ₄ o. Purchase of books from pupils.	2904 ¹ / ₄ v. Partial invalidity of act.
	2904 ¹ / ₄ w. Annual ad valorem tax; amount.
	2904 ¹ / ₄ x. Same; amount apportioned for purchase of text books.

Article 2904¹/₄. Purchase of text books by State Board of Education and distribution of same for use in public free schools without cost.—The State Board of Education is hereby authorized and empowered and it is made its duty to purchase books from the contractors of text books used in public free schools of this State and to distribute the same without other cost to the pupils attending such schools within this State in the manner and upon the conditions hereinafter set out. [Acts 1919, 36th Leg., ch. 29, § 1.]

Explanatory.—This act does not necessarily supersede Acts 1915, 34th Leg., ch. 134, relating to the purchase of text books for free distribution by common and independent school districts.

Took effect Feb. 25, 1919.

Art. 2904¹/₄a. Money necessary to purchase books to be annually set apart out of free school fund of State.—In order to carry out the provisions of this Act, the State Board of Education shall annually, at a meeting designated by them each year, set apart out of the available free school fund of the State an amount sufficient to purchase and distribute the necessary school books for the use of the pupils of this State for the scholastic year ensuing. [Id., § 2.]

Art. 2904¹/₄b. State Text Book Fund; how constituted.—The State Text Book Fund of this State shall consist of the fund set aside by the State Board of Education from the available school fund as is provided for in Section 2 of this Act [Art. 2904¹/₄a], together with all funds accruing from the sale of disused books and all moneys derived from the purchase of books from boards of school trustees by private individuals, by schools, or from any other source. [Id., § 3.]

Art. 2904¹/₄c. Report of funds required for purchase of books; amount to be set aside from school fund; funds set aside not to revert to school fund.—The State Board of Education shall require from the State Superintendent, on July first of each year, a report as to the funds necessary for the purchase and distribution and other necessary expenses of school books for the regular school session of the following year, and said Board of Education shall have the power to set apart from the available school fund the estimated amount with 25 per cent additional, this additional sum to be used only to meet emergencies or necessities caused by unusual increase in scholastic attendance or by unusual and unforeseen expenses and school conditions. Funds transferred to the Text Book fund shall remain permanently in this fund, until expended and shall not lapse to the State at the close of the fiscal year; provided, that the State Superintendent of Public Instruction shall be required to include in the aforementioned report to the State Board of Education a statement as to the amount of this fund which is unexpended, and said amount shall be considered by the Board

in determining the necessary expenditures for text books for the following year. [Id., § 4.]

Art. 2904¹/₄d. Purchase and distribution of books by State Superintendent of Public Instruction.—The purchase and distribution of free text books for the State shall be under the management of the State Superintendent of Public Instruction, subject to the approval of the State Board of Education. All details of plans for purchase and distribution of books not definitely covered by the provisions of this law shall be subject to the laws of the State and approval of the State Board of Education. [Id., § 5.]

Art. 2904¹/₄e. Book contractors to maintain depositories for supplies of books; orders for books from.—All parties with whom book contracts have been made shall establish and maintain in some city in the State a depository where a stock of their goods to supply all immediate demands shall be kept; all contractors not maintaining their own individual or separate State agencies or depositories shall maintain a joint agency or depository to be located at some suitable and convenient distributing point, at which general depository each contractor joining in said agency shall keep on hand a sufficient stock of books to supply the schools of the State. Boards of School Trustees of every school district of the State, or their legally appointed representatives, shall be entitled to order directly from the State agency or depository herein provided for, and designated by said contractor or contractors as established to comply with conditions of this Act, text-books for use in the schools under the control of said trustees, such books to be purchased in accordance with the terms of this Act, and to be delivered by said depository, all packing, shipping, freight, express, mailing or other charges to be paid by said contractor or depository, to railway station at the town or city in which school is situated, or to railway station designated in the requisition; provided, that the depository shall not be required to fill orders by express or parcel post except such orders as may be defined by the State Superintendent of Public Instruction as emergency orders. The cost above established freight rate for filling such emergency orders may be added to the price of the books so shipped; provided further that if book contractors have complied with orders from the State Department of Education and have made prompt shipments as required by their contracts, that if the receivers of said shipments fail or refuse to take the shipments from the transportation companies, that the contractors will not be responsible for any demurrage in case of such failure.

Any person, school not controlled by the State, or dealer in any county in the State may order books from the said State agency, or depository and the books so ordered shall be furnished at the same rate and discount as are granted to the State; provided that in such case the State depository or agency may require that the price of books so ordered shall be paid in advance. Upon the failure of any contractor to furnish the books as provided in the contract and in this Act, the county judge in the county wherein such books have not been furnished, shall report the fact to the Attorney General and he shall bring suit on account of such failure in the name of the State of Texas in the district court of Travis county, and shall recover on the bond given by such contractor for the full value of the books not furnished as required, and in addition thereto the sum of one hundred dollars, and each day of failure to furnish the books shall constitute a separate offense, and the

amounts so recovered shall be placed to the credit of the State Text Book Fund. [Id., § 6.]

Art. 2904 $\frac{1}{4}$ f. School trustees to be custodians of books; distribution to pupils.—The school trustees of each district shall be designated as the legal custodians of the books, and shall have the power to make such arrangements for the distribution of books to the pupils as they may deem most effective and economical; provided that no district shall have the power to make any regulation in regard to text books, which is at variance with the provision of this Act, or with the regulation of the State, made by the State Superintendent of Public Instruction and approved by the State Board of Education. [Id., § 7.]

Art. 2904 $\frac{1}{4}$ g. Books to remain state property; delegation by trustees of power to requisition and distribute books.—Books shall remain the property of the State, and after purchase through requisition according to the provisions of this Act, shall remain in the charge of the district school trustees, as the legal custodians of the books. The district school trustees shall have the power to delegate to their employes such power as to requisitions and distribution of books and the management of books, as in their judgment may be best; provided, that such plans shall not be at variance with the provisions of this law, or with the State Rules for Free Text Books, formulated by the State Superintendent of Public Instruction and approved by the State Board of Education. [Id., § 8.]

Art. 2904 $\frac{1}{4}$ h. Bonds of custodians of books.—One or more members or employes of each district board of trustees shall enter into bond in the sum of fifty per cent in excess of the value of the books consigned to them by the State, payable in Austin, Texas, to the Governor of the State of Texas, or his successors in office, said bond to be approved by the county judge of the county in which the school is situated, and by the State Superintendent of Public Instruction and deposited with the State Superintendent, conditioned on the faithful discharge of his duties under his employment and under this Act and that he or they will faithfully account for all books coming into his or their possession and for all moneys received from the sales thereof; provided that all moneys accruing from the forfeiture of the bonds shall be deposited by the Governor to the credit of the State Text Book Fund. [Id., § 9.]

Art. 2904 $\frac{1}{4}$ i. Requisitions for books; manner of making.—Requisitions for books shall be made in the following manner. On the first day of April each teacher shall make report to the principal, of the maximum attendance of his or her grade, or school, if not a graded school. If the school has only one teacher, said report as to the maximum attendance of pupils of each grade of work shall be made by the teacher to the board of school trustees and to the county superintendent. In case of unorganized counties, or counties having an ex officio county superintendent, reports shall be made to the State Superintendent. Reports as to the maximum attendance for the school shall be made not more than one week subsequent to the first school day of April by the principal to the city or town superintendent or by the principal to the county superintendent if the school is not situated in a city or town. The city or town superintendent of schools shall compile reports of principals and make report to the State Superintendent of Public Instruction. The county superintendent shall make such re-

port to the State Superintendent of Public Instruction as to the maximum attendance of each rural school of his county as will designate the number of text books of each grade and kind, to which each rural school of his county shall be entitled. Reports as to the maximum attendance of each school under their direction shall be made to the State Superintendent of Public Instruction by the aforesaid superintendents of cities, towns, and counties, not later than April 25th, provided that should the school close before this date, it shall be the duty of the teacher to file with the county superintendent and with the board of school trustees reports complying with the provisions of this Act. Blank forms for reports and for requisitions of text books shall be furnished to all boards of school trustees by the State Department of Education. Requisitions for books shall be based on said reports as to the maximum number of scholastics in attendance the preceding school session, plus an additional fifteen per cent, and such requisitions shall be made through the State Superintendent of Public Instruction and by him furnished to the State Depository designated by contractors of books not later than June 1st of each year; provided that in cases of unforeseen emergency the State depository shall fill small orders for books on requisition approved by the chairman of the district board of school trustees, such requisition subsequently to be sent promptly for approval to the State Department of Education. One copy of each text-book used in the work taught by the teacher shall be issued by the school trustees, or their representatives, to each teacher as a desk copy, such books to be returned to the trustees or their representatives at the close of the session. [Id., § 10.]

Art. 2904¹/₄j. Payment for books requisitioned.—Bills for text books purchased by the State on requisitions as provided for in Section 10 of this Act shall be paid by warrants on the State Treasury made by the State Department of Education and approved by the State Superintendent of Public Instruction. Such payment shall be made within ninety days from date of delivery and if payment be delayed thereafter, 6 per cent per annum shall be added until date of payment. The State Department of Education shall issue to each school district warrants to the value of five per cent of the contract price of books supplied to said district, this sum to be paid from the Free Text Book Fund, to cover the cost of care of the books and the cost of distribution of the books to the pupils of said districts. [Id., § 11.]

Art. 2904¹/₄k. Reports as to use, care, and condition of books by teachers and school officers; inspection of books.—Teachers and school officers must make such reports as to the use, care and condition of free text books as may be required by the local trustees or by the State Department of Education. The salary for any month of any teacher or employé who neglects to make such report at the proper time, may be withheld until each report be received in a condition satisfactory in form and content. Text books shall be subject to inspection by any inspector or agent authorized by those having charge of the local text book service, or authorized by the State Superintendent of Public Instruction, subject to the approval of the State Board of Education; provided that inspectors authorized by the State Department of Education shall be those in regular employment as high school inspectors, rural school inspectors, or inspectors of vocational education. [Id., § 12.]

Art. 2904 $\frac{1}{4}$ l. Rules for requisition, etc., of books; teachers, etc., not to sell, etc., school supplies.—Specific rules as to the requisition, distribution, care, use, and disposal of books may be made by the State Superintendent of Public Instruction subject to the approval of the State Board of Education; provided that such rules shall not conflict with the provisions of this Act, or with the uniform text book law under the terms of which contracts for supplies, books are made with the publisher or with the terms of said contract. No teacher or employé of the school engaged in the distribution of text books under this law as the agent or employé of the State, or of any county or district in the State shall, in connection with this distribution, sell or distribute, or in any way handle, any kind of school furniture or supplies, such as desks, stoves, blackboards, crayon, erasers, pens, ink, pencils, tablets, etc. [Id., § 13.]

Art. 2904 $\frac{1}{4}$ m. Labels for books; records of books issued; care of books.—All books shall have printed labels pasted on both inside covers; said label to be supplied by the State Department of Education. Each school shall number all books, placing the number on these labels. All teachers shall keep a record of the number of all books issued to each pupil. All books must be covered by the pupil, under the direction of the teacher. Books must be returned to the teacher at the close of the session, or when the pupil withdraws from school. Each pupil, or its parent or guardian, shall be responsible to the teacher for all books not returned by the pupil and said pupil not returning all books delivered to him or her shall not be entitled to the benefits of this Act until said books are paid for by said parent or guardian.

Local boards of trustees shall make provision for the fumigation of books before the re-issue of the books. Covers of all books shall be removed before re-issue, and the pupil to whom the book is issued shall replace cover, under the direction of the teacher. [Id., § 14.]

Art. 2904 $\frac{1}{4}$ n. Purchase of books by pupils, etc.—Books may be bought from the local boards of trustees by pupils or parents of pupils attending the public schools of the State, said boards to furnish the books at the retail contract price. Any book may be purchased from the State depository designated by the contractor holding the contract for said book, by State Institutions or by private schools, or church schools, such purchase to be made on the same terms as those given to the State for the same book. All money accruing from sales of books by district boards of school trustees shall be forwarded to the State Text Book Fund not later than one month after the sale. [Id., § 15].

Art. 2904 $\frac{1}{4}$ o. Purchase of books from pupils.—For the next two school sessions after the passage of this Act, all district boards of school trustees or their legally appointed representatives, shall be empowered to pay to any pupil one-half of the exchange price of any adopted text book in use the preceding year, on delivery to the teacher of the said book, provided that the same privilege of surrendering to the State the adopted books in previous use during the scholastic year preceding the change of books and receiving therefor one-half of the exchange price of books, shall be accorded to cities, towns, or districts, which, previously to the passage of this Act have owned and furnished free text books to the pupils. Bills for the re-payment to the school district of such purchases shall be attested as correct before a notary public by the chairman of the district board of trustees, or by his legally appointed representatives approved by the State Superintendent of Public Instruction, and

paid on warrants on the Text Book Fund issued by the State. Each district shall be allowed warrants to the amount of five per cent of the aggregate exchange price of all books turned over by the district to the book contractors and accepted by them in exchange for new books, this sum being set apart to pay cost of handling and packing books, and transportation to the nearest railway station. [Id., § 16.]

Art. 2904 $\frac{1}{4}$ p. Disposition of books unfit for use.—The State Superintendent of Public Instruction with the approval of the State Board of Education, may provide for the disposition of such text books as are no longer in a fit condition to be used for purposes of instruction, provided that the district board of trustees shall retain a sufficient number of each text book to be used as exchange copies in case of change of the adopted text book, and provided that whenever it should become practicable to sell such old text books for use in the manufacture of paper, pulp or similar substances, the highest price obtainable shall be secured by bids and money accruing from the sale shall be deposited to the credit of the State Text Book Fund. In case of the disuse of books in fair condition, inspectors of the State Department of Education may require the continuance of the use of said books. [Id., § 17.]

Art. 2904 $\frac{1}{4}$ q. Complaints as to text-book service.—Complaints in regard to text-book service shall be made both to the State Superintendent and to the State depository designated by contractors of the books. In case such complaint does not receive reasonably prompt attention, complaint shall be taken to the county judge, who shall proceed in accordance with the provisions of this Act (Section 6). Trustees of unorganized counties shall make complaint to the county judge of the county to which said unorganized county is attached for judicial purposes. [Id., § 18.]

Art. 2904 $\frac{1}{4}$ r. Requisitions for supplementary books.—In making requisitions for supplementary books, teachers shall designate their first, second, third choice, etc., to the limit of the sets of supplementary books adopted, and such reports shall be furnished to the State Superintendent. And said supplementary books shall be issued according to rules prescribed by the State Superintendent of Public Instruction. Requisitions for supplementary books may be made at convenient times during the session, but must be made within one month in advance of the time the books will be needed. [Id., § 19.]

Art. 2904 $\frac{1}{4}$ s. Notice to book contractors of operation of act.—Immediately upon the taking effect of this Act, it shall be the duty of the State Superintendent of Public Instruction to notify all parties holding contracts for the sale of text-books for use in the public schools of this State to the effect that the State of Texas has taken over the contracts now existing and will purchase books thereunder according to their terms. [Id., § 20.]

For sec. 21 of this act see Penal Code, art. 1513dd.

Art. 2904 $\frac{1}{4}$ t. Time when act becomes operative.—The furnishing to the pupils and patrons of the schools of this State of free text books shall not begin under the terms of this Act until the commencement of the scholastic term of 1919-1920. [Id., § 22.]

Art. 2904 $\frac{1}{4}$ u. Expenses due to operation of act.—All necessary expenses incurred by the operation of this Act incident to the enforcement of this law shall be paid from the State text book fund herein provided.

for upon bills approved by the State Superintendent of Public Instruction and shall be paid upon warrants drawn by the Comptroller upon the Treasury of the State. [Id., § 23.]

Art. 2904 $\frac{1}{4}$ v. Partial invalidity of act.—Should any sections or any part of this Act be declared unconstitutional it shall not affect any other part of this Act. [Id., § 24.]

Art. 2904 $\frac{1}{4}$ w. Annual ad valorem tax; amount.—There is levied and shall be collected for public free school purposes for the year 1919 and annually thereafter an ad valorem tax of thirty-five (35c) cents on the one hundred (\$100.00) dollars valuation of all real property situated, and on all property owned, in the State, on the first day of January of each and every year, and on all property sent out of the State prior to the first day of January for the purpose of evading the payment of taxes thereon and afterwards returned to the State, except so much thereof as may be exempted by the Constitution and Laws of this State or the United States, which said taxes shall be collected in the same manner as other ad valorem taxes, and all of said taxes are hereby appropriated for such purpose for the years ending August 31, 1920, and August 31, 1921. [Acts 1919, 36th Leg. 2d C. S., ch. 23, § 1.]

Took effect 90 days after July 23, 1919, date of adjournment.

Art. 2904 $\frac{1}{4}$ x. Same; amount apportioned for purchase of text books.—The State Board of Education shall annually, at a meeting designated by them each year, set apart out of the funds raised under the provisions of this Act an amount sufficient, not to exceed fifteen (15c) cents on the one hundred (\$100.00) dollars valuation on all property mentioned in Section one hereof, to purchase and distribute the necessary school books for the use of the pupils of the public free schools of this State. [Id., § 2.]

Sec. 3 of this act repeals all conflicting laws.

CHAPTER TWENTY

THE TEXAS STATE TEXTBOOK COMMISSION

Art.	Art.
2909b. Time of meeting; continuance of present contracts; consideration of advisability of change; terms of new contract; investigation of publications.	2909f. Bond of contractor; duties of Attorney General; suits on bond; new bond.
	2909ff. Prices to be paid for books; discrimination; suit on bond.

Article 2909b. Time of meeting; continuance of present contracts; consideration of advisability of change; terms of new contract; investigation of publications.—It shall be the duty of the Commission to meet not later than September 1, 1918 and as often thereafter as may be necessary for the purposes of considering the advisability of continuing or discontinuing at the expiration of all current contracts any or all of the State adopted text books in use in the public schools of Texas, and of making such adoptions as are provided for in Section 5 of this Act [1918 Supp., art. 2909bb].

Before making any change in the adopted series, however, the Commission shall, upon thorough investigation, satisfy itself that a change is desirable in the interests of the children in the schools, and in the interests of economy, and if in the judgment of the Commission, no text on any subject or subjects is offered that is better suited to the require-

ments of the schools than the present adopted text or texts, provided that the price and quality of such texts be satisfactory to the Commission, and, in their judgment, offer the best obtainable contract for the State, then it shall be lawful for the Commission to renew any contract for such period of time as may be deemed advisable, not to exceed a period of six years; provided, that, wherever the contractor supplying any book, agrees to renew the contract on the same terms for a period of not less than one year or more than six, the members of the Commission shall give preference to the offer of the company holding the contract, if in their judgment they shall thereby secure as good or better books at a lower price than by making a different contract, and it shall always be lawful for them to renew a contract on such terms as in their judgment may be for the best interests of the State. The contracts for the total number of different texts adopted should be so arranged, in adoptions taking place after the passage of this Act, that contracts on not more than one-sixth of the total number of different State text books shall expire in any one year, or shall be changed in any one year. If no text or texts on any prescribed subject or subjects are submitted by any particular publisher or publishers that meet the requirements of the schools, as may be determined by the Commission, then it shall be the duty of the chairman of the Commission to instruct the secretary of the Commission to investigate the book markets for the purpose of securing bids with a view to providing at the most reasonable price or prices possible, the best available texts on any and all subjects that are to be adopted by the Commission for the schools of Texas. [Acts 1917, 1st C. S., ch. 44, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 34, § 1 (§ 4).]

Explanatory.—Took effect Nov. 15, 1921. The above provision does not supersede all of Art. 2909b as it appears in the 1918 Supplement, but only the last paragraph thereof.

Art. 2909f. Bond of contractor; duties of Attorney General; suits on bond; new bond.—The bidder to whom any contract may have been awarded, shall execute a good and sufficient bond payable to the State of Texas, in the sum of not less than Twenty-Thousand Dollars, (\$20,000.00), for each basal book adopted under the provisions of this Act; and a good and sufficient bond payable to the State of Texas in the sum of not less than Three Thousand Dollars (\$3,000.00), for each supplementary Text-book adopted under the provisions of this Act; provided further, that the Commission is hereby given authority to require bond in such further and additional sums as it may deem advisable, said bond to be approved by the Commission; such bond to be conditioned that the contractor shall faithfully perform all the conditions of the contract; the contract and bond shall be prepared by the Attorney General, and be payable in Travis County, Texas, and shall be deposited in the office of the Secretary of State. The Bond shall not be exhausted by a single recovery thereon, but may be sued upon from time to time, until the full amount thereof is recovered; and the Texas State Text-book Commission, may, at any time, on twenty days' notice, require a new bond to be given, and the event the contractor shall fail to furnish such new Bond, the Contract of such Contractor, may, at the option of the Texas State Text-book Commission, be forfeited. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 11; Acts 1917, 35th Leg. 1st C. S., ch. 44, § 13; Acts 1919, 36th Leg. 2d C. S., ch. 53, § 1.]

Explanatory.—Took effect 90 days after July 22, 1919, date of adjournment. The act, in its title and enacting part, purports to amend "Article 2909(f), Title 48, Chapter 20, of the Revised Civil Statutes," etc.

Art. 2909ff. Prices to be paid for books; discrimination; suit on bond.—All contracts with publishers for the furnishing of books here-

under shall further stipulate and bind such publishers that they will not hereafter during the life of the respective contracts furnish or offer to furnish and distribute the same book or books under contract with any other State, county or school district in the United States at a lower price than that at which said publishers agree to furnish and distribute the same books under the contracts executed pursuant to this Act, unless such publishers respectfully shall immediately give such lower price to the beneficiaries of the contracts executed hereunder, provided, that in the event any such contract is made it shall be the duty of the Attorney General to institute suit upon the bond hereinabove provided for, for a recovery on behalf of the State of the liquidated damages due under and as provided for in Section 28 of this Act, and proof of a violation of this provision in any particular shall be prima facie evidence of liability in any such suit brought hereunder, and in case that any contractor who has a contract to furnish a book or books for the State under the provisions of this Act shall at any time during the period of this adoption contract with any other State, county or school district in the United States to furnish and distribute the same book or books at a lower price than fixed in accordance with the provisions of this Act, under similar conditions of sale and distribution as may be decided by the Texas State Text Book Commission such lower price shall immediately be given to the State of Texas, and for the breach of any of the conditions and stipulations contained herein or in the respective contracts, the contract may be forfeited and the contractors shall be liable to the State of Texas in liquidated damages in the full amount of the bond; and it shall be the duty of the Attorney General to bring suit on the bond of such contractors for such liquidated damages as provided for in Section 28 hereof [Supplement 1918, Art. 2909n]. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 12; Acts 1917, 1st C. S., ch. 44, § 14; Acts 1921, 37th Leg. 1st C. S., ch. 34, § 1 (§ 14).]

CHAPTER TWENTY-THREE

VOCATIONAL EDUCATION

Art.
2909¾. Acceptance of Act of Congress; good faith of State pledged.
2909¾a. State Treasurer to be custodian of funds.
2909¾b. State Board of Education designated State Board for Vocational Education.

Art.
2909¾c. Appropriations.
2909¾d. Purpose of appropriation.
2909¾e. Schools entitled to benefits of appropriation.
2909¾f. Studies, etc., as vocational education.

Article 2909¾. Acceptance of Act of Congress; good faith of State pledged.—The State of Texas, hereby accepts the provisions of the Act of Congress, approved February 23, 1917, entitled; “An Act to provide for the promotion of vocational education; to provide for co-operation with the States in the promotion of such education in agriculture, trades and industries, and home economics; to provide for co-operation with the States in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure.” The good faith of the State is hereby pledged to make available thorough appropriations for the several purposes of said Act funds sufficient at least to equal the sums allotted, from time to time, to this State for the appropriations made by

said Act and to meet all conditions necessary to entitle the State to the benefits of said Act. [Acts 1919, 36th Leg., ch. 114, § 1.]

Explanatory.—This Act supersedes Act June 5, 1917, 35th Leg. 1st C. S. ch. 45, to the same effect. Took effect 90 days after March 19, 1919, date of adjournment.

Acts 1921, 37th Leg. 1st C. S., ch. 18, re-enacts the provisions of this act, and makes an appropriation for the fiscal year 1921-22 and the fiscal year 1922-23.

Art. 2909³/₄a. State Treasurer to be custodian of funds.—The State Treasurer is hereby designated custodian of all funds allotted to this State from the appropriations made by said Act, and he shall receive and provide for the proper custody and disbursements of the same in accordance with this Act. [Id., § 2.]

Art. 2909³/₄b. State Board of Education designated State Board for Vocational Education.—The State Board of Education is hereby designated as the State Board for Vocational Education, authorized, and is hereby given all necessary power, to co-operate, as provided in and required by the aforesaid Act of Congress with the Federal Board of Vocational Education in the Administration of the provisions of said Act; and to do all things necessary to entitle the State to receive the full benefits thereof. [Id., § 3.]

Art. 2909³/₄c. Appropriations.—There is hereby appropriated out of the money in the State Treasury not otherwise appropriated, for the scholastic year 1919-20, \$57,591.26, or so much thereof as may be necessary, to be used for salaries of teachers, supervisors, or directors of agricultural subjects in the public schools; \$21,671.72, or so much thereof as may be necessary, for salaries of teachers of trade and industrial and home economics subjects in the public schools; and \$40,935.47, or so much thereof as may be necessary for training of teachers of vocational subjects in the colleges of the State, to be conditioned upon receiving a like sum from the Federal Board for Vocational Education to be used for similar purposes, and for the scholastic year 1920-21, \$69,687.89, or so much thereof as may be necessary for salaries of teachers, supervisors, or directors of agricultural subjects in the public schools; \$26,133.06, or so much thereof as may be necessary for paying salaries of teachers of trade and industrial and home economics subjects in the public schools; \$49,362.16, or so much thereof as may be necessary, for training of teachers of vocational subjects in the colleges of the State, to be conditioned upon receiving a like sum from the Federal Board of Vocational Education to be used for similar purposes; provided, that such amounts may be expended from each of these funds as, in the judgment of the State Board of Vocational Education, may be necessary for such expenses of direction and supervision of the work as will enable the State to secure the full benefit of the appropriation of the Federal government under the Smith-Hughes Act. [Id., § 4.]

Art. 2909³/₄d. Purpose of appropriation.—It is hereby expressly provided that all appropriations by local school boards for the purposes of this Act, and all appropriations by the State in its educational budgets that come within the provisions of this Act shall be allowed to compensate for the appropriations herein provided; and that the appropriations of this Act are simply a guarantee of good faith on the part of the State in the administration of the Federal Vocational Education Act; and are to be actually distributed only in order to secure to the State the full benefits of the Federal appropriation or, in case of necessity, to preserve the good name of the State; provided, that the State Board for Vocational Education is hereby authorized to permit the expenditure by the

State of amounts not exceeding more than \$25,000.00 for 1919–20 and \$25,000.00 for 1920–21, for aid in securing the benefits of the Federal appropriation to the rural schools and schools of small towns, the remainder of the funds required to duplicate Federal funds being required of school Boards accepting Federal funds under the provisions of this Act. [Id., § 5.]

Art. 2909³/₄e. Schools entitled to benefits of appropriation.—In order for any school to secure the benefits of the appropriation for the purposes specified in this Act, plans shall be submitted to the State Board of Vocational Education showing the kinds of vocation for which it is proposed that the appropriation shall be used; the kind of school & equipment; courses of study; methods of instruction; qualifications of teachers and plans for the supervision and in the case of teacher-training institutions, plans for the training of teachers, as provided in the Federal Act. Such plans shall be submitted to the State Superintendent of Public Instruction upon the form prescribed by the State Board for Vocational Education, and approved by the Federal Board for Vocational Education. It shall be the duty of the State Superintendent as secretary of the State Board for Vocational Education, to make a thorough investigation of such application submitted for aid under this Act, and the State Board for Vocational Education shall require a certificate that each school applying for aid under this Act meets substantially the requirements of the law before aid in any amount is granted. [Id., § 6.]

Art. 2909³/₄f. Studies, etc., as vocational education.—The State Board for Vocational Education shall have authority to make studies and investigations relating to Vocational Education, to advise with the Federal Board having in charge the direction of this work, to prescribe qualifications for the teachers, directors, & supervisors of the subjects for which provision is made in this Act, provided that they do not conflict with regulations of the said Federal Board, and to provide for the certification of such teachers, directors, and supervisors. [Id., § 7.]

TITLE 49

ELECTIONS

Chap.

1. Time and place of holding elections.
2. Officers of election.
3. Ordering elections, etc.
4. Suffrage.
- 4a. Suffrage—Women.
5. Official ballot.
6. Supplies, arrangements and expenses of election.
7. Manner of conducting elections and making returns thereof.

Chap.

8. Contesting elections.
9. Miscellaneous provisions.
10. Nominations—By primary elections and otherwise.
- 10b. Regulating and limiting expenditures at primary elections.
11. National convention—State conventions to select delegates to.

CHAPTER ONE

TIME AND PLACE OF HOLDING ELECTIONS

Art.

2910. Elections, general, time for holding.
 2911. Elections, special, time for holding.
 2912. Polls, hours of opening and closing.

Art.

2913. Precinct election, formed how and when, publication.

Article 2910. Elections, general, time for holding.

See *State v. Cook*, 78 Tex. 406, 14 S. W. 996; *Borches v. State*, 33 T. Cr. R. 96, 25 S. W. 423.

Statutes mandatory.—Provisions of statutes regulating time and place of elections are mandatory, and an election held on some other day than that specified is void. *Gray v. Ingleside Independent School Dist.* (Civ. App.) 220 S. W. 350.

Art. 2911. Elections, special, etc.

See *State v. Cook*, 78 Tex. 406, 14 S. W. 996.

In general.—Under this article, and arts. 1356, 1357, 1361, 1362, 2930, 2933, the county judge may order an election for the election of officers for a newly organized county without waiting until the next general election. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 2912. Polls, hours of opening and closing.

Provision directory.—This article, and arts. 605, 786, 787, as to time during which polls shall be open and when they shall close, are directory. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

In view of this article, and art. 605, held, that bond election is not invalidated by holding polls open until 7 p. m., in spite of arts. 786, 787, as to election of mayor and aldermen. *Id.*

Where judges of election were under the impression that the hour for closing the polls was 6 o'clock, and at that hour one of the judges left the voting place, but no public announcement was made that the polls were closed, permitting one to vote a few minutes after 6 was only an irregularity, which did not invalidate the election. *Winters v. Independent School Dist. of Evant* (Civ. App.) 208 S. W. 574.

Art. 2913. Precincts, election, formed how and when, publication.

Voting precincts how established.—Under prior statutes corresponding to this article and art. 2914, held, that the establishment of two voting precincts in a justice precinct, so as to include a city having four wards and a part of the surrounding country, does not invalidate an election held therein. *Henry, J., dissenting.* (*Davis v. State*, 75 Tex. 424, 12 S. W. 957, followed.) *Bell v. Faulkner*, 84 Tex. 187, 19 S. W. 480.

CHAPTER TWO

OFFICERS OF ELECTION

Art. 2925. Compensation of judges and clerks; working day.	Art. 2926. Payment of compensation.
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Article 2925. Compensation of judges and clerks; working day.—Judges and clerks of general and special elections shall be paid three dollars a day each and thirty cents per hour for any time in excess of a days work as herein defined; and the judge who delivers the returns of election immediately after the votes have been counted shall be paid two dollars for that service, provided the polling place of his precinct is at least two miles from the court house, and provided also he shall make returns of all election supplies not used when he makes return of the election. Ten working hours shall be considered a day within the meaning of this Article. [Acts 1905, 1 S. S., p. 557, § 146; Acts 1921, 37th Leg., ch. 112, § 1, amending art. 2925, Rev. Civ. St.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 2926. Payment of compensation.—The compensation of judges and clerks of general and special elections shall be paid by the County Treasurer of the county where such services are rendered, upon the order of the Commissioners' Court of such county. [Acts 1921, 37th Leg., ch. 112, § 1, amending art. 2926, Rev. Civ. St.]

CHAPTER THREE

ORDERING ELECTIONS, ETC.

Art. 2929. Proclamation of election, etc. 2930. Order for election, etc.	Chap. 2933. Notice of election, etc. 2936. In case of a tie another election shall be held.
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Article 2929. Proclamation of election, etc.

See *Borches v. State*, 33 T. Cr. R. 96, 25 S. W. 423.

Art. 2930. Order for election, etc.

See *Borches v. State*, 33 T. Cr. R. 96, 25 S. W. 423.

In general.—Under this article, and arts. 1356, 1357, 1361, 1362, 2911, 2933, the county judge may order an election for the election of officers for a newly organized county without waiting until the next general election. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 2933. Notice of election, etc.

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

Applicable to county organization elections.—This article, relating to duties of county judge concerning elections, may be applied to an election relating to the organization of a county, in view of art. 3081. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 2936. [1805] [1754] In case of a tie another election shall be held.

Effect of ordering special election.—Where a candidate for the office of county and district clerk was legally elected at a general election, a special election ordered thereafter, on the ground that the vote was a tie, held not to deprive such candidate of his right to hold the office. *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

CHAPTER FOUR

SUFFRAGE

Art. 2938. Qualifications for voting—who not qualified.	Art. 2939j. Act cumulative.
2939. Qualifications for voting; voting by absentee.	2940. Qualifications for voting in city elections.
2939a. Poll tax shall be paid by women.	2941. "Residence" defined.
2939b. Persons entitled to vote.	2942. Poll tax collected from whom; when paid; receipt.
2939c. Extension of time for paying poll tax.	2943. Poll tax, who not required to pay.
2939d. Obtaining exemption certificates.	2952. Poll tax receipt in case of removal to another county or precinct, proviso.
2939e. Tax collectors may issue receipts and exemption certificates.	2954. Minor reaching majority between Feb. 1 and election day, certificate.
2939f. Lists of persons paying poll taxes.	2961. Lists of poll taxpayers, etc.
2929g. Custody of duplicate receipts and exemption certificates.	2963a-2963k. [Omitted.]
2939h. Report to county clerk.	
2939i. Disposition of poll taxes collected.	

Article 2938. Qualifications for voting; who not qualified.

Legislative authority.—The Legislature, subject to restrictions of organic law, the federal and state Constitutions, has full power and authority to deal as it may see fit with subject of suffrage at any election which may be required or authorized by law. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Suffrage clause of state Constitution being restrictive in its operation, its legal effect is to deprive Legislature of authority to take from or add to specified qualifications of electors in any election to which clause applies. *Id.*

There is no inherent right for the people to vote or to hold an election, such subjects being governed by constitutional and legislative provisions, which regulations, designed to secure the freedom of the voters, the security and purity of the ballot, and the certainty of the result, should not be entirely ignored. *Trustees of Independent School Dist. No. 57 v. Elbon (Civ. App.)* 223 S. W. 1039.

Women.—Women are "citizens," within Bill of Rights of Constitution of Texas, though citizenship does not necessarily carry privilege of suffrage. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing, 110 Tex. 369, 218 S. W. 479.

Art. 2939. [1731] Qualifications for voting; voting by absentees.
—Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector; and every person of foreign birth, subject to none of the foregoing disqualifications, and who has, not less than six months before an election in which he or she offers to vote, declared his or her intention to become a citizen of the United States, in accordance with the Federal naturalization laws, and shall have resided in this State one year next preceding such election and the last six months in the county in which he or she offers to vote, shall also be deemed a qualified voter; and all electors shall vote in the voting precinct of their residence; provided, that the electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; and provided, further that any voter who is subject to pay his or her poll tax under the laws of the State of Texas or ordinances of any city or town in this State, shall have paid said tax before he or she offers to vote at any election in this State, and hold a receipt showing the payment of his or her poll tax before the first day of February next preceding such election; and, if he or she is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemption, as required by this Title. Or, if such voter shall have lost or mis-

placed said tax receipt, he or she shall be entitled to vote, upon making affidavit before any officer authorized to administer oaths that such tax was paid by him or her before said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost, misplaced or inadvertently left at home. Such affidavit shall be made in writing and left with the judge of the election. Provided, that in any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said subdivision of the county for six months next preceding such election.

Any qualified elector, as defined by the statutes of his State, who expects to be absent from the county of his or her residence, and at any other place in this State, on the day of his or her election may vote subject to the following conditions, to wit: At some time not more than ten days nor less than three days prior to the date of such election such elector shall make his or her personal appearance before the County Clerk of his or her residence, and if personally unknown to such clerk, shall be identified by at least two reputable citizens of such county, and shall deliver to such clerk his or her poll tax receipt, or exemption certificate, entitling him or her to vote at such election, and said clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election, which shall then and there be marked by said elector apart and without the assistance or suggestion of any other person, in such manner as said elector shall desire same to be voted, which ballot shall be folded and placed in a sealed envelope and delivered to said clerk who shall keep the same so sealed, and who shall also keep said poll tax receipt or certificate open to the inspection of any person who may wish to examine or see same until the second day prior to said election, and said clerk shall on said second day place the said poll tax receipt or certificate, together with the said sealed envelope containing said marked ballot, in another envelope which shall be by said clerk then mailed to the presiding judge of the voting precinct in which said elector lives, or at sometime not more than twenty days nor less than ten days prior to the date of such election, such elector shall make his personal appearance before a notary public, and if personally unknown to such notary public, shall be identified by at least two reputable citizens of this State, and shall deliver to such notary public his poll tax receipt or exemption certificate, entitling said elector to vote at such election, or if such elector shall have lost or misplaced his or her poll tax receipt, he shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such poll tax was actually paid by him or her before said first day of February next preceding such election at which he or she offers to vote and that said receipt had been lost, misplaced or left at home and in such case the affidavit so made shall be sent by the officer administering the oath to the County Clerk of the county in which said elector resides. It shall then be the duty of such County Clerk receiving the affidavit to verify same by examining the poll tax records of the county wherein said elector resides, and said notary public shall mail same to the County Clerk of the county of residence of such elector along with affidavit of the applicant that said applicant is the elector so named, and upon receipt of the poll tax receipt or exemption certificate, the County Clerk shall mail to such elector one ballot which has been prepared in accordance with the law for use in such election under

registered letter marked "Official ballot for such elector (giving elector's name) not to be opened except in the presence of a notary public," printed on outside of letter. Such elector shall make oath before such notary public that such ballot was then and there marked by said elector apart and without assistance or suggestions of any other person, in such manner as said elector shall desire, same to be voted, which ballot shall be folded and placed in a sealed envelope together with such affidavit which shall be marked on the outside of said envelope "Official ballot of such elector, giving elector's name," and mailed by such notary public to County Clerk of the county wherein said elector votes, who shall keep same so sealed, and who shall also keep said poll tax receipt or certificate open to the inspection of any person who may wish to examine or see same until the second day prior to said election, and said clerk shall on said day place the said poll tax receipt or certificate together with the said sealed envelope containing said marked ballot in another envelope which shall be by said clerk then mailed to the presiding judge of the voting precinct in which said elector lives. The postage for the entire correspondence herein made necessary to be provided by said elector. In the presence of the election officers provided by law, and on the day of such election and between the hours of two and three o'clock the said presiding judge of same in the precinct of the residence of said elector shall open the envelope containing said poll tax receipts and marked ballots and publicly announce that the ballot of such named electors is proposed to be cast, at which time any person who desires to challenge said vote and the right of same to be cast, shall be heard to present such challenge, and if there be no challenge of same, said vote shall be cast and counted according to the law; but if there be any challenge of such vote legal cause for same shall be heard and decided according to the law provided in the case of challenge; and in case no challenge is made, such poll tax receipt, after same is marked "Voted" as provided by law, shall be mailed back to the said county clerk. But in case of challenge, if challenged, such poll tax receipt together with affidavits relating thereto shall be mailed by said judge of election to the county clerk of such county who shall keep same for thirty days and if no demand be made for the production of same before any body or person in authority within said time, said county clerk shall deliver such receipt to the owners thereof. When voted the judge of election shall mark opposite the name of such absentee voter the word "Absentee." * * *; provided that the provisions of this act providing for absentee voting or casting ballots with the county clerk shall apply to any and all primary elections only. [Acts 1905, 1 S. S., p. 520, § 2; Acts 1917, 35th Leg. 1st C. S., ch. 40, § 1; Acts 1920, 36th Leg. 4th C. S., ch. 6, §§ 4, 4a; Acts 1921, 37th Leg., ch. 113, § 1, amending art. 2939, Rev. Civ. St. 1911, as amended.]

Explanatory.—Took effect 90 days after March 12, 1921, date of adjournment. The part of the section at the place indicated by asterisks is set forth post, as art. 289a, Penal Code.

Right of suffrage.—Suffrage is not a natural or inalienable right, yet it is a privilege conferred by the Constitution, and is not to be taken away, except by clear command of law. *Moore v. Plott* (Civ. App.) 206 S. W. 958.

Construction.—The suffrage clause of Const. art. 6, § 2, restricting to males privilege of voting in any election within its legal effect and operation, is not in any legal sense remedial, and does not require on that ground a liberal construction. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Residence.—Women are "citizens," within Bill of Rights of Constitution of Texas, though citizenship does not necessarily carry privilege of suffrage. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Character of election.—An "election," as the term is used in Const. art. 6, § 2, stating the qualifications of voters at an election, does not include primary elections, which

have been held to be elections within the meaning of article 5, § 8, giving the district court jurisdiction of contested elections, so that the Woman Suffrage Act (art. 3171a), permitting females possessing the qualifications of electors as defined by the Constitution, except as to sex, to vote in primary elections, is not invalid on that account. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Art. 3171a, empowering women to vote at primary elections, does not violate Const. art. 6, § 2, making only male persons qualified electors at elections within the state, since the word "elections" in the Constitution refers only to governmental elections and not to preliminary and non-governmental activities like primary elections. *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479.

Not all restrictions which Constitution of Texas imposes on legislative action concerning elections are applicable indiscriminately to all elections; whether a particular restriction is applicable to a particular election depending on character of election. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Under art. 3171a, women may vote at primary elections; such act not violating Const. art. 6, § 2, making only male persons qualified electors at elections within the state, since the word "elections," in the Constitution, refers only to governmental elections, and not to preliminary and nongovernmental activities, like primary elections. *Id.*

"Governmental elections," unlike primary elections or conventions, are elections, such as general elections, which directly and finally affect all the people of the included territory, and determine finally who shall hold public office, or whether a particular governmental policy shall prevail. *Id.*

Art. 2939a. Poll tax shall be paid by women.—The poll tax herein levied shall apply to women as well as to men, and every person who has been made a qualified voter in this State under the Nineteenth Amendment to the Constitution of the United States and who was over twenty-one years of age and under sixty years of age on the first day of January, A. D. 1920, must pay the poll tax herein levied prior to the first day of February, 1921, in order to participate in elections, general, special or primary, held within this State or any subdivision or municipality thereof between the first day of February, 1921, and the thirty-first day of January, 1922, both dates inclusive. [Acts 1920, 36th Leg. 4th C. S., ch. 6, § 5.]

Took effect Oct. 2, 1920.

Art. 2939b. Persons entitled to vote.—All persons, both male and female, who have heretofore paid the poll tax or secured exemption certificates required by existing laws for voting in primary or general elections held within this State for the year 1920, and all persons, both male and female, who were over the age of sixty years on the first day of January, 1919, and who do not reside within cities of ten thousand inhabitants or over, shall be entitled to vote in all elections within the State of Texas which may be held prior to the first day of February, A. D. 1921. [*Id.*, § 6.]

Art. 2939c. Extension of time for paying poll tax.—All persons, male and female, who possess the qualifications of a voter within this State under the Constitution and laws of the United States, but who have not heretofore paid a poll tax within the time prescribed by the laws of this State in order to entitle them, if they had been otherwise qualified, to vote, shall have and are hereby granted until the twenty-second day of October, A. D. 1920, in which to pay the poll tax of the same amount heretofore collected from male persons only as a prerequisite to voting in elections held in this State prior to February 1, A. D. 1921, which tax when so paid shall entitle the persons paying the same to a poll tax receipt and shall entitle the holder thereof to vote in the general election in November, 1920, and in all other elections, general, special, municipal and primary, held within this State prior to the first day of February, A. D. 1921, subject, however, to all other rules and restrictions now provided by the laws governing elections. [*Id.*, § 7.]

Art. 2939d. Obtaining exemption certificates.—All persons resident within this State on the first day of January, A. D., 1920, and who were on said last named date over the age of sixty-one years, and all such persons who have become twenty-one years of age since January 1, A. D. 1920, shall, if otherwise qualified under existing laws, be entitled to vote in all elections mentioned in the preceding sections of this Act, by obtaining, prior to October 22, 1920, exemption certificates of the same kind now prescribed by the election laws of this State; provided, however, that all persons resident within this State on the first day of January, A. D. 1920, and who were more than sixty years of age on the first day of January, A. D. 1919, and who do not live in cities of ten thousand inhabitants or over, and who are otherwise qualified, may participate in elections, general, special, municipal and primary held within this State prior to February 1, 1921, without obtaining exemption certificates; and provided further that discharged soldiers, sailors and marines whose poll taxes were remitted by Act of the Thirty-sixth Legislature passed at the First Called Session hereof, and approved on the ninth day of May, A. D. 1919, and known as Chapter 3 of the Acts of the First Called Session of the Thirty-sixth Legislature, may vote as provided for in said Act without obtaining exemption certificates. [Id., § 8.]

Explanatory.—Acts 1st Called Sess. of 36th Leg., ch. 3, is temporary in its nature and is not included in this compilation.

Art. 2939e. Tax collectors may issue receipts and exemption certificates.—The tax collectors of the various counties in this State shall issue poll tax receipts and exemption certificates to all persons entitled under the provisions of Sections 7 and 8 of this Act [arts. 2939c, 2939d] to receive the same, and who apply therefor prior to October 22, 1920. [Id., § 9.]

Art. 2939f. Lists of persons paying poll taxes.—Prior to the twenty-eighth day of October, 1920, the county tax collector of each county shall deliver to the board that is charged with the duty, under the general election laws of this State, of furnishing election supplies, separate certified lists of the persons in each precinct who have paid their poll tax or obtained exemption certificates as permitted or required under Sections 7 and 8 of this Act [Arts. 2939c, 2939d] the names being arranged in alphabetical order, and to each name the proper number as shown by the duplicate, with description of the voter as to his residence, voting precinct, length of residence in State and county, race, occupation and address, or if the voter resides in an incorporated city, the ward and street and number of the voter's residence, if numbered. If the county has any unorganized county or counties attached to it for judicial purposes, the collector of taxes shall furnish to said board before October twenty-eighth, as many certified lists of the electors resident in such unorganized county or counties, as there are election precincts in such unorganized county, which lists as respects poll tax receipts and exemption certificates shall be identical with those required for poll tax receipts and exemption certificates under prior laws. Said board shall furnish each presiding judge of the precinct a certified list of the voters of his precinct who have complied with the provisions of this Act, and at the same time that other election supplies are furnished, and such lists of qualified voters shall be in the form required by Article 2961, Revised Civil Statutes of 1911. [Id., § 10.]

Art. 2939g. Custody of duplicate receipts and exemption certificates.—The county tax collector of each county in the State shall keep securely in a safe place the duplicates for each precinct from which the said poll tax receipts and exemption certificates have been detached, and they must remain there except when taken out for examination, which must always be done in his presence, but they shall be burned by the county judge at the expiration of one year, if no election contest shall have, in the meantime, been instituted. [Id., § 11.]

Art. 2939h. Report to county clerk.—On or before the thirty-first day of October, A. D. 1920, the collector of taxes in each county in this State shall make statement to the county clerk showing how many poll tax receipts and exemption certificates he has issued under the provisions of Sections 7 and 8 of this Act [Arts. 2939c, 2939d], and to whom issued, in which voting precinct in the county, and such statement shall become a record of the county and as such shall be kept by the county clerk. [Id., § 12.]

Art. 2939i. Disposition of poll taxes collected.—The poll taxes collected by virtue of this Act shall be and are hereby set aside to the State and county and to the particular funds thereof as now prescribed by law for poll taxes heretofore collected. [Id., § 13.]

Art. 2939j. Act cumulative.—This Act shall be construed as being cumulative to the election laws of this State now in force, except that in case of conflict this Act shall control. [Id., § 14.]

Art. 2940. Qualifications for voting in city elections.

In general.—In city election involving expenditure of funds, where voter told judges that he had no taxable property within city, it was their duty to refuse his ballot, since it was his duty to show that he was qualified. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Although Constitution provides that at elections to determine expenditure of money or assumption of debt by towns and cities only taxpayers can vote, since taxpayer is defined as property owner, it is not essential that property tax be actually paid, nor is assessment roll the only evidence of payment. *Id.*

Art. 2941. "Residence" defined.

Question of fact.—Under this article, and art. 2952, defining residence as actual physical living in place, question of residence held one of fact. *Garvey v. Cain* (Civ. App.) 197 S. W. 765.

Art. 2942. Poll tax collected from whom; when paid; receipt.—A poll tax shall be collected from every person between the ages of twenty-one and sixty years who resided in this State on the first day of January preceding its levy, Indians not taxed, persons insane, blind, deaf or dumb and those who have lost a hand or foot, or permanently disabled, excepted; which tax shall be collected and accounted for by the tax collector each year and appropriated as required by law. It shall be paid at any time between the first day of October and the first day of February following; and the person, when he pays it, shall be entitled to his poll tax receipt, even if his other taxes are unpaid. [Acts 1905, 1 S. S., p. 520, § 12; Acts 1920, 36th Leg. 4th C. S., ch. 6, § 2 amending art. 2942, Rev. Civ. St.]

Persons entering state after January first.—One who did not become a citizen of the state until November 1, 1915, was a qualified voter in an election held in January, 1916, under Const. art. 6, § 2, although he paid no poll tax for the year 1915, not being subject to such a tax. *Winters v. Independent School Dist. of Evant* (Civ. App.) 208 S. W. 574.

Under Const. art. 6, § 2, art. 7, § 3, art. 8, § 1, Rev. St. 1911, art. 7692, poll tax becomes due on January 1st, and persons entering the state after such date need not pay such tax in order to be qualified voters. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 2943. Poll tax, who not required to pay.—Every person who is more than sixty years old or who is blind or deaf or dumb, or is permanently disabled, or has lost one hand or foot, shall be entitled to vote without being required to pay a poll tax, if he has obtained his certificate of exemption from the county collector when the same is required by the provisions of this title. [Acts 1905, 1 S. S., p. 520, § 6; Acts 1920, 36th Leg. 4th C. S., ch. 6, § 3.]

Art. 2952. Poll tax receipt in case of removal to another county or precinct; proviso.

Residence question of fact.—Under art. 2941, and this article, defining residence as actual physical living in place, question of residence held one of fact. *Garvey v. Cain* (Civ. App.) 197 S. W. 765.

Art. 2954. Minor reaching majority between Feb. 1, and election day, etc.

Application.—There was nothing to prevent one who became of age during the year 1917 to sign a petition for the organization of a county early in April, 1918, although he had not paid poll tax for 1917, and did not have an exemption certificate; this article not applying. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 2961. Lists of poll taxpayers, etc.

Cited, *Shaw v. Lindsley* (Civ. App.) 195 S. W. 338.

Arts. 2963a–2963k.

Explanatory.—Acts 1919, 36th Leg. 1st C. S., ch. 3, gave discharged sailors, soldiers and marines the right to vote in the years 1919 and 1920 without the payment of poll taxes. It is omitted from this compilation as being temporary.

CHAPTER FOUR A

SUFFRAGE—WOMEN

Articles 2963¹/₄–2963¹/₄f.

Explanatory.—The act appearing at this place in *Texas Complete Statutes 1920* appears in this compilation as arts. 3171a–3171g, post.

CHAPTER FIVE

OFFICIAL BALLOT

<p>Art. 2969. Ballots, how printed; form, etc.</p> <p>2970. Ballot, further regulations as to.</p> <p>2971. Constitutional amendment and other questions, how submitted.</p>	<p>Art. 2973. Ballots, how many furnished.</p> <p>2974. Ballots (counted), etc.</p>
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Article 2969. Ballots, how printed; form, etc.

Mutilation.—There is no statutory law prohibiting a mutilated ballot from being counted, and if the intent of the voter can be ascertained by the ballot cast, in the light of surrounding circumstances, effect should be given to the ballot in accordance with such intent. *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

A ballot at a general election cast for district and county clerk, whereon perpendicular lead pencil lines had been drawn through all the party tickets, one of them indicating an attempted erasure, and other horizontal pencil marks had been made through the names of certain candidates, the face of the ballot was ambiguous, and permitted the voter who cast it to explain why he voted it in that condition. *Id.*

Where a ballot cast at an election for district and county clerk bore horizontal lead pencil marks through the initials of the names of candidates for that office, such ballot held sufficiently to indicate that the voter did not intend to vote for such candidates, but did intend to vote for those whose names were not marked in any respect. *Id.*

Directory provisions.—This article is only directory as far as "writing the name of the candidate for whom a voter desires to vote in the blank column, and in the space provided for such purpose," is concerned, and a vote was not illegal, where the printed name of the candidate was scratched and the name of another written in the space provided for the printed name. *Moore v. Plott* (Civ. App.) 206 S. W. 958.

Art. 2970. Ballot, further regulations as to.

In general.—Under art. 3172, authorizing a nominee to decline nomination 20 days before election, a nominee by independent petition is entitled to be certified as such by the secretary of state after he declined a nomination by a party, notwithstanding this article, prohibiting the name of any candidate appearing more than once on the official ballot. *Westerman v. Mims* (Sup.) 227 S. W. 178.

Art. 2971. Constitutional amendment and other questions, how submitted.

In general.—Under Rev. St. art. 2971, printing on ballot furnished voters at election on proposed changes to charter of city of Dallas, submitted under Home-Rule Bill, of propositions as to proposed ordinances granting franchises, held not illegal, art. 3097, as to printed matter on ballots, applying. *Shaw v. Lindsley* (Civ. App.) 195 S. W. 338.

Art. 2973. Ballots, how many furnished.

Cited, *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

Art. 2974. Ballots (counted) etc.

Cited, *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

CHAPTER SIX

SUPPLIES, ARRANGEMENTS, AND EXPENSES OF ELECTION

Art.
2980. Guard rails, etc.
2983. Board to provide election supplies.

Art.
2986. Collector's fees, etc.

Article 2980. Guard rails, etc.

See *Twin City Co. v. Birchfield* (Civ. App.) 228 S. W. 616.

Art. 2983. Board to provide election supplies.

Cited, *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

Art. 2986. Collector's fees, etc.

In general.—Tax collector held entitled to retain 10 cents for each poll tax receipt issued by him in addition to maximum fees allowed him by arts. 3881-3883, 3887, 3889, 3893, 3897, 3898, since this article was not repealed thereby. *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

Prior laws.—Under Acts 25th Leg. Sp. Sess. c. 5, approved June 16, 1897, as amended by Acts 25th Leg. Sp. Sess. c. 15, approved June 19, 1897, county collectors of taxes who were to receive only 10 cents for each poll tax receipt and certificate of exception issued by them were those subject to all requirements of sections 11 and 16. *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

CHAPTER SEVEN

MANNER OF CONDUCTING ELECTIONS AND MAKING RETURNS THEREOF

Art.
2994. Judges, appointment by voters, etc.
3001. Poll tax receipt stamping, etc.
3003. One voter at a time in booth; assistance of illiterates; interpreter; supervisors may be present.
3004. Judges, etc., shall not electioneer, etc.

Art.
3007. Ballot boxes and ballots, custody; admission to polls.
3008. Defective, etc., ballots, etc.
3009. Deposit and count, etc.
3011. Signature of judge, etc.
3012. Ballots which shall not be counted.

<p>Art. 3024. Return of elections, how and to whom made.</p> <p>3030. County commissioners shall open returns, when.</p> <p>3031. Returns shall not be estimated, unless, etc.</p>	<p>Art. 3032. Certificates of election to county and precinct officers.</p> <p>3036. Such returns shall be counted, when, etc.</p> <p>3044. County judge shall certify, etc.</p> <p>3044a. Uniform date for qualification of all county and precinct officers.</p>
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Article 2994. Judges, appointment by voters, etc.

Election returns.—In view of this article, and arts. 3024, and 3031, relating to counting and canvassing of election returns, the admission in evidence of papers designated as tally sheets and election returns for the purpose of showing an election was error, where no one testified as to who prepared the papers, nor that they were accurately made and they were only signed by a clerk, and not in such form as to constitute any part of the lawful return of an election. *Griffith v. State* (Civ. App.) 216 S. W. 469.

Art. 3001. Poll tax receipt stamping, etc.

Signature of presiding judge.—Under this article, and art. 3011, 50 ballots for county treasurer, without signature of presiding judge written on blank side when they were cast, counted, and returned for candidate, were illegal. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Art. 3003. One voter at a time in booth; assistance to illiterates; interpreter; supervisor may be present, etc.—Not more than one person at the same time shall be permitted to occupy any one compartment, voting booth or place prepared for a voter, nor shall any assistance be given a voter in preparing his ballot, except when a voter is unable to prepare the same himself because of some bodily infirmity, such as renders him physically unable to write, or is over sixty years of age and is unable to read and write, in which case two judges of such election shall assist him, they having been first sworn that they will not suggest, by word or sign or gesture, how such voter shall vote; and they will confine their assistance to answering his questions, to naming candidates, and the political parties to which they belong, and that they will prepare his ballot as such voter himself shall direct; provided that the voter must in every case explain in the English language how he wishes to vote, and no judge of the election shall use any other than the English language in aiding the voter, or in performing any of his duties as such judge of the election, and in all cases where assistance is given hereunder, two judges of the election shall assist such voter, they having been first sworn that they will not suggest by word, sign, or gesture, how such voter shall vote; that they will confine their assistance to answering his questions in the English language, to naming candidates, and, if the voting be at a general election, to naming the parties to which such candidates belong, and that they will prepare the ballot as such voter directs, in the English language; and where any assistance is rendered in preparing a ballot other than as herein allowed, the ballot shall not be counted, but shall be void for all purposes. If the election be a general election, the judges who assist such voters shall be different political parties, if there be such judges present, and if the election be a primary election, a supervisor, or supervisors, may be present, when the assistance herein permitted is being given, but such supervisor or supervisors must remain silent except in cases of irregularity or violation of the law. [Acts 1905, 1 S. S., p. 533, § 82; Acts 1918, 35th Leg. 4th C. S., ch. 30, § 1; Acts 1919, 36th Leg., ch. 55, § 1.]

Took effect March 13, 1919.

Art. 3004. Judge, etc., shall not electioneer, etc.

Electioneering.—In city election for issuance of bonds, it is not improper electioneering to print upon notice of election statement that city was without funds to build sewers which public health required. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Art. 3007. Ballot boxes and ballots, custody; admission to polls.
 —From the time of opening the polls until the announcement of the results of the canvass of votes cast and the signing of the official returns the boxes and official ballots shall be kept at the polling place in the presence of one or more of the judges and supervisors, if there are any. No person shall be admitted within the room where the election is being held, except the judges, clerks, persons admitted by the presiding judge to preserve order, supervisors of election, and persons admitted for the purpose of voting. [Acts 1905, 1 S. S., p. 533, § 76; Acts 1918, 35th Leg. 4th C. S., ch. 30, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 3008. Defective, etc., ballots, etc.

Cited, *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

Mutilated ballots.—A ballot cast for district and county clerk, containing horizontal marks through names of certain candidates, and also perpendicular lead pencil marks through all the party tickets, one of which marks, indicating an attempted erasure, held not a "mutilated" ballot; "mutilated" meaning "destitute or deprived of some essential or valuable part; greatly shortened." *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

Art. 3009. Deposit and count, etc.

Cited, *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

Art. 3011. Signature of judge, etc.

Necessity.—Under this article, and art. 3001, 50 ballots for county treasurer, without signature of presiding judge written on blank side when they were cast, counted, and returned for candidate, were illegal. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Art. 3012. [1741] [1697] Ballots which shall not be counted.

Ballots must be numbered.—Under Const. art. 6, § 4, relating to elections, and directing the legislature to provide for the numbering of ballots, the legislature enacted Rev. St. 1879, arts. 1694, 1697, which, respectively direct a judge of election to write the voter's poll-list number on the ballot, and forbid the counting of an unnumbered ballot. Held, that article 1694, is mandatory and that article 1697 is binding on the courts, as well as the officers of election. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

Art. 3024. [1743] [1698] Return of elections, how and to whom made.

See *Trustees of Independent School Dist. No. 57 v. Elbon* (Civ. App.) 223 S. W. 1039.

Irregularities not invalidating election.—Where the manner in which the votes cast at an election were returned to the commissioners' court of the county was irregular, but there was no showing of fraud, or that the returns were changed or tampered with, or that the free exercise of the voters' franchise was in any way affected thereby, such votes should be counted. *Hillman v. Kuykendall* (Civ. App.) 223 S. W. 242.

Returns as evidence.—In view of this article, and arts. 2994 and 3031, relating to counting and canvassing of election returns, the admission in evidence of papers designated as tally sheets and election returns for the purpose of showing an election was error, where no one testified as to who prepared the papers, nor that they were accurately made and they were only signed by a clerk, and not in such form as to constitute any part of the lawful return of an election. *Griffith v. State* (Civ. App.) 216 S. W. 469.

Art. 3030. [1753] [1705] County commissioners shall open returns, when.

Determination by commissioners.—Under this article, and arts. 3031, 3032, 3044a, commissioners' court was acting within province of its lawful duties in determining whether particular returns should be estimated in the canvass, though such action in rejecting particular returns may have been wrongful. *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

It is no part of the duty of an officer to ascertain the result of the election held to elect his successor, if the result has been declared by officials authorized by this article, and art. 3032 to ascertain result. *Id.*

— **As evidence.**—The estimate of the commissioners' court as to result of election under this article, followed by the issuance of certificate of election by county judge under art. 3032, is *prima facie* evidence of right of office, and is conclusive evidence of such right until it shall have been otherwise determined in some appropriate

proceeding of some tribunal having authority in such matters. *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Art. 3031. [1754] [1706] Returns shall not be estimated, unless, etc.

See *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Cited, *Wells v. Commissioners' Court of Presidio County* (Civ. App.) 135 S. W. 608; *Griffith v. State* (Civ. App.) 216 S. W. 469.

Art. 3032. [1755] [1707] Certificates of election to county and precinct officers.

See *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Art. 3036. [1758] [1710] Such returns shall be counted, when, etc.

Operative date of constitutional amendment.—Const. art. 17, § 1, provides that when a vote has been had on adopting a constitutional amendment returns shall be made to the secretary of state, and if the amendment receives a majority of the votes cast it becomes a part of the constitution, and proclamation shall be made by the governor thereof. Held, under Rev. St. 1879, art. 1710, that as the amendment to Const. 1876, art. 8, § 9, was ratified by vote August 14, 1883, it did not become operative until after 40 days, and was not in force until proclaimed by the governor on September 25, 1883. *Texas Water & Gas Co. v. City of Cleburne*, 1 Civ. App. 580, 21 S. W. 393.

Art. 3044. [1766] [1718] County judge shall certify, etc.

County commissioners have 30 days within which to qualify.—Under Rev. St. 1879, art. 1718, county commissioners have at least 30 days within which to qualify for office. *Cassin v. Zavalla County*, 70 Tex. 419, 8 S. W. 97.

Art. 3044a. Uniform date for qualification of all county and precinct officers.—That after each general election in this State, those who are elected to the various county and precinct offices in the State, shall qualify by taking the oath of office and entering upon and assuming the duties of their respective offices, as prescribed by law, on the first day of January, following the last general election, or as soon thereafter as possible. And all those officers holding offices at the time of such general election shall surrender their offices to their successors accordingly on such date, or as soon after such date, as their said successors shall have qualified, and be ready to assume the duties thereof. [Acts 1917, 35th Leg., ch. 143, § 1; Acts 1921, 37th Leg., ch. 45, § 1.]

Explanatory.—Sec. 2 repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

Holdover over.—The holdover whose term of office has expired has no right to or interest in the office itself, his only right and duty being to protect its possession against an intruder until the qualification of his successor. *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Holdover officer is fully absolved from further liability as to the preservation of records and the further discharge of the duties of his office when he shall have delivered them to the holder of the certificate of election from properly constituted authorities after having duly qualified according to law. *Id.*

Const. art. 16, § 17, requiring officers to perform their duties until their successors shall be duly qualified, has reference to public or governmental officers, and officers of a political party, though provided for by statutory law, are not to be regarded as public or governmental officers, so that the provision does not authorize the county executive committee of a party to hold over until their successors are qualified. *Walker v. Hoping* (Civ. App.) 226 S. W. 146.

Even in the absence of any express provision of the governing law, officers, whether state, municipal, corporation, or otherwise, hold over until their successors are chosen and qualified, and this rule applies, in the absence of a regulation or usage of a political party, to the county executive committeemen of the party. *Id.*

DECISIONS RELATING TO SUBJECT IN GENERAL

Mutilated ballots—Validity.—There is no statutory law prohibiting a mutilated ballot from being counted, and if the intent of the voter can be ascertained by the ballot cast, in the light of surrounding circumstances, effect should be given to the ballot in accordance with such intent. *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

CHAPTER EIGHT

CONTESTING ELECTIONS

<p>Art. 3046. Contest of election for district attorney.</p> <p>3050. Other contested elections than for officers.</p> <p>3051. Notice of contest.</p> <p>3052. Reply to notice of contest.</p> <p>3053. Service of notice, etc.</p> <p>3055. Cause to have precedence, etc.</p> <p>3056. Rules of evidence and procedure on trial.</p>	<p>Art. 3057. Contestee in certain cases to execute bond.</p> <p>3062. Fraudulent votes not to be counted.</p> <p>3063. Election to be declared void, when.</p> <p>3065. Appeal available, etc.</p> <p>3068. Measure of damages.</p> <p>3077. Other contested elections.</p> <p>3078. Parties defendant under preceding article.</p>
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Article 3046. [1793] Contest of election for district attorney.

Jurisdiction of district court.—Suits by duly elected treasurer of county against two persons, one of whom usurped office and illegally held it for year, when he resigned to make place for other, under appointment from county judge, held suits for an office, of which district court had jurisdiction, though this and following articles were not complied with. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Jurisdiction of district court of contested election can be invoked only by compliance with this and following articles, executing Const. art. 5, § 8, conferring on district court jurisdiction of contested elections. *Id.*

Const. art. 5, § 8, as amended, in 1891, to give district court jurisdiction of contested elections, and this and following articles, prescribing rules by which contest may be tried, enlarged jurisdiction of district court, and did not limit its original power to try suit for office. *Id.*

The constitutional amendment conferring jurisdiction upon a district court to hear and determine election contests is not self-executing. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

Art. 3050. [1797] Other contested elections than for officers.

Collateral attack on charter amendment election.—In action involving the right of a street railroad to remove tracks from certain streets and extend system in other street in which it was claimed that the city had a right to authorize such extension under the charter as amended, the validity of the election at which the charter was amended will not be inquired into, under this article, since the result of the election cannot be attacked in a collateral proceeding. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 307.

Art. 3051. [1798] Notice of contest.

See *Bell v. Faulkner*, 84 Tex. 187, 19 S. W. 480.

Misjoinder.—There is no misjoinder of causes of action, nor of parties, where, in proceedings to contest an election of two school trustees, two defeated candidates are contestants against the two successful ones; all parties interested adversely to the contestees being proper parties plaintiff. *Kennison v. Du Plantis* (Civ. App.) 220 S. W. 118.

Notice of grounds.—In a contest of a school election to determine whether bonds should be issued, it is essential, to give the district court jurisdiction, that the county attorney be served with a written notice of contest and statement of the grounds on which the contestant relies, and service of petition of contest upon such attorney, with verbal notice, was insufficient. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

Under this article, requiring election contestants to give contestees notice in writing of intention to contest, and to deliver to them a written statement of the grounds, which does not refer to article 1827, prescribing the requisites of a petition, a service of a copy of the petition filed in a contest case is not required, and the fact that the copy served does not name the contestees does not invalidate the proceedings; it affirmatively appearing that the contestees were not misled. *Kennison v. Du Plantis* (Civ. App.) 220 S. W. 118.

The ordinary rules of procedure in civil actions do not apply to election contests, so that the sufficiency of the written statement of contest is not to be determined by rules applicable to the petition in a civil cause. *Id.*

Though this article requires election contestants to give contestees written notice of intention to contest, the fact that the contest was filed in court before the notice was given does not invalidate the proceedings. *Id.*

Art. 3052. [1799] Reply to notice of contest.

See *Bell v. Faulkner*, 84 Tex. 187, 19 S. W. 480.

Art. 3053. [1800] Service of notice, etc.

Cited, *Moore v. Plott* (Civ. App.) 206 S. W. 953.

Art. 3055. [1802] Cause to have precedence, etc.

Cited, *Kennison v. Du Plantis* (Civ. App.) 220 S. W. 118.

Art. 3056. [1803] Rules of evidence and procedure on trial.

Procedure in general.—In election contest statement of result of previous election is irrelevant and properly stricken from pleading. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Declarations of voter.—On contest of an election as a stock law election under art. 7235, the declarations of voters made before or after the election are incompetent to show that by reason of age or residence they were not qualified to vote. *Reid v. King* (Civ. App.) 227 S. W. 960.

Evidence.—In determining whether erroneous ruling of judges materially affected result of election, court will consider evidence of how voter, denied privilege of casting his ballot, would have voted had he been permitted. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Mere showing that an unnamed and unidentified negro was refused privilege of voting, without showing that he owned taxable property or resided in town or how he would have voted, does not show error in exclusion of his ballot. *Id.*

Burden of proof is upon election contestant to show that result was materially affected by erroneous ruling of election officers. *Id.*

In election contest, consideration by judge of irregularities in ballots, discovered and noted in private room in presence of counsel without formal tender in court for judicial consideration, held not reversible error. *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

In election contest for fraudulent substitution of ballots, uncorroborated testimony of voters repudiating ballots held insufficient to support finding of fraudulent substitution. *Id.*

In contest of a school election to determine whether bonds should be issued to build a schoolhouse, upon the ground that certain persons were unlawfully denied the right to vote, it devolved upon contestants to show, by clear and satisfactory testimony, that such persons possessed all the necessary qualifications of voters. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

Result of an election should not be set aside until it is clearly made to appear that the election was not properly and fairly held. *Id.*

A ballot at a general election cast for district and county clerk, whereon perpendicular lead pencil lines had been drawn through all the party tickets, one of them indicating an attempted erasure, and other horizontal pencil marks had been made through the names of certain candidates, the face of the ballot was ambiguous, and permitted the voter who cast it to explain why he voted it in that condition. *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

Art. 3057. [1804] Contestee in certain cases to execute bond.

Contestee not enjoined from taking office.—In view of arts. 3057-3061, and 3063, providing method of contesting results of election and providing for bond to protect contestant, equity will not intervene on behalf of contestant by enjoining contestee from taking office pending result of contest. *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Art. 3062. [1804e] Fraudulent votes not to be counted.

Result how determined.—Under this article, in suit contesting election on issuance of bonds by road district, where court found 28 votes were cast against bond issue, but fraudulently made to appear for it, it properly subtracted such votes from total for issue as returned, and added them to total against issue. *Baskin v. Walschak* (Civ. App.) 202 S. W. 747.

Art. 3063. [1804f] Election to be declared void, when.

Acts invalidating election.—Under this article, if election officials erroneously require proof that voter has actually paid his taxes and such ruling materially affects result, election must be declared void. *Kempen v. Bruns* (Civ. App.) 195 S. W. 643.

Where count of all ballots illegally excluded showed prevailing majority of four in favor of proposition as against previous majority of six, election was not void on account of illegal ruling. *Id.*

Though qualified voter was told by private individual that judges would not let him vote, his vote could not be counted where he did not go to polls for purpose of voting. *Id.*

To warrant counting ballot of qualified voter denied the privilege of voting, it is not sufficient for him to testify that he thought he would have voted certain way, but he must testify that he would have voted for or against proposition. *Id.*

Where judges of election were under the impression that the hour for closing the polls was 6 o'clock, and at that hour one of the judges left the voting place, but no public announcement was made that the polls were closed, permitting one to vote a few minutes after 6 was only an irregularity, which did not invalidate the election. *Winters v. Independent School Dist. of Evant* (Civ. App.) 208 S. W. 574.

Where the manner in which the votes cast at an election were returned to the

commissioners' court of the county was irregular, but there was no showing of fraud, or that the returns were changed or tampered with, or that the free exercise of the voters' franchise was in any way affected thereby, such votes should be counted. *Hillman v. Kuykendall* (Civ. App.) 223 S. W. 242.

In view of this article, and art. 3077, the mere fact that a levee improvement district's election on the question of issuing bonds was held by the manager alone is no reason for holding it invalid. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

Art. 3065. [1804h] Appeal available, etc.

Writ of error.—Under this article, a decision in an election contest can be reviewed only by appeal, and a writ of error to review the same must be dismissed. *Frank v. Sufford* (Civ. App.) 216 S. W. 283.

Art. 3068. [1804k] Measure of damages.

Cited, *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Art. 3077. [1804t] Other contested elections.

Cited, *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

Art. 3078. [1804u] Parties defendant under preceding article.

Notice of contest.—In a contest of a school election to determine whether bonds should be issued, it is essential, to give the district court jurisdiction, that the county attorney be served with a written notice of contest and statement of the grounds on which the contestant relies, and service of petition of contest upon such attorney, with verbal notice, was insufficient. *Barker v. Wilson* (Civ. App.) 205 S. W. 543.

DECISIONS RELATING TO SUBJECT IN GENERAL

Political question.—Election contest is not matter pertaining to ordinary administration of law in courts, but is a political question, to be regulated by the political authority. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Statutory remedy cumulative.—The statute providing for contesting elections does not destroy the right which existed before it was enacted to litigate the title to an office. *Stubbs v. Moursund* (Civ. App.) 222 S. W. 632.

CHAPTER NINE

MISCELLANEOUS PROVISIONS

<p>Art. 3081. Provisions of title apply to all elections, except, etc.</p> <p>3082. Persons not eligible to hold office.</p>	<p>Art. 3083. Certificate of election shall not issue unless.</p> <p>3083a. Writs of injunction, etc., to enforce preceding articles, etc.</p>
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Article 3081. [1810] [1759] Provisions of title apply to all elections, except, etc.

See *State v. Cook*, 78 Tex. 406, 14 S. W. 996.

County organization election.—Art. 2933, relating to duties of county judge concerning elections, may be applied to an election relating to the organization of a county, in view of this article. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Art. 3082. [1810a] Persons not eligible to hold office.—No person shall be eligible to any State, County, precinct or municipal office in the State of Texas unless he shall be eligible to hold office under the Constitution of this State, and unless he shall have resided in this State for the period of twelve months and six months in the county, precinct, or municipality, in which he offers himself as a candidate, next preceding any general or special election and shall have been an actual bona fide citizen of said county, precinct, or municipality for more than six months. Providing further, that no person ineligible to hold office shall ever have his name placed upon the ballot or ticket at any general or special election, or at any primary election where candidates are selected under primary election laws of this State; and no such ineligible candidate shall ever

be voted upon, nor have votes counted for him, at any such general, special, or primary election. [Acts 1895, p. 81; Acts 1919, 36th Leg., ch. 13, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 3083. [1810b] Certificate of election shall not issue unless.—There shall not be issued by the Secretary of State, or by any county judge of the State, or any other authority authorized to issue such certificates, any certificates of election or appointment to any person elected or appointed to any office in this State, who is not eligible to hold such office under the Constitution of this State and under the above Article of the Statutes of this State; and the name of an ineligible person, under the Constitution and laws of this State, shall not be certified by any party, committee or any authority authorized to have the names of candidates placed upon the primary ballots at any primary election in this State; and the name of any ineligible candidate under the Constitution and laws of this State shall not be placed upon the ballot of any general or special election by any authority whose duty it is to place names of candidates upon official ballots. [Acts 1895, p. 81; Acts 1919, 36th Leg., ch. 13, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 40, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

Art. 3083a. Writs of injunction, etc., to enforce preceding articles, etc.—The district court shall have authority to issue writs of injunction and all other necessary process at the suit of any interested party or of any voter, to enforce the provisions of the above two articles and to protect thereunder the rights of all parties and the public; for such purpose, jurisdiction and authority is conferred upon all district courts of this State and all cases filed hereunder shall have first right of precedence upon trial and appeal. [Acts 1919, 36th Leg., ch. 13, § 1.]

CHAPTER TEN

NOMINATIONS—BY PRIMARY ELECTIONS AND OTHERWISE

Art.	1. NOMINATIONS BY PARTIES OF ONE HUNDRED THOUSAND VOTES AND OVER	Art.	2. NOMINATIONS BY PARTIES OF TEN THOUSAND AND LESS THAN ONE HUNDRED THOUSAND VOTES
		3140.	State convention; time of meeting; further duties.
3085.	Primary election defined.	3147.	Contests of primary elections, etc.
3086.	Primary election day; second primary; special primaries; city, etc., primaries.	3151.	Certificate and printing name on ballot, on decision by committee, unless appeal.
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3096.	Ballot, primary, etc.	3153.	Appeal from executive committee, etc.
3097.	Ballot, primary or general, no symbol, etc.	3154.	Review of certificates of nomination, by district court; procedure.
3107.	County executive committees, etc.	3156.	Judgment of court final in what cases.
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3139.	State convention to canvass vote for candidates for state offices; declaration of result; certificate to Secretary of State.	3159.	May nominate, how.
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<p>Art. 3. NON-PARTISAN AND INDEPENDENT CANDIDATES</p> <p>3164. Non-partisan and independent candidates' names placed on ballot, how.</p> <p>3165. Same.</p> <p>3166. Same.</p> <p>5A. WOMEN VOTERS</p> <p>3171a. Women entitled to vote; poll tax.</p> <p>3171b. Registration of women voters in cities; form of receipts.</p> <p>3171c. Women entitled to vote at primary elections outside cities during 1918.</p>	<p>Art. 3171d. Lists of registered women voters for election judges.</p> <p>3171e. Where lists need not be furnished.</p> <p>3171f. Where registration of women necessary.</p> <p>2171g. Act to govern elections during 1918; requirements thereafter.</p> <p>6. MISCELLANEOUS PROVISIONS</p> <p>3172. Nomination declined, how; vacancy how filled, etc.; posters used when, etc.</p> <p>3174. Parties, new, etc.</p>
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1. NOMINATIONS BY PARTIES OF ONE HUNDRED THOUSAND VOTES AND OVER

Article 3085. Primary election defined.

Cited, *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479.

Election does not include primary election.—An "election," as the term is used in Const. art. 6, § 2, stating the qualifications of voters at an election, does not include primary elections, which have been held to be elections within the meaning of article 6, § 8, giving the district court jurisdiction of contested elections, so that the Woman Suffrage Act (art. 3171a), permitting females possessing the qualifications of electors as defined by the Constitution, except as to sex, to vote in primary elections, is not invalid on that account. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Art. 3086. General primary election day; second primary; special primaries; city, etc., primaries.—The fourth Saturday in July, 1918, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party, at any primary election for any State or District office unless he has complied with every requirement of this Chapter and all other laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections, for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any State or District office under this Article, a second primary election shall be held by such political party, in the State or such District, or Districts, as the case may be, on the Fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot, as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Any political party may hold a second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office, where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations; provided that all precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town

shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. [Acts 1905, S. S., p. 549, § 105; Acts 1918, 35th Leg. 4th C. S., ch. 90, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.
Cited, Pollard v. Speer (Civ. App.) 207 S. W. 620.

Art. 3093. Qualifications for voting; poll tax.—No one shall vote in any primary election or convention, unless he is a citizen of the United States and has paid his poll tax or obtained his certificate of exemption from its payment, in cases where such certificate is required, before the first of February next preceding, which fact must be ascertained by the officers conducting the primary election by an inspection of the certified lists of qualified voters of the precinct, and of the poll tax receipts or certificates of exemption; nor shall he vote in any primary election except in the voting precinct of his residence: provided, that if this receipt or certificate be lost or misplaced, or inadvertently left at home, that fact must be sworn to by the party offering to vote; and provided, further, that the requirements as to presentation of the poll tax receipt, certificate of exemption or affidavit shall apply only to cities of ten thousand population or over as shown by the last United States census; provided, that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries, not inconsistent with this title.

✓ This Act shall not be held or construed to repeal or in any way limit or restrict the right of women to vote in primary elections or conventions given them by any law enacted at the 4th Called Session of the 35th Legislature.

All laws or parts of laws in conflict herewith are repealed. [Acts 1905, S. S., p. 546, § 103; Acts 1918, 35th Leg. 4th C. S., ch. 60, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.
Cited, Koy v. Schneider, 110 Tex. 369, 218 S. W. 479.

✓ **Art. 3096. Ballot, primary, etc.**

Cited, Koy v. Schneider, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880.

Pledge to support nominee.—This article, requiring a participant in a primary to pledge support to the nominee, is not to be construed to prevent changes in party fealty unless the legislative intent to that effect is plain, since such construction would raise grave doubt to the validity of the statute as an interference with privilege of free suffrage guaranteed by the Constitution. *Westerman v. Mims* (Sup.) 227 S. W. 178.

The pledge of one who participates in a primary to support the nominee required by this article, pledges him to uphold that nominee by aid or countenance, but he is under only a moral obligation to do so, since the obligation is not one that can be enforced by the courts, and a "moral obligation" in law is defined as one that cannot be enforced by action, but which is binding on the parties who incur it in conscience and according to natural justice. *Id.*

Art. 3097. Ballot, primary or general, no symbol, etc.

Printing on ballots.—Under art. 2971, printing on ballot furnished voters at election on proposed changes to charter of city of Dallas, submitted under Home-Rule Bill, of propositions as to proposed ordinances granting franchises, held not illegal, art. 3097, as to printed matter on ballots, applying. *Shaw v. Lindsley* (Civ. App.) 195 S. W. 338.

Art. 3107. County executive committees, etc.

Filling vacancy.—This article, providing that vacancy in the office of chairman or member of the county committee of a party shall be filled by a majority vote of said executive committee, contemplates an act of the committee as a body, and, in the absence of some provision of law to the contrary, it would take a majority of the members of such committee to constitute a quorum which could act as the committee, so that appointments to fill vacancies made by only one committeeman are invalid. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Holding over.—Const. art. 16, § 17, requiring officers to perform their duties until their successors shall be duly qualified, has reference to public or governmental officers.

and officers of a political party, though provided for by statutory law, are not to be regarded as public or governmental officers, so that the provision does not authorize the county executive committee of a party to hold over until their successors are qualified. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

The county chairman of a political party who was elected under the provisions of this article, holds over after the election of his successor until the successor qualifies, which occurs, since there is no provision for formal qualification, when the successor accepts the office either expressly or by entering upon its duties. *Id.*

Art. 3108. County chairman, etc.

Acceptance of office.—Evidence that the county chairman, elected at a primary, stated he would not accept because he could not hold such office while postmaster, held to show by a preponderance thereof, notwithstanding some testimony to subsequent statements by him that he would act, that he had never accepted the office. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Art. 3131. Objections to nomination, etc.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Art. 3138. State executive committee to canvass returns as to nominations for state offices; statement of vote; list of delegates elected to state conventions.—On the third Monday after the fourth Saturday in July, 1918, and every two years thereafter the State Executive Committee shall meet at a place selected at the meeting held on the second Monday in June preceding, and shall open and canvass the returns of the primary elections held on the fourth Saturday in July as to candidates for State offices, as certified by various county chairmen and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the State committee and certified by its chairman. If such returns show that for any State office no candidate received a majority of all the votes cast for all candidates for such office, such committee shall prepare a list of the two candidates receiving the highest vote for each office for which no candidate received a majority of votes cast at such primary for such office and shall certify same to the county chairman of the several counties to be placed upon the official ballot as candidates for office at the second primary election to be held on the fourth Saturday in August thereafter. On the second Monday after the fourth Saturday in August, 1918, and every two years thereafter, the State Executive Committee shall meet at the place selected for the meeting of the State convention and shall open and canvass the returns of the second primary election held to nominate candidates for State offices as certified by the various county chairmen to the State Chairman, and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the State Committee and certified by its chairman. At this meeting the State Committee shall also prepare a complete list of the delegates elected to the State conventions from each county, as certified to the State Chairman by each County Chairman. The State Chairman shall present said tabulated statement and said list of delegates to the chairman of the State Convention immediately after its temporary organization on the following day, for its approval or disapproval. [Acts 1905, S. S., p. 545, § 119; Acts 1918, 35th Leg. 4th C. S., ch. 90, § 2.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 3139. State convention to canvass vote for candidates for state offices; declaration of result; certificate to Secretary of State.—The State Convention shall canvass the vote cast in the entire State for each candidate for each State office as shown by the statement thereof presented to it by the State Committee, and shall declare the candidates for each State office who has received a majority of votes cast for all candi-

dates for such office in the first primary election, if any candidate receives a majority of all the votes cast for all the candidates for such office at said primary election, and if no candidate received such majority, then it shall declare the candidate who received a majority of all votes cast for such office at the second primary election, the nominee of the party for such office; and the chairman and the secretary of the State Convention shall forthwith certify all such nominations to the Secretary of State. [Acts 1905, 2 S. S., p. 4. Acts 1905, S. S., p. 550. Acts 1907, p. 329, § 120; Acts 1918, 35th Leg. 4th C. S., ch. 90, § 2.]

Art. 3140. Party state conventions; time of meeting; further duties.—All party State Conventions to announce a platform of principles and announce nominations for Governor and State offices shall, except as otherwise provided, meet at such places as may be determined by the parties respectively on the Tuesday after the second Monday after the fourth Saturday in August, 1918, and every two years thereafter and they shall remain in session from day to day until all nominations are announced and the work of the convention is finished. Provided, that said convention shall, among other things, elect a chairman of the Executive Committee and thirty-one members thereof, one from each senatorial district of the State, the members of said committee to be those persons who shall be recommended by the delegates representing the counties composing the senatorial districts respectively, each county voting its convention strength, each of whom shall hold said office until his successor is elected; and, in case of a vacancy, a majority of the members of said committee shall fill the same by electing some eligible person thereto. [Acts 1905, S. S., p. 549, § 116; Acts 1918, 35th Leg. 4th C. S., ch. 90, § 2.]

Art. 3147. Contests of primary elections, etc.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620. Cited in dissenting opinion, *San Antonio & A. P. R. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 3151. Certificate and printing name on ballot, on decision by committee, unless appeal.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Art. 3152. Same, where such appeal is not perfected.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Art. 3153. Appeal from executive committee, etc.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

Art. 3154. Review of certificates of nomination by district court; procedure.

Cited, *Pollard v. Speer* (Civ. App.) 207 S. W. 620; *Hamilton v. Davis* (Civ. App.) 217 S. W. 431. Cited in dissenting opinion, *San Antonio & A. P. R. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Art. 3156. Judgment of court final in what cases.

Jurisdiction of Court of Civil Appeals to issue injunction.—Since Court of Civil Appeals, under this article, has no appellate jurisdiction of election contest for precinct office, such court has no power to issue an injunction restraining officers from placing respondent's name on official ballot in a primary election contest pending in district court, in view of art. 1592, permitting issuance of writs only in aid of appellate jurisdiction. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

2. NOMINATIONS BY PARTIES OF TEN THOUSAND AND LESS THAN ONE HUNDRED THOUSAND VOTES

Art. 3159. May nominate, how.

Legislative control.—Though the Legislature may make reasonable regulations as to nominations, it cannot forbid nominations, either by a new party or an old one, or exclude the names of nominees from the official ballot, so that election laws which exclude from the official ballot the names of nominees of a newly formed party would be unconstitutional. *Morris v. Mims* (Civ. App.) 224 S. W. 587.

Manner of nominating.—Though this article, and arts. 3160, 3161, 3163, provide only for nominations by parties which cast more than 10,000 votes at the last election, art. 3174 recognizes that new party nominees may appear on the official ballot, and such party may make its nominations by any reasonable method not prohibited by law, including nominating conventions held in the manner prescribed for parties which cast between 10,000 and 100,000 votes at the last election. *Morris v. Mims* (Civ. App.) 224 S. W. 587.

Art. 3162. Nominations of such parties to be certified by whom.

See *Morris v. Mims* (Civ. App.) 224 S. W. 587.

3. NON-PARTISAN AND INDEPENDENT CANDIDATES

Art. 3164. Non-partisan and independent candidates' names placed on ballot, how.

See *Westerman v. Mims* (Sup.) 227 S. W. 178.

Art. 3165. Same.

See *Westerman v. Mims* (Sup.) 227 S. W. 178.

Art. 3166. Same.

See *Westerman v. Mims* (Sup.) 227 S. W. 178.

5a. WOMEN VOTERS

Art. 3171a. Women entitled to vote; poll tax.—From and after the passage of this Act any woman, who possesses the other qualifications of an elector under the Constitution and laws of this State, shall have the right to vote at any and all primary elections or nominating conventions held under the laws of this State, and the fact of her sex shall in no wise disqualify such person, provided the payment of a poll tax shall in no case be required of such person as a qualification to vote in such primary elections or to participate in such nominating conventions during the year 1918. [Acts 1918, 35th Leg. 4th C. S., ch. 34, § 1.]

Explanatory.—Sec. 6 of this Act repeals all conflicting laws. The act took effect 90 days after March 27, 1918, date of adjournment.

Constitutionality.—An "election," as the term is used in Const. art. 6, § 2, stating the qualifications of voters at an election, does not include primary elections, which have been held to be elections within the meaning of article 5, § 8, giving the district court jurisdiction of contested elections, so that this act, permitting females possessing the qualifications of electors as defined by the Constitution, except as to sex, to vote in primary elections, is not invalid on that account. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Under this chapter, women may vote at primary elections; such act not violating Const. art. 6, § 2, making only male persons qualified electors at elections within the state, since the word "elections," in the Constitution, refers only to governmental elections, and not to preliminary and nongovernmental activities, like primary elections. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing, 110 Tex. 369, 218 S. W. 479.

Art. 3171b. Registration of women voters in cities; form of receipts.—In all cities of ten thousand inhabitants and over, the County Tax Collector shall provide a record for the registration of women voters, setting forth the name, age, race, and present residence, giving the street number; and each woman who expects to vote in the primary election shall each year personally appear and personally fill out the blank form

of registration receipts hereinafter set out said registration receipt on oath not less than fifteen (15) days before the date of the primary election at which she expects to vote. Such registration receipt shall be detached from said book, leaving thereunder a duplicate, carbon, or other copy thereof, which shall contain the same information; and the original shall be delivered, bearing its proper number, to the woman registrant, in person, to identify her in voting. Registration receipts for each precinct shall be numbered consecutively, beginning at one. They shall be in the following form:

Registration Receipt.

State of Texas, County of _____ No. —, I _____ of _____ County, Texas, am _____ years of age, color _____, race _____, occupation _____, residence No. —, _____ City, Voting Precinct _____, Post Office Address _____, have lived at said place _____ years.

(Signed) _____

Sworn to and subscribed before me, this _____ day of _____, 19—.

Tax Collector _____ County.

I, _____, Tax Collector aforesaid, hereby certify that the foregoing registrant personally signed and swore to the facts set out in the above receipt before me, showing her to be a qualified voter in primary elections in said County, State and precinct for the year _____.

(Seal.)

Tax Collector _____ County.

[Id., § 2.]

Compelling issuance of poll tax receipt.—In suit to compel tax collector to give plaintiff receipt to entitle her to vote in primary election under this chapter, the Court of Civil Appeals in disposing of plaintiff's appeal subsequent to the election will dismiss appeal, since rendition of judgment compelling issuance of poll tax receipt for such purpose subsequent to the election would be a vain thing. *Koy v. Schneider* (Civ. App.) 225 S. W. 188.

Restraining issuance of poll tax receipts.—Despite Rev. St. 1911, art. 4643, subd. 1. in view of articles 3154–3158, a candidate for a party nomination to the state Legislature at a primary election has a complete remedy to contest the election on account of illegal votes of females being cast against him under the Women Suffrage Act (Acts 35th Leg. 4th Called Sess. [1918] c. 34) and cannot enjoin the tax collector from issuing poll tax receipts to women entitling them to vote at the primary, even though the suffrage act is unconstitutional; the election cannot be contested before it is held by preventing the collector from discharging a political function required of him by law. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Art. 3171c. Women entitled to vote at primary elections outside cities during 1918.—Every woman who possesses the other qualifications of an elector under the Constitution and laws of this State, and who lives in a voting precinct outside of a city of ten thousand inhabitants, shall have the right to vote in all primary elections held in the year 1918, who shall present herself, personally, at the office of the tax collector of the county in which she lives at any time not less than fifteen days prior to the holding of such primary election, and shall personally fill out, with her own hand, in duplicate, or upon a form and stub, the form of registration receipt prescribed in Section 2 of this bill [Art. 3171b], and shall sign and swear to same before said tax collector, who shall certify one copy of such receipt in form as prescribed in Section 2 of this Act and deliver same to such registrant, who shall present same, or an affidavit as to its loss or destruction, when she offers to vote at such primary election. [Id., § 2a.]

Art. 3171d. Lists of registered women voters for election judges.—The Tax Collector shall furnish to the Board charged with the duty of furnishing election supplies, separate certified lists of the women registered in each precinct, in cities of ten thousand and over, the names to be arranged in alphabetical order, and to each name its appropriate number as shown by the duplicate retained in his office. Said Board shall furnish each presiding judge of each precinct, in cities of ten thousand and over, the certified lists of said women voters in his precinct at the time when he furnishes other election supplies. Such certified lists of qualified women voters shall be in the same form as that required by law for the certified lists of qualified male voters furnished by said Board to said judge of the election of said precinct; provided that before the name of each woman voting in such primary election, the judges or clerks shall write on the poll lists the word "woman"; provided, further, that such word may be so placed either with a rubber stamp, or pen and ink, or pencil. [Id., § 3.]

Art. 3171e. Where lists need not be furnished.—It shall not be necessary for the County Tax Collector to furnish the Chairman of the county executive committee of political parties, judges of election, or any other person, for use in primary elections, a certified list of women voters, except in cities of ten thousand inhabitants and over. [Id., § 3a.]

Art. 3171f. When registration of women necessary.—Where registration, as above provided in cities of ten thousand or over, is required, said registration shall be a necessary qualification for women voting in primary elections. And the provisions in the laws of the State of Texas governing and pertaining to elections and production of poll tax certificates and certificates of exemption required of men, the affidavits in case of loss of said certificates and the penalties for fraudulently or falsely obtaining the same, and all other laws for the purity and protection of the electorate, when not in conflict with the provisions of this Act, shall apply to and govern the duties, responsibilities and privileges of the women voters of this State, but where in conflict shall, as to female voting, be governed by the provisions of this Act. [Id., § 4.]

Art. 3171g. Act to govern elections during 1918; requirements thereafter.—The provisions of this Act shall apply to and govern the voting of women in the primary elections held during the year 1918, and from and after the first of January, 1919, each woman voter in this State, voting and offering to vote in any primary election or convention shall be required to pay the poll tax now required by law of each male person who desires to vote and shall be governed and controlled by all of the laws of the State of Texas, requiring and permitting the voting upon the payment of poll taxes in this State. [Id., § 5.]

6. MISCELLANEOUS PROVISIONS

Art. 3172. Nomination declined, how; vacancy how filled, etc.; posters used when, etc.

Declining nomination.—Under this article, authorizing a nominee to decline nomination 20 days before election, a nominee by independent petition is entitled to be certified as such by the secretary of state after he declined a nomination by a party, notwithstanding art. 2970, prohibiting the name of any candidate appearing more than once on the official ballot. *Westerman v. Mims* (Sup.) 227 S. W. 178.

Art. 3174. Parties, new, etc.

New party nominations.—Though arts. 3159-3161, 3163, provide only for nominations by parties which cast more than 10,000 votes at the last election, this article recognizes

that new party nominees may appear on the official ballot, and such party may make its nominations by any reasonable method not prohibited by law, including nominating conventions held in the manner prescribed for parties which cast between 10,000 and 100,000 votes at the last election. *Morris v. Mims* (Civ. App.) 224 S. W. 537.

CHAPTER TEN B

REGULATING AND LIMITING EXPENDITURES AT PRIMARY ELECTIONS

Art.
3174¼. Definitions.

3174¼a. Campaign and assistant campaign managers; designation; removal.

Art.

3174¼b. Forfeiture of rights for violations of act by candidate.

Article 3174¼. Definitions.—For the purpose of this Act the word “Candidate” shall be taken as referring to any person who has announced to any other person or to the public that he is a candidate for the nomination for any office which the laws of this State require shall be determined by a primary election. The words “County nomination” shall be taken as referring to the nomination for any office to be filled by the choice of the voters residing in only one county or less than one county, and the words “District Nomination” shall be taken as referring to the nomination for any office to be filled by the choice of the voters residing in more than one county, and the words “State nomination” shall be taken as referring to the nomination for any office to be filled by the choice of the voters of the entire State.

In all cases where second primary elections may be held in compliance with any law of this State, the first and second primary elections shall for the purposes of this Act be considered together as one primary election. [Acts 1919, 36th Leg., ch. 88, § 1.]

Took effect 90 days after March 9, 1919, date of adjournment.

See Penal Code, arts. 295-1 to 295-6.

Art. 3174¼a. Campaign and assistant campaign managers; designation; removal.—Every candidate for a state or District nomination may designate a campaign manager by written appointment filed with the Secretary of State, and every candidate for a County nomination may designate a campaign manager by written appointment to be filed with the County Clerk of his County, and each candidate for State or District nomination, or the lawfully designated campaign manager of such candidate, may also designate an assistant campaign manager for each county affected by such candidacy by written appointment to be filed with the County Clerk of the County. Any campaign manager or assistant campaign manager designated as provided in this section may be removed by the designation of a successor, and all vacancies occurring by such removal or by death, resignation or otherwise, may be filled in the manner provided for original designations. [Id., § 2.]

Art. 3174¼b. Forfeiture of rights for violations of act by candidate.—If any candidate shall knowingly violate any of the provisions of this Act or shall knowingly permit or assent to the violation of any provision of this Act by any campaign manager or assistant campaign manager or other person, he shall thereby forfeit his right to have his name placed upon the primary ballot or if nominated in the primary election, to have his name placed on the official ballot at the general election, and proceedings by quo warranto to enforce the provisions of this section or to determine the right of any candidates alleged to have violated any

of the provisions of this Act to have his name placed on the primary ballot or the right of any nominee alleged to have violated any of the provisions of this Act to have his name placed upon the official ballot, for the general election may be instituted at the suit of any citizen in the District Court of any County, the citizens of which are entitled to vote for or against any candidate who may be charged in such proceedings with having violated the provisions of this Act. All such proceedings so instituted shall be advanced and summarily heard and disposed of by both the Trial and Appellate Courts. [Id., § 9.]

CHAPTER ELEVEN

NATIONAL CONVENTION, STATE CONVENTION TO SELECT DELEGATES TO

Article 3175a. Nomination of candidates, etc.

Cited, *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880.

TITLE 50

ELECTORS OF PRESIDENT AND VICE-PRESIDENT

Article 3176. [1811] [1760] Time of election, etc.

See *Borches v. State*, 33 Cr. R. 96, 25 S. W. 423.

TITLE 51

ESCHEAT

Art.
3186. When estates shall escheat, etc.
3189. Citation, etc.
3190. Claimants may appear and plead.
3193. Judgment for the state, when.

Art.
3195. Judgment to contain description, etc.
3196. Claimant not personally served may
sue, etc.

Article 3186. [1821] [1770] When estates shall escheat, etc.

Evidence—Of death and failure of heirs.—Under Laws 1885, p. 35, providing that, in an action to escheat, the absence of any assertion of a lawful claim to property, or of any exercise of lawful acts of ownership thereon for seven years, shall be prima facie evidence of the death of the owner and failure of heirs, the fact that no claim has been asserted for that length of time cannot be proved by the failure of the original owner, or of some one claiming under him, to list the property for taxation and to pay taxes thereon. *Hanna v. State*, 84 Tex. 664, 19 S. W. 1008.

— **Of intestacy.**—Under this article, providing that, in an action to escheat, failure to record or probate a will in the county where the property lies within seven years after the owner's death shall be prima facie evidence that he left no will, to prove that no will has been so recorded or probated it is not sufficient for the clerk of the county in which the land sought to be escheated lies to testify that he failed to find the probate or record of any such will in the probate records of that county, when such a will may have been probated in another county from which that county was taken, or in a county to which that county was attached for judicial purposes. *Hanna v. State*, 84 Tex. 664, 19 S. W. 1008.

Art. 3189. [1824] [1773] Citation, etc.

Misnomer.—In an action to escheat the estate of Thomas "Stephens," deceased, a judgment for the state on the appeal will be reversed on rehearing which shows for the first time a jurisdictional defect, in that the citation published in the petition summoned all persons interested in the estate of Thomas "Stephenson." *Ellis v. State*, 3 Civ. App. 170, 24 S. W. 660.

Art. 3190. [1825] [1774] Claimants may appear and plead.

Cited, *Ellis v. State*, 3 Civ. App. 170, 21 S. W. 66.

Art. 3193. [1828] [1777] Judgment for the state, when.

Cited, *Ellis v. State*, 3 Civ. App. 170, 21 S. W. 66.

Art. 3195. [1830] [1779] Judgment to contain description, etc.

Cited, *Ellis v. State*, 3 Civ. App. 170, 21 S. W. 66.

Art. 3196. [1830] [1779] Claimant not personally served may sue,

etc.

Cited, *Ellis v. State*, 3 Civ. App. 170, 21 S. W. 66.

TITLE 52

ESTATES OF DECEDENTS

Chap.	Chap.
1. Jurisdiction.	17. Allowance to widow and minor children.
3. General provisions.	18. Setting apart the homestead and other exempt property to widow and children.
4. Applications for the probate of wills and for letters.	19. Presentment, etc., of claims against an estate.
5. Probate of wills.	20. Classification and payment of claims.
6. Granting letters.	22. Sales.
7. Temporary administration.	23. Report of sales, etc.
8. Oath and bond of executors and administrators.	24. Enforcing specific performance of contracts.
10. Inventory, appraisal and list of claims.	26. Partition and distribution.
11. Certain rights, duties and powers of executors and administrators.	27. Final settlement, etc.
12. Administration under a will.	28. Payment of estates into the treasury.
13. Subsequent executors and administrators.	29. Administration of community property.
14. Withdrawing estates from administration.	31. Costs.
15. Removal of executors and administrators.	32. Appeals to the district court.

CHAPTER ONE

JURISDICTION

Art.	Art.
3206. Probate jurisdiction of county court.	3210. In case of concurrent jurisdiction of several courts.
3207. Probate jurisdiction of district court.	
3209. In what counties wills shall be probated and letters granted.	

Article 3206. [1840] [1789] Probate jurisdiction of the county court.

In general.—Under arts. 1705, 1706, 1712, prescribing the jurisdiction of the district court, and this article, and art. 3207, it has always been the policy to avoid multiplicity of suits, and when possible to settle in one suit such issues as could not have been settled in the probate court. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Jurisdiction—In general.—Under Const. art. 5, § 16, county court has, sitting as a court of probate, jurisdiction to grant ancillary letters of administration when necessary. *Atchison T. & S. F. Ry. Co. v. Berkshire* (Civ. App.) 201 S. W. 1093.

County court had jurisdiction of a bill to review a decree of distribution of the estate of a deceased ward, brought by heirs excluded from the distribution, where the real issue was not the settlement of the estate of a deceased person, but an inquiry into the correctness of the final report of the guardian. *Young v. Gray*, 60 Tex. 541.

The county court is without jurisdiction to determine title to the personal property of a decedent on the application of his son to have the administrator deliver the property to him. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Whatever powers an executor or administrator appointed in one state may exercise over property situated in another state is governed by the laws of the latter state, each having the absolute power to control administration of the property of decedents situated within its borders. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

The probate court has no power to pass on the issue of ownership of a legatee's share, raised by claim of assignment contested by the legatee. *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

Under Const. art. 5, § 16, the district court of Harris county held without jurisdiction to determine the disposition of the proceeds of the sale of homestead of herself and husband, the administration of whose estate was pending in the probate court of Brazoria county. *Meyer v. Meyer* (Civ. App.) 223 S. W. 259.

— **Exclusive.**—General rule is that jurisdiction of probate court to sell property of decedent upon whose estate administration has been commenced is exclusive. *Lauraine v. Ashe*, 109 Tex. 69, 196 S. W. 501.

Under Const. art. 5, § 16, giving county courts jurisdiction of probate courts, and art. 3358, providing provisions of a probated will shall be executed unless annulled by order of court probating it, the county court has exclusive original jurisdiction over probate matters. *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969.

The jurisdiction of the county court, under Const. art 5, § 16, in all matters pertaining to the settlement and distribution of an estate which is being administered in

such court, or administration of which is necessary, is exclusive. *Meyer v. Meyer* (Civ. App.) 223 S. W. 259.

— **Court of Civil Appeals.**—In view of orders of county court, for Court of Civil Appeals to restrain unauthorized depredation, pending appeal in proceedings to probate a will, upon testatrix's property by temporary administratrix appointed by county court, held not encroachment on jurisdiction of county court to administer estates of deceased persons. *Stewart v. Poinbeouf* (Civ. App.) 201 S. W. 1025.

— **Federal courts.**—Const. art. 5, § 6, and arts. 1763, 1764, 1766, 1771, and this article, give the county court the general jurisdiction of a probate court and original jurisdiction in civil cases when the matter in controversy does not exceed \$1,000, but no jurisdiction of suits to recover land or enforce liens thereon. Const. art. 5, § 8, and arts. 1705, 1706, 1712, 3207, give the district court appellate jurisdiction in probate matters, original jurisdiction and general control over executors and administrators, and original jurisdiction for the trial of title to land and the enforcement of liens thereon, and of all suits when the matter in controversy exceeds \$500. Art. 5699 authorizes any interested person to institute suit in the proper court to contest the validity of a probated will. Held, that a suit by the heirs of a husband and wife to have a joint will treated as ineffective to dispose of the community property, to set aside a judgment establishing the title of trustees under such will, to annul a separate will of the wife, so far as it bequeathed her residuary estate, and for a partition of the property, was not within the jurisdiction of a federal court, since, assuming that the other relief could be obtained by an independent suit in equity in the state district court, the suit, so far as it sought to annul the will of the wife, was merely supplemental to the proceedings for the probate of the will, and cognizable only by the probate court under the Texas decisions. *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

— **Collateral and direct attack.**—Order of probate court, divesting itself of supervisory control of guardianship estate, being a nullity, was subject to collateral attack. *Davis v. White* (Civ. App.) 207 S. W. 679.

— **Presumptions as to.**—County court in probate is court of general jurisdiction, and its judgments and orders have absolute verity in collateral proceeding; presumption prevailing that, when, in order for sale by guardian, property is confined to certain interest in certain estate, court understood what it intended should be sold by guardian, and confined sale to property described. *Schaefer v. Williams* (Civ. App.) 208 S. W. 220.

Art. 3207. [1841] [1790] Probate jurisdiction of district court.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.
Cited, *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Jurisdiction of district court.—Where the probate jurisdiction of county court under Const. art. 5, § 16, is inadequate to adjust equities in settlement of question arising during administration of estate, resort may be had to equity powers of district court, judgment to be performed through probate court, district court's jurisdiction in such case being auxiliary and ancillary to that of probate court, and to be exercised only in special cases. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

In suit on vendor's lien notes, provision of a consent judgment directing sale of the interest of a decedent's estate through the district court, which had taken jurisdiction of the entire controversy as to all parties having any interest to be affected by the foreclosure was not void merely because administration of the estate was pending in the probate court. *Wyss v. Bookman* (Civ. App.) 212 S. W. 297.

Action by intestate's creditor against nonresident administrator, heirs, and heirs' grantees, to foreclose creditor's lien, was properly brought in the district instead of the probate court, where there were no other creditors, and no heirs or parties claiming an interest in the land not parties to the action, and where the land on which the lien was sought to be foreclosed was the only land owned by the estate. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

Art. 3209. [1843] [1792] In what counties wills shall be probated and letters granted.

Non-residents.—Under Const. art. 5, § 16, county court has, sitting as a court of probate, jurisdiction to grant ancillary letters of administration when necessary. *Atchison T. & S. F. Ry. Co. v. Berkshire* (Civ. App.) 201 S. W. 1093.

Where a railroad employé was injured in Arkansas in interstate commerce on the line of a Texas corporation, and was therefore entitled to recover under Act Cong. April 22, 1908 (U. S. Comp. St. § 8665), but died pending suit, an administrator was properly appointed in the Texas county court where deceased sued, although at the time of his death deceased was a nonresident of Texas and died in another state. *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Sup.) 232 S. W. 494.

This article, subsds. 3, 4, fixing the venue for grant of letters of administration, having no relation to the estate of a nonresident dying without the state and leaving no kindred, but leaving property within the state without a fixed situs in any particular county, the probate court which first assumes jurisdiction may retain it. *Id.*

Where the only asset of deceased railroad employé in the state was a right of action against an interstate carrier, which failed to comply with the federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8623), the fact that such right of action would support a suit in many counties of the state by a personal representative in no wise defeated jurisdiction of county court of Bowie county to grant letters of administration on the estate, under Const. art. 5, § 16. *Id.*

Art. 3210. [1844] [1793] In case of concurrent jurisdiction of several courts.

Priority of jurisdiction.—While proceedings looking to the appointment of a guardian for a minor instituted in the county court of F. county were still pending in the district court on appeal, the probate court of another county had no authority to appoint a temporary guardian or issue an injunction in aid of the jurisdiction illegally assumed. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

CHAPTER THREE

GENERAL PROVISIONS

<p>Art. 3219. And shall be entered of record. 3225. Person having will, etc., may be attached, etc. 3233. Rights, etc., of executor, etc., regulated by common law, etc. 3234. Depositions and rules of evidence. 3235. In whom property vests upon death of testator or intestate.</p>	<p>Art. 3236. Any person interested in an estate may file opposition, etc. 3241. Annual exhibits required; final settlement, when. 3242. Notice of filing exhibit. 3244. [Superseded.] 3245. Titles made by executors, etc., valid, although, etc.</p>
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Article 3219. [1853] [1802] And shall be entered of record.

Cited, *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000.

Art. 3225. [1859] [1807] Person having will, etc., may be attached, etc.

Compelling probate.—Under this article, the court may compel probate of a will upon ascertaining its existence. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Art. 3233. [1867] [1815] Rights, etc., of executors, etc.

Powers—To contract.—Contracts of executor or administrator are not binding on estate, in absence of statutory authority or express or implied power in the will itself. *Lovenskiold v. Nueces Hotel Co.* (Civ. App.) 208 S. W. 759.

— **To subscribe to stock.**—Executor, who signed as such an instrument reading, "I, —, hereby subscribe the sum of \$500 to the capital stock of" a hotel corporation, held individually bound, for, even if he had contracted in name of estate, he alone and individually would have been bound. *Lovenskiold v. Nueces Hotel Co.* (Civ. App.) 208 S. W. 759.

Art. 3234. [1868] [1816] Depositions and rules of evidence.—In all proceedings in the county court arising under the provisions of this title, the depositions of witnesses may be taken and read in evidence under the same rules and regulations as in the District Court, and all laws in relation to witnesses and evidence that govern in the District Court shall apply to proceedings in the county court, so far as may be applicable. Except that in the case of the probate of a will and in all other proceedings in estates where there is no opposing party or his attorney of record, upon whom service of notice and copies of interrogatories may be had, notice of the intention to take such depositions of a witness may be served by posting such notice for a period of twenty days as is provided in the statutes governing the posting of notices. At the time such notice is filed with the clerk of the court, copy of the interrogatories propounded shall also be filed, and at the expiration of such twenty days commission may issue for the taking of such depositions. If no one appears to file cross interrogatories, the county judge may file such cross interrogatories. [Acts 1876, p. 129, sec. 136; Acts 1919, 36th Leg., ch. 108.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 3235. [1869] [1817] In whom property vests upon death of testator or intestate.

See *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

In general.—Arts. 3309, 3621, 3622, 3623, 4099, 4101, 5493, and this article, do not authorize administrator to charge against the estate a premium paid for the making of his bond. *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of this article, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration. *Drew v. Jarvis*, 110 Tex. 136. 216 S. W. 618.

Title vests in devisees, etc., and heirs.—Under this article, the estate of a decedent vests in his devisees subject to payment of his debts, while creditors' claims constitute a lien on all of the property of the estate; and this lien, which is general, can be enforced by means of administration. *Albert v. Bascom* (D. C.) 245 Fed. 149.

Title to land vests in decedent's heirs, and not in his administrator. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Where will devised land by granting and habendum clauses sufficient, without qualifying language, to vest a fee under this article, but preceding such granting and habendum clauses stated that estate was devised "subject to the conditions hereinafter shown," and in subsequent portions of will provided that no portion of the estate should vest absolutely in devisee until he reached a certain age, at which time specified sum should be given him, and that remainder should not be delivered to him in his absolute right until he reached specified age, or in discretion of executors until he reached a specified age, and provided further for use of estate by executors for charitable purposes upon devisee's death without issue before estate "shall have passed to and become absolute in him," it did not vest absolute fee in devisee at time of testator's death, but vested the estate in devisee in fee upon the conditions named, one of which was that he should live to a specified age before being given specified portion of estate, and that on his death without issue before reaching specified age the estate should vest in executors. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

Under this article, on death of a seller of land, legal title to her debt against the buyer descended to her heirs, and was never in her administrator. *Smith v. Price* (Civ. App.) 230 S. W. 836.

What law governs.—The situs of a personal judgment follows the residence of the owner, relative to the person or persons in whom title thereto vests on his death, so that the owner of such judgment, obtained in Texas, dying in Georgia, where he resided, title thereto as property other than real estate, under Park's Ann. Civ. Code Ga. § 3929, vested in his administrator for the benefit of his heirs and creditors. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

Right of possession.—Under this article, the administrator is not entitled to possession of property not in the possession of the decedent and to the possession of which he was not entitled at the time of his death. *Lauraine v. Dickson Car Wheel Co.* (Civ. App.) 198 S. W. 1103.

In view of arts. 2005, 3362-3364, and this article, when an executor who is authorized to act independently of the probate court in good faith, and not in fraud of creditors, passes the estate committed to him to those entitled to receive it, he loses control thereof and may not thereafter administer it for creditors, and is not as a consequence further accountable to creditors in his representative capacity. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

An executor de son tort does not exist under Texas law. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

Tenants in common.—In trespass to try title, a judgment against a defendant in possession as plaintiff's cotenant, whether considered as a devisee or as one whose interest as executor extended to only part of the land, was proper. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

Liability of devisees, heirs, etc., for debts.—Personal property is the primary fund for the payment of the debts of a decedent. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Under this article, though the personal estate of a decedent is the primary fund for the payment of his debts, the personalty need not be exhausted in the sense that before the administrator can resort to the realty all of the personal assets should be reduced to possession by him. *Id.*

"Exempt property" not liable.—Notwithstanding the statutes except the homestead from the community property liable for community debts making it "exempt from forced sale" (art. 3592, and this article), nevertheless the survivor may convey the community homestead to discharge community debts which constitute no lien thereon. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Heirs may sue to recover property, when.—The general rule is that the legal representative of a deceased person's estate is the proper person to enforce payment of indebtedness due the estate, and this rule applies ordinarily in cases where a contract between a married man and another has matured previous to, or during, the administration of his estate by an executor. *Ætna Life Ins. Co. v. Osborne* (Civ. App.) 224 S. W. 815.

Suit against devisees, heirs, etc.—In trespass to try title brought by heirs of owner against his widow's devisees, it was not error to refuse to join the executors under the

widow's will; such executors having no interest in the property. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

Where the question whether an administrator had committed a devastavit could be determined only by suit, a creditor of the estate was not required to postpone collection of its debt and sale of realty of the estate to satisfy the debt, until litigation over the question of devastavit should be determined by the court of last resort. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

In an administrator's action against intestate's son to recover proceeds of intestate's cattle sold by son while living with intestate and cultivating her farm, evidence held not to show that proceeds were used by intestate during her lifetime. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

Art. 3236. [1870] [1818] Any person interested in an estate may file opposition, etc.

See *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.
Cited, *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837.

"Person interested."—In view of this article, and art. 3263, giving "those interested in an estate" certain rights as to its administration, art. 3384, giving only to "any one entitled to a portion" of an estate "as heir, devisee or legatee" the right, by giving bond as provided in art. 3385, to withdraw an estate from administration, does not give such right to the vendee of an heir, devisee, or legatee. *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

Party who had rendered services for testator pursuant to testator's promise to bequeath land to such party held not entitled to contest will, under this article, being merely a creditor of the testator, and not a "person interested" in the estate, within such statute. *Daniels v. Jones* (Civ. App.) 224 S. W. 476.

Where will contestant was not entitled to contest will, because not a person interested in the estate, under this article, it was court's duty to dismiss proceeding regardless of whether demurrer to petition was filed at proper time. *Id.*

Time for filing.—Under Rev. St. 1879, art. 1818, after an order has been made discharging an administrator, and directing payment of the estate to another person, it is too late to hear objections in behalf of persons entitled to a share in the estate, who did not appear in the court below. *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

Pleading.—In probate matters originating in the county court there is less strictness required in pleading than is common in suits of law in the same court or in the district court, especially where averments whose sufficiency is questioned relate to matters which opposite parties must affirmatively establish. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Effect of other statutes.—Arts. 3358-3361, as to applications to annul or suspend the provisions and directions of a will after it has been probated, are inapplicable to contest of application to probate will. *Walker v. Irby* (Civ. App.) 229 S. W. 331.

Partial settlement of contest.—Agreement between I., contestant of a will and B., one of the two beneficiaries, that they shall share equally in the estate, whatever the outcome of the proceedings, does not deprive the court of power to proceed with contest of the provisions of the will favorable to the other beneficiary. *Walker v. Irby* (Civ. App.) 229 S. W. 331.

Art. 3241. [1875] [1822a] Annual exhibits required; final settlement, when.

Effect of approval of annual exhibit.—Approval of statutory administrator's annual exhibit does not prevent, on the final settlement, re-examination of the charges made by him. *Jones v. Gilliam*, 109 Tex. 552, 212 S. W. 930.

Art. 3242. [1876] [1823] Notice of filing exhibit.

See 1918 Supp., arts. 6016½-6016½c, as to publication in newspaper instead of posting.

Art. 3244. [1878] [1825] [Superseded.]

This article is superseded by inclusion of its provisions in art. 3234, as amended.

Art. 3245. [1879] [1826] Titles made by executor, etc., valid although, etc.

In general.—In action to set aside a conveyance by sole devisee and executors of lands of the estate to defendant, a surety of the executors, evidence held to show collusion between defendant and the executors. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

Rights and liabilities of purchasers.—Plaintiffs having an equitable interest in land under a will, if trustees sought to convey it free from such interest, could follow it into the hands of any outsider not an innocent purchaser for value, and could also follow it into the hands of one of the trustees. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

CHAPTER FOUR

APPLICATIONS FOR THE PROBATE OF WILLS AND FOR LETTERS

Art. 3247.	Application for letters must be filed within four years after death of testator or intestate, exception.	Art. 3253.	What the application shall state where the will cannot be produced in court.
3248.	Wills shall not be probated after lapse of four years, unless, etc.	3256.	Citation to issue, etc.
3249.	Administration not barred, when.	3257.	Service of such citation, etc.
3250.	Applications shall be in writing, etc.	3260.	Service of such citation by publication.
3251.	Application for probate of written will produced in court shall state, what.	3262.	Application may be made, by whom.
		3263.	Administration may be prevented, how.

Article 3247. [1880] [1827] Application for letters must be filed within four years after death of testator, or intestate, exception.

Cited, *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789; *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Effect of Trading with the Enemy Act.—A proceeding for appointment of permanent administrator of the estate of a deceased, who left no property in the state, the only reason for the appointment being to prosecute a suit for the benefit of the heirs who are residents of Austria-Hungary, will be suspended until the end of the war, in view of Trading with the Enemy Act, § 7, cl. b (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½d), denying to alien enemies the right to maintain suits in courts of the United States. *Galveston, H. & S. A. Ry. Co. v. Blankfield* (Civ. App.) 211 S. W. 808.

Effect of delay.—If administration is not had within the four years prescribed by Rev. St. 1879, art. 1827, the probate court loses jurisdiction to issue letters, and a vendor's lien again becomes prior to all other claims against the estate made prior by statute, in cases of administration, and a trustee may thereafter convey premises held in trust to secure such lien, upon default being made in any payment thereunder. *Rogers' Heirs v. Watson*, 81 Tex. 400, 17 S. W. 29.

Ancillary letters after four years not void.—Rev. St. 1879, arts. 1827, 1828, do not render void on collateral attack ancillary letters of administration, issued more than four years after the testator's death upon the estate of a man who died testate in another state, in which his will has been duly admitted to probate. *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806.

Art. 3248. [1881] [1828] Will shall not be probated after a lapse of four years, unless, etc.

In general.—Where an application for the probate of a will is made and prosecuted by a trustee for the legatee, the legatee's substitution as the applicant, made more than four years after testator's death, is not within the inhibition of Rev. St. 1879, art. 1828. *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Under this article, proponent, proceeding for probate 13 years after testatrix's death, had the burden to show she was not in default. *House v. House* (Civ. App.) 222 S. W. 322.

Excuses for delay.—A married woman, daughter-in-law of testatrix, is not exempt from the limitation of this article, though her coverture probably might be looked to as a circumstance tending to excuse her delay. *House v. House* (Civ. App.) 222 S. W. 322.

Applicant held in default.—The only heir of deceased on discovering a will making bequests to others, and naming him as executor, is under moral obligation to offer it for probate, or disclose its existence, that the other beneficiaries may offer it. *Van Orden v. Pitts* (Com. App.) 206 S. W. 830.

In proceedings to probate will by testatrix's daughter-in-law, divorced after testatrix's death, evidence held to justify finding of trial court that daughter failed to exercise degree of diligence imposed by this article on those who have right to probate testamentary instruments, in failing to move for probate of will for 13 years after testatrix's death, and 9 years after her own divorce. *House v. House* (Civ. App.) 222 S. W. 322.

Art. 3249. [1882] [1829] Administration not barred, when.

See *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

Administration held not "closed."—Under Rev. St. 1879, art. 1829, an administration is not "closed," though the final account of the executor is approved, and the money on hand is ordered to be distributed, if he is not discharged, and he subsequently asks for orders regarding the estate, acquires property for the estate under the orders, and renders two annual accounts. *Blackwell v. Blackwell* (Sup.) 24 S. W. 389.

Art. 3250. [1883] [1830] Applications shall be in writing, etc.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Art. 3251. [1884] [1831] Application for probate of written will produced in court shall state what.

Negating disqualification.—Since a trust company could probate the will in which it was named as executor, without seeking to have an executor appointed, it was not bound to state, in the application for probate, that it was not disqualified by law from accepting letters. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Art. 3253. [1886] [1833] What the application shall state where the will cannot be produced in court.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Art. 3256. [1889] [1836] Citation to issue, etc.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Persons who may contest will—Estoppel or waiver.—A widow, after her husband's will has been admitted to probate, does not lose her right to attack the instrument on the theory of ratification by securing a partition under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3556, of her undivided share of the common estate. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Art. 3257. [1890] [1837] Service of such citation, etc.

Cited, *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Art. 3260. [1893] [1840] Service of such citation by publication.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Art. 3262. [1895] [1842] Application may be made by whom.

See *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Cited, *Pendleton v. Hare* (Com. App.) 231 S. W. 334.

Application by testamentary executor.—Under this article, a will is properly presented for probate by the person named in it as executor, regardless of whether he is competent to act as executor. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

— **Effect of declining executorship.**—That testamentary executor in writing declined the executorship of the will could have no effect on the right of such executor to propound the will for probate. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Art. 3263. [1896] [1843] Administration may be prevented, how.

In general.—In view of this article, and art. 3236, giving "those interested in an estate" certain rights as to its administration, art. 3384, giving only to "any one entitled to a portion" of an estate "as heir, devisee or legatee" the right, by giving bond as provided in art. 3385, to withdraw an estate from administration, does not give such right to the vendee of an heir, devisee, or legatee. *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

CHAPTER FIVE

PROBATE OF WILLS

<p>Art. 3267. How a written will which is produced in court may be proved.</p> <p>3269. Nuncupative will shall not be proved, when.</p> <p>3271. Facts which must be proved.</p> <p>3272. Further proof in case of will which cannot be produced in court.</p> <p>3273. All testimony shall be committed to writing, etc.</p>	<p>Art. 3274. Order shall be entered, will, etc., shall be recorded, when.</p> <p>3275. Certified copy of record may be read in evidence.</p> <p>3276. Will probated in another state or country may be filed and recorded in this state.</p>
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Article 3267. [1900] [1847] How a written will which is produced in court may be proved.

Evidence to prove execution.—In proceedings to probate a will, evidence held insufficient, under this article, to prove execution in compliance with art. 7857. *Massey v. Allen* (Civ. App.) 222 S. W. 682.

Subscribing witness—Testimony not conclusive.—Though, under this article, a will may be proved by one of the subscribing witnesses, it is improper, in a proceeding to contest a probated will on the ground of want of mental capacity, to direct a verdict in favor of the contestant, although the only subscribing witness who testified stated that, in her opinion, the testator did not know what he was doing; the attorney who prepared the will and others giving testimony tending to show that the testator was competent. *Day v. Henderson* (Civ. App.) 224 S. W. 248.

Secondary evidence—Admissible, when.—The testimony of persons present at the execution of a will is admissible in establishing it, after one of the subscribing witnesses has been examined, as provided by Rev. St. 1879, art. 1847. *Elwell v. Convention*, 76 Tex. 521, 13 S. W. 552, distinguished. *Stephenson v. Stephenson*, 6 Civ. App. 529, 25 S. W. 649.

Method prescribed not exclusive method.—While the method of this article is the preliminary rule for proving wills, other evidence may be resorted to, both in lieu of the statutory method and to supply lapses of memory on the part of the subscribing witnesses. *Massey v. Allen* (Civ. App.) 222 S. W. 682.

Rev. St. 1911, art. 3267, providing that a written will may be proved by the written affidavit of subscribing witnesses, does not lay down an exclusive method, but merely a permissive one, and does not forbid the introduction of other than the statutory proof. *In re Fullhas' Estate* (Civ. App.) 228 S. W. 659.

Proof of loss of will.—A party attempting to prove the loss of a will must show the constituent fact that it existed, just as though the will was being proven for probate as a lost instrument, and such requirement is necessary to show a revocation of a former will, under this article, and arts. 3271, 7859. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

Art. 3269. [1902] [1849] Nuncupative will shall not be proved, when, etc.

Reduction to writing.—Under this article, and arts. 3270, 7861, 7863, relating to the manner of execution and proof of nuncupative wills, it is not sufficient that one or even two of the witnesses to the testator's verbal disposition set down the testament; it being necessary that each of the witnesses sign, read, assent, or agree to what is written, notwithstanding art. 5502, permitting the exercise of joint authority by the majority of those upon whom it is conferred. *Walker v. Fields* (Civ. App.) 221 S. W. 652.

Vernon's Sayles' Ann. Civ. St. 1914, arts. 3269, 3270, 7861, 7863, relating to the execution and proof of nuncupative wills, not providing who shall commit the testimony of the attesting witness to writing or its manner or form, the procedure may be informal so long as it observes the essential requirements of the law, and the testimony as reduced to writing will be sufficient if it contains all the requirements of a nuncupative will, as the testamentary words, that they were uttered while the testator was in extremis and that he called upon those present to bear witness to his disposition; it being also proper to include the fact that testator dies at his habitation, etc., and to show who was present and heard the words. *Id.*

Art. 3271. [1904] [1851] Facts which must be proved.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Requirements held mandatory.—The requirements of this article, that the testator at the time the will was executed was 21 years of age or married, of sound mind, and is dead, must be established before a will can be admitted to probate, regardless of whether the pleadings raise any such issue or not. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Effect on pleading.—In view of this article, allegation by contestant in proceedings to probate unproduced will under article 3272 that testator, "while sane, executed the will alleged by proponent, that afterwards, while sane, he revoked the same," held objectionable as not specific as to manner in which will was revoked. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Duty of court.—It is court's duty in proceeding to probate a will, whether contested or not, to elicit from witnesses, when deemed necessary, any material facts bearing upon issues to be determined. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Presumptions and burden of proof.—When testamentary instruments were presented for probate, duty devolved on proponents to show not only proper execution, but also testatrix's mental capacity to make a will. *Sherwood v. Sherwood* (Civ. App.) 221 S. W. 658.

A party attempting to prove the loss of a will must show the constituent fact that it existed, just as though the will was being proven for probate as a lost instrument. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

— **Testamentary capacity.**—One contesting a probated will by original proceeding on the ground that the testator was without mental capacity, has the burden of proof. *Day v. Henderson* (Civ. App.) 224 S. W. 248.

— **Fraud and undue influence.**—Notwithstanding suspicious circumstances as to making of will, such as that chief beneficiary wrote will and maintained secrecy as to its execution and existence until after testator's death, burden of whole case remains upon contestants as to fraud and undue influence. *Leahy v. Timon* (Civ. App.) 204 S. W. 1029.

The burden is on contestant to prove undue influence was exercised by a husband

over his wife at the time she executed her will in his favor. *Jennings v. Jennings* (Civ. App.) 212 S. W. 772.

In a suit to annul a will admitted to probate, the burden is on plaintiffs suing to set it aside for want of capacity, or undue influence to establish such matters, and every presumption will be indulged in favor of the will. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

In order to set aside the probate of a will on account of undue influence, the burden is on him who is attacking the will to show that testator has been induced to act contrary to his own wishes and to make a different will from one he would have made had he been left entirely free to act according to his own judgment and discretion, and such influence must have been in force at the very time of the execution of the will. *Stolle v. Kanetzky* (Civ. App.) 220 S. W. 557.

— **Revocation.**—When a lost will has been established, if, when last seen, it was in testator's possession, the presumption is that he destroyed it; but if, when last seen, it was in the possession of some one other than testator, no such presumption arises, and the burden is on one claiming testator destroyed the will to prove that fact. *Rape v. Cochran* (Civ. App.) 217 S. W. 250.

A will placed by testator at a bank was in his control within the meaning of the rule that, where a will, which when last seen was in the custody of the testator, cannot be found after his death, a presumption arises that it has been revoked. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

A party attempting to prove the loss of a will must show the constituent fact that it existed, just as though the will was being proven for probate as a lost instrument, and such requirement is necessary to show a revocation of a former will under this article and arts. 3267, 7859. *Id.*

Admissibility of evidence.—Evidence of declarations made by testatrix concerning the will and the acts of the proponent should be limited to the state and conditions of the mind of the testatrix, and, unless there is a prima facie showing of undue influence or fraud, cannot be considered on those issues. *Marshall v. Campbell* (Civ. App.) 212 S. W. 723.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony with reference to proponent getting a stranger to prepare will, instead of a kinsman of wife's family, held irrelevant. *Jennings v. Jennings* (Civ. App.) 212 S. W. 772.

On the issue of undue influence exerted on testatrix by her husband, the proponent testimony of a son that he did not know of existence of the will was inadmissible. *Id.*

On the issue of undue influence exerted on testatrix by her husband, evidence that he had whipped her and used abusive language toward her, and was otherwise guilty of unkind treatment, was admissible. *Id.*

On the issue of undue influence exerted on testatrix by her husband, the proponent, evidence of a conversation 12 years before the execution of will, with reference to what part of her father's estate testatrix wanted, was irrelevant. *Id.*

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony that on the morning after her father's death proponent demanded his wife's share of the estate, was irrelevant. *Id.*

In will contest on ground of undue influence, fraud, and duress, evidence as to declarations of testatrix is admissible. *Rounds v. Coleman* (Civ. App.) 214 S. W. 496.

Where a will was contested on the ground of the testator's want of capacity, the fact that he unreasonably disinherited some of his children is a matter for consideration. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Under this article, in a suit to set aside the probate of a will, witnesses to the probate can testify that testatrix was of age and of sound and disposing mind; that the witnesses were credible, and would have known it if she had revoked her will. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

In contest of will on grounds of undue influence and mental incapacity, it was error to exclude contestant daughter's evidence that proponent's wife was unkind to testatrix and neglected her during her last illness, such evidence being admissible as a circumstance tending to show that the will was an unnatural one, and that testatrix was insane. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

In proceedings to probate holographic will, two instruments of later dates, also alleged to be wills of testatrix, which court held not sufficiently proven to entitle them to probate, held inadmissible in evidence for any purpose. *Sherwood v. Sherwood* (Civ. App.) 221 S. W. 658.

In proceedings to probate a will, testimony of a devisee as to certain declarations of testator tending to show the will offered was the will he intended to make, such witness being called by proponents in rebuttal, should have been excluded. *Massey v. Allen* (Civ. App.) 222 S. W. 682.

Though declarations of testator that he has made his will are not admissible, either on issue of execution or attestation, where it is alleged by contestants that proponents have exercised undue influence, such declarations, made within a reasonable period from execution, are admissible to show testator's state of mind and effect of such influence thereon. *Id.*

In a will contest, exclusion of testimony as to the amount of the physician's bill for operating on testator during his last illness held proper; such testimony being irrelevant and immaterial. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Testimony on contest of the will of the father of the parties, giving all his property to two of his children, B. and W., that their mother, who had predeceased the father,

had requested all to look after her baby, B., was not prejudicial to W., and was admissible as tending to show any undue influence of W. did not affect the provision for B. *Walker v. Irby* (Civ. App.) 229 S. W. 331.

— **Revocation of will.**—Where a will cannot be produced, and its last custodian has been some person other than the testator, testator's declarations that he had destroyed it for the purpose of revoking it are admissible. *Rape v. Cochran* (Civ. App.) 217 S. W. 250.

Sufficiency of evidence—Execution and genuineness.—The probate of a will cannot be denied on ground of forgery, on proof that proponent had opportunity to become proficient in copying signatures of attesting witnesses or signature of maker of will. *Mills v. Mills* (Civ. App.) 206 S. W. 100.

In contest of will, evidence held insufficient to sustain judgment that proposed will was a forgery. *Id.*

On contest of a will alleged to have been revoked by a subsequent will not produced, evidence held sufficient to show the execution and the loss of the subsequent will. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

— **Testamentary capacity.**—Evidence as to the mental condition and eccentricities of testatrix, in a will contest, held insufficient to support finding of incapacity. *Vaughan v. Malone* (Civ. App.) 211 S. W. 292.

Evidence held to justify finding that 79 year old testatrix did not have sufficient testamentary capacity to make a valid and binding will. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

In a suit to set aside a judgment admitting to probate the will of plaintiff's father on the ground of insanity, evidence held insufficient to justify finding that decedent was insane. *Stolle v. Kanetzky* (Civ. App.) 220 S. W. 557.

In a will contest, proponent is required to establish testamentary capacity merely by the greater weight of the credible evidence; it being unnecessary that testamentary capacity be clearly shown. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

On contest of a will, evidence held insufficient to show that testator was not physically or mentally able to execute a valid will. *In re Fullhas' Estate* (Civ. App.) 228 S. W. 659.

— **Fraud and undue influence.**—In proceeding for probate of will, evidence held sufficient to sustain verdict that execution of will was induced by proponent's undue influence. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

A wife's will in favor of her husband cannot be set aside upon evidence that upon one occasion during the 36 years of married life he objected to the purchase of some clothing. *Jennings v. Jennings* (Civ. App.) 212 S. W. 772.

Evidence held insufficient to show undue influence over testatrix by her husband. *Id.*

In a suit to set aside the probate of a will on the ground that testator had been influenced unduly by his son, who was plaintiff's brother, evidence held insufficient to support a finding that undue influence had been exercised. *Stolle v. Kanetzky* (Civ. App.) 220 S. W. 557.

Evidence of opportunity and the fact that a former will differing from the one in probate had been destroyed by the testator is insufficient to establish undue influence. *Id.*

In a will contest, fraud and undue influence may be proved by circumstantial evidence. *Pendell v. Apodaca* (Civ. App.) 221 S. W. 682.

Evidence held sufficient to support a verdict finding that a will was the result of undue influence exercised by the man with whom testatrix was living in adultery. *Id.*

In a will contest, evidence held insufficient to produce even a surmise or suspicion of undue influence by the beneficiaries. *Drewry v. Armstrong* (Civ. App.) 223 S. W. 281.

Where a will makes an unreasonable or unnatural disposition of property, and the testator was so weakened in body and mind as to be easily influenced and the beneficiaries were in position to exercise undue influence, a jury or court would be authorized in finding that such influence was exercised, but where the record shows no such state of facts there can be no such presumption. *Id.*

On contest of a will, evidence held insufficient to show that testator was not physically or mentally able to execute a valid will, or that he was in such weakened condition as to be unable to resist the proponent, or that the will as probated was hers and not his. *In re Fullhas' Estate* (Civ. App.) 228 S. W. 659.

— **Revocation of will.**—Evidence held to sustain jury's finding that a later will was not intended to revoke former holographic will. *Adams v. Maris* (Com. App.) 213 S. W. 622.

Art. 3272. [1905] [1852] Further proof in case of will which cannot be produced in court.

See *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Evidence.—By virtue of this article, when a written will is not produced, its non-production must be proved sufficiently to satisfy the court it cannot be done by reasonable diligence; then the contents must be substantially proved by the testimony of a credible witness who has read the same, or who has heard it read. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

Art. 3273. [1906] [1853] All testimony shall be committed to writing, etc.

See *Cook v. Denike* (Civ. App.) 216 S. W. 437; *Perdue v. Perdue*, 110 Tex. 209, 217 S. W. 694.

Testimony reduced to writing.—Under art. 3690, prohibiting testimony of interested party as to transaction by deceased in suit between heirs and executor, unless called by opposite party, proponent having called heir as witness in county court to testify as to transaction with deceased, the testimony reduced to writing under this article and arts. 3274, 3275, was competent in district court. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Under this article and art. 3275, subscribing witnesses' testimony, given in the county court during a will contest, that testator at time of signing the codicil "was of sound and disposing mind and memory." committed to writing under such statutes, held properly read in the district court during the trial on appeal from the county court's order, as against the contention that witness could not testify that the testator had a disposing memory. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Admission, in district court on appeal from order of county court probating will, of certified copy of testimony taken in county court, under this article, and arts. 3274, 3275, if error, was harmless, where the witness testified fully to the same facts in the district court. *Id.*

Art. 3274. [1907] [1854] Order shall be entered, will, etc., shall be recorded, when.

Cited, *Prather v. McClelland*. 76 Tex. 574, 13 S. W. 543.

Order—In general.—Provision in will that no other action shall be had in the county court in relation to the settlement of the testator's estate than the probating and recording of his will and the return of an inventory, appraisal and lists of claims, is ineffective until the will is probated as required by law. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

— **Is in rem.**—Proceeding by which wills are proved for record and established as muniments of title are actions in rem, and judgments rendered therein are binding upon every one. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

A judgment in will contest is conclusive as to rights of heir, although heir did not actively participate in the contest by joining in the pleadings. *Id.*

Art. 3275. [1908] [1855] Certified copy of record may be read in evidence.

Cited, *Perdue v. Perdue*, 110 Tex. 209, 220 S. W. 322.

Written testimony as evidence in district court.—Under Rev. St. art. 3273, requiring testimony for the probate of a will to be reduced to writing and subscribed in open court, and this article, the written testimony on the hearing for probate is admissible in a suit to set aside the probate tried in the district court on appeal. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

Under this article, where, in proceedings in the county court to probate a will, proponent introduced testimony of testator's brother, which testimony was committed to writing pursuant to art. 3273, on appeal to the district court it was admissible on behalf of contestants, despite the incompetency of the brother as a witness under art. 3690, had he not been called by proponent in the county court. *Perdue v. Perdue*, 110 Tex. 209, 217 S. W. 694.

Art. 3276. [1909] [1856] Will probated in another state or country may be filed and recorded in this state.

In general.—Legal services rendered in a proceeding to probate a will in Oklahoma, or in resisting the contest of the probate of the will interposed by decedent's heirs, cannot be made a charge in favor of the attorney against the estate in the hands of a Texas administrator, at least until the Oklahoma executor, through whom the attorney seeks to go against the Texas administrator by right of subrogation, has become invested with the credentials provided by this article. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Meeting requirements entitles to probate.—Where the requirements of this article, in relation to application for probate of a foreign will, were met, the will was entitled to probate, and the county judge had no power or authority to deny it. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Foreign probate insufficient.—Judgment probating a will in Oklahoma gave such no standing in Texas. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Foreign will as evidence.—A foreign will can be used in the courts of Texas as evidence of the ownership of property before recorded in the county court or probated in Texas according to Texas law, except as to real property situated in Texas. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

CHAPTER SIX

GRANTING LETTERS

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| <p>Art.
3277. Who are disqualified, etc.
3278. When a will has been probated letters testamentary shall be granted.
3279. When administration shall be granted.
3280. Administration shall not be granted, unless, etc.
3281. Order in which letters shall be granted.
3288. Where will is discovered after grant of administration.</p> | <p>Art.
3289. Executor of will proved in another state entitled to letters within this state, when.
3290. Bond shall be required, etc.
3291. Further administration shall be granted, when.
3293. What facts must appear before granting letters testamentary.
3294. What facts must appear, etc.</p> |
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Article 3277. [1910] [1857] Who are disqualified, etc.

Corporations.—A corporation may be appointed and act as executor; the creation of such corporations being authorized by art. 1121, subd. 37. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Art. 3278. [1911] [1858] When a will has been probated letters testamentary shall be granted.

Failure to qualify and act.—A party in Texas could not, unknown to executors under the will of an Iowa decedent, have the will of such decedent probated, and afterwards prohibit the executors from administering the estate in Texas because more than 20 days elapsed after the probate before they sought to qualify under this article. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Acceptance implied from acting.—A trustee appointed in a will need not formally accept duties of his office, but if he acts in performance of trust, he will be held to have accepted. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

Art. 3279. [1912] [1859] When administration shall be granted.

Effect of independent executorship.—This article, regarding administration with will annexed, held not to apply where an independent executor accepted appointment by taking charge of estate and administering its affairs. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

Art. 3280. [1913] [1860] Administration shall not be granted unless, etc.

Necessity determinable by county court.—It is the exclusive province of the county court to determine whether the necessity exists for the administration of an estate. *Van Grinderbeck v. Lewis* (Civ. App.) 204 S. W. 1042.

Necessity.—The facts that the expenses of funeral and last illness were due and unpaid and the estate owed a note of \$1,000, and owned property yielding a considerable sum as rents, do not support a judgment that no necessity existed for administering the estate. *Van Grinderbeck v. Lewis* (Civ. App.) 204 S. W. 1042.

Necessity presumed.—Necessity for administration is to be presumed, in absence of showing, relative to revival of action against administrator or heirs of deceased party. *Saner-Ragley Lumber Co. v. Spivey* (Civ. App.) 230 S. W. 878.

No necessity.—Where debtor, after alleged fraudulent conveyance to his wife, died leaving an insolvent estate, the creditor, without first securing administration upon the debtor's estate and establishing his debt against the estate, could maintain a proceeding against debtor's widow and children to set aside the conveyance, and in such proceeding the debt could be established and ordered paid out of the property. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Where only property exempt.—Where all claims against deceased were barred by limitation, except one incurred by his brother for a coffin amounting to \$20 there was no necessity for administration; it appearing that the only estate was a homestead worth about \$100. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

"Estate" on which administration may be granted.—Right of action surviving to personal representative of a railroad employé, receiving injuries while engaged in interstate commerce, due to failure of railroad to comply with federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8623), is an "estate" on which administration may be granted. *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Sup.) 232 S. W. 494.

Art. 3281. [1914] [1861] Order in which letters shall be granted.

Independent executor.—Under this article, and art. 3293, the fitness of executor is determined by testator, and court is left without discretion in the matter, so that it was duty of court to accept the oath of an independent executor whenever tendered.

and order issuance of letters testamentary upon his request. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

Art. 3288. [1921] [1868] When will is discovered after grant of administration.

See *Van Orden v. Pitts* (Com. App.) 206 S. W. 830.

Art. 3289. [1922] [1869] Executor of will proved in another state entitled to letters within this state, when.

See *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Domestic administrator superseded.—Under this article, an inheritance tax administrator appointed under art. 7491, is superseded by executor under probated foreign will. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Liability of domestic administrator.—Where the executor of an Oklahoma decedent engaged an attorney to probate the will, and the attorney resisted the contest interposed by the decedent's heirs, his claim for legal services may, where the assets in Oklahoma were exhausted, be made a charge against the personal estate in the hands of the ancillary Texas administrator, the executor having abandoned his application to be appointed administrator with the will annexed in the state of Texas, for the ancillary administrator bears the same responsibility as if he were the sole administrator or executor, and privity arises from his obligation to pay the debts of the estate, including the expenses of administration. *Pendleton v. Hare* (Com. App.) 231 S. W. 334.

Privilege not grant of power.—The privilege given by this article, and art. 3290, to a foreign personal representative to receive appointment as such in Texas, is not a grant of administrative power, but merely a privilege to be invoked on proper application, any administrative power deriving from appointment in Texas and qualification of the representative according to the local law. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

"Ancillary" administration defined.—The term "ancillary," when applied to the administrator of a decedent's estate, is not to be taken as signifying a supplemental administration in the sense that it is a part of and connected with the principal administration in the state of the domicile; the expression implies no privity or official connection between the two administrators. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Duty of ancillary administrator.—The common-law rule allowing an ancillary administrator, after satisfying all local demands, to pay the residue over to the domiciliary representative of the estate, is not an absolute requirement, but founded on a comity, which the court of the situs has the discretion to ignore. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Judgment against foreign executor invalid.—Judgment in a suit against a foreign executor brought in a court of Texas is not binding on the estate, as an executor or administrator can neither sue nor be sued outside of the state in which he receives appointment. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

Art. 3290. [1923] [1870] Bond shall be required, etc.

See *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

Art. 3291. [1924] [1871] Further administration shall be granted, when.

Administrator de bonis non, appointment.—A final order discharging administrators of an estate absolutely did not negative probate court's power thereafter to appoint administrator de bonis non, there being nothing to show estate had been finally closed. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

Art. 3293. [1926] [1873] What facts must appear before granting letters testamentary.

Must issue to person named in will.—Under art. 3281, and this article, the fitness of executor is determined by testator, and court is left without discretion in the matter, so that it was duty of court to accept the oath of an independent executor whenever tendered, and order issuance of letters testamentary upon his request. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

Art. 3294. [1927] [1874] What facts must appear, etc.

See *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481.

Cited, *Mosher Mfg. Co. v. Equitable Surety Co.* (Com. App.) 229 S. W. 313.

CHAPTER SEVEN

TEMPORARY ADMINISTRATION

Art.	Art.
3297. County judge may appoint temporary administrator, when.	3300a. Same; contest of appointment.
3298. Appointment may be made without application, etc.	3300b. Hearing and determination of contest.
3299. Oath and bond required.	3301. Pending contest, the county judge may appoint temporary administrator.
3300. Appointment shall cease to be of force, when.	3302. Rights and powers, etc.

Article 3297. [1930] [1877] County judge may appoint temporary administrator, when.—Whenever it may appear to the county judge that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some suitable person temporary administrator with such limited powers as the circumstances of the case may require; and the appointment so made may be made permanent, as hereinafter provided. [Act Aug. 9, 1876, p. 98, § 20; Acts 1921, 37th Leg., ch. 71, § 1, amending art. 3297, Rev. Civ. St. 1911.]

See *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Effect of recitals in appointment.—Where the court, in appointing temporary administrator, recited sufficient grounds in the order to justify the appointment, the decree would not be affected by any invalid reason that might have been recited therein. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Where an order for the temporary appointment of administrators under the authority of this and following articles, recited that the application was made so that an oil lease might be executed, but did not confer the power to execute the lease, the administrators did not have that power. *Allar Co. v. Roeser* (Civ. App.) 217 S. W. 442.

Lease before appointment.—A lease made by lessors as temporary administrators, before their application for appointment under this and following articles, was filed, and which was not confirmed by the order of appointment, is void. *Allar Co. v. Roeser* (Civ. App.) 217 S. W. 442.

Art. 3298. [1931] [1878] Appointment may be made without application, etc.

See *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

Art. 3299. [1932] [1879] Oath and bond required.

See *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; *Allar Co. v. Roeser* (Civ. App.) 217 S. W. 442.

Art. 3300. [1933] [1880] Appointment shall cease to be of force, when.—The order of the court in making such appointment shall state that unless the same is contested at the next regular term of the court, after service of citation, the same shall be made permanent, provided the court is of the opinion that a permanent administrator is necessary. [Act Aug. 9, 1876, p. 98, § 20; Acts 1921, 37th Leg., ch. 71, § 1, amending art. 3300, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

See *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857.

Art. 3300a. Same; contest of appointment.—Immediately after such appointment so made, it shall be the duty of the clerk of the court to issue citation; which shall state the name of the person appointed, and when so appointed, and the name of the deceased estate, and shall cite all persons interested in the welfare of the estate to appear at the term of court named in such citation, and contest such appointment if they so desire; and, that, if such appointment is not contested at the

term of court so named in the citation, then the same shall become permanent. [Acts 1921, 37th Leg., ch. 71, § 2, adding art. 3300a.]

Art. 3300b. Hearing and determination of contest.—In case such appointment is contested, the court shall hear and determine the same as the law and the facts require, and during the pendency of such contest, the person so appointed as temporary administrator shall continue to act as such; and, in case such appointment is set aside, the court shall require the person so appointed to make out, and file in court, under oath, a complete exhibit of the condition of such estate, and what disposition, if any, he has made of the same, or any portion thereof. [Id., § 2, adding art. 3300b.]

Art. 3301. [1934] [1881] Pending contest the county judge may appoint temporary administrator.

Administrator, not heirs, etc., proper plaintiff.—Even if a temporary administrator should not have been appointed for an estate, under this article, yet where the will of the deceased had been duly probated, and there was an administration of the estate pending, and debts in a large sum had been filed and approved, the heirs and devisees of deceased could not bring trespass to try title to land belonging to the estate against others claiming it. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Art. 3302. [1935] [1882] Rights and powers, etc.

See *Allar Co. v. Roeser* (Civ. App.) 217 S. W. 442.

In general.—Under Rev. St. 1879, art. 1878, providing that the probate court shall "define the powers" of temporary administrators appointed by it, and art. 1882, a probate court may authorize a husband, as temporary administrator of his wife's property, to prosecute an action already begun by the husband and wife, to recover land belonging to her separate estate. *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

Usual powers presumed.—Where the power conferred on temporary administrator by his appointment does not appear, it may be assumed in the absence of anything showing necessity for greater authority that he was simply clothed with the usual powers of temporary administrators. In *re Chapman's Estate* (Civ. App.) 213 S. W. 989.

Authority need not affirmatively appear.—That petition, in action by temporary administratrix, did not affirmatively show her authority from probate court to bring suit, does not render judgment for administratrix subject to collateral attack upon ground that court was without jurisdiction, notwithstanding this article, the judgment being a judicial determination that court had jurisdiction. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Intervening in will contest—Costs.—Where executor appointed temporary administrator, under this article, intervened in will contest, though the order appointing him did not authorize him to do so, costs were properly taxed against him individually, and not against estate. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Injunction against temporary administrator.—In view of orders of county court, for Court of Civil Appeals to restrain unauthorized depredation, pending appeal in proceedings to probate a will, upon testatrix's property by temporary administratrix appointed by county court, held not encroachment on jurisdiction of county court to administer estates of deceased persons. *Stewart v. Poinbeouf* (Civ. App.) 201 S. W. 1025.

CHAPTER EIGHT

OATH AND BOND OF EXECUTORS AND ADMINISTRATORS

Art.
3307. Oath of temporary administrator.
3309. Bond of executors and administrators.

Art.
3313. When will provides that no bond shall be required.
3319. Sureties may ask to be discharged and for new bond.

Article 3307. [1940] [1887] Oath of temporary administrator.

See *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857.

Art. 3309. [1942] [1889] Bond of executors and administrators.

Premiums paid on fidelity bond.—The fact that an administratrix or her attorneys were induced to believe, from the language of a county judge, that he would allow as

expenses premiums paid by the administratrix on a fidelity bond, did not authorize or legalize such a charge, as the law, once determined, must be followed, although the court may have theretofore labored under an erroneous impression as to what the law was. *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

In the absence of some statutory authority, a premium paid for the making of an administrator's bond is not a proper charge against the estate, but should be borne by the administrator. *Id.*

This article, and arts. 3621, 3622, 3623, 3235, 4099, 4101, 5493, do not authorize administrator to charge against the estate a premium paid for the making of his bond. *Id.*

Liability on bond.—Though check for price of articles belonging to intestate's estate and sold by administrator by authority of the probate court was made payable to administrator as agent and attorney in fact of the heirs, he received it as administrator, and the sureties on his bond are liable for the proceeds. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

An administrator, and consequently his sureties sued on his bond, held prima facie entitled to credits for payments by him in the administration of the estate, as shown by his canceled checks and other vouchers. *Id.*

A surety of executors is liable for their fraud and breach of trust, although he may not have personally profited, and he cannot drive the beneficiary of the trust to a separate suit against the executors. *Bain v. Coats* (Civ. App.) 223 S. W. 571.

Interest on claim.—Interest should not be allowed against the sureties on administrator's bond from the time of his death, but only from the time of demand on them for payment of money belonging to the estate, prior to which time they had no knowledge of any claimed misapplication of funds, or failure to account by the administrator; no demand for payment by him or request for distribution of the estate, or suggestion of willful or wrongful withholding of money, having been made. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

Action on bond.—In action by an administrator de bonis non against the former administrator and his surety for an accounting as to a note owing by the former administrator to decedent, a defense by the surety that the former administrator was insolvent if it constitutes a defense as against art. 3378, requiring an administrator to account for such debt in the same manner as if it were so much money in his hands, is not availing to the surety, unless it be pleaded; proof thereof under a general denial being insufficient. *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

Discharge of sureties.—Payment by administrator de bonis non for purpose of turning over to intestate's heirs the money that had come into his hands as such, which at death of the administrator was on deposit to credit of the administrator as such, is no consideration for any attempted release of the administrator de bonis and another as sureties on the administrator's bond. *Smith v. Belding* (Civ. App.) 224 S. W. 562.

Art. 3313. [1946] [1893] When will provides that no bond shall be required.

See *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

Art. 3319. [1952] [1899] Sureties may ask to be discharged and for new bond.

Letter requesting release not effective as discharge.—Surety's letter to county judge requesting release from liability under guardian's bond did not relieve surety from liability, where no petition to be relieved therefrom was filed and where guardian was not cited to appear and give new bond, as required by this article and art. 4109. *Southwestern Surety Ins. Co. v. Peden* (Civ. App.) 223 S. W. 1114.

CHAPTER TEN

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Art.	Art.
3332. Inventory and appraisal.	3344. New appraisalment may be required.
3337. Court shall approve or disapprove.	3345. Order for same.
3340. Duty of executor to make additional inventory.	3346. New appraisalment in place of original.
3341. May be cited to make, etc.	3347. Not more than one reappraisalment.
3342. Order requiring additional inventory.	3348. Shall be evidence, to what extent.
3343. Erroneous inventory or list may be corrected.	

Article 3332. [1965] [1912] Inventory and appraisalment.

Property constituting assets—In general.—It will be presumed that personal property in intestate's possession and on her premises at time of her death belonged to her. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

— **Homestead not assets though proper to include.**—The homestead was not subject to administration as assets of the husband's estate. *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

— **Insurance policy.**—The proceeds of a life policy made payable to one having no insurable interest in the life of the insured belong to the insured's estate. *American Nat. Ins. Co. v. Wallace* (Civ. App.) 210 S. W. 859.

Conclusiveness and effect.—Where an administrator, while inventorying the personalty of the estate, apprised the county court that it was claimed by decedent's son, who applied to have the property turned over to him, an application which the court granted, and the administrator turned the property over, the effect of the order was to eliminate the property from the inventory, at least until some action was taken in a court of competent jurisdiction to recover it. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Where, when district court entered order denying administrator's application for sale of realty to pay debts, certain personalty was not in his hands as administrator, and was not even a part of his inventory, having been turned over to decedent's son, who claimed it, pursuant to the order of the county court, and no objection was made to the inventory, which did not refer to the personalty, decedent's creditor cannot, by way of contest of the application for sale by the administrator, inject the issue of the correctness of the inventory. *Id.*

The inventory of a decedent's estate required by this chapter, to be filed by the administrator, should be at least prima facie a guide for the county court in respect of what property belongs to the estate and comes under the jurisdiction of the court. *Id.*

Art. 3337. [1970] [1917] Court shall approve or disapprove same.

Cited, *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Art. 3340. [1973] [1920] Duty of executor, etc., to make additional inventory.

Cited, *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105.

Art. 3341. [1974] [1921] May be cited to make, etc.

Cited, *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Form of proceeding.—It is not proper to include the proceeding to have the additional property inventoried, under Rev. St. 1879, arts. 1921, 1922, in a proceeding to require the administrator to make an exhibit of the condition of the estate. *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105.

Art. 3342. [1975] [1922] Order requiring additional inventory.

Cited, *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105; *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 3343. [1976] [1923] Erroneous inventory or list may be corrected.

Cited, *Brown v. Fleming* (Com. App.) 212 S. W. 483; *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 3344. [1977] [1924] New appraisalment may be required.

Cited, *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 3345. [1978] [1925] Order for same.

Cited, *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 3346. [1979] [1926] New appraisalment stands in place of original.

Cited, *Yates v. Watson* (Com. App.) 221 S. W. 966.

Art. 3347. [1980] [1927] Not more than one reappraisalment.

See *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Cited, *Yates v. Watson* (Com. App.) 221 S. W. 966.

Art. 3348. [1981] [1928] Shall be evidence to what extent.

See *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25.

Conclusiveness and effect of inventory.—In proceedings by administrator de bonis non to sell land for payment of deceased's debts, held neither corrected nor original in-

ventory was conclusive against him, in view of this chapter. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

Neither the original nor the corrected inventory of the personalty of a decedent is conclusive for or against the administrator under this chapter. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

In an action by a mother's administrator against a son to recover proceeds of cattle sold by the son while he was living with his mother and cultivating her farm, where it was undisputed that she had had 72 cattle, evidence held sufficient to identify the cattle sold as cattle belonging to the mother, though the inventory made evidence by this article, showed only 19 cattle. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

CHAPTER ELEVEN

CERTAIN RIGHTS, DUTIES AND POWERS OF EXECUTORS AND ADMINISTRATORS

Art.	Art.
3351. Duty in regard to plantation, manufactory or business.	3355. Power to release mortgages.
3353. Ordinary diligence shall be used to collect claims and recover property of estate.	3356. Acts of one co-executor or co-administrator valid.
3354. Property may be purchased, compromises made, etc., under order of the court.	3357. Preceding article does not apply when.

Article 3351. [1984] [1931] Duty in regard to plantation, manufactory or business.

In general.—Rev. St. 1879, art. 1931, must be construed to include a mercantile business. Where the executor is free from the control of the county court, i. e., an independent executor, it is his duty to determine, from the lights before him, whether the estate will be benefited by continuing the business and, if he uses a reasonable discretion, his estate is not chargeable with loss incurred in carrying on such business. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

Art. 3353. [1986] [1933] Ordinary diligence shall be used to collect claims and recover property of estate.

Cited, *McAllen v. Brownsville Masonic Temple Ass'n* (Civ. App.) 201 S. W. 660.

In general.—The general rule is that the legal representative of a deceased person's estate is the proper person to enforce payment of indebtedness due the estate, and this rule applies ordinarily in cases where a contract between a married man and another has matured previous to, or during, the administration of his estate by an executor. *Aetna Life Ins. Co. v. Osborne* (Civ. App.) 224 S. W. 815.

Power to waive priority of claim.—Under this article, an administrator is without authority to agree that, on payment of a part of a series of vendor's lien notes, the remainder should be made a second lien subject to the loan procured to pay off the first of the series, and so a deposition of administrator tending to show such an agreement was properly excluded in an action on notes. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

Action by administrator.—Under this article, an administrator may, in proceeding to collect a series of vendor's lien notes, exercise an option to declare the entire series due on default in payment of any one of them or interest. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

In an administrator's action against intestate's son to recover proceeds of intestate's cattle sold by son while living with intestate and cultivating her farm, evidence held not to show that proceeds were used by intestate during her lifetime. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

Art. 3354. [1987] [1934] Property may be purchased, compromises made, etc., under order of the court.

Cited, *McAllen v. Brownsville Masonic Temple Ass'n* (Civ. App.) 201 S. W. 660.

Power to waive priority of claim.—Under this article, and art. 3355, an administrator does not have the authority, without the consent of the probate court, to agree that maker of vendor's lien notes may procure a loan on the land and pay off part thereof, postponing the security for the remaining notes as a second lien. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

Power to compromise claim.—Under direct provisions of this article, administrator cannot compromise claim for broker's commissions, so as to bind estate, without order of probate court. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Individual liability for breach of agreement.—An executor, who exacted for the estate money to discharge the lien of a judgment owned by the estate in violation of his agreement to release that judgment if the debtors did not bid at the sale of the mortgaged property, cannot defeat his individual liability for the injury so caused by his plea that he was acting as representative of the estate. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

Art. 3355. [1988] [1935] Power to release mortgage.

Cited, *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

Power to compromise mortgage.—Evidence and agreed statement of facts that a will made defendants executors without bond with power to sell, and testimony by an executor that he was authorized to act in the transaction as such, and that whatever he did was satisfactory to the estate, is sufficient to sustain the trial court's conclusion that the executor was authorized to make a contract to take the mortgaged property in full satisfaction of the judgment. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

Art. 3356. [1989] [1936] Acts of one co-executor or co-administrator valid.

See *Dodge v. Lacey* (Civ. App.) 216 S. W. 400.

In general.—Under Rev. St. 1879, arts. 1936, 1937, in a suit by an agent against the executors of testator's estate for his commissions, the letters written by one of the executors to plaintiff and to the person to whom testator's real estate was alleged to have been sold are admissible against the estate without the coexecutors having joined therein. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

Evidence held insufficient to support finding that the estate of decedent was bound by the contract of only one of three executors and trustees, employing plaintiff broker to sell the land on commission. *Dodge v. Lacey* (Civ. App.) 216 S. W. 400.

Liability for acts of coexecutor.—An executor is not personally liable for money obtained by a coexecutor in violation of an agreement in which the former took no part, and of which he was shown to have no knowledge, in the absence of proof that the former executor had received benefits from the estate. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

Art. 3357. [1990] [1937] Preceding article does not apply, when.

See *Dodge v. Lacey* (Civ. App.) 216 S. W. 400.

DECISIONS RELATING TO SUBJECT IN GENERAL

Foreign executors and administrators.—Notwithstanding interest of another in an estate, or fact that he was administrator of that part of the estate located elsewhere, the Texas administrator is the only person within the state of Texas who can make contracts concerning property of the intestate within that jurisdiction. *Duenkel v. Amarillo Bank & Trust Co.* (Civ. App.) 222 S. W. 670.

An administrator is the agent of the court in the jurisdiction where he is appointed, and is not subject to the jurisdiction of the courts of other state unless he voluntarily appears and submits to its jurisdiction. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

CHAPTER TWELVE

ADMINISTRATION UNDER A WILL

Art. 3358. Directions in will to be executed, unless, etc.	Art. 3368. Estate shall be partitioned and divided by court, when.
3360. Citation to executor, etc., in such case.	3370. Upon failure to give bond, estate shall be administered under direction of the court.
3362. Testator may provide that no action be had in court, except probate of will, etc.	3371. Bond shall be filed and recorded.
3363. Creditor may sue executor in such case.	3372. Creditor may sue on bond, etc.
3364. Executor without bond may be required to give bond, when.	3374. Executor may sell property without order of court, when.
3365. Order requiring bond.	3378. Naming an executor in a will does not release him from a debt, etc.

Article 3358. [1991] [1938] Directions in will to be executed, unless, etc.

In general.—Under Const. art. 5, § 16, giving county courts jurisdiction of probate courts, and this article, the county court has exclusive original jurisdiction over probate matters. *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969.

Where guardian had ample funds as executor and trustee to educate and maintain wards, and was charged under the will to use such funds for that purpose, neither he nor his sureties are entitled to credit for any of guardianship fund expended for such purpose without authority from the probate court. *Davis v. White* (Civ. App.) 207 S. W. 679.

This article, and arts. 3359-3361, are inapplicable to contest of application to probate will. *Walker v. Irby* (Civ. App.) 229 S. W. 331.

Nature of proceedings to annul.—A creditors' suit to collect a judgment from income payable under testamentary trust was not "to annul or suspend provisions of a will," within this article. *Nunn v. Titcher-Goettinger Co.* (Civ. App.) 196 S. W. 890.

Art. 3360. [1993] [1940] Citation to executor, etc., in such case.

Cited, *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Art. 3362. [1995] [1942] Testator may provide that no action be had in the court, except probate of will, etc.

Jurisdiction of court.—Where an estate was solvent, and the will provided that no action should be taken in county court, and defendant was an independent executrix asserting adverse claims of other heirs, the district court alone had authority to determine the heir's rights in a suit for partition. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

The court has no control over an independent executor in the faithful performance of his duties as provided in the will, and the only action which that court is required or authorized to take is to probate the will which names the executor; he, if his powers are general, managing the estate and paying the debts as though they were his own. *Ewing v. Schultz* (Civ. App.) 220 S. W. 625.

The management of an estate by independent executor is an administration under the law, and the County Court has no jurisdiction to settle accounts between him and the heirs and devisees. *Fernandez v. Holland-Texas Hypotheek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

Where a will gave an absolute estate to testator's children, and in subsequent provision authorized the executor to take possession of "any and all property belonging to my estate; to sell and convey same; to invest any money that may come into his hands in such way as he shall deem proper; and to execute all the deeds of conveyance, acquittances and receipts necessary and proper to be executed in order to carry out the object of this instrument," the executor, by such provision, was made an independent executor, and not a trustee. *Beckham v. Beckham* (Com. App.) 227 S. W. 940.

Independent executor.—Failure of succeeding independent executor designated by will to file oath previous to application of a third person for appointment of administrator held not a waiver of his right to be appointed as executor. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

— **Probating will effects appointment.**—Under this article, relating to independent executors, held that it is not necessary that an independent executor take an oath and his designation as executor, and probate of will is sufficient to perfect his appointment. *Pepper v. Walling* (Civ. App.) 195 S. W. 892.

Independent executor is qualified to act from time will appointing him is admitted to probate. *Coleman v. Texas Produce Co.* (Civ. App.) 204 S. W. 382.

— **Powers.**—Independent executors have the right to manage and control estates without interference of the courts, unless necessity arises for the adjustment of some legal rights of others. *Beckham v. Beckham* (Civ. App.) 202 S. W. 517.

Independent executor under terms of will had no authority to bind estate in subscribing to stock of hotel company; no power to invest any part of estate in any business having been given in will, which provided revenues from realty should be divided among certain devisees, etc. *Lovenskiold v. Nueces Hotel Co.* (Civ. App.) 203 S. W. 759.

— **Personal liability.**—Hotel company's petition to recover from independent executor on subscription to capital stock held sufficient to show executor's personal liability, alleging in alternative that, if executor did not bind estate, he bound himself personally. *Lovenskiold v. Nueces Hotel Co.* (Civ. App.) 203 S. W. 759.

— **Community property.**—Where property of deceased was left to an executor in trust without action of the probate court, a deed of testator's half of community property by the survivor, before the executor qualified, was ineffective. *Nations v. Neighbors* (Civ. App.) 201 S. W. 691.

— **Termination of executorship.**—In view of this article, and arts. 2005, 3235, 3363 and 3364, when an executor who is authorized to act independently of the probate court in good faith, and not in fraud of creditors, passes the estate committed to him to those entitled to receive it, he loses control thereof and may not thereafter administer it for creditors, and is not as a consequence further accountable to creditors in his representative capacity. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

— **Resignation.**—Where one nominated by will as independent executor was appointed guardian of estate of minor beneficiaries after filing his application to probate the will but prior to admission of the will to probate and his appointment as independent executor, appointment as guardian did not amount to resignation of his executorship. *Beckham v. Beckham* (Civ. App.) 202 S. W. 517.

Where one nominated by will as independent executor was appointed guardian of estate of minor beneficiaries after filing his application to probate the will but prior to admission to probate and appointment as independent executor, appointment as guardian did not amount to resignation of trusteeship as to any of the beneficiaries under the will. *Id.*

Art. 3363. [1996] [1943] Creditor may sue executor in such case.

Cited, *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

In general.—Under Rev. St. 1879, art. 1202, providing that, “in every suit against the estate of a decedent involving title to real estate, the executor,” etc., “shall be made parties,” and art. 1943, a mortgage creditor may sue the executor for foreclosure, without making the heirs of the deceased mortgagor parties. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

Under Rev. St. 1879, arts. 1942, 1943, the qualifications and return of inventory by one of two executors of such a will is sufficient to withdraw the estate from administration by the court, and subject property in the hands of such executor to levy and sale on execution. *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

Art. 3364. [1997] [1944] Executor without bond may be required to give bond, when.

Cited, *McAllen v. Brownsville Masonic Temple Ass'n* (Civ. App.) 201 S. W. 660; *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

Independent executor.—This article, and art. 3365, are applicable to executors acting under will already probated, and does not require that person named as independent executor give bond until by probate of the will he becomes independent executor. *Daniels v. Jones* (Civ. App.) 224 S. W. 476.

Art. 3365. [1998] [1945] Order requiring bond.

Cited, *Daniels v. Jones* (Civ. App.) 224 S. W. 476.

Art. 3368. [2001] [1948] Estate may be partitioned and divided by court, when.

Trustees cannot divest themselves of duty.—Trustees under a will had no right to divest themselves of the duty of partitioning the property in settlement of the will and to confer upon testator's son the power to subsequently handle the property for the beneficiaries. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

Art. 3370. [2003] [1950] Upon failure to give bond estate shall be administered under direction of the court.

Cited, *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549.

Art. 3371. [2004] [1951] Bond shall be filed and recorded.

Cited, *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549.

Art. 3372. [2005] [1952] Creditor may sue on bond, etc.

Cited, *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549.

Art. 3374. [2007] [1954] Executor may sell property without order of court, when, etc.

Will construed.—Where executor was left the right to “manage and control” and “invest proceeds of rents and sale, all the rest of said property just as if it was his own,” the title was in the executor, and he could sell either real or personal property to pay debts. *Nations v. Neighbors* (Civ. App.) 201 S. W. 691.

— **Authority to grant oil and gas lease.**—Where a will gave power to executors and executrices to do and perform anything in and about the management and control and disposition of the estate, and to carry the provisions of the will into execution, but there were no express terms authorizing sale of mineral rights, the executors, etc., have no authority to grant an oil and gas lease. *Smith v. Womack* (Civ. App.) 231 S. W. 840.

Power of independent executor.—An independent executor has the same authority as the probate court possesses in ordinary administrations to employ agents to sell the lands of the estate and to make the estate liable for reasonable commissions earned under such employment. *Jones v. Gilliam*, 109 Tex. 552, 212 S. W. 930.

An independent executor has the right to sell property to pay debts without an order, whether such power is expressed in the will or not. *Fernandez v. Holland-Texas Hypotheek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

Art. 3378. [2011] [1958] Naming an executor in a will does not release him from a debt, etc.

Cited, *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

CHAPTER THIRTEEN

SUBSEQUENT EXECUTORS AND ADMINISTRATORS

Article 3379. [2012] [1959] Subsequent administrator under a will shall succeed to rights of executor, etc.

Application for letters.—Under art. 1959, Rev. St. 1879, it is sufficient, in an application for letters as administrator de bonis non, merely to represent to the court that the estate is not fully administered, and the necessity for administration need not appear therein. *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

Powers.—Administrator de bonis non, successor of others who had failed to act until estate was finally closed, had same rights and powers as if he had been originally appointed on death of decedent, and had continued to act until he sold, under order of court, unlocated balance land certificate, community property of decedent and widow. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

CHAPTER FOURTEEN

WITHDRAWING ESTATES FROM ADMINISTRATION

Art.		Art.	
3334.	Persons entitled to estate may cause executor or administrator to be cited, etc.	3388.	Lien on property in hands of distributees.
3385.	May give bond to pay debts of estate, etc.	3389.	Creditor whose claim has been allowed, etc., may sue on bond.
3386.	Bond shall be filed and recorded and order of court thereon.	3391.	Creditor may also sue distributee.
3387.	Partition may be had of estate.	3392.	Order discharging executor or administrator, and closing estate.

Article 3384. [2017] [1964] Persons entitled to estate may cause executor or administrator to be cited, etc.

See *Miller v. Miller* (Civ. App.) 227 S. W. 737.

Withdrawing estate from administration—In general.—Judgment of district court on the minutes on appeal from order of probate court appointing guardian for minor heirs, denying application of applicant to be appointed guardian, but not confirming appointment of appellee, is insufficient to sustain a judgment ordering the estate withdrawn from administration. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

— **Who entitled.**—In view of arts. 3236, 3263, giving “those interested in an estate” certain rights as to its administration, this article, giving only to “any one entitled to a portion” of an estate “as heir, devisee or legatee” the right, by giving bond as provided in article 3385, to withdraw an estate from administration, does not give such right to the vendee of an heir, devisee, or legatee. *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

The beneficiaries under a will and the executor named therein in the absence of objection by creditors have a right to terminate administration whenever they see fit, if not contrary to the will. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

— **Application.**—That application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as persons of minors did not deprive county court of jurisdiction to determine whether estate should be withdrawn, and to whom it should be delivered, if withdrawn; applicant having executed bond required by art. 3385. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Art. 3385. [2018] [1965] May give bond to pay debts of estate, etc.

See *Brown v. Fleming* (Com. App.) 212 S. W. 483; *Miller v. Miller* (Civ. App.) 227 S. W. 737.

Cited, *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729; *Rowe v. Dyess* (Com. App.) 213 S. W. 232; *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Art. 3386. [2019] [1966] Bond shall be filed and recorded and order of court thereon.

See *Miller v. Miller* (Civ. App.) 227 S. W. 737.

Cited, *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

Art. 3387. [2020] [1967] Partition may be had of estate.

See *Miller v. Miller* (Civ. App.) 227 S. W. 737.
Cited, *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

Art. 3388. [2021] [1968] Lien on property in hands of distributees.

Cited, *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 727.

Art. 3389. [2022] [1969] Creditor whose claim has been allowed, etc., may sue on bond.

Cited, *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

Art. 3391. [2024] [1971] Creditor may also sue distributee.

In general.—In a suit against an independent executor and residuary legatees to recover under a promise by decedent to make a bequest in plaintiff's favor which had not been done, a complaint, charging that the legatees had received of the executor and then had in their possession certain enumerated mixed property of a value more than sufficient to satisfy the claim, was insufficient as failing to allege a personal liability against the legatees; the remedy being to proceed to enforce a creditor's lien against the property with the aid of the court's equitable process. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

In action by intestate's creditor against nonresident administrator, heirs, and heirs' grantees to foreclose creditor's lien under this article and art. 3456, after such land had been sold by heirs to such grantees, judgment was not objectionable as a judgment against a foreign administrator, being a judgment in rem for the purpose of foreclosing the lien. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

An heir or devisee, though liable to creditor of decedent to the extent of the property he takes, is not personally liable for a deficiency after the sale of the property. *Id.*

Art. 3392. [2025] [1972] Order discharging executor or administrator and closing estate.

Cited, *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

Appeal.—Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of art. 3235, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

CHAPTER FIFTEEN

REMOVAL OF EXECUTORS AND ADMINISTRATORS

Article 3394. [2027] [1974] In what cases may be removed with notice.

Causes for removal.—Temporary administratrix's conversion of testatrix's property is ground for her removal. *Stewart v. Poinbeouf* (Civ. App.) 201 S. W. 1025.

CHAPTER SEVENTEEN

ALLOWANCE TO WIDOW AND MINOR CHILDREN

Article 3410. [2043] [1990] Sale shall be ordered to raise allowance, when.

Homestead.—The homestead was not subject to administration as assets of the husband's estate, nor could it be sold to pay an allowance under the statute to the widow and minor children. *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

Order, of the probate court setting apart the husband's interest in the homestead, which was community property, to the widow and children for their support, and directing a sale of such interest to satisfy the allowance, were not merely erroneous, but void for lack of power to make them, and might be attacked collaterally. *Id.*

CHAPTER EIGHTEEN

SETTING APART THE HOMESTEAD AND OTHER EXEMPT PROPERTY TO WIDOW AND CHILDREN

Art. 3413. Court shall set apart exempt property, etc.	Art. 3424. When homestead shall not be partitioned.
3414. Allowance in lieu of exempt articles.	3426. No distinction between separate and community homestead.
3416. To whom the exempt property shall be delivered.	3427. Homestead not liable for debts, except, etc.
3417. Allowance shall be paid, how.	3428. Other exempt property, liable for what debts.
3420. Property upon which liens exist shall not be set aside.	3429. Homestead rights of surviving husband.
3422. When estate proves to be insolvent.	
3423. Exempt property, etc., not to be considered in ascertaining solvency.	

Article 3413. [2046] [1993] Court shall set apart exempt property, etc.

See *Hedeman v. Newnom*, 109 Tex. 472, 211 S. W. 968.

1. Construction.—Under this article, and art. 3416, referring to duty of probate court to set apart for the use of widow, minor children, and unmarried daughters remaining with the family of deceased all property of the estate exempt from execution, where there was no administration of the estate, there could be no setting apart of exemptions granting to an unmarried adult daughter possession of the homestead rent free until partition be affected by sale. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

5. Homestead.—The wife and adult unmarried daughter of deceased could hold his homestead. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Orders of the probate court setting apart the husband's interest in the homestead, which was community property, to the widow and children for their support, and directing a sale of such interest to satisfy the allowance, were not merely erroneous, but void for lack of power to make them, and might be attacked collaterally. *Allen v. Ramsey* (Civ. App.) 226 S. W. 489.

The homestead was not subject to administration as assets of the husband's estate, nor could it be sold to pay an allowance under the statute to the widow and minor children. *Id.*

9. Effect of divorce or abandonment of husband.—While a divorced wife could not assert any claim to the homestead of her deceased husband, yet she, as the duly constituted guardian of their minor daughter, could apply to the county court to have the homestead which he occupied at the date of his death set apart for the occupation and use of such minor. *Scripture v. Scripture* (Civ. App.) 231 S. W. 826.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3413, provides that exempt property must be set apart for the use of widow, minor children, and unmarried daughters remaining with the family of the deceased, and the qualification "remaining with the family" does not apply to minor children, so that a minor daughter under custody of decedent's divorced wife may have the use and occupation of the homestead set over to her. *Id.*

The fact that decedent was single when he died did not affect the right of a minor daughter living with decedent's divorced wife to have the homestead set aside for such minor's use, for, notwithstanding the marriage status had been dissolved by the divorce decree, and the custody of the child awarded to the mother, and that they did not live with the father, yet he was legally bound for the child's support. *Id.*

10. Conveyance or abandonment of homestead.—Where an insolvent decedent gave a note and mortgage upon his land when single, subsequently married, made the land his homestead, and, after abandoning it, gave, without his wife's joinder, a new note and trust deed, and some time later re-established such homestead, the mortgage lien is superior to the homestead exemption rights of the widow and children in the land. *Investors' Mortgage Security Co. v. Newton*, 109 Tex. 478, 211 S. W. 971.

Art. 3414. [2047] [1994] Allowance in lieu of exempt articles.

See *Hedeman v. Newnom*, 109 Tex. 472, 211 S. W. 968.

Art. 3416. [2049] [1996] To whom the exempt property shall be delivered.

Administration necessary.—Under art. 3413 and this article, where there was no administration of the estate, there could be no setting apart of exemptions granting to an unmarried adult daughter possession of the homestead rent free until partition be affected by sale. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Art. 3417. [2050] [1997] Allowance shall be paid, how.

See *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481.

Art. 3420. [2053] [2000] Property on which liens exist shall not be set aside.

In general.—In a suit wherein defendant children, as tenants in common, claimed homestead rights as against foreclosure of a lien, evidence held not to sustain allegation that they had designated such homestead, so as to estop them from claiming homestead rights in a larger tract. *Massillon Engine & Thresher Co. v. Barrow* (Civ. App.) 203 S. W. 933.

A valid mortgage lien upon personal property of an insolvent decedent, created before his marriage, and prior to passage of this article, is superior to the wife's subsequent claim for allowances in lieu of homestead and exemptions; this article superseding the Probate Act of 1848, having reference to liens given by the husband after his marriage. *Hedeman v. Newnom*, 109 Tex. 472, 211 S. W. 968.

Art. 3422. [2055] [2002] When estate proves to be insolvent.

Constitutionality.—In view of Rev. St. 1879, art. 2007, where the homestead of an insolvent decedent was set aside to the widow, one adult child living, such child, on the death of the widow, inherited the property absolutely and free from the claims of the creditors or administrator; so much of art. 2002 as attempts to pass the homestead of an insolvent absolutely to the widow and minor children to the exclusion of the adult being unconstitutional, because in violation of Const. art. 16, § 52, providing that the homestead shall descend and vest as other real property of the deceased. *Stayton, C. J.*, dissenting. *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485, followed. *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916.

Construction and application.—This article, providing that, when the estate is insolvent, the widow's title to all property and allowances derived from "the estate of the husband" set apart to her under arts. 3413, 3414, shall be absolute, and not taken for any debts of the estate, except as authorized in following provisions, does not apply to a chattel mortgage given by a husband upon his property when a single man; "the estate of the husband" in such property being only the equity of redemption. *Hedeman v. Newnom*, 109 Tex. 472, 211 S. W. 968.

Art. 3423. [2056] [2003] Exempt property, etc., not to be considered in ascertaining solvency, etc.

See *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481.

Art. 3424. [2057] [2004] When homestead shall not be partitioned.

In general.—Where in partition suit the evidence establishes that the actual uses made of land claimed as a homestead were contrary to an abandonment or intention to abandon and residence on other tract of land was consistent with right to claim homestead of tract in suit, the land was not subject to partition under direct provisions of this article. *Eason v. Eason* (Civ. App.) 212 S. W. 972.

Persons protected.—If it be true that the homestead is protected in favor of an unmarried adult daughter against creditors, Const. art. 16, § 52, does not protect it in her favor from partition among the heirs, the only persons thus protected being the surviving husband or wife or minor children. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Occupancy by widow.—If land conveyed to second wife became her homestead, it was not subject to partition after the husband's death at suit of the divorced first wife, claiming through her son, even though it was community property of the second marriage. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Titles acquired otherwise than by descent from ancestor.—Const. art. 16, § 52, prohibiting partition of homestead by heirs during lifetime of surviving wife, does not apply where the wife buys the children's interest, and partition is prayed by a third party against the wife under a claim that the husband was holding an interest therein in trust; the wife not being an heir. *McBride v. Briggs* (Civ. App.) 199 S. W. 341.

Art. 3426. [2059] [2006] No distinction between separate and community homestead.

In general.—Where a surviving widow and several children live as cotenants upon a common piece of land, the legal title of which is owned by a child, their mother held not entitled to 200 acres of the land as her homestead, where she has recognized the rights of the children. *Massillon Engine & Thresher Co. v. Barrow* (Civ. App.) 203 S. W. 933.

If land conveyed to second wife became her homestead, it was not subject to partition after the husband's death at suit of the divorced first wife, claiming through her son, even though it was community property of the second marriage. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

A third wife and her children can claim no homestead rights in the community interest that once belonged to the second wife. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

Notwithstanding the statutes except the homestead from the community property liable for community debts, making it "exempt from forced sale" (arts. 3592, 3235),

nevertheless the survivor may convey the community homestead to discharge community debts which constitute no lien thereon. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Where the homestead was community property, the title of the children vested at once on the death of the husband and was not dependent on the continued use of the property as a homestead by the widow and minor children, and their abandonment of it was not a defense to a suit to recover their undivided interest therein after an unauthorized sale for the purpose of paying an allowance to the widow and minor children. *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

A surviving widow of one having a homestead in community property has the same right under the Texas laws as the deceased owner. *Woodward v. Sanger Bros.*, 246 F. 777, 159 C. C. A. 79.

Where a surviving widow, who during the minority of children held all of the community estate of herself and her husband, which was claimed by him as a homestead, after the children reached their majorities, etc., and the daughters were married, consented to a partition whereby she received in fee less than one-half of the land in all of which she had a homestead estate, such partition did not free the land which the widow received in fee from its homestead character which had previously been impressed thereon under the Texas laws. *Id.*

Art. 3427. [2060] [2007] Homestead not liable for debts, except, etc.

See *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481; *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485.

Cited, *Allen v. Ramey* (Civ. App.) 226 S. W. 489.

In general.—In view of Rev. St. 1879, art. 2002, where the homestead of an insolvent decedent was set aside to the widow, one adult child living, such child, on the death of the widow, inherited the property absolutely and free from the claims of the creditors or administrator; so much of art. 2002 as attempts to pass the homestead of an insolvent absolutely to the widow and minor children to the exclusion of the adult being unconstitutional, because in violation of Const. art. 16, § 52, providing that the homestead shall descend and vest as other real property of the deceased. *Stayton, C. J.*, dissenting. (*Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485, followed.) *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916.

Homestead descending from father to children cannot be offset by surety on bond of father as guardian of children, but otherwise as to all other property so descending. *American Bonding Co. of Baltimore, Md., v. Fountain* (Civ. App.) 196 S. W. 675.

In suit against unmarried children upon their notes secured by trust deed upon homestead of their deceased parents, such homestead was not exempt, under Constitution. *Gilbreath v. Cage & Crow* (Civ. App.) 198 S. W. 972.

A lien in a contract for street improvement to secure payment to contractor covering homestead and given by widow, if construed as mortgage, is invalid, under Const. art. 16, § 50. *Schutze v. Dabney* (Civ. App.) 204 S. W. 342.

Art. 3428. [2061] [2008] Other exempt property, liable for what debts.

Cited, *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485.

Art. 3429. [2062] [2009] Homestead rights of surviving husband.

In general.—Rights of heirs of deceased wife were fixed by laws in force at time of death and could not thereafter be disturbed either by statutory or by constitutional restrictions. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

CHAPTER NINETEEN

PRESENTMENT, ETC., OF CLAIMS AGAINST AN ESTATE

<p>Art. 3430. Notice of issuance of letters shall be given. 3435. Claims shall be postponed if not presented in twelve months; proviso. 3439. Affidavit to claim. 3440. Claim lost or destroyed, etc. 3441. Affidavit made before whom. 3442. Allowance or approval without affidavit, void. 3443. Memorandum of allowance or rejection. 3444. Failure to indorse or annex memorandum. 3445. When claim is allowed shall be presented for approval, etc.</p>	<p>Art. 3446. Claims shall be acted upon by the court. 3447. Action of the court upon claims. 3448. Any person interested in estate may oppose approval of a claim. 3449. When claim has been rejected the owner may bring suit. 3450. Judgment establishing claim shall be filed, etc. 3452. Action of court on claim a judgment, etc. 3456. Claim shall not be allowed after order for partition. 3457. Judgment shall not be rendered in favor of claim which has not been presented and rejected.</p>
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Article 3430. [2063] [2010] Notice of issuance of letters shall be given.

In general.—Under this article, and arts. 3443, 3449, and 3450, providing that judgments on claims disallowed by administrators shall be filed with the county court and have same effect as if they had been allowed, such judgments are not enforceable by execution, and cannot become dormant and be revived by scire facias under arts. 3717 and 5696. *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358.

Art. 3435. [2068] [2015] Claims shall be postponed, if not presented within twelve months; proviso.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854.

In general.—The debt being that of deceased, it was duty of creditor to exhaust its remedy against his property before resorting to property of son mortgaged by deceased to secure debt. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

Presentation.—Evidence held to support the trial court's finding that a properly authenticated demand for payment was presented by plaintiff claimant to defendant administrator. *Lay v. Thompson* (Civ. App.) 224 S. W. 433.

Time for presentation.—When an estate is being administered by an independent executor, it is unnecessary for a claimant against the estate to present claim to such executor for allowance or classification within one year; this article, not applying. *Ewing v. Schultz* (Civ. App.) 220 S. W. 625.

In a suit against an independent executor to recover a debt owing plaintiff by decedent, evidence held to sustain a finding that, if presentation was necessary, the claim was presented to the executor for allowance in proper time. *Id.*

Art. 3439. [2072] [2018] Affidavit to claim.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854.

In general.—One having a claim against a decedent's estate was charged with knowledge that the administratrix had no authority to pay the account unless it was allowed by her and approved by the court and paid in due course of administration. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Claimants held charged with knowledge that administratrix had not allowed their accounts and bound to see that it was allowed as directed by law. *Id.*

Affidavit—Necessity.—Administrator's rejection of unverified complaint did not set in motion the statute of 90 days' limitation. *Hooks v. Martin* (Civ. App.) 229 S. W. 592.

Appeal.—Under arts. 3439–3448, 3452, any person interested in the estate of a decedent may appeal from the county court to the district court from action of the county court allowing a claim against the estate, whether or not such person appeared at all and contested the claim in the county court, and no notice of appeal need be given. *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

A married female heir had legal capacity to contest and to prosecute an appeal from action of county court allowing a claim against the estate of a decedent under arts. 3439–3448, 3452, and that wholly independent of her husband, since such proceedings do not constitute a suit within the contemplation of the statutes and decisions, in which the wife must be joined by her husband, and she could execute the appeal bond as the sole principal, and, husband having signed the bond as a surety, he thereby became bound as a surety to the same extent any other surety would be bound, and the bond was valid and sufficient. *Id.*

Art. 3440. [2073] [2019] Claim lost or destroyed, etc.

Cited, *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3441. [2074] [2020] Affidavit made before whom.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3442. [2075] [2021] Allowance or approval without affidavit, void.

Cited *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3443. [2076] [2022] Memorandum of allowance or rejection.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358; *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Allowance or rejection.—Under this article, and arts. 3444, and 3449, where administratrix neither allowed nor rejected claim, claimants held not justified in waiting over a year before taking any action. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Art. 3444. [2077] [2023] Failure to indorse or annex memorandum.

Cited, *Butler v. Fechner* (Civ. App.) 200 S. W. 1126; *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3445. [2078] [2024] When claim is allowed, shall be presented for approval.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3446. [2079] [2025] Claim shall be acted upon by the court.

See *Wygall v. Woodlief's Heirs*, 76 Tex. 604, 13 S. W. 569.

Cited, *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3447. [2080] [2026] Action of the court upon claims.

Cited, *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Effect of judgment.—A claim having been allowed by administrator and approved by court, and no appeal having been taken from such action, matter is res adjudicata. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

The allowance by a court of competent jurisdiction of a claim against a decedent's estate is a judgment which cannot be collaterally attacked. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Art. 3448. [2081] [2027] Any person interested in estate may oppose the approval of a claim.

Cited, *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3449. [2082] [2028] When claim has been rejected the owner may bring suit.

See *Leverett v. Wherry* (App.) 15 S. W. 121; *Moore v. Glass*, 6 Civ. App. 368, 25 S. W. 128.

Cited, *Jenkins v. Cain*, 72 Tex. 88, 10 S. W. 391; *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358.

Jurisdiction.—Under Rev. St. 1879, art. 2067, as to order for sale of mortgaged property, where an administrator has allowed a claim, but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by art. 2028. *Western Mortg. & Invest. Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Presentation and rejection.—Under Rev. St. 1879, art. 2028, where the note sued on has a rejection indorsed with defendant's name, without being signed as administrator of the estate sued, it sufficiently proves the presentation and rejection of the note, in the absence of a sworn denial and of evidence to show that there is another person bearing the same name as himself. *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752.

If acts of administratrix amounted to allowance of claim presented to her, claimants held not entitled to sue; there being no rejection as basis for the suit. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Time for suit.—Under Rev. St. 1879, art. 2028, the statute of limitations is set in motion upon a claim which is rejected by an administrator, for the reason that proper credits have not been entered thereon, and after the lapse of 90 days from such rejection it cannot be revived by a second presentation, and indorsement thereon by the administrator of a portion of the claim. *Willis v. Talbert* (Sup.) 11 S. W. 535.

Under arts. 3443, 3444, and this article, where administratrix neither allowed nor rejected claim, claimants held not justified in writing over a year before taking any action. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Administrator's rejection of unverified complaint did not set in motion the statute of 90 days' limitation. *Hooks v. Martin* (Civ. App.) 229 S. W. 592.

Agreement to make will.—If a decedent agreed to reward by will a certain person for services, and failed to do so, such person may recover from his estate compensation to the extent of the value of the services. *Kuhlmann's Estate v. Poss* (Civ. App.) 220 S. W. 564.

Where there was a contract to reward by will one performing services, such person could not recover the reasonable value of her services from the estate, without showing that she was not rewarded by will. *Id.*

Sufficiency of evidence.—In an action against the estate of a decedent to recover for the services of a minor child in caring for an automobile, evidence held sufficient to sustain verdict in favor of plaintiff at the rate of \$5 per month for 16 months. *Kuhlmann's Estate v. Poss* (Civ. App.) 220 S. W. 564.

In an action against the estate of a decedent for compensation for nursing, a finding of the jury that plaintiff performed such services during a certain period held not supported by the evidence. *Id.*

A verdict against an estate, allowing \$5 per day for carrying breakfast to a sick person's bed and bathing his feet cannot be upheld, in the absence of a showing that the services were worth such an amount. *Id.*

Contracts to pay for services, either in money when they are performed, or by bequest in the will of the recipient, are viewed with great caution, and can be established only by full and satisfactory proof, and no presumptions or inferences will be indulged in favor of them. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

Evidence held to show that testatrix's nephew, suing her executor on her express or implied contract to pay him for his services, had relied on testatrix's generosity in the way of legacy, rather than on a promise, express or implied to pay. *Id.*

Art. 3450. [2083] [2029] Judgment establishing claim shall be filed, etc.

See *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

In general.—Under arts. 3430, 3443, 3449, and this article, as to judgments on claims disallowed by administrators, such judgments are not enforceable by execution, and cannot become dormant and be revived by scire facias under arts. 3717 and 5696. *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358.

Art. 3452. [2085] [2031] Action of court on claim a judgment, etc.

Suit in district court.—A married female heir had legal capacity to contest and to prosecute an appeal from action of county court allowing a claim against the estate of a decedent under arts. 3439–3448, and this article, and that wholly independent of her husband, since such proceedings do not constitute a suit within the contemplation of the statutes and decisions, in which the wife must be joined by her husband, and she could execute the appeal bond as the sole principal, and, husband having signed the bond as a surety, he thereby became bound as a surety to the same extent any other surety would be bound, and the bond was valid and sufficient. *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Contest of claim in county court not required.—To entitle an heir, or person interested in the estate otherwise than as heir to appeal from an order of the probate court, it is not necessary that he should have appeared to contest the matter before the court, and made objections to the approval of the claim. *Glenn v. Kimbrough's Estate*, 70 Tex. 147, 8 S. W. 81.

Notice of appeal not required.—Under arts. 3439–3448, and this article, any person interested in the estate of a decedent may appeal from the county court to the district court from action of the county court allowing a claim against the estate, whether or not such person appeared at all and contested the claim in the county court, and no notice of appeal need be given. *Rainbolt v. Gray* (Civ. App.) 230 S. W. 229.

Art. 3456. [2089] [2035] Claim shall not be allowed after order for partition.

Suit against heirs.—Under this article, where the estate was solvent, and plaintiff's the only claim, administration was needless, and he could sue the heirs directly. *Buchanan v. Thompson's Heirs*, 4 Civ. App. 236, 23 S. W. 328.

In action by intestate's creditor against nonresident administrator, heirs, and heirs' grantees to foreclose creditor's lien under art. 3391, and this article, after such land had been sold by heirs to such grantees, judgment was not objectionable as a judgment against a foreign administrator, being a judgment in rem for the purpose of foreclosing the lien. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

Art. 3457. [2090] [2036] Judgment shall not be rendered in favor of claim which has not been presented and rejected.

In general.—The assignees of a judgment for a sum of money, and foreclosing a vendor's lien therefor, after the defendant had died, in ignorance that the judgment had become dormant, filed with the clerk an affidavit of the death, and obtained an order of sale against the administrator, as allowed by Rev. St. 1879, art. 2276, under which the land was sold, and they became purchasers. Held, that under Rev. St. 1879, arts. 2036, 2275, the assignees could not petition the district court to revive the judgment, set aside the sale, and enforce the lien, without having first presented the judgment as a claim against the estate, since the debt was the principal object of their suit, and they were not the vendors of the land having a superior title until the price was paid, as in *Robertson v. Paul*, 16 Tex. 472, but merely the owners of a secured debt. *Jenkins v. Cain*, 72 Tex. 88, 10 S. W. 391.

CHAPTER TWENTY

CLASSIFICATION AND PAYMENT OF CLAIMS

Art.	Art.
3458. Classification of claims.	3463. Proceeds of sale of property on which there is a mortgage or other lien.
3460. Order of payment of claims.	

Article 3458. [2091] [2037] Classification of claims.

Cited, Van Valkenburgh v. Ford (Civ. App.) 207 S. W. 405.

Inapplicable to independent executorship.—An independent executor being the sole judge of what claims he will and what claims he will not allow and pay, this article, and art. 3460, relating to classification of claims and the order of payment, have no application. Ewing v. Schultz (Civ. App.) 220 S. W. 625.

Expenses of administration.—Under Rev. St. 1879, art. 2037, a judgment for costs, rendered against an administrator in an action brought against him to try title, and to partition land of his intestate, belongs in the second class. Manning v. Mayes, 79 Tex. 653, 15 S. W. 638.

Within art. 3623, and this article, reasonable attorney's fees are expenses of administration. Pendleton v. Hare (Com. App.) 231 S. W. 334.

Under art. 3623, and this article, respectively declaring that executors and administrators shall be allowed all reasonable attorney's fees necessarily incurred by them in the course of administration, and that expenses of administration, etc., shall have priority, the executor of a decedent is entitled to procure legal services for the probate of a will, though not personally interested therein, for, if the statute does not authorize such expenditures, it does not forbid the same, and the probate of the will is the first essential step toward carrying out the trusts declared. *Id.*

Mortgages and lien creditors.—In action on husband's and wife's note and to foreclose deed of trust securing payment thereof, where independent executor of deceased wife intervened, alleging that the property was subject to the payment of claims against the community estate, and alleging existence of claims to certain amount, and asking court to classify and pay claims out of proceeds of sale, the court having acquired jurisdiction had the right to hear and finally determine every issue raised by the pleading and evidence, and to determine and classify any and all claims presented. Fernandez v. Holland-Texas Hypoteek Bank of Amsterdam, Holland (Civ. App.) 221 S. W. 1004.

In action on husband's and wife's note and to foreclose a deed of trust on community property, in which the wife's independent executor intervened, alleging that the community estate was insolvent and asking to have creditors paid out of the proceeds of the sale, the district court had jurisdiction of all claims against the estate and their classification; and, where the deed of trust was a lien upon the community estate prior to other creditors, court properly decreed foreclosure to satisfy the indebtedness on note. *Id.*

Art. 3460. [2093] [2039] Order of payment of claims.

Cited, Ewing v. Schultz (Civ. App.) 220 S. W. 625.

Art. 3463. [2096] [2042] Proceeds of sale of property on which there is a mortgage or other lien.

See Moore v. Glass, 6 Civ. App. 363, 25 S. W. 123.

CHAPTER TWENTY-TWO

SALES

Art.	Art.
3479. Advantage of estate to be considered in ordering sale.	3490. Requisites of such application.
3480. No sale without order of court.	3491. Citation in such case.
3480a. Lease of gas, oil, or mineral lands of estate.	3493. Action of the court on application.
3480b. Same.	3496. Sale may be public or private for cash or part credit; minimum cash payment; lien; adequacy of price; security.
3481. Sale may be on what terms.	3497. Twenty days' notice of sale.
3488. Order for sale of property mortgaged, etc.	3501. Order of court for sale of property.
3489. Duty of executor, etc., to apply for sale of real estate, when.	3504. Executor or administrator shall not purchase property of the estate.

Article 3479. [2112] [2058] Advantage of estate to be considered in ordering sale.

Cited, *Jones v. Gilliam* (Civ. App.) 199 S. W. 694; *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Art. 3480. [2113] [2059] No sale without order of court.

See *Keener v. Moss*, 66 Tex. 181, 18 S. W. 447.

Necessity of order.—Under Rev. St. 1879, art. 2059, a sale of property by an administrator, even though afterwards confirmed by the probate court, is invalid, unless an order of such court authorizing the sale was previously entered. *Ball v. Collins* (Sup.) 5 S. W. 622.

Under this and following articles, an administrator cannot sell land, except for certain purposes, and upon order of probate court, which must be strictly followed. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

— **Sale by guardian.**—Under this article, order of sale is essential to validity of sale of ward's lands by guardian, so that its terms must control as to property sold. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

This article applies to guardianship, and, unless such order is granted in case of guardian desiring to sell property belonging to a ward, the sale is void. *Loving v. Clark* (Civ. App.) 228 S. W. 590.

— **"Any property."**—Under this article, the term "any property" includes notes as well as all other kinds of property, and a valid assignment of a note is a "sale" of it, passing the title to assignee. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Presumptions and burden of proof.—In action upon vendor's lien note, where plaintiff's pleadings showed that it had been the property of an estate of which an administrator was appointed in Kentucky and been placed with a bank under an escrow agreement between one of the owners and the administrator, the burden was on plaintiff to show an order of court under this article. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Without proof to the contrary, it will be presumed that the laws of Kentucky are the same as the laws of Texas, forbidding sale of any property of an estate without an order of the court authorizing a sale by executor or administrator. *Id.*

In suit on vendor's lien note which had been property of an estate, plaintiff's burden of showing, as a condition to his right of action, an order of court under this article, authorizing foreign administrator's sale or assignment thereof to him, was not sustained by his mere statement that he was the owner of the note, which was a bare conclusion or opinion, without basis of fact, and, though not objected to, it had no probative force. *Id.*

Art. 588, and art. 1906, subd. 9, requiring a denial under oath of genuineness of indorsement or assignment of note, were not intended to dispense with proof of an administrator's authority to sell or assign, as such authority, under this article, depends upon an order of court, so that absence of any verified denial of administrator's assignment thereof to plaintiff did not dispense with proof of its validity. *Id.*

Art. 3480a. Lease of gas, oil, or mineral lands of estate.—Whenever there is real property belonging to the estate of a deceased person that is believed to contain gas, oil, other minerals, or metals, upon application in writing by the executor or administrator, or any heir, devisee or legatee of the deceased interested in such gas, oil, other minerals or metals, or any creditor of the estate whose claim had been allowed and approved or established by suit, the County Court, by an order entered on the Minutes of the Court either in term time or in vacation may direct the lease of such property for the purpose of drilling, mining, and operating for such gas, oil, other minerals or metals; or any part thereof. Such order shall state the minimum bonus, if any, to be received by the executor or administrator under such lease or sale, the minimum royalty to be reserved to the estate under such lease or sale in no event less than $\frac{1}{8}$ royalty on oil and such other terms of such lease or sale as the court may desire to embody in such order.

Before such application shall be heard by the County Court notice of such application shall, however, be given by the executor or administrator by publication of such notice in one issue of any newspaper published in the county where such real property is situated, which notice shall appear subsequent to filing of such application and not less than ten days prior to hearing thereon, and which notice shall describe such real property with sufficient accuracy to identify same and shall state the time and place of hearing on such application. [Acts 1919, 36th Leg., ch. 137.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 3480b. Same.—The executor or administrator shall in term time or vacation report to the County Court any lease or sale made by him in accordance with the immediately foregoing article within ten days of entry of order authorizing such lease or sale and shall embody in such report, or attach thereto, a full copy of the proposed contract of lease or deed of conveyance evidencing such sale, and such lease or sale shall be approved by the court, with such amendments, if any, as the court may direct, or shall be disapproved by the court at any time within ten days after the filing of such report either in term time or vacation by an order of approval or disapproval entered on the Minutes of said Court. If said lease is approved, the order of approval shall direct the executor or administrator to execute and deliver the lease, contract or deed of conveyance approved on compliance by the other party or parties thereto with the terms thereof; provided that no lease executed under the provisions of this Chapter shall be binding upon heirs, legatees, or distributees of any estate, or on purchasers from said estate unless actual development has been commenced by the time said estate is partitioned and distributed and is being and continues to be prosecuted with reasonable diligence thereafter. [Id.]

Art. 3481. [2114] [2060] Sale may be on what terms.

Employment of broker.—In necessary cases the probate court may, under the statute, sanction an administrator's employment of a broker to make a sale advantageous to the estate, and allow a reasonable broker's commission as a legitimate expense of administration, although the power should be sparingly exercised. *Jones v. Gilliam*, 109 Tex. 552, 212 S. W. 930.

The probate court, not the administrator, must be the judge as to the necessity of employing a broker to make a sale for the estate, as well as of the amount of the broker's compensation; the administrator being but an agency of the court. *Id.*

Art. 3488. [2121] [2067] Order for sale of property mortgaged, etc.

In general.—A creditor of a decedent's estate properly filed his claim in the probate court, and asked for a sale of the land to satisfy it before appealing to the district court to adjudicate adverse claims to the land by those who could not be made parties in the probate court. *Fryckberg v. Scott* (Civ. App.) 218 S. W. 21.

Suit in district court.—Under Rev. St. 1879, art. 2067, where an administrator has allowed a claim, but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by art. 2028, which provides that "when a claim for money against an estate has been rejected by an * * * administrator in whole or in part the owner may bring suit to establish it in any court having jurisdiction." *Western Mortg. & Inv. Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Art. 3489. [2122] [2068] Duty of executor, etc., to apply for sale of real estate, when.

Cited, *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Resort to other fund or remedy.—Personal property is the primary fund for payment of debts of a decedent, and must be exhausted before resort can be had to land. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

That personal property belonging to estate had been lost by wrongful act of former administrator would not prevent decedent's land being sold to pay debts of estate. *Id.*

If the personal property belonging to the estate of a decedent had been lost by the wrongful act of a former administrator, decedent's land could nevertheless be sold to pay his debts before exhaustion by the creditors of their remedy against the administrator. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Community property.—Community property of husband and wife is subject to administration and sale by administrator of husband or wife under certain circumstances to pay separate debts of either husband or wife. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

A sale by an administrator *de bonis non* under proper order of the probate court of an unlocated balance land certificate, community property of decedent and his widow, held not void; sale having been properly reported and approved. *Id.*

Art. 3490. [2123] [2069] Requisites of such application.

Cited, *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Provisions directory.—A sale of land by an administrator is not void because his application did not comply with Rev. St. 1879, art. 2069, by containing a statement of the charges and claims against the estate, such requirements being merely directory. *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799.

Sufficiency of application.—Administrator's application to sell real estate must show claims against estate and estimated expense of administration. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Collateral attack.—An order of sale of land to pay a claim, made by the county court on an application under art. 3489, and this article, is not void and subject to collateral attack because the claim was not then established, where the record shows subsequent establishment, classification, and payment, and therefore its existence. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Art. 3491. [2124] [2070] Citation in such case.

In general.—One who had purchased interest of some of heirs in land held entitled to intervene in proceedings to sell such land for payment of debts of deceased. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

Art. 3493. [2126] [2072] Action of the court on application.

In general.—Judgment of county court in proceedings for sale of land, that personal property mortgaged by deceased belonged to his son, was void for want of jurisdiction. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

In proceedings by administrator *de bonis non* to sell land for payment of deceased's debts, intervener, who had purchased interest of certain of heirs in such land, could show that certain personal property belonging to estate was still in hands of administrator and available for payment of decedent's debts. *Id.*

In such proceeding the administrator could show that certain personal property was not property of decedent, or, if it ever was, it had been lost to estate by act of former administrator. *Id.*

Art. 3496. [2129] [2075] Sale may be public or private for cash or part credit; minimum cash payment; lien; adequacy of price; security.

Adequacy of price.—An order confirming administrator's sale of land for one-fourth of its actual value is so grossly unjust to the heirs as to be subject to revision by certiorari, though petition for certiorari did not allege fraud or mistake. *Lee v. Benzes* (Civ. App.) 209 S. W. 768.

Where land is sold by administrator for one-fourth of its actual value, the inadequacy in price is so great as to shock the conscience and raise a presumption that the court was imposed upon. *Id.*

Art. 3497. [2130] [2076] Twenty days' notice of sale.

See 1918 Supp., arts. 6016½-6016½c, as to publication in newspaper instead of posting.

Art. 3501. [2134] [2080] Order of court for sale of property.

See *Ball v. Collins* (Sup.) 5 S. W. 622.

Requisites.—Order authorizing administrator to sell real estate must give terms of such sale. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Conclusiveness.—The county court, so far as the administration of estates of decedents is concerned, is a court of general jurisdiction, having jurisdiction to sell property for the payment of debts, and its judgment, in such regard, where jurisdiction over an estate is once acquired, is as binding as that of any other court, and not subject to collateral attack. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

In a collateral proceeding no presumption can be indulged against the validity of an order of the probate court directing a sale of lands. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Art. 3504. [2137] [2083] Executor or administrator shall not purchase property of the estate.

In general.—In action to set aside a conveyance by sole devisee and executors of lands of the estate to defendant, a surety of the executors, evidence held to show collusion between defendant and the executors. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

In action to set aside collusive purchase from executors of lands of the estate, the court was not precluded from giving relief on a finding of the fraud charged because there was no finding of fraud as to the preliminary contract pursuant to which the conveyance was made, as the contract had served its purpose when merged in the executed deed. *Id.*

In action to set aside collusive purchase from executors of lands of the estate, the pleadings were sufficient, without specially pleading the preliminary contract pursuant to which the conveyance was executed, as such contract could be used as evidence on the issues without special pleading. *Id.*

DECISIONS RELATING TO SUBJECT IN GENERAL

Agreements by administrator.—Administrator's promise to give broker's commissions for selling real estate must be authorized or approved by probate court before it is binding upon estate. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Probate court's refusal to allow administrator credit for broker's commissions for negotiating real estate sales, will not be reversed, except for clear abuse of discretion. *Id.*

CHAPTER TWENTY-THREE

REPORT OF SALES, ETC.

Art. 3508. Sales shall be reported in thirty days.	Art. 3514. Conveyance of real estate.
3511. Action of court on report of sale.	3515. Conveyance of real estate shall not be delivered, until, etc.
3512. Sale shall be set aside, when.	

Article 3508. [2141] [2087] Sales shall be reported in thirty days.

Former act.—Under a former act corresponding to this article, the court had power to approve or disapprove a sale, though the act was silent as to the necessity of confirmation; and, in the absence of a decree confirming a sale, the title did not pass to the purchasers, unless it is shown that he was entitled to confirmation by virtue of his compliance with the statute in all essential particulars. *Harris v. Brower*, 3 Civ. App. 649, 22 S. W. 758.

Art. 3511. [2144] [2090] Action of court on report of sale.

Form of order.—Order confirming administrator's sale of real estate must direct that proper conveyance be made when purchaser complies with terms of sale. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

Art. 3512. [2145] [2091] Sale shall be set aside, when.

In general.—Probate court, if not satisfied that administrator's sale of real estate was fairly made, should set it aside. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

In action to set aside a conveyance by sole devisee and executors of lands of the estate to defendant, a surety of the executors, evidence held to show collusion between defendant and the executors. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

In action to set aside collusive purchase from executors of lands of the estate, the pleadings were sufficient, without specially pleading the preliminary contract pursuant to which the conveyance was executed, as such contract could be used as evidence on the issues without special pleading. *Id.*

In action to set aside collusive purchase from executors of lands of the estate, the court was not precluded from giving relief on a finding of the fraud charged because there was no finding of fraud as to the preliminary contract pursuant to which the conveyance was made, as the contract had served its purpose when merged in the executed deed. *Id.*

Conditions precedent.—Where the executor of a husband sold city property and used the proceeds to discharge liens on farm lands belonging to the testator's two children, to whom such property was devised, the children cannot, though the sale and deed were invalid, recover the city property without accounting for the proceeds. *Loving v. Clark* (Civ. App.) 228 S. W. 590.

Collateral attack.—In trespass to try title constituting collateral attack on long past order of probate court authorizing administrator de bonis non to sell unlocated balance of land certificate, community property of decedent and his wife, it must be conclusively presumed that court, before ordering sale, found fact of existence of debts owing by decedent, condition precedent to its power to authorize sale. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

Art. 3514. [2147] [2092] Conveyance of real estate.

Conveyance.—An administrator's deed to land is but an assertion that the title remained in decedent to the date of his death, and is not evidence of such ownership. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Title and interest conveyed.—Where plaintiffs proved the existence of community debts established by suit, classified in the estate of deceased husband and one-half thereof paid out of the consolidated estates of the deceased husband and deceased wife, the lands being sold prior to the opening of administration on the wife's estate and not inventoried as a part thereof, and the proceeds of the sale formed assets of the consolidated estates and entered into the amount distributed to the heirs of both, held, in view of the record, that the sale by the executor of the estate of deceased husband was valid.

vesting purchaser with title of both of the estates. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

The surviving executor under a will, in distributing the property according to agreement between the beneficiaries, cannot convey the interests which the beneficiaries had inherited from the testator's wife, to whom he had devised his estate subject to certain payments, and who had since died. *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

Evidence.—In action to set aside a conveyance by sole devisee and executors of lands of the estate to defendant, a surety of the executors, evidence held to show collusion between defendant and the executors. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

Art. 3515. [2148] [2093] Conveyance of real estate shall not be delivered until, etc.

In general.—Administrator should not convey real estate until purchaser has complied with terms of sale, and if sale be upon credit, until purchaser has given his note for balance due. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

CHAPTER TWENTY-FOUR

ENFORCING SPECIFIC PERFORMANCE OF CONTRACTS

Article 3518. [2151] [2096] Proceeding to enforce specific performance of bond, etc.

See *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111.

CHAPTER TWENTY-SIX

PARTITION AND DISTRIBUTION

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| <p>Art.
3527. Application for partition and distribution.
3531. Application may be made, when.
3532. Upon return of citation served, court shall proceed, etc.
3533. Court shall ascertain what facts.
3534. Shall appoint guardians for minors, etc.
3535. Decree of partition.</p> | <p>Art.
3536. Where estate consists of money or debts only.
3549. Distributee purchasing at sale shall pay only the excess of his share.
3550. Court may order sale, when.
3556. Surviving husband or wife may have partition of common property.
3561. Expenses of partition to be paid by whom.</p> |
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Article 3527. [2154] [2099] Application for partition and distribution.

Jurisdiction.—Where an estate was solvent, and the will provided that no action should be taken in county court, and defendant was an independent executrix asserting adverse claims of other heirs, the district court alone had authority to determine the heir's rights in a suit for partition. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Art. 3531. [2158] [2103] Application may be made, when.

Cited, *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

In general.—Under this article, the executor, upon application by the heirs, devisees, or legatees after expiration of 12 months from the grant of the letters, must be in a position to show cause why a partition and distribution of the estate should not be made, at which time a minors' interest should be received and thereafter managed and controlled by the minors' guardian under art. 3534. *Beckham v. Beckham* (Com. App.) 227 S. W. 940.

Time for application.—While it is the general rule that no person interested in an estate can sue to recover property while administration is still pending, there are exceptions to the rule, one of which is that such suit may be brought where no debts exist. *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

Art. 3533. [2160] [2105] Court shall ascertain what facts.

Cited, *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Art. 3534. [2161] [2106] Shall appoint guardians for minors, etc.

In general.—Under art. 3531, the executor, upon application by the heirs, devisees, or legatees after expiration of 12 months from the grant of the letters, must be in a

position to show cause why a partition and distribution of the estate should not be made, at which time a minors' interest should be received and thereafter managed and controlled by the minors' guardian under this article. *Beckham v. Beckham* (Com. App.) 227 S. W. 940.

Guardian ad litem.—In partition suit against father and his minor children, where there was a clear conflict between the father's interest and that of the minors, a guardian ad litem was properly appointed for the latter. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

Where the adult beneficiaries under the will of testator made a partition agreement which affected the rights of infants, it was proper, in a friendly partition action brought to carry the agreement into effect, to appoint a guardian ad litem for the infants, though the plaintiff in the partition action purported to act as their next friend, it appearing that he was a party to the agreement and seeking its confirmation, for, in such case, it is inappropriate that he be allowed to represent the infants. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

Authority of representative.—In an action against the unknown heirs of a person, an attorney appointed to represent the unknown heirs was without authority, after the adjournment of the term, to file an application for a new trial. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Art. 3535. [2162] [2107] Decree of partition.

Cited, *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Art. 3536. [2163] [2108] Where estate consists of money or debts only.

Cited, *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Art. 3549. [2176] [2121] Distributee purchasing at sale shall pay only the excess of his share.

Application.—This article has no reference to homestead or other exemptions which may be set apart for use of widow and unmarried adult daughters. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Art. 3550. [2177] [2122] Court may order sale, when.

See *Ball v. Collins* (Sup.) 5 S. W. 622.

Art. 3556. [2183] [2128] Surviving husband or wife may have partition of common property.

In general.—A widow, after her husband's will has been admitted to probate, does not lose her right to attack the instrument, on the theory of ratification by securing a partition under this article, of her undivided share of the common estate. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Under this article, the heirs of a married woman could have required her husband, as community survivor, to distribute the estate by suit in the county court of probate jurisdiction, and if such right was not exercised within 12 months from filing of the community survivor's bond, district court had jurisdiction of suit at instance of heirs for partition and distribution. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

Whatever may have been the effect of a voluntary partition and division of community property among children, wherein husband was given a child's part for his share, and a child later acquired the land, as between the parties themselves, it could not have the effect to change the status of the property from community to separate as to creditors without notice. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

Art. 3561. [2188] [2133] Expenses of partition to be paid by whom.

Cited, *Glasgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050.

CHAPTER TWENTY-SEVEN

FINAL SETTLEMENT, ETC.

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| <p>Art.
3563. Duty of executor, etc.
3570. Action of court upon account.
3571. Partition of estate on hand shall be made.</p> | <p>Art.
3572. Executor, etc., shall be discharged, when.
3573. Order for discharge of executor, etc., when, etc.</p> |
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Article 3563. [2190] [2135] Duty of executor, etc.

Cited, *Gallaspie v. Hardy* (Civ. App.) 196 S. W. 592.

Art. 3570. [2197] [2142] Action of court upon account.

See *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799; *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

Order discharging administrator.—Under art. 3563, and this article, an order discharging an administrator on the same day upon which he rendered his final account, without the 20 days' notice required, held void. *Gallaspie v. Hardy* (Civ. App.) 196 S. W. 592.

Art. 3571. [2198] [2143] Partition of estate on hand shall be made.

See *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.
Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814; *Gallaspie v. Hardy* (Civ. App.) 196 S. W. 592.

Art. 3572. [2199] [2144] Executor, etc., shall be discharged, when.

Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814; *Gallaspie v. Hardy* (Civ. App.) 196 S. W. 592.

Art. 3573. [2200] [2145] Order for discharge of executor, etc., when, etc.

Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814.

Evidence.—Evidence, in a distributee's suit for her share of an estate, held not to sustain a finding that a payment by the administrator was in full of such share; the utmost fullness being required in the hearing in the probate court, under arts. 3571, 3572, and this article. *Gallaspie v. Hardy* (Civ. App.) 196 S. W. 592.

CHAPTER TWENTY-EIGHT

PAYMENT OF ESTATES INTO THE TREASURY

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| <p>Art.
3575. When those entitled to estate do not appear and claim, shall be paid to state treasurer.
3578. While the property remains under control of executor, etc., distributees may have partition.</p> | <p>Art.
3583. Distributees may recover funds paid into the treasury.
3584. Mode of recovery.</p> |
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Article 3575. [2202] [2147] When those entitled to estate do not appear and claim, shall be paid to state treasurer.

Cited, *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

Art. 3578. [2205] [2150] While the property remains under control of executor, etc., distributees may have partition.

Cited, *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

Art. 3583. [2210] [2155] Distributees may recover funds paid into the treasury.

Cited, *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

Art. 3584. [2211] [2156] Mode of recovery.

Cited, *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

CHAPTER TWENTY-NINE

ADMINISTRATION OF COMMUNITY PROPERTY

Art. 3592.	Community property liable for community debts, etc.	Art. 3600.	After order of court, survivor has control, etc.
3593.	Where there is no child administration is not required.	3601.	Survivor shall keep account, etc.
3594.	Where there is a child survivor holds subject, etc.	3602.	New appraisalment and bond may be required.
3595.	Application for community administration.	3603.	Duty of survivor to pay debts.
3596.	Court shall appoint appraisers.	3604.	Creditor may have survivor to make exhibit, when.
3597.	Inventory, appraisalment, and list of indebtedness, sworn to and returned, etc.	3609.	Surviving wife shall have same rights, etc.
3598.	Bond of survivor.	3611.	Rights of wife cease when she marries again.
3599.	Action of court upon inventory, etc.	3612.	Persons entitled to estate may have partition, when.

Article 3592. [2219] [2164] Community property liable for community debts, etc.

1. **Rights of survivor in general.**—The surviving widow has a right to recover damages accruing to community property during the lifetime of the husband. *San Antonio & A. P. Ry. Co. v. Evans* (Civ. App.) 198 S. W. 674.

Where administration was granted on estate of husband, wife's control over community property ceased, and estate passed under jurisdiction of probate court for administration and settlement. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

The husband is entitled to the exclusive management and disposition of the community estate during marriage, which right continues and is likewise exclusive after the wife's death for the purpose of discharging the ordinary debts of the community estate; such power of the surviving husband overriding that of the wife's administrator. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

The general rule is that the legal representative of a deceased person's estate is the proper person to enforce payment of indebtedness due the estate, and this rule applies ordinarily in cases where a contract between a married man and another has matured previous to, or during, the administration of his estate by an executor, and this is also true although the proceeds of the debt may be community funds of the dead husband's estate and of the surviving wife. *Ætna Life Ins. Co. v. Osborne* (Civ. App.) 224 S. W. 815.

3. **Effect of qualification as administrator of community.**—The qualification of a surviving wife as community administratrix, under the provisions of this article, et seq., is an "administration," within the meaning of art. 5704, which will put such statute of limitation in motion after its suspension by reason of the death of the husband, at least so far as actions to subject community property to community debts are concerned. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

4. **Title vesting in survivor.**—After husband's death widow held tenant in common of community property with the children, and only entitled to recover proportional part of damages to property accruing after the husband's death. *San Antonio & A. P. Ry. Co. v. Evans* (Civ. App.) 198 S. W. 674.

Where a husband and wife had jointly conveyed more than one-half their community property to the husband's children as gifts, not as advancements, a statement by the husband that he intended the rest of the property to go to his wife does not affect its status, or defeat the children's right to one-half the balance after their father's death. *Justice v. McRuffin* (Civ. App.) 224 S. W. 204.

5. **Subsequent marriages.**—In partition by children of their father's first marriage against the children of his second marriage and the second wife, wherein it appeared that a 40-acre tract, owned in community by the husband and his first wife, was exchanged for a 100-acre tract claimed as community by the husband and his second wife, and wherein plaintiffs claimed, by reason of a resulting trust, a decree apportioning the interest of the parties held erroneous, as giving a cestui que trust more than the proportion contributed by him to the purchase price of the 100-acre tract. *Pynes v. Pynes* (Civ. App.) 225 S. W. 777.

6. **Sale, lease and conveyance of property.**—The surviving husband can only convey community realty to pay community debts, although a conveyance for another purpose, acquiesced in by all interested, will pass title. *Barkley v. Stone* (Civ. App.) 195 S. W. 925.

After the wife's death the husband may legally convey her interest in community property only for the purpose of paying community debts. *Burnham v. Hardy Oil Co.*, 195 S. W. 1139, 108 Tex. 555.

Existence of community debts authorizes conveyance of community property by surviving spouse. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

That motive which induced sale of community lot by surviving spouse was that surplus above amount necessary to pay community debts should be advanced to a child in financial trouble would not invalidate sale. *Id.*

Whenever right of surviving spouse to sell community property for payment of community debts has been exercised within limitation of law, and debts of community paid, it results as a matter of law that property was sold for purpose of paying community debts. *Id.*

A sale by an administrator de bonis non under proper order of the probate court of an unlocated balance land certificate, community property of decedent and his widow, held not void; sale having been properly reported and approved. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

Where notes held by defendant constituted a valid, subsisting community debt, secured by a vendor's lien on the land, the purchaser's surviving wife had a legal right, if necessary, to convey the land in settlement of the notes. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

The power to sell property belonging to the community estate to pay community claims, which may be exercised by the regularly qualified survivor, vests in the survivor who fails to qualify under the statutes. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

The power of the survivor to convey property of the community estate in satisfaction of demands against that estate cannot be held to sustain only conveyances in discharge of enforceable demands against the property conveyed, but includes the payment of a note barred by limitation. *Id.*

Surviving wife, tenant in common of homestead with her children, to save it from threatened foreclosure of vendor's lien, had the right to extend time of payment of purchase-money note by making new note to third party who took over purchase-money notes from vendor, and to execute deed in trust binding her interest and that of the children in the homestead to secure such note. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

A surviving husband may sell community property for the purpose of paying community debts, provided the power is exercised in good faith. *Hams v. Mager* (Civ. App.) 216 S. W. 422.

In trespass to try title by heirs of a deceased wife against the purchaser from the surviving husband who sold to pay community debts, defendant purchaser was required only to show the existence of community debts to justify the sale to him by the surviving husband, together with the fact of the land being community property and his grantor the survivor of the community. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

7. — **Homestead.**—Notwithstanding this article, and art. 3235, except the homestead from the community property liable for community debts making it "exempt from forced sale" the survivor may convey the community homestead to discharge community debts which constitute no lien thereon. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

8. — **Validity of conveyance.**—Where property of deceased was left to an executor in trust without action of the probate court, a deed of testator's half of community property by the survivor, before the executor qualified, was ineffective. *Nations v. Neighbors* (Civ. App.) 201 S. W. 691.

A surviving husband, having qualified as community administrator, had authority to sell community property without the existence of debts, and his failure to sign deed to the purchaser as community administrator would not affect its validity. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

10. — **Joinder or acquiescence of children in conveyance.**—Where, after death of wife, husband granted right of way for canal purposes to rice irrigation company over community tract, the company leasing other parts of the community tract for rice raising, and the company constructed the canal and paid each year the rent for leased land to the husband as long as he lived, and he paid to each of the children of himself and his deceased wife their proportionate share of such rent, and the children, knowing of the conveyance and lease, made no objection thereto, they were as fully bound by the conveyance of the right of way as if they had properly signed and acknowledged it. *Old River Co. v. Barber* (Civ. App.) 210 S. W. 758.

11. — **Construction and operation of conveyance in general.**—A deed to community property made by the surviving husband for the purpose of paying a community debt should be given the same effect as if made in the wife's lifetime, provided the power of sale was not fraudulently exercised against the wife's heirs. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

13. — **Title and interests conveyed.**—Deeds executed by widow in her own behalf and as survivor of community estate, and by others, did not convey interest of minor children of deceased husband, if they had any, aside from his community interest. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

A deed by which a surviving husband quitclaimed "all my right, title and interest" in certain community real estate, conveyed the entire interest that the husband and his deceased wife had in the land, and not merely that of the surviving husband. *Hams v. Mager* (Civ. App.) 216 S. W. 422.

14. — **Rights and liabilities of purchasers in general.**—Authority of surviving spouse to sell community property for payment of community debts being general, those dealing with survivor are under no duty to see that funds are applied properly. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

In an action by deceased wife's heirs against persons purchasing community property from the surviving husband, the purchaser, in order to defend his title, need ordinarily show only the existence of community debts at the time of his purchase. *Iiams v. Mager* (Civ. App.) 216 S. W. 422.

Where son who inherited title to a portion of father's share of community estate, on father's death, conveyed such title, the grantee could bring an action to establish and confirm his title, where the wife qualified as survivor and repudiated the grantee's title and claimed and held adversely thereto. *Miller v. Miller* (Civ. App.) 227 S. W. 737.

A surviving spouse is authorized by law to sell community property for the payment of debts, and the purchaser of such property so sold is not charged with the duty to see the purchase money is applied to the payment of the community debts. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

15. — **Bona fide purchasers.**—Where legal title to community property is in the surviving husband, his conveyance to an innocent purchaser, although not for purpose of paying community debts, will pass title on the theory of estoppel. *Burnham v. Hardy Oil Co.*, 108 Tex. 565, 195 S. W. 1139.*

17. — **Avoidance of conveyance or lease.**—In action by persons claiming under a deceased wife against purchasers of community property from the surviving husband, evidence that part of the purchase price of such community real estate was still due the state, and that it was incumbered by a judgment lien at the time it was sold, held to sustain a finding that defendants had discharged burden of showing existence of community debts at time of sale. *Iiams v. Mager* (Civ. App.) 216 S. W. 422.

A suit by the heirs of a wife to cancel an oil and gas lease made by the husband as community administrator, on the ground that the court was without jurisdiction to appoint an administrator because there were no community debts, is a collateral attack on the order of appointment. *Tholl v. Speer* (Civ. App.) 230 S. W. 453.

19. **Rights of children.**—Upon the wife's death legal title to her share in community property vested in her children subject to surviving husband's rights to occupy premises as homestead. *Barkley v. Stone* (Civ. App.) 195 S. W. 925.

It is not obligatory on a debtor to interpose limitations to defeat a debt he still owes, and the omission of a surviving husband to plead limitations against a community obligation cannot be treated as actuated by a fraudulent intent against the heirs of the wife, when such omission is just as prejudicial to his interests in and to community property as to that of the wife's heirs. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Where wife dies, and husband takes possession of community property, after the expiration of a reasonable time for payment of community debts an action may be brought by the heirs of the deceased wife for their interest, and limitations then begin to run without the surviving husband's expressly repudiating any claim on the part of the heirs. *Williford v. Simpson* (Civ. App.) 217 S. W. 191.

Son who inherited from father, on father's death, a portion of the father's share of the community estate with title subject to the administrative right of surviving wife to control, manage, and dispose of the community property, could convey such title. *Miller v. Miller* (Civ. App.) 227 S. W. 737.

24. **Conversion by survivor.**—Where an intestate died insolvent, and his surviving widow, without qualifying as administrator of the community estate, carried on the business, and a creditor bank appropriated funds from the business deposited by the widow's clerk, knowing that the estate was subject to administration, the subsequently appointed administrator could recover such funds whether the widow had consented to the appropriation or not. *Fain v. Security State Bank & Trust Co.* (Civ. App.) 226 S. W. 453.

25. **Suits by or against survivor.**—In action on husband's and wife's note and to foreclose deed of trust securing payment thereof, where independent executor of deceased wife intervened, alleging that the property was subject to the payment of claims against the community estate, and alleging existence of claims to certain amount, and asking court to classify and pay claims out of proceeds of sale, the court having acquired jurisdiction, had the right to hear and finally determine every issue raised by the pleading and evidence, and to determine and classify any and all claims presented. *Fernandez v. Holland-Texas Hypotheek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

In action on husband's and wife's note and to foreclose a deed of trust on community property, in which the wife's independent executor intervened, alleging that the community estate was insolvent and asking to have creditors paid out of the proceeds of the sale, the district court had jurisdiction of all claims against the estate and their classification; and, where the deed of trust was a lien upon the community estate prior to other creditors, court properly decreed foreclosure to satisfy the indebtedness on note. *Id.*

26. **What are community assets.**—An administrator has the right and is under the duty of collecting a note which is part of the community estate of his decedent and decedent's wife as against the claim of a former administrator's surety that only one-half of such note should be accounted for. *American Surety Co. of New York v. Norton* (Civ. App.) 220 S. W. 437.

27. **Community and separate debts.**—Community property of husband and wife is subject to administration and sale by administrator of husband or wife under certain circumstances to pay separate debts of either husband or wife. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

Community property is the primary fund for the payment of community debts, and, where there exists sufficient community property to pay community debts, no resort

can be had to the separate property of a deceased husband for the purpose of paying such debts. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

The same binding effect is given to a judgment rendered against the husband alone on a community debt when suit is brought before as when brought after the death of the wife, with respect to the liability of the community property to satisfy the same. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

The heirs of the wife on her death are entitled, not to one-half of the community property then existing, but to one-half of what may remain after the discharge of the debts contracted by either husband or wife during marriage for which such property is liable under art. 4627, and this article. *Id.*

The fact that a surviving husband had changed the form of a community debt and the payee prior to his sale of community property to pay debts did not make the debt any the less a community debt. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

30. Reimbursement of expenditures and adjustment of equities.—Where, on wife's death, her children inherited her interest in the community property, their heritage was incumbered with whatever part of the purchase price remained unpaid, and they could claim reimbursement from their father of only one-half of the excess contributed by them in payment of the purchase price after their mother's death. *Leach v. Leach* (Civ. App.) 223 S. W. 287.

Where wife purchased land as her separate property, but made payments of interest on vendor's lien notes and paid for improvements on the property with community funds, the expenditure of community funds for such purpose did not entitle children to defeat foreclosure of vendor's lien, but entitled them, at the most, to an accounting and perhaps a lien, but subordinate to the right to have vendor's lien foreclosed. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

31. Administration on death of both spouses.—Where testator's wife died before him, his will, which recognized the community of his deceased wife and directed that the interest which had not been set aside should be set over to the children of the marriage, did not give the testator's executor power to sell the community property of the deceased wife, although authorizing the executor to dispose of other property. *Loving v. Clark* (Civ. App.) 228 S. W. 590.

Where the executor of a husband under power of sale disposed of lands partly belonging to the community of the deceased wife, and the report of the executor, who was also guardian of children of the marriage, indicated that sale was made under power of sale of the husband's will, there is no presumption that the deceased wife's community estate passed; the will merely authorizing the sale of the testator's property and the deed referring to the will. *Id.*

Where the executor of a testator, who was authorized to sell property, sold the community of the estate of a deceased wife, which the testator directed to be set over to the children of the marriage, the purchaser has the burden of showing that the community was subject to debts. *Id.*

An order confirming the report of the executor of a testator which showed a sale of property belonging to the community of the testator's deceased wife, held merely to show that the proceeds of the sale were used to pay off indebtedness against farm lands which passed to children of the marriage under testator's will, and not a sale to pay community debts. *Id.*

Where testator authorized the executor to sell city property and reinvest the proceeds in farm lands for the benefit of his two infant daughters and the executor, who was also appointed guardian, without any order of the court sold lands belonging partly to the community estate of the testator's deceased wife, which estate the testator had recognized, and the deed recited the sale was made by virtue of the powers under the will, the community of the deceased wife did not pass, although the report of the executor and guardian, referring to the sale, was confirmed, and the proceeds devoted to paying liens on the farm lands of the children. *Id.*

The granting of administration on husband's estate does not confer jurisdiction over the community estate of the husband's deceased wife. *Id.*

Art. 3593. [2220] [2165] When there is no child, administration not required.

In general.—Where a husband was in adverse possession of land, but became insane before he acquired title thereto, and the wife took charge of the family and continued to live with the insane husband upon the land, the possession of the wife could not be distinct from that of the husband, and a judgment in trespass to try title against the husband was binding on the wife, notwithstanding this article. *Fidelity Lumber Co. v. Howell* (Civ. App.) 206 S. W. 947.

Title to community property under this article, passes to the wife, on the husband becoming insane, only when they have no children. *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

Art. 3594. [2221] [2166] Where there is child, survivor holds subject, etc.

Cited, *Withrow v. Adams*, 4 Civ. App. 438, 23 S. W. 437; *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

Sales by husband.—Under this article, and art. 3600, the husband of an insane woman, being empowered on qualifying as community administrator to dispose of the

community estate as he deems best for the interest of the estate, can convey it, though there be no community debts, and though it be the community homestead. *Green v. Windham* (Civ. App.) 230 S. W. 726.

Art. 3595. [2222] [2167] Application for community administration.

See *Simons v. Ware* (Civ. App.) 219 S. W. 858; *Green v. Windham* (Civ. App.) 230 S. W. 726.

Cited, *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

Limitations.—That surviving wife failed to file her application to be allowed to administer as survivor of the community property, free from control of the probate court, until after application for temporary and permanent letters of administration had been made by another and temporary letters granted, would not annul or work a forfeiture or waiver of wife's right, or deprive her of that right in view of this article, and arts. 3596-3598, and article 3609, where wife made application in less than 4 months from date of husband's death. *In re Chapman's Estate* (Civ. App.) 213 S. W. 989.

Art. 3596. [2223] [2168] Court shall appoint appraisers.

See *In re Chapman's Estate* (Civ. App.) 213 S. W. 989.

Cited, *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

Art. 3597. [2224] [2169] Inventory, appraisal, and list of indebtedness, sworn to and returned, etc.

See *In re Chapman's Estate* (Civ. App.) 213 S. W. 989.

Effect of incomplete and unsigned inventory.—The fact that an inventory of community property filed in the probate court by the surviving wife did not, in terms, purport to be an inventory of all the community property, that no list of claims owing to the estate was attached thereto, and that the inventory was not signed and sworn to by her, as required by Pasch. Dig. art. 4648, is not sufficient to invalidate a sale of the community property by her. *Withrow v. Adams*, 4 Civ. App. 438, 23 S. W. 437.

Inventory as evidence.—In action by creditor to set aside conveyance by deceased to his wife as fraudulent, the inventory of the wife as community administratrix was admissible to show the condition of deceased's estate. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Art. 3598. [2225] [2170] Bond of survivor.

See *In re Chapman's Estate* (Civ. App.) 213 S. W. 989.

In general.—It is not true that any creditor having a claim against a community estate is entitled to recover his debt from the survivor, if it does not exceed the amount of her bond, regardless of whether there has been a devastavit. *Hurst v. Crawford* (Civ. App.) 216 S. W. 284.

Under arts. 3594, 3609, exclusive management and control of community property pass to the wife on the husband becoming insane, they having children, only on her giving the bond required by this article. *Howell v. Fidelity Lumber Co.* (Com. App.) 228 S. W. 181.

If the wife, administering as survivor of the community, knows of the existence of a claim which has been presented and approved by her, and exhausts the estate in discharging debts of the same class, she is liable on her bond to "faithfully administer" for a pro rata on such claim. *Evans v. Taylor*, 60 Tex. 422.

Effect of failure to file bond.—The failure of a survivor of a community to execute a bond, as required by Act Aug. 1, 1870, passed during the pendency of the administration of the community, does not invalidate a deed executed by her after the passage of that act, where there are debts and charges against the community authorizing a sale by the wife without qualifying as survivor. *Withrow v. Adams*, 4 Civ. App. 438, 23 S. W. 437.

Limitations.—A husband, having given bond as community survivor to account to the heirs of his deceased wife for their interest in the community property, and having sold it, became liable on the bond, in an action by the heirs for their interest, for the proceeds, and limitations then began to run in favor of him and his sureties against such action. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

Art. 3599. [2226] [2171] Action of court upon inventory, etc.

See *Green v. Windham* (Civ. App.) 230 S. W. 726.

Cited, *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

Appointment presumed valid.—Where the proceedings in the county court on a husband's application for appointment as community administrator does not affirmatively show an absence of community debts, all reasonable presumptions will be indulged in favor of the validity of the judgment appointing the administrator, especially as arts. 3594-3601 did not provide that the appointment was dependent on the existence of debts. *Tholl v. Speer* (Civ. App.) 230 S. W. 453.

Art. 3600. [2227] [2172] After order of court, survivor has control, etc.

Effect of qualifying.—Where a decedent owned no property, except community property, the appointment and qualification of the surviving spouse as community administrator, under the provisions of art. 3592 et seq., precludes any other administration. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

Under art. 2469, husband's share of the community estate passed to his children or their descendants on his death, subject to the administrative right of the surviving wife to control, manage, and dispose of the community property under this article, and the action of the wife in qualifying as survivor did not divest the children of the title so acquired. *Miller v. Miller* (Civ. App.) 227 S. W. 737.

Sale, lease and conveyance of property.—A surviving wife, as community administrator under the provisions of arts. 3592 et seq., has no control or power to dispose of the separate property of her deceased spouse. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

A sale made by the survivor before filing the inventory as required by this article is void, and is not cured by a subsequent compliance with the statute; and failure of the children to apply to the court for protection does not impair their rights. *Griffin v. West Ford*, 60 Tex. 501.

Where the proceedings in the probate court on a husband's application for appointment as community administrator were in strict compliance with arts. 3594-3601, an order approving the inventory and appraisal and authorizing the husband as administrator to control, manage, and dispose of the community property, authorized the execution of an oil and gas lease covering community property. *Tholl v. Speer* (Civ. App.) 230 S. W. 453.

Under art. 3612, providing, relative to the administration of community estate, that the persons entitled may demand and have partition and distribution after the lapse of 12 months, where a husband was appointed community administrator in 1901, and no demand for partition and distribution was made by the wife's heirs, he was authorized, in 1918, to make an oil and gas lease. *Id.*

Under this article, and art. 3594, the husband of an insane woman, being empowered on qualifying as community administrator to dispose of the community estate as he deems best for the interest of the estate, can convey it though there be no community debts, and though it be the community homestead. *Green v. Windham* (Civ. App.) 230 S. W. 726.

Actions by or against survivor.—Under this article, a suit to set aside a sale by a survivor because not for the best interest of the community is not a collateral attack on a probate court judgment. *Rice v. Lipsitz* (Civ. App.) 211 S. W. 293.

In suit to set aside a sale of community property by the survivor, evidence held sufficient to take to the jury the issues whether the debts for which the sale was made were claims against the community estate, whether the sale was free from coercion, and whether it was with a view to the interest of the parties, so that a directed verdict for defendant was erroneous. *Id.*

Art. 3601. [2228] [2173] Survivor shall keep an account, etc.

See *Simons v. Ware* (Civ. App.) 219 S. W. 858.

Art. 3602. [2229] [2174] New appraisal and bond may be required.

Cited, *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

Art. 3603. [2230] [2175] Duty of survivor to pay debts.

Reimbursement.—Where wife dies and husband pays community debts, he is entitled to be reimbursed out of the community estate. *Williford v. Simpson* (Civ. App.) 217 S. W. 191.

Art. 3604. [2231] [2176] Creditor may have survivor to make exhibit, when.

Cited, *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

Art. 3609. [2236] [2181] Surviving wife shall have same rights, etc.

Surviving wife's rights.—Pasch. Dig. art. 4642, vests the husband with full control over the community property on the decease of his wife, empowering him to sell the same, and sue and be sued in regard thereto, in the same manner as during her lifetime, on filing in the probate court a full and complete inventory and appraisal, to be taken and recorded as in cases of administration. Held, that article 4652, which vests the surviving wife with exclusive management and control of the community property, under the same rights, rules, and regulations as are enacted in favor of the surviving husband, so long as she remains unmarried, empowers an unmarried surviving wife to sell the community property. *Withrow v. Adams*, 4 Civ. App. 438, 23 S. W. 437.

Right of surviving wife until she again marries to administer under arts. 3592-

3614, the community property free from control of the probate court is, unless in some way forfeited or waived, exclusive of any other form of administration or the right of any other person to administer. In re Chapman's Estate (Civ. App.) 213 S. W. 989.

That surviving wife failed to file her application to be allowed to administer as survivor of the community property, free from control of the probate court, until after application for temporary and permanent letters of administration had been made by another and temporary letters granted, would not annul or work a forfeiture or waiver of wife's right, or deprive her of that right in view of arts. 3595-3598, and this article, where wife made application in less than 4 months from date of husband's death. Id.

Under this article, and art. 3594, exclusive management and control of community property pass to the wife on the husband becoming insane, they having children, only on her giving the bond required by art. 3598. Howell v. Fidelity Lumber Co. (Com. App.) 228 S. W. 181.

Art. 3611. [2237] [2182] Rights of wife cease when she marries again.

Remarriage of widow.—Where surviving wife remarried, she could not, under this article, be sued as a representative of the community estate. Moore v. Belt (Civ. App.) 206 S. W. 225.

Under this article, a surviving wife upon remarriage ceases to have control and management of the community estate, or right to dispose of the same, and she cannot sell it even to pay community debts. Van Ness v. Crow (Civ. App.) 215 S. W. 572.

Art. 3612. [2238] [2183] Persons entitled to estate may have partition, when.

See Clark v. First Nat. Bank (Com. App.) 210 S. W. 677; Simons v. Ware (Civ. App.) 219 S. W. 858.

Cited, Tholl v. Speer (Civ. App.) 230 S. W. 453.

Right to partition.—Where more than 12 months had elapsed since wife had qualified as survivor, grantee of son's title acquired in the community estate from father could bring action for partition and distribution under this article. Miller v. Miller (Civ. App.) 227 S. W. 737.

Necessity of partition and distribution.—In suit by son's grantee in trespass to try title and to quiet title to portion of the community estate inherited from father, against the mother who had qualified as survivor, where there was no action to compel partition and distribution under this article, it was improper for court to confirm plaintiff's title against the mother, both individually and as survivor, and to order a writ of possession. Miller v. Miller (Civ. App.) 227 S. W. 737.

Discharge of survivor.—Rev. St. 1879, art. 2183, does not authorize a survivor who has filed an inventory, and given bond for the administration of a community estate, to procure a settlement of his accounts and a discharge of his trust by a decree of the county court made on his own application. Pressler v. Wilkie, 84 Tex. 344, 19 S. W. 436.

CHAPTER THIRTY-ONE

COSTS

Art.		Art.	
3621.	Commission allowed executors and administrators.	3623.	Shall be allowed expenses, etc.
3622.	Commissions not allowed on certain moneys.	3624.	Account for expenses shall be filed and acted upon by the court.

Article 3621. [2245] [2190] Commission allowed executors and administrators.

Premium on bond.—This article, and arts. 3309, 3622, 3623, 3235, 4099, 4101, 5493, do not authorize administrator to charge against the estate a premium paid for the making of his bond. Jarvis v. Drew (Civ. App.) 215 S. W. 970.

Art. 3622. [2246] [2191] Commissions not allowed on certain moneys.

Cited, Jarvis v. Drew (Civ. App.) 215 S. W. 970.

Art. 3623. [2247] [2192] Shall be allowed expenses, etc.

See Richardson v. Kennedy, 74 Tex. 507, 12 S. W. 219.

Premium on bond.—This article, and arts. 3309, 3621, 3622, 3235, 4099, 4101, 5493, do not authorize administrator to charge against the estate a premium paid for the making of his bond. Jarvis v. Drew (Civ. App.) 215 S. W. 970.

Attorney's fees.—Despite arts. 7487-7502, providing for collection of inheritance taxes and appointment of administrator for that purpose, and this article, and art. 3624, as to allowance of reasonable attorneys' fees to executors and administrators, county judge held unauthorized to approve contract between administrator to collect inheritance tax on estate of decedent in another state, and an attorney, which contract was fraudulent and unconscionable as calling for such payments to attorney by way of retainer and for services as would exploit estate for his benefit. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Where administrator resists an effort to withdraw the estate from administration, the allowance of attorney's fees therefor depends on whether he honestly believed the withdrawal was illegal; and such fees cannot be allowed where the right to withdraw was clear. *Rowe v. Dyess* (Com. App.) 213 S. W. 234.

The propriety of defending a suit or proceeding against an estate must depend upon the apparent justice of the case; and, where an administrator acts in good faith, he will not necessarily be deprived of attorney's fees, even though he be mistaken as to the justice of the case. *Id.*

Under this article, the fact that an administrator's attorneys represented the administrator individually in the prosecution of his contested claim against the estate, and also in other matters for which fees were not properly chargeable against the estate, does not prevent allowance to the administrator of a reasonable sum as attorney's fees, based on value of services actually rendered by the attorneys for the benefit of the estate. *Id.*

An administrator is not entitled to allowance for attorney's fees in the prosecution of his claim against the estate, nor in his contest for appointment as administrator. *Id.*

Legal services rendered in a proceeding to probate a will in Oklahoma, or in resisting the contest of the probate of the will interposed by decedent's heirs, cannot be made a charge in favor of the attorney against the estate in the hands of a Texas administrator, at least until the Oklahoma executor, through whom the attorney seeks to go against the Texas administrator by right of subrogation, has become invested with the credentials provided by art. 3276, specifying conditions to the right of a foreign executor to apply and receive letters testamentary in Texas. *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

In view of this article, and art. 3624, liability for attorney's fees incurred in the course of administration of a decedent's estate is a charge against the estate in favor of the attorney, and not the personal obligation of the administrator, and may be presented and collected by the party to whom payable like as any other claim. *Id.*

An administrator may properly be allowed remuneration for reasonable attorney's fees paid, where the legal services were given on behalf and for the benefit of the estate. *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

Under this article, and art. 3458, the executor of a decedent is entitled to procure legal services for the probate of a will, though not personally interested therein, for, if the statute does not authorize such expenditures, it does not forbid the same, and the probate of the will is the first essential step toward carrying out the trusts declared. *Pendleton v. Hare* (Com. App.) 231 S. W. 334.

Within this article, and art. 3458, reasonable attorney's fees are expenses of administration. *Id.*

An executor who contracts with an attorney for legal services in connection with the probate of a will, which is the first essential and indispensable step toward carrying out the trusts imposed, is acting, not in his individual but in his representative, capacity. *Id.*

Broker's commissions.—Under Rev. St. 1879, art. 2192, where a testator's will gives his executors power to sell his real estate, they can employ an agent to procure a purchaser for them, and the estate is liable for the agent's commissions. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

Probate court's refusal to allow administrator credit for broker's commissions for negotiating real estate sales, will not be reversed, except for clear abuse of discretion. *Jones v. Gilliam* (Civ. App.) 199 S. W. 694.

This article is inapplicable to payment of broker's commissions, not authorized or approved by probate court. *Id.*

Probate court did not abuse its discretion in refusing administrator credit for broker's commissions for negotiating real estate sales, where it was conceded prospective purchaser failed to perform his part of contract. *Id.*

In necessary cases the probate court may, under the statute, sanction an administrator's employment of a broker to make a sale advantageous to the estate, and allow a reasonable broker's commission as a legitimate expense of administration, although the power should be sparingly exercised. *Jones v. Gilliam*, 109 Tex. 552, 212 S. W. 930.

The probate court, not the administrator, must be the judge as to the necessity of employing a broker to make a sale for the estate, as well as of the amount of the broker's compensation; the administrator being but an agency of the court. *Id.*

An estate may properly be charged with the commission of a broker employed by an administrator, where the employment was reasonably necessary to sell land. *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

Art. 3624. [2248] [2193] Account for expenses shall be filed and acted upon by the court.

See *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799; *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

Cited, *Thompson v. Dodge* (Civ. App.) 210 S. W. 586; *Hare v. Pendleton* (Civ. App.) 214 S. W. 948.

CHAPTER THIRTY-TWO

APPEALS TO THE DISTRICT COURT

<p>Art. 3631. Right of appeal. 3632. Appeal bond, requisites of. 3633. Bond not required of executors, etc., unless, etc. 3635. Duty of county clerk to make and transmit transcript, etc. 3636. Transcript to be transmitted, when, etc.</p>	<p>Art. 3637. Duty of district clerk who receives transcript, etc. 3638. Appeals shall be tried de novo in regular order upon the docket. 3639. Certified copy of judgment of district court to be transmitted to county court.</p>
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Article 3631. [2255] [2200] Right of appeal.—Any person who may consider himself aggrieved by any decision, order, decree or judgment of the County Court, shall have the right to appeal therefrom to the District Court of the County upon complying with the provisions of this Chapter; provided that in appeals from orders or judgments, appointing Administrators or temporary administrators, the administrators shall continue the prosecution of suits then pending in favor of the estate, and if on appeal from Probate Court, a different Administrator shall be appointed, he shall be substituted in such case. [Act Aug. 9, 1876, p. 128, § 130; Acts 1921, 37th Leg., ch. 116, § 1, amending art. 3631, Rev. Civ. St. 1911.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after March 12, 1921, date of adjournment.

See *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552.

Cited. *Halbert v. Alford* (Sup.) 16 S. W. 814; *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Who may appeal.—Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of art. 3235, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Art. 3632. [2256] [2201] Appeal bond, requisites of.

Cited. *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Necessity of bond.—Where an appeal bond is required by statute, it is a jurisdictional matter, and a judgment without such bond having been given is a nullity. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

Sufficiency of bond.—Under Rev. St. 1879, art. 2201, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed. (*Hicks v. Oliver*, 10 S. W. 97, followed.) *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

Under Rev. St. 1879, art. 2201, a bond conditioned merely for the performance of the "decree or judgment" is sufficient, since the word "judgment" is broad enough to include "decision" and "order." *Halbert v. Alford* (Sup.) 16 S. W. 814.

Under this article, a bond not fixed by county court and made payable to appellee is defective, and appeal should be dismissed, unless bond is amended under article 2104. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Art. 3633. [2257] [2202] Bond not required of executor, etc., unless, etc.

In general.—Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of art. 3235, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Independent executor.—Person named as independent executor in instrument offered as will, was not exempt from giving bond, on appeal from county to district court from order denying probate, under this article, such person not being the executor until the will is probated. *Warne v. Jackson* (Civ. App.) 230 S. W. 242.

Art. 3635. [2259] [2204] Duty of county clerk to make and transmit transcript, etc.

Cited. *Halbert v. Alford* (Sup.) 16 S. W. 814; *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

Art. 3636. [2260] [2205] Transcript to be transmitted, when, etc.

See *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916.
Cited, *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

Art. 3637. [2261] [2206] Duty of district clerk who receives transcript, etc.

See *Moore v. Glass*, 6 Civ. App. 368, 25 S. W. 128.

Art. 3638. [2262] [2207] Appeals shall be tried de novo in regular order upon the docket.

Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814; *United States Fidelity & Guaranty Co. of Baltimore, Md. v. Lowry* (Civ. App.) 219 S. W. 222.

Nature of proceeding in district court.—The district court, on appeal in proceedings for the sale of land of a decedent to pay debts, has no greater power than the county court had originally. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

An appeal to the district court from an order of the county court probating the will requires a trial de novo. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Amendments in district court.—Though application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as of persons of minors, the defect was curable by amendment or new pleading in the county court, and could be cured in like manner in the district court on appeal. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Issues for determination.—On appeal in a will contest from the county to the district court, the district court had no judicial power to compel any of the parties to the suit to submit to determination of any issues not involved in the appeal. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

When all the parties to a will contest appealed from the county to the district court, expressly stipulate for judicial determination of other matters of which the district court might assume original jurisdiction, including the disposition of property not affected by the will, such court has power to enter a judgment on such other issues. *Id.*

Judgment.—Where probate of a will and codicil was allowed by one order, it was not error for the district court, on appeal from that part of the order admitting the codicil to probate, to enter judgment probating both will and codicil, the codicil being merely a part of the will. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Art. 3639. [2263] [2208] Certified copy of judgment of district court to be transmitted to county court.

See *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.
Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814; *Williams v. Foster* (Civ. App.) 229 S. W. 896.

DECISIONS RELATING TO APPEAL IN GENERAL.

Effect of appeal.—An appeal to the district court from an order of the county court probating the will, suspends the final judgment, leaving the estate unsettled pending the appeal. *Early v. Mundy* (Civ. App.) 227 S. W. 716.

While proceedings looking to the appointment of a guardian for a minor instituted in the county court of F. county were still pending in the district court on appeal, the probate court of another county had no authority to appoint a temporary guardian or issue an injunction in aid of the jurisdiction illegally assumed. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Review—In general.—In proceedings to probate a will, the trial judge was the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given their testimony. *House v. House* (Civ. App.) 222 S. W. 322.

— **Harmless error.**—In proceedings to probate a will, any error in excluding from evidence testamentary instruments subsequently executed by testatrix held harmless to proponents. *Sherwood v. Sherwood* (Civ. App.) 221 S. W. 658.

In will contest, where the evidence was not sufficient for submission of issue of undue influence to the jury, instruction on undue influence, if erroneous, held harmless. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

Admission, in district court on appeal from order of county court probating will, of certified copy of testimony taken in county court, under arts. 3273-3275, if error, was harmless, where the witness testified fully to the same facts in the district court. *Id.*

In will contest, instruction excluding from jury's consideration evidence introduced by proponent tending to show undue influence, if error, was harmless, where proponent had not introduced any evidence on such issue. *Id.*

In a will contest, exclusion from consideration of the jury of proponent's evidence tending to show undue influence, if error, was harmless, if there was not sufficient evidence for submission of issue of undue influence to the jury. *Id.*

TITLE 53

EVIDENCE

Chap.	Chap.
1. Personal attendance of witnesses.	3. Depositions of parties.
2. Depositions of witnesses.	4. General provisions.

CHAPTER ONE

PERSONAL ATTENDANCE OF WITNESSES

Art.	Art.
3644. Fees of witnesses.	3648a. Interpreter may be summoned and appointed; compensation.
3647. Party may be examined as a witness.	3648b. Same; services chargeable as costs.

Article 3644. [2268] [2213] Fees of witnesses.

In general.—It is only when a witness appears in obedience to an authorized subpoena entitling him to the statutory compensation that his fees may be finally taxed against the party cast in the suit. *Fidelity & Deposit Co. of Maryland v. Scott* (Civ. App.) 211 S. W. 245.

Art. 3647. [2271] [2216] Party may be examined as a witness.

Cited, *Kountze v. Cargill* (Civ. App.) 22 S. W. 227.

Art. 3648a. Interpreters may be summoned and appointed; compensation.—The commissioners' courts of the various counties of this state are hereby authorized to pay for the services of interpreters employed by the various courts within their respective counties not to exceed the sum of Three and fifty-Hundredths Dollars (\$3.50) a day, which sum is to be paid out of the general funds of the county upon warrants issued by the respective courts or clerks thereof in favor of the persons rendering such services; provided, however, that such interpreter shall be paid only for the time he is actually employed. [Acts 1918, 35th Leg. 4th C. S., ch. 15, § 1.]

Explanatory.—Sec. 3 of the act repeals all laws in conflict. The act took effect March 18, 1918.

Art. 3648b. Same; services chargeable as costs.—In all civil suits wherein the services of an interpreter is used there shall be charged and collected as part of the costs of the case as interpreter's fees the sum of Three Dollars (\$3.00), which amount when collected shall be paid into the general funds of the county. [Id., § 2.]

CHAPTER TWO

DEPOSITIONS OF WITNESSES

Art.	Art.
3649. Depositions of witness may be taken, when.	3665. Any person may be compelled to appear and answer, etc.
3650. Notice and service thereof.	3675. Either party may use depositions, when.
3651. When notice may be given by publication.	3676. Objections to depositions.
3657. Officers authorized to execute.	3677. Depositions to be read in evidence, subject, etc.
3660. Execution of the commission.	3678. Matter not responsive stricken out.
3663. Depositions by oral examination and answer.	

Article 3649. [2273] [2218] Depositions of witnesses may be taken, when.

See *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618.

Art. 3650. [2274] [2219] Same; notice and service thereof.

Necessity of notice.—It was not error to suppress the admission of depositions which were shown to have been taken without notice to the adverse party. *Millikin v. Smoot*, 71 Tex. 759, 12 S. W. 59, 10 Am. St. Rep. 813.

Name and residence of witness.—A notice of application for the commission to take depositions of witnesses reciting "who reside in the county of El Paso, in the state of Texas," when in fact one of them lived in Hudspeth county, and was then temporarily in El Paso county, held a substantial compliance with this article. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

Art. 3651. [2275] [2220] When notice may be given by publication.

Cited, *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

Art. 3657. [2281] [2226] Officers authorized to execute.

See *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Deputy district clerk.—A deputy district clerk can take depositions only in the clerk's name by himself as deputy. *Kirby Lumber Co. v. Long* (Civ. App.) 224 S. W. 906.

Art. 3660. [2284] [2229] Execution of the commission.

Suppression of deposition under prior statute.—Where the caption to depositions fails to identify the witnesses as those named in the commission, and the certificate fails to state that the answers were "signed and sworn to" by the witnesses before the notary taking the depositions, both the caption and the certificate are fatally defective, and the depositions should be suppressed on motion. *Emberson v. McKenna* (App.) 16 S. W. 419.

A deposition consisting of answers prepared by one of the counsel from statements made to him by deponent, and afterwards sworn to by deponent, should be suppressed. *Phoenix Assur. Co. of London v. Freedman* (Sup.) 19 S. W. 1010.

Swearing witness.—A witness whose deposition is to be taken in writing in answer to written interrogatories need not be sworn before his answers are reduced to writing, such requirement applying only on oral examination. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

Leading interrogatories.—In action on notes by indorsee, leading interrogatories to president of payee company held justified on account of witness' unwillingness and his hostility to defendant makers. *Commercial Security Co. v. Collins* (Civ. App.) 208 S. W. 728.

Art. 3663. Depositions by oral examination and answer.—The testimony of any witness, and of any party to a suit, by oral deposition and answer may be taken in any civil case in any of the District and County Courts of this State, in any instance where depositions are now authorized by law to be taken. [Acts 1907, p. 187; Acts 1919, 36th Leg. ch. 5, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 3665. Any person may be compelled to appear and answer, etc.

Letters rogatory.—The power of a proper court to honor a request of a court in an independent jurisdiction, expressed by letters rogatory, for the use of its process in aid of obtaining the deposition of a witness whose testimony is material in a cause pending in the latter, is inherent, and does not depend on statute, but the court to which a letter rogatory or request is addressed is under no compulsion to respect it, being a matter within its discretion. *Ex parte Taylor*, 110 Tex. 331, 220 S. W. 74, 9 A. L. R. 963.

Under the general jurisdiction possessed under the Constitution, it was within the power of the district court of Dallas county to honor the request of a foreign court for its aid in obtaining a deposition from a witness, and to order the witness to appear before a notary, who had been issued a commission, to take the testimony and give his oral deposition. *Id.*

In the execution of the request of a foreign court, expressed by letters rogatory, for the use of its process in aid of obtaining the deposition of a witness, it is the duty of the court to see that the witness is protected in all of his legal rights, and while the relevancy and materiality of the testimony adduced is for the determination of the court having jurisdiction of the cause, the court executing the request will see that the witness is not compelled to give evidence which is privileged. *Id.*

Art. 3675. [2288] [2233] Either party may use depositions, when.

In general.—Defendant may use plaintiff's depositions on trial when cross-interrogatories have been filed and answered. *John P. King Mfg. Co. v. Solomon* (Civ. App.) 25 S. W. 449.

The fact that the witness had been subpoenaed by the opposite party, but not placed on the stand so as to be available for cross-examination, is no ground for excluding the deposition. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

In absence of cross-interrogatories.—A party who has not filed cross-interrogatories cannot use depositions taken by his adversary over the latter's objection. *San Antonio & A. P. Ry. Co. v. Harrison*, 72 Tex. 478, 10 S. W. 556.

Art. 3676. [2289] [2235] Objections to depositions.

Application of article.—The objection urged to depositions taken out of the state, offered by defendant, was to the form and taking of the same. The bill of exceptions did not show that the depositions were filed in time. Held, that the presumption was that they were not properly filed, and hence their exclusion because not taken and returned by an authorized officer was not error. *Lienpo v. State*, 28 Tex. App. 179, 12 S. W. 588.

Where it did not appear that deposition of plaintiff taken by defendant, and cross-interrogatories propounded by plaintiff's counsel and answers thereto, were not filed at least one entire day before the day of the trial, or that defendant had filed objection to cross-interrogatories and answers before commencement of trial, court on appeal will not consider objections to cross-interrogatories and answers. *Texas Moline Plow Co. v. Grimminger* (Civ. App.) 217 S. W. 747.

Time for objection.—In an action against several defendants, the term of court at which some of the defendants were required to answer, previous to which a deposition was filed, was the first term after such deposition had been filed, and such defendants were required to make their motion to suppress the depositions at such term of court, and could not wait until a later term of court, at which the other defendants were required to answer. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

Where county attorney had notice and filed cross-interrogatories, and the clerk issued commissions, and the depositions were taken and filed, motion made at a subsequent term to quash depositions on the ground that affidavit required by Code Cr. Proc. 1911, art. 824, as a predicate for obtaining commission, was not shown to have been made, should not have been entertained, in view of this article, made applicable to criminal cases by Code Cr. Proc. 1911, art. 822; affidavits having been filed embodying the facts required by art. 832, as a predicate for introduction of depositions. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

Grounds of objection.—An objection to a deposition signed "Van Vorhis," on the ground that the notice and commission gave the name of the witness as "Van Horn," is an objection to "the manner and form" of taking the deposition. *Missouri Pac. Ry. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509.

Objection to depositions, because not under oath, could not be made at time of introduction of answers in evidence, where no written objection was filed at least a day before the case was called for trial. *Padgitt Bros. Co. v. Dorsey* (Civ. App.) 206 S. W. 851.

Objections to interrogatories because they were prefaced by a synopsis of the allegations of the petition and because they were leading were objections going to the form and manner of taking. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

— **Failure of witness to answer, irresponsive answers or failure to take answers of all witnesses.**—Objections that the answers contained in a deposition are not responsive must be taken before the trial, as they go to the manner and form of taking the deposition. *Harris v. Nations*, 79 Tex. 409, 15 S. W. 262.

Court properly refused to suppress a deposition on the ground that the witness had failed to answer certain cross-interrogatories, where the answers given show that he answered fully and freely all questions about which he had first knowledge. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

— **Competency of witness.**—Where, at the time of trial, plaintiff's conviction of murder had been affirmed and motion for rehearing overruled, his deposition, taken previously, was properly quashed; the competency of his answers to the interrogatories propounded to him depending not upon his status at the time such answers were given, but upon his status when the deposition was offered as evidence. *Berry v. Godwin* (Com. App.) 222 S. W. 191, reversing order (Civ. App.) 188 S. W. 30.

Where the depositions of one mentally incapacitated to testify are taken, they may be suppressed before trial. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

— **Competency of testimony given by witness.**—One of defendant's witnesses gave his testimony by deposition. One of the interrogatories stated: "If there be any other fact or facts concerning this matter, tending to throw any light upon the matters in controversy, * * * please state the same here." The answer was: "* * * The reason why the barrow pits were wide, opposite the lower bank, is that rock was encountered near the surface." Held, that it was error to exclude this answer on objection at the trial, as the objection was to "the manner and form" of taking the deposition, could only be made by notice in writing before the trial. *Gulf, C. & S. F. Ry. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611.

Entire deposition cannot be excluded on motion to strike merely because portions of it consisted of conclusions of deponents. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

That a witness testifying by deposition made contradictory statements does not warrant the suppressing of deposition; the matter merely going to the witness' credibility. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

Discretion of trial court.—A motion to suppress a deposition on the ground that the witness failed to answer cross-interrogatories propounded is a matter addressed to the discretion of the trial court. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

Art. 3677. [2290] [2236] Depositions to be read in evidence, subject, etc.

In general.—Facts and law existing at time of trial and of offering of deposition in evidence, and not at time of its taking, must be looked to ordinarily to determine its competency. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

Refusal to allow plaintiff's attorney to introduce in evidence a carbon copy of a deposition alleged to have been misplaced held not an abuse of discretion, under art. 1952. *Owensboro Wagon Co. v. San Antonio Tie & Lumber Co.* (Civ. App.) 199 S. W. 701.

In action against carrier for damage to cattle in transit, trial court did not err in permitting plaintiff to read excerpts from depositions taken before another party was dismissed from cause as plaintiff and joint owner of cattle and amended petition filed alleging individual ownership. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 203 S. W. 410.

Though offer of answer in deposition is by party other than those who propounded the interrogatory, objection of hearsay is available; it becoming his testimony on offering it. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

Defendants' assurance that a witness who had testified by deposition would be available in person at the trial, if plaintiffs desired to examine him, in reliance on which plaintiffs announced ready for trial, though entitling plaintiffs to withdraw the case from the jury, if the witness was not present in court, did not entitle them to an exclusion of the deposition from evidence. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

Witness present at trial.—Where a witness was present at the trial by procurement of defendant, having been brought from California, and was sworn and placed under the rule, it was not an abuse of discretion to permit plaintiff to introduce the deposition of the witness. *Southern Pac. Co. v. Henderson* (Civ. App.) 208 S. W. 561.

It is within the discretion of the trial judge to permit a deposition to be used at the trial, though the witness is present in court. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

Oral testimony at former trial.—There is no rule requiring plaintiff to use a transcript of the oral testimony given by a witness on a former trial, instead of his written deposition taken in the manner prescribed by law. *Southern Pac. Co. v. Henderson* (Civ. App.) 208 S. W. 561. And the introduction by defendants of testimony of witness given at a former trial does not entitle plaintiffs to exclude from evidence a deposition of the same witness. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

Papers attached to deposition.—In a servant's action against master for injuries, the materiality of a letter from plaintiff, asking the witness to testify in the case, not being apparent, the witness' failure to comply with request to attach it to his deposition did not furnish sufficient ground for suppressing deposition. *Southern Pac. Co. v. Henderson* (Civ. App.) 208 S. W. 561.

Former suit.—A deposition taken by plaintiff in a different action which was not filed among the papers in the suit until the day on which the case was called for trial cannot be read in evidence; no notice that it would be offered having been given. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Art. 3678. [2291] [2237] Matter not responsive stricken out.

Time for objection.—The objection that an answer of witness in a deposition is not responsive to the question can only be raised by motion before announcement of ready for trial. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

Responsiveness of answers.—Part of answers to questions in deposition as to what witness, a railroad conductor, had to do with shipment and what occurred in regard to it, held not responsive. *Massey v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 409.

In action on notes by indorsee, answer of president of payee company to interrogatory held responsive; therefore properly permitted to be read to jury. *Commercial Security Co. v. Collins* (Civ. App.) 208 S. W. 728.

CHAPTER THREE

DEPOSITIONS OF PARTIES

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

Article 3679. [2292] [2238] Party may take his own deposition.

Cited, *Kountze v. Cargill* (Civ. App.) 22 S. W. 227.

Art. 3680. [2293] [2239] May take deposition of adverse party.

See Art. 3663, ante.

Examination of party.—See *El Paso Electric Ry. Co. v. Sauerennann* (Civ. App.) 208 S. W. 237.

Interrogatories to a party and the answers thereto, are properly suppressed where the answers were taken by the officer without the issuance of a commission authorizing them. *Western Union Tel. Co. v. Haman*, 2 Civ. App. 100, 20 S. W. 1133.

Failure to appear or answer interrogatories.—In view of a defendant's failure to appear for taking of her deposition on interrogatories pursuant to this article, it was within the discretion of the trial court to refuse to allow her to testify, and to allow plaintiff to introduce the interrogatories to her in rebuttal of defendant's evidence, pursuant to article 3685. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

Art. 3681. Where either party is a corporation, no ex parte depositions.

Deposition in interrogatories.—A corporation has the right to take the depositions of an adverse party upon interrogatories filed, but cannot proceed ex parte. *El Paso Electric Ry. Co. v. Sauerennann* (Civ. App.) 208 S. W. 237.

Art. 3682. [2294] [2240] Not necessary to give notice.

Cited, *Gulf, C. & S. F. Ry. Co. v. Nelson*, 5 Civ. App. 387, 24 S. W. 538; *El Paso Electric Ry. Co. v. Sauerennann* (Civ. App.) 208 S. W. 237.

Notice.—Notice to parties in a suit or their attorneys of filing of interrogatories in order to take their depositions is not required, and failure to issue such notices was not evidence of a design to intrap defendants. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

Art. 3683. [2295] [2241] Taken and returned as other depositions.

Commission.—Interrogatories, and the answers thereto, are properly suppressed where the answers were taken by the officer without the issuance of a commission authorizing them. *Western Union Tel. Co. v. Haman*, 2 Civ. App. 100, 20 S. W. 1133.

Art. 3685. [2297] [2243] Refusal to answer, etc.

Taking interrogatories as confessed.—This article has reference only to the failure to answer an interrogatory pertinent and relevant at the time when an answer is required. *Barnard v. Blum*, 69 Tex. 608, 7 S. W. 98.

Where, upon interrogatories filed, the case is correctly styled in the notice, commission, etc., but an erroneous docket number was used, refusal of court to treat interrogatories as confessed because of this incorrect numbering cannot be upheld, where it appeared that all parties at various steps of proceedings erroneously used the wrong number, and defect was not discovered until after trial. *El Paso Electric Ry. Co. v. Sauerennann* (Civ. App.) 208 S. W. 237.

In view of a defendant's failure to appear for taking of her deposition on interrogatories, it was within the discretion of the trial court to refuse to allow her to testify, and to allow plaintiff to introduce the interrogatories to her in rebuttal of defendant's evidence, pursuant to art. 3685. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

CHAPTER FOUR
GENERAL PROVISIONS

<p>Art. 3687. Common law rules of evidence. 3688. Color or interest does not disqualify. 3689. Husband or wife not disqualified, except, etc. 3690. In actions by or against executors, etc., certain testimony not allowed. 3692. Printed statutes evidence, when. 3693. Certified copies of acts, etc., evidence. 3694. Copies of records of public officers and courts to be prima facie evidence.</p>	<p>Art. 3696. Copies and certificates from certain officers are evidence. 3700. Recorded instruments admitted in evidence without proof, when. 3706. Certified copy of instrument sued on is evidence, when. 3707a. Certified copies of documents in custody of University of Texas. 3710. Execution of notes and other instruments presumed, unless, etc. 3712. Suit on sworn account. 3713. Records of corporation are evidence.</p>
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Article 3687. [2299] [2245] Common law rules of evidence.

COMMON LAW RULES OF EVIDENCE

INTRODUCTORY

I. Competency of Evidence in General

1. Nature and source of evidence in general.—The state, in its litigation with its citizens, has no special immunities or privileges as to rules of evidence. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

In an action involving accounts, a witness was properly permitted to testify to the sum of certain checks and items which he used an adding machine to reach instead of calculating it himself. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

2. Results of tests, examinations and experiments.—In an action for death of person on track at night, evidence of experiments made under similar conditions, for the purpose of demonstrating that the headlight of an engine did not leave the track in darkness because of a curved track, was admissible. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

In action for death of operator of motorcar, struck by defendant's passenger train on a downgrade curve, upon which deceased had stopped, it was error to exclude evidence of experiments under the same conditions, showing the distance at which a man sitting on the end of a tie at the place of the accident could be seen by a person in the locomotive cab. *Gulf. C. & S. F. Ry. Co. v. Whitfield* (Civ. App.) 206 S. W. 380.

For admission, in an action for the killing by a train of a child on the track, of the result of experiments as to how far a child could be seen from there, the conditions need not have been exactly the same, but only substantially so; dissimilarity affecting the weight, rather than the admissibility, of the evidence. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

2½. Telephone conversations.—In an action against a telegraph company for delay in delivering a death message, testimony of plaintiff's son, who sent the message, detailing the statements of the party at the other end of the wire when he phoned the message to an agent of the telegraph company for transmission, held not inadmissible as hearsay, irrelevant, immaterial, and prejudicial. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

3. Testimony by a witness as to his intent, motive or condition of mind.—Testimony that defendant would have told plaintiff concerning defendant's claim to property if plaintiff had told her that she was going to make a loan on the property, held self-serving, hypothetical, and properly excluded. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

The intent with which a party does an act is a fact known to him concerning which he is competent to testify, though other witnesses cannot testify to such intent, but only to facts and circumstances evidencing intent. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In an architect's action against a corporation, where neither of the letters introduced in evidence referred to any agreement that the architect should receive no compensation if the plans and specifications were not used, it was reversible error, after defendant's general local manager had been cross-examined thereon to impeach his testimony to such agreement, to refuse upon re-examination by defendant to allow witness to explain why he made no mention of it in his letters when objected to on the ground that it did not call for facts but for undisclosed intentions. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

4. — Execution and delivery of contracts and conveyances.—In an action involving a contract whereby the parties were to divide the profits arising from the purchase and sale of land, the intervener, one of the parties to the contract, was properly not permitted to state what his intentions were at the time the contract was made, etc. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

6. — **Negligence and contributory negligence.**—On the issue whether one, acting to save another from imminent danger brought about by the negligence of a third person, acted rashly, evidence showing how the danger appeared to the person so acting is admissible. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

9. — **Good faith in general.**—In an action by creditor against stockholders individually, because of alleged overvaluation of the oil land given for the stock, a stockholder, who was one of the incorporators, was properly allowed to testify as to reasons for placing such value on the oil lands. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

12. **Evidence admissible by reason of admission of similar evidence of adverse party.**—In suit for conversion of iron purchased by plaintiff, fact that it was developed on cross-examination that plaintiff had in his pocket letters from iron company offering so much a ton for iron, and was called on by defendant's attorney to let him see them, who then asked questions as to plaintiff's knowledge as to who wrote them, etc., did not authorize submission of letters in evidence by plaintiff. *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

Witness having, at plaintiff's instance, testified to part of a letter which could not be produced, could, over plaintiff's objection of hearsay, testify to other contents thereof. *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280.

The admission of illegal evidence on the part of one of the parties will not authorize his adversary to introduce similar illegal evidence in rebuttal, when excepted to. *Massey v. Allen* (Civ. App.) 222 S. W. 682.

II. Competency of Witnesses

14. **Knowledge or means of knowledge of facts, as affecting capacity.**—In a prosecution for keeping a disorderly house, it was error to admit testimony by police officers as to the reputation of the premises, where such officers did not have adequate knowledge thereof. *Schwimmer v. State*, 84 Cr. R. 227, 206 S. W. 521.

In a suit to determine boundary line, testimony of one who had assisted surveyors in running the line many years previously, had lived near, and knew the claims of parties, one being his uncle, relating to the boundary line, was properly admitted before the jury. *Stark v. Staffen* (Civ. App.) 208 S. W. 695.

Where a witness testified that he had known the location of the boundary line between several lots all his life, that there were marked trees there recognized as being on the dividing line, and that he was present when a survey of certain property was made and the line between the lots was marked, the court erred in not permitting him to testify as to the location of such line in regard to certain improvements. *Ludtke v. Wilson* (Civ. App.) 222 S. W. 351.

In an action for injuries in collision between an automobile and a street car, testimony as to the condition and location of the automobile the morning after, and as to marks and tracks on the street tending to show that the automobile had been dragged some distance, held admissible on issue of whether the street car was running at an unlawful speed, though the witness was not present at the accident; that fact affecting merely the weight of his testimony and not its admissibility. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

In an action against a railroad for damages for shortage between weights at points of shipment and destination of certain cars of coal delivered to consignee, testimony of a witness, that the market value of the coal was the price at the mines plus carriage and tax and giving the amount at each place on each shipment, was admissible where he first testified that he knew the market value. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

15. **Age and maturity of mind.**—When child is offered as witness, it is proper to ascertain whether he has sufficient intelligence and knowledge of obligation of oath to be prompted to tell truth, and, if he has, he should be permitted to testify. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

A bill of exceptions stating that prosecutrix, a 13 year old girl, testified that she did not know the nature or effect of an oath, when qualified by the court's statement that the witness was intelligent and as competent as any ordinary adult witness, and satisfied the court that she fully understood the difference between right and wrong, does not show that the witness was incompetent to testify. *Williams v. State* (Cr. App.) 225 S. W. 173.

16. **Unsoundness of mind.**—In an action for personal injuries where there was evidence that plaintiff had lost his memory and power to control his thoughts, but was not actually insane, it was not error to put him on the stand and question him as to relevant matters in his past life, and as to the accident, though at defendant's request plaintiff's wife had, during the trial, intervened as plaintiff's next friend because of his incompetency. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Insane woman upon whom a rape was charged could not testify in prosecution; law rendering her incompetent as witness. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

17. **Obligation of oath.**—If infant witness is not familiar with such expressions as "obligation of oath," etc., he should be instructed in simple terms, and be permitted to testify, if he understands that it is wrong to swear falsely and that he will be punished. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

Code Crim. Proc. art. 1197, providing for commitment of a minor girl charged with violation of the law to a juvenile reformatory, instead of to the penitentiary, at her option or at the suggestion of other parties, merely provides a different punishment, but does not relieve her from liability to prosecution for perjury, and therefore does

not render her incompetent as a witness. *Williams v. State* (Cr. App.) 225 S. W. 173.

A 7 year old negro boy, who stated on voir dire that he did not know what it meant to swear, or that he would be punished if he swore falsely, but who stated that he knew it was right to tell the truth, and that he was going to tell it, is incompetent to testify as a witness, though he might have been qualified to testify if the court had further instructed him as to the nature of the oath and the punishment for false swearing. *Anderson v. State* (Cr. App.) 226 S. W. 414.

18. **Infamy or conviction of crime.**—In criminal cases, see notes to *Code Crim. Proc.* art. 788.

20. **Extrinsic evidence as to competency in general.**—Where witness has been convicted of felony and sentenced, proper procedure is to introduce proclamation of pardon before permitting him to testify. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

21. **Determination as to competency.**—Whether negro boy, suing railroad for personal injuries, was competent to testify as witness, in that he understood nature and obligation of oath, was matter resting in sound discretion of trial court. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

Examination by prosecuting attorney of witness offered by defendant on question of general reputation of deceased, for purpose of preliminary test of witness, is discretionary with the court. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

23½. **Communications to or information acquired by physician.**—Where accused claimed temporary insanity, his examining physician having testified, it was not error for the state to call him in rebuttal, and, on objection of privilege, to excuse him, without instructions to disregard the incident; there being no statute exempting communications between patient and physician, in the absence of which they are admissible. *Dodd v. State*, 83 Cr. R. 160, 261 S. W. 1014.

A physician's testimony cannot be excluded on the ground that it is privileged, since in the absence of statutory enactment communications between physicians and patients are not privileged. *Crow v. State* (Cr. App.) 230 S. W. 148.

24. **Communications to or advice by attorney or counsel.**—An attorney may testify to anything he knows, whether learned before or after his employment as counsel. *Arispe v. Clark* (Civ. App.) 204 S. W. 373.

25. — **Relation of attorney and client.**—Communications to adviser, who is not licensed to practice law and is not practicing attorney, are not privileged. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

27. — **Subject-matter of communications or advice in general.**—In prosecution of a wife for killing her husband, testimony of the attorney for the husband in his divorce suit that the husband asked him for advice as to what punishment would likely be meted out to him if he killed his wife, etc., who was defending on the ground of self-defense, held not excluded as to a privileged communication between attorney and client. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.

Defendant's attorney might, when called by the state, testify to the authenticity of an agreed statement of a former trial containing testimony of a witness since deceased. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

33. **Waiver of privilege.**—In a garnishment proceeding, where neither the garnishee owner nor his attorney objected to the attorney's being a witness, nor to the introduction of letters coming into witness' possession as such attorney, the intervener is not in a position to urge them inadmissible because of the relationship of attorney and client. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

In trespass to try title, plaintiff claiming under an instrument which the jury found was a deed, but which defendants claimed was a mortgage, testimony of plaintiff as to a conversation between him and counsel for defendants was improperly excluded, where if the conversation was privileged the privilege was clearly waived by plaintiff by going into the details of his transactions with counsel in his original testimony and offering such transactions as an explanation for his laches in filing suit. *Langham v. Gray* (Civ. App.) 227 S. W. 741.

III. *Demonstrative Evidence*

38. **Compelling person injured to submit to examination by physicians.**—In personal injury action, where plaintiff, in testifying to injuries, indicated location of pain with his hands, but did not remove any of his clothing or exhibit any portion of his person, court properly refused to require plaintiff to be examined by defendant's physicians. *Texas Electric Ry. v. Rowell* (Civ. App.) 211 S. W. 788.

41. **Articles subject of or connected with controversy.**—In action for failure to deliver goods according to sample, evidence held to sufficiently identify the samples to authorize their admission in evidence. *Dallas Waste Mills v. Texas Cake & Linter Co.* (Civ. App.) 204 S. W. 868.

43. **Writings submitted for comparison.**—In an action by a depositor who asserted that a bank had paid and charged his account with forged checks, where bank officials testified to the genuineness of the signature to the checks involved, as did other witnesses familiar with the depositor's signature, checks proven genuine, which were so identified by the bank officials, were improperly admitted for purposes of comparison by the jury with the alleged forged documents, for the admission of such checks would tend to raise collateral issues, and the signature was not an ancient one. *Texas State Bank of Ft. Worth v. Scott* (Civ. App.) 225 S. W. 571.

IV. Documentary Evidence

50. Admissibility of public or official records and certificates in general—Judicial acts and records in general.—In trespass to try title, one of the muniments in the title of plaintiff being a deed from the administrator of the estate of a decedent, certain probate orders made in the estate of such decedent, reciting that his wife and daughter were his only heirs at law, were admissible as muniments of title; plaintiff's grantor being one of such heirs. *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726.

A judgment entry alone, unaccompanied by any other part of the record of such judgment, or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact of its rendition, is inadmissible if reasonably objected to, a rule not qualified by the fact that the judgment offered is from a court of general jurisdiction, nor by the fact that it may contain general recitals of jurisdiction, but if the mere fact that a judgment has been rendered in a given case becomes material in trial of another case, the judgment is admissible to show the fact. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

51. — Pleadings.—In action for breach of contract for sale of timber, buyer's petition in intervention in previous suit against seller, as limited by instruction of court, held properly admitted. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Abandoned pleadings may be offered and used as evidence when relevant and material, and their relevancy and materiality is to be determined by the same rules which govern the admissibility of other testimony. *Hines v. Bost* (Civ. App.) 224 S. W. 698.

53. — Official records and reports.—In action for salaries paid defendant while occupying office to which plaintiff had been elected, city register of warrants showing delivery of warrants for salary to defendant together with their payment and cancellation, where authenticity of register was proved by custodian, held admissible. *Pease v. State* (Civ. App.) 228 S. W. 269.

54. — Tax deeds, records and receipts.—There being no law authorizing tax receipts to be recorded prior to 8 Gammel's Laws, p. 1095, passed in 1876, followed by Laws 1915, c. 85 (Vernon's Ann. Civ. St. Supp. 1918, arts. 7617a-7617d), the filing for record of a tax receipt in 1849 was unauthorized, so that the receipt was not admissible in evidence to show the boundaries of land. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

55. — Records and returns of surveyors.—The original English field notes and maps prepared by the surveyor to locate surveys are part of the original title, and may be considered in aid of description contained in the grant, and to supply what is omitted therefrom. *Barrow v. Murray* (Civ. App.) 212 S. W. 178.

63. Admissibility of transcripts and certified copies—Judicial records and proceedings in general.—In an action to establish a trust in land, certified copies of a decree in chancery in another state, in which another was appointed trustee, held admissible to corroborate the positive testimony of a witness as to the agreement under which the property was conveyed to the alleged trustee. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

64. — Of federal courts in state courts.—A copy of a decree of a federal court is inadmissible in evidence, where neither the instrument itself nor the certificate of the clerk shows by what court it was rendered. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

66. — Records and proceedings in land office.—Affidavits for a duplicate certificate filed to meet the requirements of Rev. St. 1879, arts. 3883-3885, and approved by the land commissioner, who issued a duplicate certificate thereon, became archives of the land office, and certified copies thereof were as admissible in evidence as the originals. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

In trespass to try title involving boundary, where a map was properly filed in the General Land Office, a copy thereof was admissible in evidence; and, it being contemplated that field notes of all surveys shall be made and recorded, a map should be made from such field notes, which should fully explain it, so that a letter, although accompanying the map and filed, was not admissible, except that part certifying to the map's correctness, in the absence of a law authorizing its filing. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

69-71. Requisites of exemplification or certificate in general.—Unsealed certified copy of enrollment record of the citizens or freedmen of one of the Five Civilized Tribes was inadmissible in action involving question of fact as to an Indian's age at the time of his execution of the deed. *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (Civ. App.) *Newsom v. Langford*, 174 S. W. 1036.

A copy of a foreign decree is not admissible in evidence, where it is not properly certified as required by U. S. Comp. St. § 1519, to entitle it to full faith and credit. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

73. Admissibility of private writings and documents in general—Corporate records and proceedings.—In a servant's action for injury while lost, the employer's charter was admissible to show that the person in charge of business was a director. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

75. Admissibility of conveyances, contracts and other instruments.—Where plaintiff's agent took defendant's order on blank, which provided that salesmen were not authorized to alter the sales offer by verbal agreement, and wrote on the back of the carbon copy left with defendant that if defendant became financially unable to complete

the contract he might rescind, such clause was admissible in plaintiff's action for the alleged balance due, since the contracts were duplicate originals. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

76. — **Relation to matters in controversy in general.**—In a suit for damages to a paving contractor through insufficiency of a concrete mixer sold him by defendant, plaintiff having alleged that he had, to defendant's knowledge, been awarded contracts for the laying of specified grade of concrete, the written paving contracts awarded to plaintiff were properly admitted in evidence as the basis of his suit when properly proven. *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645.

In an action involving a contract whereby parties were to divide profits from the purchase and sale of certain land, the jury had the right to consider the book entries, the contract between the parties, deeds, deed of trust, releases, etc., in determining their true relation. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

In trespass to try title, deed from a third person to a defendant, wherein was reserved a vendor's lien to secure the payment of three promissory notes, held admissible, in so far as the controversy between plaintiffs and such defendant was concerned. *Johnson v. Frost* (Civ. App.) 229 S. W. 558.

77. — **Recitals of fact in general.**—Ordinarily recitals in deeds are evidence only against privies, and do not affect strangers. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

Extraneous and self-serving declarations in a deed of conveyance are not admissible in evidence against stranger to the deed. *Morrison v. Bennette* (Civ. App.) 238 S. W. 307.

In trespass to try title, in which plaintiff claimed to have acquired title by adverse possession, recitals in deed to plaintiff from predecessor, offered not as a muniment of title, but to show privity between plaintiff and predecessor to establish continuity of possession, held admissible for such purpose as against objection that defendant was not a party thereto. *Id.*

81. — **Form and validity in general.**—A power of attorney was admissible in evidence although in the Spanish language. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

In an action to cancel a deed, brought against a woman sued as a feme sole, a \$500 note, and deed of trust securing it, both executed by the feme sole defendant, held admissible as against the objection that they were executed without consideration, and to defraud the woman's creditors, including plaintiff; the questions of lack of consideration and of fraud being peculiarly questions of fact to be considered in connection with the instruments themselves. *Powell v. Dyer* (Civ. App.) 227 S. W. 731.

In a suit to recover on a note, where plaintiff bank pleaded that the date of the note had been changed without its knowledge, and that it repudiated the change as soon as it had notice thereof, and introduced all the officers of the bank to testify that they had not altered the note nor knew when, why, or by whom it was altered, it was not error to admit the note in evidence as showing the original contract. *Rus v. Farmers' Nat. Bank of Sealy* (Civ. App.) 228 S. W. 985.

82. — **Execution and proof.**—An instrument whereby plaintiffs agreed to convey land when an old note should be reduced to \$2,500 need not be signed by defendant to be binding and effective on plaintiff, and was not inadmissible in an action on a new note for \$2,500 when offered by plaintiff, in whose possession it then was, on the ground that witness, testifying that defendant had knowledge of the existence of the instrument and assented to its terms, was mistaken in a statement that defendant had signed, such mistake only going to his credibility. *Peacock v. Aug. A. Busch & Co.* (Civ. App.) 231 S. W. 447.

In broker's action for commission, where it was claimed that contract broker made with purchaser was unauthorized, proof that such contract was ratified made the contract admissible in evidence against owner for all purposes. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

85. — **Documents insufficient or incomplete when standing alone.**—Where appraisers appointed to partition land reported that it could not be properly partitioned, and the administrator applied to sell the lands, and the description in his application and in the report and order of the appraisers was insufficient, but was made certain by many subsequent deeds, the administrator's deed was admissible in trespass to try title to certain of the lands then sold. *McCardell v. Lea* (Civ. App.) 200 S. W. 562.

87. **Admissibility of books of account.**—In an action involving book accounts where the books were in evidence, it was not error to admit a statement, which plaintiff testified he had made upon an adding machine from the different books or registers, showing the amounts in question; such statement containing all that the books would have shown had they been exhibited page by page to the jury, and it being impracticable to go through the books before the jury and check out the items shown by such statement. *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374.

91. — **By whom entries are made.**—In suit submitted upon sole issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, where plaintiff claimed that at time of conveyance he paid to defendant \$500 in cash for the land, the court erred in excluding evidence of the cashier of the bank as to whether plaintiff's account showed a charge of \$500 on said date, though the cashier had not made the entry. *Ellis v. Haynes* (Civ. App.) 216 S. W. 249.

92. — **Entries made from memoranda or other information.**—A ledger account for sending and receiving telegrams, made up from the telegrams themselves, and in which for the first time are entered the amount of the charges, held admissible as book of original entry, notwithstanding a counter blotter in which was made a partial record of telegrams. *Early-Foster Co. v. Mackay Telegraph Co.* (Civ. App.) 204 S. W. 1172.

In an action against a railroad company to recover for shortage of coal delivered to plaintiff, testimony of witnesses who weighed out the cars of coal at the initial points of shipment, that in the line of their duties they kept a record of the weights of the cars when empty and loaded and that each attached the original scale tickets, which corresponded with the entries on their books, was admissible, as were the scale tickets themselves, upon which the weights, gross, tare and net, were stamped when the weighing was done; the figures on the tickets being construed to mean pounds and not tons. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

96. Admissibility of private memoranda and statements in general.—In action to establish a trust in land, a memoranda statement in books of one who had assisted in the partition of the estate under will of alleged trustee's father, showing an allotment of interests, was admissible to corroborate positive testimony of witness as to agreement under which property was conveyed to alleged trustee. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

98. Admissibility of letters, telegrams, and other correspondence.—In action to establish a trust in land, letters of agents, while it was being handled by a substituted trustee, and a deed from such trustee conveying property handled by him, were admissible to corroborate positive testimony as to agreement in which property was conveyed to alleged trustee. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

Where a letter or collection slip sent by an insurance company was admissible in its behalf on the issue of authority of an agent to collect premiums, the fact that a notation was made thereon by the collecting agent, when he returned the slip to the company, of the death of insured does not render the slip inadmissible. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

In action on life policy issued by mutual benefit association involving issue of whether insured had authorized change of beneficiary by substitution of wife's name for that of mother, a letter, written by insured to his sister, from which a portion had been torn, held inadmissible. *Gardner v. Sovereign Camp, W. O. W.* (Civ. App.) 227 S. W. 215.

99. Maps, plats, and diagrams.—In an action under a lease for rent, where defenses were that building was not constructed according to agreement between lessor and lessee and faulty construction, the court properly permitted plaintiff to introduce in evidence the plans and specifications for the building, and to show that water which accumulated in the basement was seepage water caused by the United States reclamation in handling water for irrigation purposes. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

100. Photographs.—In an action for damages for death, photographs of the place of the accident were properly admitted in evidence. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

101. — Physical appearance and identity of persons.—Evidence in servant's action for injuries held to warrant admission of book plates showing X-ray photographs of the normal human foot, for comparison with plaintiff's foot after the injuries. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614.

In an action for injuries, in which a physician testified that an operation made plaintiff "infinitely better," a photograph taken after injury and before the operation was admissible to show the extent of his injuries. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003.

105. Books and other printed publications—Scientific and technical works.—In personal injury action, it was proper to refuse to permit plaintiff to read in evidence extracts from a book written by an authority on surgery. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 200 S. W. 1120.

112. Authentication of documents—Public documents and records in general.—Letters from Mexican officials to other officials are not admissible without extrinsic evidence of their genuineness. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

114. — Judicial acts and records.—A copy of a decree of a federal court is not admissible in evidence, where the clerk's certificate fails to show that it is a true copy of an original decree. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

Rev. St. U. S. § 905 (U. S. Comp. St. § 1519), requires a judge's certificate as well as attestation by clerk, to entitle transcript of foreign court proceedings to be introduced in evidence. *Nease v. Broadwater Mercantile Co.* (Civ. App.) 206 S. W. 692.

When a judgment becomes relevant in another action in the same court, introduced by the clerk and offered in evidence, it requires no authentication to render it admissible; the production of the judgment by the clerk being sufficient prima facie proof of its authenticity. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

116. — Examined copies of records.—A foreign judgment certified by clerk, but not by court, is admissible where witness testified that it was true copy of original, which he had examined. *Givens v. Givens* (Civ. App.) 195 S. W. 877.

117. — Preliminary evidence for authentication in general.—In trespass to try title, evidence held sufficiently to show genuineness of letters written by Mexican officials to other officials to justify their admission. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

In an action against a surety company on an indemnity bond, reinsured by defendant, recognition by defendant of the existence of the contract rendered such bond admissible in evidence, without preliminary proof of execution. *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798.

118. — **Corporate acts, records and proceedings.**—Where there was no attack on the genuineness of an application for membership in a fraternal insurance society, the application, which was signed by deceased, proves itself. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

119. — **Conveyances, contracts and other writings in general.**—An unloading certificate made out by a stock yards company, and furnished a witness, was improperly admitted in evidence where there was no testimony from any one who had any connection with its making to show that it correctly stated the fact recited therein. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

Even if the original confessions were admissible in evidence in guardianship proceedings, copies thereof not shown to be true copies of the original are inadmissible. *In re McLaren's Estate* (Civ. App.) 221 S. W. 1045.

In an action involving the validity of oral leases, court erred in admitting in evidence deposit slips and checks relating to payments under a lease, without proof of the execution of the deposit slips, and without proof by any one who personally knew that the deposit had in fact been made. *Browning v. Hinerman* (Civ. App.) 224 S. W. 236.

120. — **Proof of authority to execute.**—In a contractor's action against an irrigation district for balance due for construction work, it was not error to admit the report of a person as defendant's consulting engineer without first showing that he had been regularly employed by the district, as such, pursuant to statute, where the report showed upon its face that he was acting as consulting engineer on the joint request of the irrigation board and the contractor. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

126. — **Form and sufficiency in general.**—One who did not personally weigh cattle could nevertheless testify as to the correctness of a copy of account sales, if he was present when the cattle were weighed. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

131. — **Books of account.**—In suit for shrinkage of cattle shipped from delay, the account sales rendered by commission company selling the cattle at destination was inadmissible to show weight when sold; such account sales not being proven by commission company. *Baker v. Holman* (Civ. App.) 196 S. W. 728.

In suit on an open account for materials and labor, testimony of plaintiff's foreman as to items of the account sued on was admissible, where he testified that, though he had no personal knowledge at the time of suit of the accuracy of the items of the account, nevertheless he would not have O.K'd time slips from which they were made up unless at the time he had known them to be accurate. *Mardez Lumber Co. v. Lufkin Foundry & Machine Co.* (Civ. App.) 216 S. W. 493.

In order to introduce account sales as a record, it is necessary to show by the entrant that he made the entries in the usual course of business, and the performance of his duty contemporaneously with the transaction recorded, and that it was correctly entered. *Panhandle & S. F. Ry. Co. v. Arnett* (Civ. App.) 219 S. W. 232.

Testimony of bank president that the books and records of the bank were kept under his supervision and were correctly kept held sufficient foundation for admission in evidence of bank ledger. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

133. — **Memoranda and statements.**—In suit on an open account for labor and materials, the trial court properly admitted in evidence certain time slips from which the items of the account were made up; plaintiff's foreman having testified that he would not have signed the slips and turned them in at the office unless he had known at the time that such slips, in their charges of hours of labor, were accurate. *Mardez Lumber Co. v. Lufkin Foundry & Machine Co.* (Civ. App.) 216 S. W. 493.

Testimony of bank president that the books and records of the bank were kept under his supervision and were correctly kept held sufficient foundation for admission in evidence of deposit slips and bank ledger. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

134. — **Letters, telegrams and other correspondence.**—Where practicing attorney testified that he had a great deal of correspondence with claim department of defendant railroad, and in answer to his letters he always received letters from J. M., and signature on letter introduced in evidence was same that was on letters he received, and that he knew that such was his signature, and that he was claim agent of defendant, authentication of signature was sufficient. *Galveston, H. & S. A. Ry. Co. v. Booth* (Civ. App.) 209 S. W. 198.

While the signature of the party writing a letter must be proved or its execution established before it is admissible in evidence, this may be done circumstantially, and, when the circumstances indicate that it is the letter of the party purporting to write it, the court may admit it. *Denny Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

The Court of Civil Appeals held not authorized, under the evidence, to say that there was not sufficient evidence to establish the execution of letters by the party purporting to write them to admit them in evidence. *Id.*

136. — **Maps, plats and diagrams.**—A map was properly admitted in evidence, although person who made it refused to testify that it was absolutely correct, jury understanding that witness was picturing land as he saw it. *Sims v. Ford* (Civ. App.) 209 S. W. 699.

137. — **Photographs and other pictures.**—In action for injuries due to fall caused by defective sidewalk, testimony of injured party that photograph offered in evidence was correct picture of scene of accident was sufficient to render it admissible. *Houston Belt & Terminal Ry. Co. v. Scheppelman* (Civ. App.) 203 S. W. 167.

In a servant's action for injury, the admission of X-ray photographs in evidence, without proof that they were correct portrayals of the injury, was error. *Kansas City, M. & O. Ry. Co. v. Swift* (Civ. App.) 204 S. W. 135.

140½. Conclusiveness and effect—Use by adverse party.—In trespass to try title, where defendant, relying on a deed, introduced the same in evidence, the recitals in the deed were available to the plaintiff in the establishment of his title, although defendant was also relying on a quitclaim deed from heirs of a former owner. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

142. Private contracts and other writings.—Despite provision of deeds of trust that any recitals of certain character in any deeds made by any trustee should be prima facie evidence, recitals of deeds executed by substitute trustee that beneficiary or holder of notes secured had requested trustee to sell the land, which request was necessary to authorize the trustee to sell, held unauthorized by the deeds. *Bowman v. Oakley* (Civ. App.) 212 S. W. 549.

Where the recitals of deeds executed by a trustee under deeds of trust by a provision of the deeds of trust constituted merely prima facie evidence, the power of the courts to ascertain the real truth, when necessary to determination of rights in litigation, was not taken away. *Id.*

Where trust deed authorized an appointment of a substitute trustee, recitation in a substitute trustee's deed of the failure of the original trustee to act and of the proper request for him to sell, of proper advertisement, and other prerequisites to an exercise of his power, were prima facie proof of the regularity and validity of the sale. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

Where it is the understanding of the parties that title to goats sold shall not pass until payment is made for them, title does not pass, though possession of the goats was delivered to the buyer and a bill of sale, reciting payment, was executed. *Hernandez v. Garcia* (Civ. App.) 216 S. W. 477.

Legal presumption that as son paid consideration recited in deed whereby lots were conveyed to him he became owner of property held sufficiently rebutted by his express declaration in his deed to his mother that she paid it and that he held title in trust for her. *Witt v. Witt* (Civ. App.) 223 S. W. 277.

In action to recover title to land, where defendant claimed title to an undivided interest under M. and N. as heirs of the original patentee, but the only evidence of such heirship was the recital therein in a power of attorney given by M. and N., the jury had the right to conclude from the absence of any stronger evidence that M. and N. were not among the heirs of the original patentee. *Thomas v. Calahan* (Civ. App.) 229 S. W. 602.

Where bond for title recited receipt of cash consideration, it was not necessary to prove that the consideration named was actually paid. *Fadell v. Taylor* (Civ. App.) 229 S. W. 965.

In trespass to try title by a prior purchaser from the common source recital in the junior purchaser's deed of payment of the purchase money is not evidence against the prior purchaser, and the burden of proof is on the junior purchaser. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

In an action to recover a tract of land by the children of deceased by his first wife against his children by his second and third wives, testimony of defendants' witness as to the identity and payment of certain notes executed by deceased during his second marriage held sufficient to support the court's finding that the tract was bought entirely on credit and paid for with funds of the second and third communities, despite recitals in the deed that a cash consideration of \$300 was paid at the time of its execution during the first marriage. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

Where plaintiff executed and delivered to defendant a check for \$500, which was indorsed by defendant and marked "paid" by a bank, there was sufficient evidence to sustain a finding of payment of the \$500. *Wilcox v. Crawford* (Civ. App.) 231 S. W. 1104.

143½. Photographs.—In an action by a passenger for personal injuries from a fall while alighting from a train, testimony of a 17 year old boy, who stood some distance away obliquely, that the rubber on the steps of the coach from which plaintiff was alighting was entirely worn through, held not sufficient to raise a conflict of testimony to warrant the jury in finding that the rubber was worn entirely through, where immediately photographs were taken which showed that, although the rubber was worn, it was not worn through. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

145. Effect of introducing part of document or record.—The rule that, where a part of an instrument is offered in evidence, it should all be admitted, has its limitations. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

In an action on a fraternal benefit certificate, where defendant had introduced the original application for insurance, plaintiff was entitled to introduce the certificate of defendant's medical examiner attached to the application. *Sovereign Camp, Woodmen of the World, v. Martin* (Civ. App.) 211 S. W. 270.

In a suit for divorce based on alleged common-law marriage, where defendant, husband, introduced excerpts of plaintiff's letter to show merely an unfulfilled promise of marriage, plaintiff's introduction of the whole letter held not error, since the material portions tended to contradict defendant's purpose. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In an action on a note given by one copartner to another, where it was claimed as to the consideration that the maker had not accounted to the payee partner for about \$50,000, and checks and drafts were introduced in support of the payee's testimony to that effect, the entire bank account of the payee was admissible, falling within the

rule that one person may introduce the remainder of an account where the other party introduces a part thereof. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

V. Reception of evidence at trial.

152. Placing witnesses under the rule.—It is within the sound discretion of the trial court to permit a witness not under the rule, who had heard a part of the testimony, to testify. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534; *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

In trespass to try title, that the former owner of the land on his own initiative was made a party defendant, as being the warrantor of one of the defendants, even if done so that he might remain in the courtroom during the trial, was not apparently prejudicial, in the absence of any showing that any request was made that the former owner be placed under the rule with other witnesses. *Bishop v. Paul* (Civ. App.) 217 S. W. 435.

The trial court did not abuse its discretion by refusing to excuse from the rule excluding witnesses two witnesses who were agents of the corporate defendant, but not such as under the law gave that defendant the right to have them remain in the courtroom during the trial. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

153. Offer of proof.—In an action for damages by one tarred and feathered on account of his attitude toward the Red Cross, refusal to permit testimony of certain prior acts of the plaintiff was not error, where offer of proof failed to show that the incident sought to be shown became known to the defendants prior to the time plaintiff was tarred and feathered. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

154. — Showing grounds or purpose of admission.—In action on secured note and to foreclose vendor's lien, where defendant's counsel declined to state purpose in asking defendant, who had collected insurance money, defendant cannot on appeal predicate error on the court's action in sustaining an objection to such question. *Blackmon v. Texas Securities Co.* (Civ. App.) 196 S. W. 590.

155. — Evidence admissible in part or for particular purpose.—Where evidence part of which was inadmissible and part admissible was offered as a whole, the exclusion of the whole was not error. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270; *McBride v. Kaulbach* (Civ. App.) 207 S. W. 576; *Buchanan v. Williams* (Civ. App.) 225 S. W. 59.

A deed will be admitted in evidence, where it is admissible against one of the defendants, although it may be inadmissible as to another defendant. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

160. Application of personal knowledge of jurors.—In action for injuries, where the evidence was ample to show a permanent injury and mental anguish therefrom, the jury could take notice of longevity; the age of plaintiff and his father being shown. *Hines v. Welch* (Civ. App.) 229 S. W. 681.

161. Effect of admission of evidence.—In action for injuries sustained when leaving train by person accompanying passengers, plaintiff's statement to railroad's claim agent, having been introduced by railroad without limitations as to its purpose, should be considered and treated for all purposes. *Houston E. & W. T. Ry. Co. v. Lynch* (Civ. App.) 208 S. W. 714.

In a servant's action against a cattle corporation for injuries due to exposure to weather while lost upon the prairie, the charter of defendant was admissible to show that it was running a cattle ranch, and not a farm, notwithstanding that it also showed the corporation to be a million-dollar one. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

162. — Restriction to special purpose.—Where evidence was admissible for any purpose, and no request was made that it be limited to the purposes for which it was properly admissible, its admission cannot be held reversible error. *Hartt v. Yturria Cattle Co.* (Civ. App.) 210 S. W. 612.

In a prosecution for slander of a female, evidence as to the act of a witness, a brother of accused, in arming himself and going to where the father of prosecutrix lived, and as to what took place there, is admissible to show bias, interest, and motive of such witness; but, where such matter occurred out of the presence of accused, the effect of such testimony should be restricted by the court to the question of bias, interest, and motive of the witness. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

Where the judgment in another case was offered by plaintiff claiming thereunder only to show the fact of its rendition, its consideration and use as evidence in the case is so limited, and it cannot be looked to as evidence showing that it was for plaintiff, the contingency on which the fund for which plaintiff is suing was payable to plaintiff. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

164. Cumulative evidence in general.—Court was justified in excluding testimony as to facts, proof of which was already undisputedly before the jury, from the testimony of both litigants. *Guyler v. Guyler* (Civ. App.) 220 S. W. 604.

168. Right to object to evidence.—In action for damages to interstate shipment of live stock, held, that connecting carrier cannot complain on appeal of admission of evidence of negligence of subsequent carrier, admissible as against initial carrier, where such connecting carrier made no request to limit such evidence. *Chicago, R. I. & G. Ry. Co. v. Jenkins* (Civ. App.) 196 S. W. 679.

169. — Estoppel or waiver.—In an action for injuries resulting in death, defendant did not waive his right to object to the admission of a statement made by deceased as part of the res gestae by cross-examining the witness by reference thereto. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

170. Time for objection.—Admission of evidence not excepted to at time will not be reviewed. *Anderson v. McCain* (Civ. App.) 195 S. W. 921.

An objection to evidence cannot be first raised on appeal. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

Court did not abuse its discretion in permitting a witness to testify as an expert concerning the distance within which a train could be stopped, where no objection as to the qualification of the witness was made until after the witness had answered the question. *St. Louis Southwestern Ry. Co. of Texas v. Lamkin* (Civ. App.) 220 S. W. 179.

171. Sufficiency and scope of objection.—In an action for injuries to an elevator passenger, when his leg was caught in the door and held while the car descended, where defendant's only objection to the answer of plaintiff's witness as to her previous written statements was that it was not responsive to the question propounded by plaintiff, and there was no suggestion that the answer was in any manner hurtful to defendant, the trial court was not called upon to exclude it from the consideration of the jury, or to exclude any portion. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

172. — General or specific.—An objection that testimony is immaterial, irrelevant, and incompetent is too general to form the basis of an assignment of error, unless it appears from the nature of the question that the answer will be prejudicial to appellant. *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224; *Moorman v. Small* (Civ. App.) 220 S. W. 127.

Objection that a hypothetical question did not conform to facts is not sufficiently specific for review purposes. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

Specific objection to introduction of ordinance that it had not been published must be made at time, that it may thereafter be available. *San Antonio & A. P. Ry. Co. v. Boyed* (Civ. App.) 201 S. W. 219.

An objection to a hypothetical question put to an expert witness that it was "a hypothetical question in which all the facts are not before the witness" held too general and indefinite to be sustained, especially where, when the attorney asking the question asked for the facts omitted, none were given, and the same hypothetical questions were asked and like answers returned by other expert witnesses without objection. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 342.

173. — Statement of grounds.—Where ground of objection to admission of evidence is not stated, matter cannot be reviewed. *McAllen v. Wood* (Civ. App.) 201 S. W. 433; *Donoho v. Carwile* (Civ. App.) 214 S. W. 533.

An objection that evidence is irrelevant and immaterial is insufficient, it being necessary to state how or why the testimony is irrelevant or immaterial. *Padgett Bros. Co. v. Dorsey* (Civ. App.) 206 S. W. 851.

A case will not be reversed for admission of self-serving and hearsay statements, where the objection to the evidence was, "because it was not shown that she (appellant) had any notice or knowledge of said transactions and conversations and could not hind her"; objections being so made and presented that the real reason why the testimony was objectionable was not called to the attention of or considered by the court. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

174. — Scope and questions raised.—In action for breach of marriage promise where bill of exceptions showed that plaintiff testified without objection that she told third persons of her engagement to defendant and that defendant's objection was to her testifying as to whom she made such statements, appellate court is not called upon to determine whether or not testimony that she made such statements was admissible and prejudicial. *Freeman v. Bennett* (Civ. App.) 195 S. W. 233.

Where only objection to question was that it called for conclusion, all other grounds were waived. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

In an action for damages to shipment of live stock, a question as to the difference in market value of the cattle in the condition when they arrived at destination, and "in good condition," and without injuries, not objected to because of the quoted words, though objected to as not giving correct measure of damages, did not constitute reversible error; the word "good" being a relative term meaning satisfactory in kind, quality, or degree. *Baker v. Herndon* (Civ. App.) 209 S. W. 165.

Where witness was asked as to testimony given in another case, objection that appellant was not a party to that suit and did not have a chance to cross-examine witnesses is insufficient to preserve point that question was incompetent because calling for hearsay testimony. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

Where there was no objection that evidence which was otherwise admissible was secondary evidence, the erroneous exclusion of such evidence on insufficient objections cannot be justified in the appellate court on the ground that it was secondary evidence. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

On defendant's appeal, in an action for damages to a stock of shoes by water, defendant's objection to certain testimony that it did not show the true measure of damages raised the question of its admissibility and its sufficiency, so that the record is sufficient to present the question of the admissibility of the evidence and its sufficiency to establish the true measure of damage. *Ara v. Rutland* (Com. App.) 215 S. W. 445.

Where testimony complained of was not subject to the objection urged, the trial court did not err in admitting it even if subject to some objection not urged. *Beasley v. Faust* (Civ. App.) 217 S. W. 179.

In an action against several tort-feasors, an objection to evidence tending to show the financial standing of one of the defendants was sufficient to require the court to sustain the objection, for the reason that the financial standing of one defendant cannot be shown for the purpose of augmenting damages against all the defendants, although

the testimony was not objected to on the specific ground that it tended to show the financial condition of one of the defendants and that he was a man of wealth. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

Objection to introduction of bond in evidence, that it was not properly executed or signed by the parties to be bound thereby, does not go to the authority of the attorneys who signed the names of the sureties thereto. *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

175. — Evidence admissible in part.—Where a part of testimony objected to as a whole is admissible for any purpose, it is not error to overrule the objection. *Stark v. Haynes* (Civ. App.) 211 S. W. 343; *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748; *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535; *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478; *Cooper v. Newsom* (Civ. App.) 224 S. W. 568; *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114; *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347; *Frye v. Wayland* (Civ. App.) 228 S. W. 975.

Where a part of witnesses' testimony was admissible for impeachment purposes, objection to whole of such evidence will not be ground for reversal. *St. Louis Southwestern Ry. Co. of Texas v. Felts* (Civ. App.) 195 S. W. 1173.

Though a portion of an answer was not responsive, the overruling of an objection to the whole of the answer does not constitute error, where the inadmissible portion was not excluded from the admissible. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Where in a servant's personal injury action a general objection was made to the admissibility of the employer's charter as a whole, the objection was properly overruled, where the charter was admissible in part. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

177. Motion to strike out—Necessity for motion.—Where bulk of a witness' opinion evidence as to value was received, before cross-examination showed that it was inadmissible, a party desiring the exclusion of such testimony must move therefor or he cannot complain. *Ft. Worth & D. C. Ry. Co. v. Haggood* (Civ. App.) 201 S. W. 1040.

Court did not err in overruling an objection to a question, where it had already been answered and no motion or request was made for exclusion of the answer. *Gibson v. State* (Cr. App.) 225 S. W. 538.

Where a witness claimed to know a fact, and his answer showed that he did not, objection to the answer presents no error, where no motion to strike was made. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

178. — Necessity of previous objection.—Refusal to strike out evidence admitted without objection is discretionary with the trial court to some extent. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

179. — Time for motion.—A motion to exclude testimony elicited on examination in chief, made after cross-examination of the witness, is addressed largely to the discretion of the trial court. *Frye v. Wayland* (Civ. App.) 228 S. W. 975.

180. — Statement of grounds.—Whether witness' answer was responsive need not be determined where its exclusion was not requested on that ground. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

181. — Evidence admissible in part.—A motion to strike must be denied, where much of the evidence against which it is directed is admissible. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

Where a part of a witness' answer was clearly admissible, the denial of a motion to suppress the whole answer and to strike out the same is not error. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

184. Effect of failure to object or except.—Only objections to evidence made in lower court will be considered on appeal. *Stark v. Haynes* (Civ. App.) 211 S. W. 343; *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183; *Smith v. Smith* (Civ. App.) 200 S. W. 540; *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191; *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424; *Strachbein v. Gilmer* (Civ. App.) 202 S. W. 333; *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758; *Perdue v. Perdue* (Civ. App.) 208 S. W. 353; *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571; *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

Appellate court cannot consider a complaint that court improperly excluded testimony, where no exception was reserved. *Jones v. S. G. Davis Motor Car Co.* (Civ. App.) 224 S. W. 701; *City of San Antonio v. Newnam* (Civ. App.) 201 S. W. 191; *Miller v. P. W. Ezell Mercantile Co.* (Civ. App.) 201 S. W. 734.

Assignments of error, objecting to affidavit in suit on open account, in that it merely alleged that all lawful offsets had been allowed, while *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3712, requires that the affidavit shall allege that all "just and lawful offsets" have been allowed, is not reviewable, in absence of objection to admission of account in evidence. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 200 S. W. 899.

In trespass to try title, where defendant offered a deed which referred to a plat, and the plat, as an integral part of the deed, which was received without objection, error could not be predicated on admission of the plat, as being a written instrument not proven up by competent evidence. *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

While general rule is that a plea of privilege is inadmissible as evidence, where defendant's plea was introduced without objection, court was authorized to consider it in so far as it tended to prove defendant's residence in another county. *J. M. Radford Grocery Co. v. Flynn* (Civ. App.) 202 S. W. 332.

Evidence objected to by defendant was admitted temporarily subject to further ruling and after its admission defendant demanded a ruling, and argument was heard

whereupon court without announcing any ruling peremptorily instructed a verdict for plaintiff. Held that if directed verdict was intended to exclude the evidence no exception was necessary to review the exclusion. *Tuffly v. Houston Motor Car Co.* (Civ. App.) 205 S. W. 832.

An exception to evidence as incompetent, and hence insufficient to support a verdict, must be overruled, where no objection was made below to the admissibility of such evidence. *Joffre v. Mynatt* (Civ. App.) 206 S. W. 951.

Though evidence of negligence not pleaded is admitted without objection, defendant's requested instruction that it be disregarded, and that damages cannot be found by reason of such negligence, should be given. *Jamison Gin Co. v. Meassels* (Civ. App.) 207 S. W. 365.

A bare conclusion or opinion of witness, without basis of fact, has no probative force though not objected to. *Webb v. Reynolds* (Civ. App.) 207 S. W. 914.

Where testimony admitted is wholly irrelevant and immaterial to any issue in the case, and inadmissible upon any theory, the court's action in admitting it will be reviewed, notwithstanding absence of objection on a specific ground. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

Where defendant insurer did not object to the introduction of evidence establishing facts which would have been shown by the inventory had it not been destroyed, held that objections to such evidence cannot be raised by assigning error to refusal of motion for direction of verdict. *Westchester Fire Ins. Co. v. Biggs* (Civ. App.) 216 S. W. 274.

A party may waive production of the best evidence by failing to object to that of an inferior grade. *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402.

Hearsay testimony, if not objected to, is evidence to be considered by the court or jury for what they may deem it to be worth. *Id.*

In an action to recover for shortage of coal delivered to consignee where there was no objection to the introduction of a freight bill and expense bill showing the weight of a car of coal, the court was justified in allowing the amount therein stated. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

185. Cure of error.—If it was error for a witness to testify as to value of certain neighboring oil land as a basis for fixing the value of oil lands in suit, the objection was waived, where the same ground was covered on cross-examination, and testimony as to value of still other lands brought out. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Objection to testimony of witness is waived, where subsequently testimony to the same effect is admitted without objection. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

In an action against railroad company arising out of crossing accident, where there was testimony that the whistle was not sounded, the fact that the railroad company brought out its version as to a fight between the engineer and another arising over dispute as to that question was not a waiver of the erroneous admission of such declarations, where the particulars of the fight were first brought out by plaintiff and defendant merely desired to prove its version. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

VI. Admissibility of evidence at former trial or in other proceeding

189. Absence of witness.—Admission of a portion of transcript of evidence at a former trial of the cause setting out the testimony of a witness was error, where it was not shown the witness was absent from the state or was dead. *Kurz v. Soliz* (Civ. App.) 231 S. W. 424.

193. Preliminary evidence.—In an action for publication of an alleged defamatory article as to proceedings in justice court against plaintiff therein for violating the prohibition law, wherein he was discharged, etc., claimed to be privileged, evidence that plaintiff had testified he was transporting the liquor for export is inadmissible where it did not appear that the publisher's reporter was present. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

RULE 1. WITNESS MAY BE SWORN AND EXAMINED, HOW

I. Examination of witnesses in general

2. Mode of testifying in general.—It is improper practice to permit a witness to testify by stating that if another witness swore to a certain state of facts, such other statement was not the truth; but each witness should testify to his own version of the facts. *Hannes v. Raube* (Civ. App.) 210 S. W. 985.

3. Questions in general.—If judgment debtor sold cattle belonging to claimant and bought other cattle for claimant with the money, and these were levied on, a question to execution defendant as to whether claimant owned cattle in the county was not objectionable as being too general as to time. *Horn v. Price* (Civ. App.) 200 S. W. 590.

Questions that are purely ancillary, and which only form a part of some predicate and lead up to the matters at issue, are not subject to the objection that they are immaterial, unless they contain something hurtful within themselves. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

4. Questions assuming facts.—Prior testimony of witness fairly tending to support claim of noises coming from defendant's mill, question as to how noise testified to affected witness is not open to objection of assuming existence of the noise. *Texas Refining Co. v. Sartain* (Civ. App.) 206 S. W. 553.

Asking defendant's witness on cross-examination if he knew whether defendant had raised the number on an alleged stolen automobile was not bad as assuming facts, where it appeared that such number was higher than any put out by maker of such car. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

Questions to witness held not to have assumed that tools on a car fell off, causing its derailment, a matter in dispute. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

5. Leading questions.—Question whether plaintiff did not tell her attorney that mule was struck just as she had told jury held leading. *Baker v. Thomas* (Civ. App.) 201 S. W. 215.

Questions, "Did you * * * sign this document * * * upon the representations made by D.?" and, "State whether or not at the time * * * you signed this agreement, * * * you relied upon the representations * * * made by the claim agent," were leading and suggestive. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 203 S. W. 90.

In prosecution for murder, where deceased was barefooted, question whether there were any barefoot tracks leading away from cultivator, with which deceased was working, although answerable by "Yes" or "No," held not leading. *Borror v. State*, 83 Tex. Cr. R. 198, 204 S. W. 1003.

In a prosecution for incest, a question to prosecutrix by the district attorney whether she went to defendant's bed every time because she was afraid of him held objectionable as leading. *Bohannon v. State*, 84 Cr. R. 8, 204 S. W. 1165.

The question, "I want you to tell the jury * * * how that [the noise testified to] affected you," is not leading, it not suggesting the answer. *Texas Refining Co. v. Sartin* (Civ. App.) 206 S. W. 553.

For a question to be "leading," it is not sufficient that it may be answered yes or no, but it must further appear that the question suggests the answer. *Southern Traction Co. v. Coley* (Civ. App.) 211 S. W. 265.

In action against street railway by woman passenger for negligence of its employes in permitting other female passengers, who were intoxicated, to assault and curse plaintiff, an interrogatory, "Did the conductor or motorman come in and try to get these women to quit fighting?" was not leading or suggestive. *Id.*

Action of trial court in refusing to permit the counsel of accused to ask, and the only eyewitness, who was tendered to both the state and accused by the court, to answer, leading questions in a prosecution for murder, was error. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

An inquiry as to the appearance of one accused of murder, whether excited or irritated, was not objectionable as leading. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

In murder trial the question whether deceased was looking in accused's direction was not objectionable as leading, it not suggesting the answer desired. *Id.*

In an action on a fraternal benefit certificate issued in favor of plaintiff's wife where liability was denied on the ground that insured misrepresented the state of her health, a question to a witness as to whether insured coughed during a certain period prior to her death held properly excluded as leading. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

In a prosecution for homicide, decedent having been shot while plowing, a question by the district attorney, "Well, was that plowed to the end of the row, or partly plowed?" was not objectionable as a leading question. *Charles v. State*, 86 Cr. R. 233, 229 S. W. 255.

A question asked by the state of its own witness whether defendant did or did not do certain things does not suggest whether the answer desired is "Yes" or "No," and is therefore not leading. *Williams v. State* (Cr. App.) 225 S. W. 173.

In a prosecution for having in possession intoxicating liquor not for medical, etc., purposes, question, "Did any liquor come into your hands by anybody?" was not leading, and did not contain matter harmful to defendant. *Rainey v. State* (Cr. App.) 231 S. W. 118.

7. — Suggestions in aid of recollection.—Where the district attorney, in examining one of his adult witnesses, reminded witness by leading question of the contents of a written statement voluntarily made by witness before the trial, and thereby elicits damaging testimony, the examination was improper. *Anderson v. State*, 83 Cr. R. 261, 202 S. W. 944, L. R. A. 1918E, 658.

8. — Children and weak-minded or ignorant persons.—It cannot be said that it is an abuse of discretion to permit a leading question to an ignorant witness, testifying through an interpreter; she having previously, without objection, stated the facts summarized in the leading question. *Haynes v. Sosa* (Civ. App.) 198 S. W. 976.

Where witness is very old and not unfriendly to accused, it is not abuse of discretion for trial court to admit leading questions. *Borror v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In a prosecution for assault to rape, where prosecutrix at time of trial was 13 years old and reluctant to describe fully defendant's treatment of her, but had testified that defendant laid her on the grass and unbuttoned her panties, it was within the court's discretion to allow prosecutrix to be asked whether defendant put his hands under her clothes and, after answering, "Yes," to be asked questions suggesting the answer that he put his hands on her private parts, notwithstanding objection to the questions as leading. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

9. — Unwilling or hostile witnesses.—It is within the sound discretion of the trial judge to permit leading questions to be asked a hostile, unwilling, or reluctant witness. *Anderson v. State*, 83 Cr. R. 261, 202 S. W. 944, L. R. A. 1918E, 658; *Shaw v. State* (Cr. App.) 229 S. W. 509.

In a prosecution for simple assault, the state's theory being that defendant had told another person that, if he would whip the assaulted party he (defendant) would pay his fine, whereupon the assault was made, question to witnesses, on examination in chief by the state before defendant had asked any question, as to whether they did not go before the grand jury and testify, etc., held inadmissible even though the witnesses were unwilling. *Lewis v. State*, 86 Cr. R. 6, 215 S. W. 303.

10. Repetition of questions.—In a personal injury action due to an explosion of gasoline sold as coal oil, where a witness had answered that, if he had made certain statements on prior trial, they were true, as his recollection at that time was better, it was not an abuse of discretion of trial court to refuse to permit further questioning on the same points. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

11. Examination by court.—That court examined witness, after differences had arisen between counsel as whether witness had testified to certain facts, did not render his testimony inadmissible. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

In a prosecution for theft, where defendant had sought a continuance to procure the attendance of absent witnesses, it was not error for the trial court to inquire of various witnesses at the trial whether the alleged absent witnesses were present at the time the offense was committed. *Mathason v. State* (Cr. App.) 229 S. W. 548.

13. Responsiveness of answer.—The answer, "The cattle that got through alive were particularly broken up and injured, and I suppose depreciated in value more than they would have been had there been no unusual delays or rough treatment of the cattle while they were in transit," was fairly responsive to a question as to what the cattle would have been worth at their destination if they had not died in transit, and had reached their destination in good condition, and without any unusual delays or rough treatment. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

In prosecution for theft of automobile, answer of a witness, to the question of defendant's counsel as to how he came to recollect dates, that it was because he knew "you lawyers would have an alibi framed up for him, and I fixed for it" held improper as unresponsive. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

In homicide prosecution, question "Now as to his [defendant's] behavior after that accident, at times did you notice that, or remark that, or call it strange, or did you think anything of it?" held properly excluded; the expected answer that defendant was crazy and not responsible at times not being responsive to the question. *Perea v. State* (Cr. App.) 227 S. W. 305.

Parts of answers to various questions in action for death of employé through machinery, held objectionable, as not responsive. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

In a prosecution for manslaughter through killing of defendant's paramour, the state cannot be held responsible for an unresponsive answer of defendant's character witness to the state's question on cross-examination that he thought everybody would sleep better by his being secured, whether defendant was guilty or not guilty; the state having already elicited that he was on defendant's bond, and had been secured before making it. *Mobley v. State* (Cr. App.) 232 S. W. 531.

14. Remarks by witness.—In prosecution for theft of automobile, statement, volunteered by a witness, after testifying that when he saw defendant and another driving the car he spoke to defendant, who nodded, that he thought he would stop defendant, as he was certain defendant was an automobile thief, held improper. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

17. Use of documents, models, etc., to explain testimony.—In a personal injury action, pictures of muscles described by physicians which they testified were correct were admissible as part of such description. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

A plaster cast is sufficiently identified as that of the locomotive wheel alleged to have caused the derailing of an engine and the death of a fireman by testimony of a witness that he saw the plaster cast taken off of the wheel in controversy, to make it the basis of testimony by the witness that the wheel was defective as shown by a gauge measurement of the cast. *Payne v. Allen* (Civ. App.) 231 S. W. 148.

18. Refreshing memory.—The court did not err in refusing to strike certain testimony where witness had refreshed his memory from an affidavit he had made at the time, although having no independent recollection of the matter, but knowing that the statement in the affidavit was true, and although he had testified differently on a former trial. *Southwestern Surety Ins. Co. v. Owens* (Civ. App.) 198 S. W. 662.

Though a witness in a proper case may be permitted to refresh his memory by referring to a record of his testimony on a former occasion, the privilege is not to be used as a means of getting before the jury the testimony given by him on the previous occasion, which would be hearsay. *Kirkland v. State*, 86 Cr. R. 595, 218 S. W. 367.

Action of prosecuting attorney in exhibiting to witness for prosecution on redirect examination document containing her testimony on direct examination, though she claimed that her memory thereof was clear, held improper, not being within rule permitting refreshment of a witness' memory, and such conduct violated the rule prohibiting impeachment of a party's own witness. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In prosecution for theft of property of the value of more than \$50, action of court in allowing prosecuting witness to look at, and refresh his recollection from a list of property which he had made on a former occasion, where the list was not offered in evidence, nor its contents read, held not error. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

In an action against a railroad company for damages for shortage of coal delivered to plaintiff, testimony of the manager of plaintiff's business at the place of delivery, as to the weight of two cars of coal upon their arrival, was admissible, though witness testified from his records which were attached to his deposition as an exhibit showing the weight of the two cars, where his duties were to keep correct records of such transactions, the cars were unloaded under his direction, and he weighed the coal and made the entries at the time of unloading and identified the weight sheets from which he testified as original records from his office, although he had no independent recollection of the weights. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

19. — Memoranda or other writings which may be used.—In action to enforce materialman's lien, testimony as to items furnished, given by one having personal knowledge thereof, and who had made a list thereof, but who did not rely upon it, except for explanation, was admissible. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

In prosecution for abortion, where defendant called trial judge who tried prior criminal case in which victim testified, court erred in refusing to allow witness to refer in any manner to statement of facts of prior case not made till two weeks after trial in such case, for purpose of refreshing recollection. *Earnest v. State*, 83 Cr. R. 257, 202 S. W. 739.

In action on notes, trial court properly permitted plaintiff's bookkeeper to consult a book kept by him to refresh his memory as to entries made therein in connection with notes in suit, and it was not incumbent on plaintiff to present book in evidence. *Gregory v. Corpus Christi Nat. Bank* (Civ. App.) 221 S. W. 305.

In a prosecution for burglary, the justice of the peace before whom defendant was examined could use his certificate attached to the confession made by defendant to refresh his recollection as to whether defendant was duly warned before he made a statement as required by statute, if the certificate aided him in recalling the facts to his mind. *Garcia v. State* (Cr. App.) 228 S. W. 938.

In a prosecution for unlawful manufacture of intoxicating liquors, where witness for state testified that accused only visited the place of manufacture once, and thereby surprised the state, held, that court did not err in permitting the state to read to the witness his testimony before the grand jury for the purpose of refreshing his memory, witness than testifying that accused made several visits, it not appearing that the testimony before the grand jury was read in the presence of the trial jury. *Shaw v. State* (Cr. App.) 229 S. W. 509.

In an action to recover from a railroad company for shortage of coal delivered to plaintiff, testimony of a witness as to the weight of part of two cars delivered was admissible, where the weights were entered by him in the books at the time of unloading, which was part of his duty, and plaintiff's general manager testified as to the correctness of the entries made. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

20. — Inspection of writing by adverse party.—If testimony of a witness before the grand jury was used by the prosecuting attorney to refresh his memory, it should have been made available to defendant in the re-examination of the witness. *Kirkland v. State*, 86 Cr. R. 595, 218 S. W. 367.

21. — Admissibility of writing as evidence.—In action on notes, trial court properly permitted plaintiff's bookkeeper to consult a book kept by him to refresh his memory as to entries made therein in connection with notes in suit, and it was not incumbent on plaintiff to present book in evidence. *Gregory v. Corpus Christi Nat. Bank* (Civ. App.) 221 S. W. 305.

In a prosecution for burglary, the justice of the peace before whom defendant was examined could use his certificate attached to the confession made by defendant to refresh his recollection as to whether defendant was duly warned before he made a statement as required by statute, if the certificate aided him in recalling the facts to his mind, though the certificate itself was inadmissible. *Garcia v. State* (Cr. App.) 228 S. W. 938.

Where a witness, in an action to recover from a railroad company for shortage of coal delivered to plaintiff, testified as to the weight of certain cars delivered, from certain weight sheets made by him at the time, the fact that the book in which the sheets were kept was not offered in evidence did not render them inadmissible; only the entry in the book relevant to the issue being admissible. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

22. Testimony from memoranda or other writings.—In an action for damages to hogs in shipment testimony by a witness, who stated positively the weight of the hogs a short time after their arrival, and stated that he gave the weights from his memory and from records, which were correctly kept, was properly admitted, though he did not identify the record or state who kept it. *Panhandle & S. F. Ry. Co. v. Cowan* (Civ. App.) 225 S. W. 185.

26. Right to cross-examine and re-examine in general.—Action of trial court in refusing to permit the counsel of accused to ask, and the only eyewitness, who was tendered to both the state and accused by the court, to answer, leading questions in a prosecution for murder, was error, and when such witness was examined by the state, accused should be accorded the same liberty of cross-examination of such witness as any other witness for the state. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

The fact that a party introduced the deposition of a witness does not entitle the adverse party to call such witness at the trial for the purpose of oral cross-examination. *Cook v. Denike* (Civ. App.) 216 S. W. 437.

27. **Control and discretion of court.**—The manner of conducting the examination of witnesses and the order in which they are permitted to testify are matters largely within the discretion of the district court. *Foster v. Guerra* (Civ. App.) 219 S. W. 295.

28. **Scope and extent of cross-examination in general.**—In trial for murder, prosecuting attorney's cross-examination of witness as to whether another witness for defendant was present at the homicide, including a threat to prosecute for perjury, held objectionable. *Steel v. State*, 83 Cr. R. 483, 200 S. W. 381.

Where defendant proved business relationship between it and the contractor, who it claimed was plaintiff's employer, plaintiff held entitled to develop the details of such relationship, especially on cross-examination. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

Admission of testimony on cross-examination, which is merely an amplification of testimony of same witness brought out by the other party on direct examination, is not error. *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010.

Where the state's witness identified a fluid which he claimed to have bought from defendant as whisky, stating that he tasted it after medicine had been put in it, and that it then tasted like whisky, it was permissible to show, on cross-examination, the kind of medicine put into the fluid. *West v. State*, 86 Cr. R. 296, 216 S. W. 186.

Where it was defendant's claim that deceased had harassed and pursued him for years, and a witness testified that he saw deceased watching defendant while in the place of business of the witness which was elevated and had a platform connected with it, deceased being on the ground, cross-examination as to the height of the platform in connection with the height of deceased was proper. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

In prosecution for theft of automobile, question to a witness on cross-examination whether he swore defendant stole the car, and answer that the witness believed defendant stole it, but would not swear to it, held improper, as not shedding light on the issues. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

On cross-examination of a witness for the state, who testified that he was 16 years of age, defendant had the right to show that the witness was not 16. *Charles v. State*, 87 Cr. R. 233, 223 S. W. 255.

In prosecution for theft of a car, in city of Waco, it was not improper cross-examination to ask witness to defendant's alibi if he knew "whether defendant had some one come to Waco and steal that car for him." *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

In a prosecution for murder, there was no error in permitting the state to ask a witness for the defense on cross-examination if it was not true that each member of the jury was not a larger man than deceased. *Taylor v. State* (Cr. App.) 229 S. W. 552.

29. **Limitation of cross-examination to subjects of direct examination.**—Where county attorney testified that he received pint bottle from prosecuting witness, that next morning defendant came in and told him that if he would open the bottle he would find it was not whisky, that when he looked he found it was broken, and liquid spilled smelled like cider, effort to prove on cross-examination that defendant told him he had emptied out whisky and put in cider before he sold it was not germane to direct examination, and objection was properly sustained. *Berry v. State*, 87 Cr. R. 210, 203 S. W. 901.

Upon a question of contributory negligence of a boy injured by purposely exploding a dynamite cap while playing on defendant's property, evidence on his cross-examination, as to what he knew and had been told in the matter of taking or meddling with others' property was relevant on the question of intelligence and discretion, particularly where plaintiff offered evidence of the boy's brightness and average record in school. *Farrand v. Houston & T. C. R. Co.* (Civ. App.) 205 S. W. 845.

In prosecution for pandering, defined by Pen. Code, art. 506a, where defendant's husband testified that he did most of the housework because his wife was sickly, held, that cross-examination of husband developing that defendant was not ill all the time was germane to the direct examination. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

In homicide prosecution, cross-examination of defendant's wife as to certain trouble between herself and the wife of deceased held admissible, in view of defendant's examination with reference to such trouble. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

Where a witness testified that, on an occasion when it was claimed deceased was looking for defendant, he appeared to be in a hurry and walking fast, cross-examination as to whether he was limping was not erroneous. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

The wife of accused cannot be cross-examined on new matter not relevant to matters brought out on direct examination, such as threats by accused, either for the purpose of impeachment or as original testimony. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

In action for damage to a cattle shipment where defendant required plaintiff's attorney to identify a letter submitting a smaller damage claim than the amount sued for, the witness may explain on cross-examination that he subsequently received additional information regarding the amount of damage. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

30. **Cross-examination as to irrelevant, collateral or immaterial matters.**—In prosecution for abortion, theory of state being that money obtained by victim was to pay defendant, while defendant sought to show money was obtained that victim and her lover might go to Nevada, cross-examination of victim as to whether it was not true she got money without her aunt's consent from bank to go off with her lover, etc., was proper. *Earnest v. State*, 83 Cr. R. 257, 202 S. W. 739.

31. **Cross-examination as to writings.**—On cross-examination of a witness for the state, who testified that he was 16 years of age according to information from his

mother court did not err in refusing to permit defendant to examine the witness in connection with a report of the school census made by the father of witness, showing his age as 14. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

32. **Cross-examination of witness to character of party.**—Where witnesses are examined very broadly as to defendant's reputation, cross-examination developing knowledge of witness as to defendant's reputation for peace when intoxicated was permissible. *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141.

Defendant may demand right to examine witness in regard to predicate for testimony as to defendant's general reputation for veracity, and should be permitted to examine to develop conclusion was reached from personal matters, not general reputation. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

Where accused's character as peaceable, law-abiding man was in issue in prosecution for murder, state's counsel, in cross-examining character witnesses, could inquire whether they had heard of accused's killing four men, outlaws, or Mexicans, or a negro train porter, for the purpose of testing witnesses' conclusions and information on which they were based. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

Where witness testified to defendant's reputation, it was permissible for state, upon cross-examination, to ask witness if he had not heard of certain specific matters affecting the reputation, but such examination should not have extended to particulars of specific instances. *Glascoc v. State*, 85 Cr. R. 234, 210 S. W. 956.

In prosecution for murder of one who had insulted defendant's wife, where state had met defendant's evidence as to deceased's bad reputation for chastity by controverting evidence that such reputation was good, defendant was entitled to cross-examine state's witnesses as to whether they had heard of prior trouble of deceased with another woman. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

In murder prosecution, where witness had testified for defendant on direct examination that defendant's reputation for peace and quiet was good, and was that of a law-abiding citizen, cross-examination as to whether witness knew that defendant had stayed in jail for specified period, and that nobody would pay his fine to take him out, held not error. *Brown v. State* (Cr. App.) 224 S. W. 1105.

In a prosecution for murder, where a witness had testified to defendant's good reputation, it was improper to ask him if he would have so testified if he had known that defendant had married a whore. *Bereal v. State* (Cr. App.) 225 S. W. 252.

Where witness testified to the general reputation and standing of accused as a law-abiding citizen in a prosecution for assault upon his wife with a knife, and was asked on cross-examination if he had ever heard that defendant had previously beaten his wife, and answered that he had heard it, the testimony as to what he had heard concerning defendant's having beaten his wife was admissible, as tending to impair the other testimony of the witness; the court limiting the matter to the question of impeachment and instructing the jury that it could not be considered for any other purpose. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

When a defendant puts his reputation in issue, his witnesses may be asked if they had not heard of specific instances of his misconduct which, if true, would affect such reputation, and the fact that such misconduct was against defendant's wife, child, mother, or other relative does not alter the rule. *Lasater v. State* (Cr. App.) 227 S. W. 949.

33. **Cross-examination of party.**—In action for personal injury, question to plaintiff on cross-examination as to whether he knew that on his same testimony in a companion case the jury had found that he was negligent, held properly excluded. *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

In action for assault and battery, it would not have been proper to admit testimony on plaintiff's cross-examination, with reference to difficulties he might have had with other persons in no manner connected with defendant, and at other times. *Hall v. Hayter* (Civ. App.) 209 S. W. 436.

In an action involving a contract whereby parties were to divide the profits arising from the purchase and sale of land, testimony of one of the parties, an intervener, on cross-examination, that he refused to produce his books or to permit the other party to the contract access to them after the suit was begun, held admissible on the issues made by plaintiff bank and the intervener. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

37. **Questions on cross-examination—Repetition of questions and questions calling for repetition of answers.**—In a prosecution for unlawfully selling intoxicating liquors, where one of defendant's witnesses on cross-examination admitted that he was charged with a similar offense, and named three persons whom he described as "pimps" whom he complained were unduly active in the prosecutions, it was improper to allow the state to impeach him on such collateral matter by proving that such men were of high character. *Johnson v. State*, 85 Cr. R. 479, 213 S. W. 667.

In a prosecution for assault with intent to murder an officer at 9:30 o'clock at night, court did not err in not permitting defendant to ask the assaulted officer on cross-examination whether 9:30 was not considered an early hour by the people of the city; defendant having shot the officer, when stopped and interrogated by him. *Walker v. State* (Cr. App.) 232 S. W. 509.

39. **Redirect examination.**—In prosecution for slander of a female, state may on redirect bring out circumstances of interest in the prosecutrix by the witness to avoid an unfavorable light into which the defendant has put the witness on cross-examination. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

Where defendant, without objection, permitted state to cross-examine witness testifying to defendant's reputation as to specific instances, he could not, on redirect, go further into such objectionable particulars. *Glascoc v. State*, 85 Cr. R. 234, 210 S. W. 956.

40. — **Explanation of testimony.**—In passenger's action for injuries, where he alleged loss of time and average earning capacity of \$3,000 per year, and defendant on cross-examination showed that he had accumulated no property, plaintiff's testimony that after his living expenses he had given every dollar to his family was admissible. *Texas & P. Ry. Co. v. Mercer* (Civ. App.) 195 S. W. 263.

In prosecution of husband for procuring his wife to enter house of prostitution, held, state went too far on redirect examination of wife in questioning as to her early life in explanation of testimony on cross-examination showing motives, etc. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

A witness put in bad light before the jury by the development of testimony on cross-examination, may, by a pertinent explanation on re-examination, remove the unfavorable impression. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

In prosecution for keeping disorderly house, defendant, after having cross-examined state's witness as to her objection to association of her child with defendant's child, could not complain that witness on redirect examination stated that her reason for objecting was her knowledge of defendant's bad reputation for chastity. *Id.*

In a prosecution for seduction, prosecutrix's testimony on re-examination that she consented because defendant promised to marry her, when she had stated on cross-examination that she had done so because she loved him, was clearly admissible. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

41. — **New matter on cross-examination.**—In a personal injury action, where defendant had cross-examined plaintiff as to her failure to tell physicians who had treated her subsequent to the injury about having received the injury, she was properly permitted to testify as to her reasons for not so doing. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

42. — **Repetition of testimony on direct or cross-examination.**—Where witness was never under the rule, had not been tampered with, did not understand English, and testified through an interpreter, there was no error in permitting him to be re-examined as to parts of his testimony, and have him explain and correct former statements. *Foster v. Guerra* (Civ. App.) 219 S. W. 295.

45. **Answer tending to disgrace witness or render him infamous.**—A witness may be compelled to answer a question as to whether he has been convicted of a felony, confined in jail or the penitentiary. *Lasater v. State* (Cr. App.) 227 S. W. 949.

48. **Caution to witness.**—Under Bill of Rights, Const. art. 1, § 10, providing that no man shall be compelled to give evidence against himself, when a witness makes known his objection in court, the trial court should either desist or further inquire into cause of his hesitation and inform him of his privilege. *Mathis v. State*, 84 Cr. R. 514, 209 S. W. 150.

II. CREDIBILITY OF WITNESSES

52. **Credibility of witnesses in general.**—The jury are the judges of the credibility of witnesses, but they have no right to arbitrarily reject the evidence of unimpeached and apparently disinterested and unbiased witnesses against whom there are no discrediting circumstances. *Hines v. Roan* (Civ. App.) 230 S. W. 1070; *Joffre v. Mynatt* (Civ. App.) 206 S. W. 951.

The trial court, having a right to pass on the credibility and interest of witnesses, was not compelled to accept as true their statements denying they had given attorneys any authority to enter into agreement for judgment. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

As a general rule self-contradiction by a witness does not destroy the evidence to which the jury has given credit, especially where there are facts explanatory of the contradiction. *Blackmon v. State*, 87 Cr. R. 173, 220 S. W. 93.

It is the province of the jury to pass on the credibility of witnesses, and they may disregard the testimony of a witness, unimpeached and uncontradicted, if they believe his testimony untrue from his manner of testimony, exhibiting prejudice, his interest in the result, or other indicia of unreliability. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

53. **Testimony of party.**—The unsupported testimony of an interested party may be disregarded by court or jury, especially where there are any circumstances tending to discredit it. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

While the jury are judges of credibility of witness, they cannot arbitrarily disregard evidence of unimpeached witnesses against whom there are no discrediting circumstances other than that one of them was a party interested. *Joffre v. Mynatt* (Civ. App.) 206 S. W. 951.

Court was warranted in discarding testimony of interested parties, where it contained inconsistencies, and where there were other facts in evidence justifying disbelief thereof. *Alsbury v. Linville* (Civ. App.) 214 S. W. 492.

Notwithstanding the rule that the credibility of a witness is a question for the jury, and the court cannot assume the truthfulness of the unsupported testimony of an interested person, a jury is not authorized to disregard the testimony of an interested party and render a judgment unsupported by even an indication from any source that the testimony of such person was not true. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

In an action to cancel an oil lease on the ground that the acknowledgment of the lessor's wife was not taken in the manner and form required by law, the jury might find against uncorroborated testimony of the lessor and his wife upon such issue, even though no affirmative evidence was offered by the defendant. *Fagan v. Texas Co.* (Civ. App.) 220 S. W. 346.

Purchaser's uncorroborated testimony that note was not a part of the purchase price, and that recitals in note and deed to the contrary were made wrongfully and without her consent by vendor, who was intrusted with the drafting of the deed, though not contradicted except by the recitals themselves, held not conclusive that note was not part of purchase price; the purchaser being an interested witness, and the jury being therefore warranted in rejecting her testimony. *Poulter v. Miller* (Com. App.) 221 S. W. 965, reversing judgment (Civ. App.) *Miller v. Poulter*, 189 S. W. 105.

In an action by a wife to cancel a deed executed by her and her husband, who was made a party defendant, the court and jury were not bound to acknowledge the testimony of the husband and wife, although uncontradicted. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

One making claim to attached property was a party to the suit and had an interest in the result, and his credibility was for the jury to pass on, and it was error for the court to tell the jury in effect to accept his testimony as true, even though there was no conflict. *Briggs v. Briggs* (Civ. App.) 227 S. W. 511.

54. Testimony of interested persons.—The testimony of vitally interested persons may be disregarded in toto. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

Court trying case was not obliged to accept defendant's testimony as true simply because he was not contradicted by some other witness. *Brannan v. First State Bank of Comanche* (Civ. App.) 211 S. W. 945.

The trial court in trying a case without a jury is not compelled to accept all the testimony of an interested witness as true, though not contradicted. *Hinds v. Allen* (Civ. App.) 213 S. W. 671.

The jury in determining the credibility of the testimony may consider the interest of the witnesses. *Poulter v. Miller* (Com. App.) 221 S. W. 965, reversing judgment (Civ. App.) *Miller v. Poulter*, 189 S. W. 105.

The trial court, in proceedings to probate a will, had a right to discredit any portion of the testimony of proponent, an interested witness, which he regarded as having been colored by her interest. *House v. House* (Civ. App.) 222 S. W. 322.

The jury, being the sole judges of the credibility of witnesses and the weight to be given their testimony, are not bound by the statements of interested witnesses, even though they may be undisputed. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

III. IMPEACHMENT AND CORROBORATION OF WITNESSES

55. Grounds of impeachment in general.—Where it was the state's theory that defendant was instrumental in inducing two negroes to kill deceased, evidence that a negro, who admitted that he killed deceased, and that another negro, whom he said was with him, were whipped by the sheriff before they implicated defendant, and that they implicated defendant after his name was suggested, is admissible. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

Where peanuts were shipped, and seller guaranteed weights and grades at destination, weights at destination according to purchaser's weights were subject by proper evidence to impeachment for error or mistake. *D. S. Cage & Co. v. Amsler* (Civ. App.) 217 S. W. 1094.

56. Corroboration of unimpeached and uncontradicted witness.—Where the issue was whether the depression in the servant's skull was due to a permanent injury and indicated a fracture and master's refusal of the offer to produce two men whose heads had similar depressions not due to injury to corroborate undenied testimony of his witness, was not error. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149.

In absence of evidence impeaching credibility of a witness, testimony of former declarations of the witness in support of his testimony is never admissible. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In a prosecution for unlawfully selling intoxicating liquors, where one of defendant's witnesses on cross-examination admitted that he was charged with a similar offense and named three persons whom he described as "pimps" whom he complained were unduly active in the prosecutions, it was improper to allow the state to impeach him on such collateral matter by proving that such men were of high character; it appearing that one of them gave important testimony tending to break down the theory of the defense, and no attack having been made on such men. *Johnson v. State*, 85 Cr. R. 479, 213 S. W. 667.

Where witness testified that he heard a party running through a field on the night of the murder, subsequent evidence showing there were tracks of a person running across the field and also describing tracks corresponding to those which would have been made by the witness claimed to have been in the field, was not subject to the objection that it was to bolster up the testimony of an unimpeached witness. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a prosecution for seduction, where prosecutrix had not been impeached as a witness, but had testified that she had told a third person that she (prosecutrix) was engaged to defendant, testimony of such third person that prosecutrix had so told her was not admissible to sustain prosecutrix's credit as a witness. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

Exclusion of defendant's testimony as to statements by a witness similar to his testimony before the state had offered any testimony to impeach the witness held proper. *Hoyt v. State* (Cr. App.) 228 S. W. 936.

58. Right to impeach one's own witness.—A party introducing a witness vouches for his integrity and veracity. *Hines v. Roan* (Civ. App.) 230 S. W. 1070; *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

Witness can be impeached by prior statements only where his testimony is actually prejudicial to case of party calling him. *Cannon v. State*, 83 Cr. R. 154, 202 S. W. 83.

A party cannot impeach his own witness. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

63. Impeachment of capacity of witness.—Evidence that prosecuting witness, upon whose testimony the state relied almost entirely for conviction, was an habitual user of cocaine, morphine, and opium, was admissible as a circumstance to be considered by jury in determining his memory and mental condition, without proof that witness was under influence of such drug at time of testifying. *Beland v. State*, 86 Cr. R. 285, 217 S. W. 147.

Mental capacity of a witness is a proper subject of consideration and impeachment, as bearing on his credibility. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

65. Cross-examination to test reliability of witness.—Counsel was not required to disclose to witness whom he was cross-examining, or to the adverse counsel in the presence of such witness, his purpose in asking the witness certain questions, asked for the alleged purpose of testing the truth of witness' testimony. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

66. Cross-examination to discredit witness or disparage testimony in general.—The state cannot, on cross-examination, by attempting to impeach a witness, get before the jury statements that are otherwise inadmissible. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

Defendant's question to plaintiff's witness on cross-examination, "Do you mean for the jury to believe that story?" was objectionable, and should not have been asked. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

67. Competency of impeaching evidence in general.—In action for commission by firm of realty brokers, held that, to impeach as witness member of firm which bought directly from defendant owners, member of plaintiff firm was properly permitted to state that buyers admitted that third broker, with whom plaintiffs acted, was first to offer them the land. *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347.

Insanity in the family of a witness is a proper subject of investigation, where it is sought to show that the witness is insane, or an idiot, to weaken the credibility or strength of his testimony. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

71. Character as ground of impeachment—Character and reputation in general.—In prosecution for perjury, defendant was entitled to ask and obtain from state's witness business in which he was engaged, or occupation he pursued, to affect his credibility by showing he was in employ of disorderly house. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

It is not permissible to impeach any witness for truth and veracity by showing that his or her reputation for chastity is not good. *Flewellen v. State*, 88 Cr. R. 568, 204 S. W. 657.

Testimony of a witness might have been discredited by proof of her general reputation as a prostitute, or by proof of complaints or prosecutions therefor. *Wood v. State*, 87 Cr. R. 187, 206 S. W. 349.

72. — Particular traits of character or habits.—In a prosecution for rape, it was error to exclude evidence of specific acts of immorality, and that prosecutrix was in the habit of bestowing her carnal favors indiscriminately, as affecting her credibility and as a mitigating fact affecting the penalty. *Calhoun v. State*, 85 Cr. R. 496, 214 S. W. 335.

In prosecution for procuring, the state's attorney could cross-examine the woman involved, who testified for defendant, as to whether she was in the habit of having intercourse with men. *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80.

In prosecution for rape, where sister of prosecutrix was a witness for defendant, examination by state of sister as to whether she was a common prostitute held proper. *Smith v. State*, 86 Cr. R. 455, 217 S. W. 154.

In murder prosecution court did not err in refusing to permit defendant to attack the credibility of witnesses by proving their bad reputation for chastity. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

75. — Particular acts or facts.—In a prosecution for murder, it was error, after asking a witness if he was not a deserter from the army and his reasons for such desertion, to inquire as to details, circumstances, and incidental matters. *Hays v. State*, 82 Cr. R. 427, 199 S. W. 621.

It was error for state to cross-examine accused's witness as to whether on a particular occasion the sheriff did not try to arrest him and he ran and the sheriff shot at him. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

Any witness may be impeached by showing he was drunk at time of events about which he testified. *Reed v. State*, 82 Cr. R. 657, 200 S. W. 843.

Plaintiff, who testified in his action for damages for loss of a trunk by an innkeeper, could be impeached only by proof of general bad reputation, and not by an affidavit made by him to the effect that he and his wife were unable to pay or give security for costs. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

Attempt to impeach a witness by proof on his cross-examination that he had burned a schoolhouse is contrary to the rule excluding for that purpose specific criminal acts. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

It was not permissible to impugn the character of a witness by testimony reflecting upon the character of the house he was keeping and his sister-in-law, who was living in his house and had given birth to three illegitimate children. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

In a prosecution for rape, it was error to exclude evidence of specific acts of immorality, and that prosecutrix was in the habit of bestowing her carnal favors indiscriminately, as affecting her credibility and as a mitigating fact affecting the penalty. *Calhoun v. State*, 85 Cr. R. 496, 214 S. W. 335.

A witness cannot be impeached by evidence of dishonesty in a particular transaction not connected with any issue in the case. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

While a witness in a criminal case may be impeached by showing that he has been indicted or convicted for an offense involving moral turpitude, yet the rule in civil cases excludes specific acts not affecting the competency of the witness, even though he has been indicted and convicted of an offense involving moral turpitude. *Burchard v. Woodward* (Civ. App.) 223 S. W. 707.

In a prosecution for murder testimony that deceased and state's witness engaged in carnal intercourse with various men held inadmissible to impeach such witness. *Crow v. State* (Cr. App.) 230 S. W. 148.

In view of the rule that a witness cannot be impeached by requiring him to testify to discreditable acts on his part immaterial to the issues, in suit to recover for fraud money paid for oil stock, defendant was improperly required to testify that, although in securing charter of the oil development company she made affidavit that certain land was worth \$50,000, later, after the issuance of the charter, she and her daughter conveyed to the company the same land for the recited consideration of \$10,000, and that such statement of the consideration was for the purpose of evading the internal revenue tax laws, requiring stamps on deeds based upon the amount of consideration. *Burchill v. Hermsmeyer* (Civ. App.) 230 S. W. 809.

In a prosecution for murder, an impeaching question asked of a state's witness, who was with deceased at the time of the killing, as to whether she had not filed a complaint against a boy for raping her, and he had been acquitted, held improper. *Barnes v. State* (Cr. App.) 232 S. W. 312.

In a prosecution for murder, a question asked of a state's witness as to whether or not she had gone to another town with a man and stayed there from Saturday to Monday held properly rejected, even if particular instances of misconduct were admissible as affecting her credibility. *Id.*

In a prosecution for manslaughter through killing of defendant's paramour, where defendant's female witness, to whose house defendant went after his quarrel with deceased on the night of the killing, testified that she lived with her three children, cross-examination of such witness by the state as to whether she had ever been married was proper, eliciting the reply that she never was married. *Mobley v. State* (Cr. App.) 232 S. W. 531.

76. — **Accusation or conviction of crime.**—Testimony impeaching witness that he had been convicted as incorrigible child held inadmissible. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

While it was permissible to impeach accused's witness by showing, if not too remote, prosecution for theft, it was error to permit the state to attempt to show, on cross-examination, that he had been shot when caught stealing. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

Testimony that state's witness had been convicted in 1887 of assault with intent to murder, and served three years in penitentiary, having been released in 1890 and subsequently pardoned, was inadmissible to impeach witness. *Ward v. State*, 81 Cr. R. 567, 196 S. W. 840.

Conviction of felony may be interposed either as disqualification of witness, where there is no pardon, or, in case of pardon, as matter of impeachment. *Id.*

Where accused had produced impeaching witnesses, district attorney could cross-examine them as to whether they were not then under indictment for illegal sale of liquor, or had not been convicted of such offense. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

Evidence in a murder case that a witness had been in jail or arrested for a matter not involving moral turpitude was not admissible in impeachment. *Parker v. State*, 83 Cr. R. 77, 201 S. W. 173.

It is always permissible to impeach witness by showing that he has been convicted, when not too remote, of any felony or any misdemeanor involving moral turpitude, but it is not permissible to thus impeach any witness by proving his prosecution or conviction of any other misdemeanor. *Johnson v. State*, 83 Cr. R. 49, 201 S. W. 177.

That a witness was arrested for drunkenness does not show moral turpitude, and is not admissible, except that drunkenness at the time of the homicide would be relevant as bearing on knowledge of the facts. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

Since under Pen. Code 1911, arts. 577-580, betting on horse races is a misdemeanor only, that witness was interested in operating race track partly supported by betting on horse races was not admissible to impeach him. *American Metal Co. v. San Roberto Mining Co.* (Civ. App.) 202 S. W. 360.

In the absence of any statute changing common-law rule for trial of civil cases, a conviction and imprisonment in a federal penitentiary for retailing liquor without pay-

ing the special tax would not render a person infamous, so as to render him incompetent as a witness, although Pen. Code 1911, art. 55, renders an offense so punishable a felony. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

Conviction of a crime not infamous under the common law is not admissible to impeach testimony. *Id.*

In a prosecution for unlawfully selling intoxicating liquor, where one of defendant's witnesses testified that she had once been arrested and fined, but did not know for what, the introduction in evidence of the judgment against her showing a conviction for being a common prostitute was admissible in impeachment; such offense imputing moral turpitude. *Le Gois v. State*, 83 Cr. R. 460, 204 S. W. 320.

In prosecution for pursuing business of selling intoxicating liquors in local option territory, where an alleged purchaser testified for state, refusal of his cross-examination to show his arrest for violations of prohibition laws and imprisonment held erroneous. *Amonett v. State*, 83 Cr. R. 587, 204 S. W. 438.

Evidence that a witness kept company with married men and that they kept her was inadmissible for purpose of impeachment; evidence that a witness has actually committed a given crime being inadmissible for such purpose. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

On cross-examination of defendant's witness, it was competent to prove that witness was under indictment for perjury as affecting his credibility. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

In a railroad employé's action for personal injuries, it was error to permit plaintiff's witness to be asked whether he had been prosecuted for stealing cotton. *Jones v. Texas Electric Ry.* (Civ. App.) 210 S. W. 749.

In a prosecution for burglary, where defense was alibi and state relied on testimony of an alleged accomplice, it was not proper to allow accomplice, who on cross-examination admitted he had been indicted for other offenses, all but one of which were committed on the night of the one involved, but denied that his father-in-law, whom defendant claimed participated in those offenses, was present, to testify on redirect that he was assisted in the commission of such offenses, and to go into the circumstances attending the other cases. *Payne v. State*, 85 Cr. R. 288, 212 S. W. 161.

Evidence as to how many times plaintiff had been arrested or convicted for gambling or running a gambling house was inadmissible as basis for impeaching him as a witness. *Jacobson v. Thomas* (Civ. App.) 220 S. W. 652.

In an action on a fraternal benefit certificate issued to plaintiff's wife liability whereon was denied on the ground of misrepresentations by insured as to her health, it was not error to refuse to require plaintiff to answer whether he had been indicted, where it appeared not only that the indictment had been dismissed but that it had been procured by fraud. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

A witness may be impeached by showing that he is under a charge of murder. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

A witness is not incompetent and so cannot be impeached, in a civil case, by reason of having been convicted of a crime, not an infamous crime under the common law, as defrauding a railway company in violation of the Interstate Commerce Act. *Talerico v. Garvin* (Civ. App.) 222 S. W. 313.

A witness cannot be impeached by showing that he had been indicted. *Id.*

For purposes of impeachment a witness will not be required to answer on cross-examination whether he had been indicted for felony and so the admission of such evidence is erroneous. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

A witness in a criminal case may be impeached by showing that he has been indicted or convicted for an offense involving moral turpitude. *Burchard v. Woodward* (Civ. App.) 223 S. W. 707.

Testimony showing conviction of a witness of a felony 25 years prior to the trial would be too remote, if offered to impeach or to affect the credibility of the witness. *Corzine v. State* (Cr. App.) 226 S. W. 686.

Proof that one has been convicted of felony is admissible when the character of such person has become a legitimate issue, and a witness may be asked if he has not been convicted of a felony, confined in jail or the penitentiary, and upon his denial such fact may be proved; but the practice is not limited to this method. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In a homicide case, court erred in permitting the state on cross-examination of defendant's witness to show that the witness had been arrested and put under bond for the offense of forgery, where subsequent to his arrest the grand jury had adjourned without indicting him, the presumption obtaining that the information or belief upon which the complaint was made was ill founded, where the grand jury fails to indict. *Shamblin v. State* (Cr. App.) 228 S. W. 241.

A witness may not be discredited by proof that he had been charged with misdemeanors which did not impute moral turpitude, such as drinking and exceeding the speed limit. *Id.*

In a prosecution for murder, it was permissible for the state to ask each of defendant's witnesses if he had not been indicted for perjury, or was not then under such indictment; the testimony being admissible as affecting generally the credibility of the witnesses. *James v. State* (Cr. App.) 228 S. W. 941.

In a prosecution for transporting and possessing intoxicating liquor in violation of the Dean Law, it was competent for the state to ask a woman who had the room next to the defendant and his wife, and who testified for defendant, she being a hostile witness, if she was not a common prostitute, though she had already stated she had a room in the hotel kept by defendant; consideration of such question being limited by the court

in its charge to the credibility of the witness. *Campbell v. State* (Cr. App.) 230 S. W. 695.

As the selling of intoxicating liquors is a felony, witnesses may be asked, for the purpose of affecting their credibility, whether they were not under indictment for selling intoxicating liquors. *Smith v. State* (Cr. App.) 232 S. W. 811.

77. — **Conduct of witness with reference to cause.**—In a murder prosecution, where defendant's mother testified that at the time of the homicide he was wearing boots, evidence that on a previous habeas corpus hearing she did not make any statement to the effect that defendant was wearing boots was admissible; she having testified that she knew at time of that trial that the state contended that the defendant wore shoes, and not boots, at the time of the killing, and that his shoes fitted into tracks found near the scene of the crime. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

78. — **Conduct of witness inconsistent with testimony.**—In a prosecution for theft of turkeys, evidence that a witness for the state made an effort to induce the owners to forego a prosecution and offered to pay them for the turkeys was admissible as tending to exculpate defendant, and to discredit the witness for the state, and to emphasize the suspicion cast by circumstances upon him. *Mandosa v. State* (Cr. App.) 225 S. W. 169.

79. — **Cross-examination for purpose of impeachment.**—In action for damages by accusation of shoplifting, where the defendant had made no attack upon plaintiff's good character, it was improper to ask plaintiff whether she had ever before been accused of any dishonest act. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

A witness cannot be impeached by allowing the opposite party to inquire whether he had not been charged with various criminal offenses, for that is not a proper mode of an impeachment even on cross-examination. *Young v. Blain* (Civ. App.) 231 S. W. 851.

In a prosecution for murder, where defendant's witness admitted he had been indicted for and acquitted of murder, and the state's counsel asked the ground of his defense, to which he replied "Self-defense," held not a material or pertinent question, but without injury to defendant; the witness' credibility only being involved. *Fowler v. State* (Cr. App.) 232 S. W. 515.

80. — **Laying foundation for impeaching evidence.**—It is error, in absence of evidence that local option is in force in certain county, to permit one accused of another offense to be asked whether he has not within two years been convicted of violating local option law in such county. *Lagow v. State*, 81 Cr. R. 460, 197 S. W. 217.

81. — **Competency of impeaching evidence in general.**—It was improper to allow a witness for plaintiff to testify that a witness for defendant in a personal injury suit told him that a doctor had said that his (defendant's) witness' testimony was worth \$1,500; such testimony having no tendency to impeach the witness, nor prove any fact pertinent to the issue. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

A witness cannot be impeached by evidence of dishonesty in a particular transaction not connected with any issue in the case, and impeaching evidence, a statement in a letter, not itself proving any wrongdoing on the part of the witness, the charge being made merely on report of others, was objectionable. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

84. — **Evidence of accusation or conviction of crime.**—Although a witness may be impeached by showing that he is under a charge of murder details of the murder are not admissible. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

In a prosecution for homicide, in the absence of proof of some character of a legal charge of theft against defendant's witness, or legal arrest or conviction for theft, evidence that he had "gotten mixed up with a pair of shoes," and that the officers came to his house and got a pair of shoes, was inadmissible. *Carlile v. State* (Cr. App.) 232 S. W. 822.

85. — **Rebuttal of evidence impeaching character.**—Where to discredit testimony of daughter of assaulted party, who testified for defendant, state showed that she got into defendant's buggy after assault, defendant was entitled to show that she drove off with him to obtain medical aid. *Yancy v. State*, 82 Cr. R. 276, 199 S. W. 470.

Where credibility of prosecuting witness was attacked, state's attorney, who employed him as a detective, and had made inquiries as to his general reputation, could testify that his general reputation in his community was good. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

Witness, having been discredited by proof of indictment for perjury, should have been allowed to explain he was not guilty. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

86. — **Evidence to sustain character of witness impeached.**—Where defendant declined to admit a state's witness was worthy of credit, but only would admit his good reputation for veracity, state was entitled to show by testimony that from his reputation the witness was worthy of credit. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

88. **Interest as ground of impeachment.**—Where a negro woman had given testimony tending to show animus of accused's witness towards deceased, her animus towards such witness was a proper subject of inquiry, and evidence that she had been arrested by him was admissible, although evidence of offense for which she was arrested was not relevant. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

In prosecution for rape, where sister of prosecutrix, who was a witness for defendant, had testified to being a common prostitute, evidence that defendant had had intercourse with the sister held inadmissible, as it would not affect her bias or interest as a witness. *Smith v. State*, 86 Cr. R. 455, 217 S. W. 154.

90. — **Interest in event of witness not party to record.**—Relative to credit to be given defendant's engineer, who testified that he did not see the signals to stop the engine, the jury could consider his interest, by reason of having caused the accident. *Texas & P. Ry. Co. v. Howard* (Civ. App.) 200 S. W. 1159.

Where witness testified that accused drove his automobile at an unlawful rate of speed, the court erred in not allowing accused on cross-examination to show that the witness was paid a sum of money in each case of conviction. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

Cross-examination of witness for defendant, to show that he tried to get two of the state's witnesses drunk and thereby discredit them, held proper. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

In prosecution for giving intoxicating liquor to minor girl, it was error to exclude evidence that witness, testifying as to giving of liquor, had reasons and motives for so testifying. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

In a murder trial, evidence was admissible for impeaching a defense witness that he had been indicted, tried, and acquitted for the same killing. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In forgery trial, accused had the right to cross-examine witness to develop the fact that the latter had an interest in the prosecution, in that he had offered to forego prosecution if accused would pay the alleged forged check, and that, failing in this, the witness desired to bring about accused's conviction to obtain possession of property which witness claimed had been delivered by him to accused in consideration of such check. *Morris v. State*, 85 Cr. R. 275, 211 S. W. 784.

In a suit for divorce based upon common-law marriage, where plaintiff's brother testified for defendant, it was proper on cross-examination to show his motives, inclinations, and prejudices and inquire as to his attempt to make plaintiff settle with defendant in a way that witness might receive benefit and of her refusal. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In a prosecution for murder, evidence that one of defendant's witnesses attempted to induce the wife of deceased to abandon the prosecution, etc., is admissible, but such evidence should be limited to the acts of the witness, and it is improper to allow evidence that such witness, in connection with relatives of the deceased who were not witnesses, attempted to influence witnesses to leave the state. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

91. — **Employment by or other contractual relation with party.**—Where witness had testified as to material facts in passenger's action for injuries, it was error to refuse testimony of such witness that plaintiff owed and had owed him over \$2,000 for eight years, since such evidence tended to show interest of witness. *Texas & P. Ry. Co. v. Mercer* (Civ. App.) 195 S. W. 263.

In a homicide case, where a member of a law firm employed by defendant to defend him, connection being subsequently terminated, testified as an eyewitness that defendant killed deceased, court did not err in refusing to receive evidence as to how much witness had received from accused under his contract to defend him, not being relevant. *Shamblin v. State* (Cr. App.) 228 S. W. 241.

In an action to cancel an oil and gas lease, court did not err in refusing to allow plaintiffs to prove by defendant witness the value per share of the stock in the defendant oil company, some of which was owned by the witness to affect his credibility, no attempt being made to show that the lease in question was of great value, and hence increased the temptation of witness to testify falsely, and it not appearing upon what leases the value of the stock was dependent. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

That a defense witness is a bondsman of defendant is admissible as affecting his interest or bias. *Mobley v. State* (Cr. App.) 232 S. W. 531.

92. — **Friendly or unfriendly relations with or feeling toward party.**—Testimony of animus of an adverse witness to either side, and extent and cause of it, is admissible. *Zarafonitis v. State*, 82 Cr. R. 120, 198 S. W. 938.

In prosecution for homicide, based upon defendant's negligent operation of an automobile, resulting in collision with buggy in which deceased was riding, it was proper, on cross-examination of deceased's husband, to elicit testimony showing that a suit brought by him for damages for wife's death was pending. *Hoffman v. State*, 85 Cr. R. 11, 209 S. W. 747.

In a prosecution for slander of a female, evidence as to the act of a witness, a brother of accused, in arming himself and going to where the father of prosecutrix lived, and as to what took place there, is admissible to show bias, interest, and motive of the witness. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

In a prosecution for a murder which followed a quarrel in which deceased accused defendant of being out with a certain woman on a certain date, in which the question whether defendant was out with such woman was sharply contested, defendant should have been allowed to ask a witness testifying thereto as to his friendship toward deceased and their relations and other questions which might throw light on the witness' motive for testifying. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In a prosecution for violation of the local option law, defendant should have been allowed to introduce evidence showing that a cousin of the state's witness was under indictment for the sale of intoxicating liquors, and that defendant was a witness against her; it being his theory that the state's witness was biased against him, and trying to obtain his conviction to prevent prosecution of his cousin. *West v. State*, 86 Cr. R. 296, 216 S. W. 186.

In a prosecution for the illegal sale of intoxicating liquors, the refusal to allow the prosecuting witness to be asked if he had not given the defendant bad checks in order to show witness' ill feeling toward defendant was not error, since such fact would not show ill feeling on the part of the person giving the checks, although it might tend to show ill will on the part of defendant, who had parted with his money. *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145.

In a prosecution for aggravated assault, court erred in refusing to permit accused to develop from prosecuting witness' cross-examination that she had sued him for damages on account of the incident, and that in the suit then pending she was seeking to recover a large sum of money, as tending to affect her credibility. *Vyoral v. State* (Cr. App.) 224 S. W. 889.

93. — **Cross-examination to show interest or bias.**—For purpose of showing animus of accused's brother-in-law towards prosecuting witness, held, that on his cross-examination state properly showed that he had been prosecuted by prosecuting witness and convicted of killing such witness' cousin. *Zarafonetis v. State*, 82 Cr. R. 120, 198 S. W. 938.

In prosecution of husband for pandering under Vernon's Ann. Pen. Code 1916, art. 506a, held, cross-examination of wife, who was principal state's witness, as to her past life, was proper for showing motives of wife and other state's witness who had been paying her attention. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

A witness may be cross-examined to develop any facts showing his bias or interest or motive. *Morris v. State*, 85 Cr. R. 275, 211 S. W. 784.

94. — **Laying foundation for impeaching evidence as to interest or bias.**—In perjury prosecution, evidence impeaching state's witness by showing immunity agreement was inadmissible where no predicate had been laid by inquiry of such witness as to such agreement. *Timmins v. State*, 82 Cr. R. 263, 199 S. W. 1106.

95. — **Competency of impeaching evidence as to interest or bias.**—To show bias and animus of defendant's brother, the only eyewitness, other than himself, who testified for him, testimony that the brother told witness that he and defendant had it fixed to kill deceased, and if defendant did not he would, was admissible. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

There was no error in excluding letters written by a witness for the state in a murder case to the wife of deceased, indicating a wish to become intimate with her, offered to show animus, where no reference to deceased appeared, and evidence otherwise showed friendly relations. *Batts v. State*, 87 Cr. R. 254, 220 S. W. 1094.

Where it was admitted that a witness for the state was employed by the county attorney to work up bootlegging cases, but it did not appear that he was employed on a contingent basis, or that he had not been paid for his services in connection with defendant's apprehension, evidence of the amount of his compensation was properly excluded. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

96. — **Rebuttal of evidence of interest or bias.**—In a prosecution for manslaughter through killing of defendant's paramour, on cross-examination of defendant's witness, who had given evidence in chief as to his good character, the state properly elicited the fact that he was on defendant's bond, and that he had been secured before making such bond; the evidence being favorable to defendant, as minimizing the act of the witness in making the bond purely as a matter of interest or friendship to defendant. *Mobley v. State* (Cr. App.) 232 S. W. 531.

98. **Inconsistency of statements as ground of impeachment.**—In personal injury action, where physician had testified to the cause of injury, he could be asked concerning any statements made upon other occasions which were inconsistent with his statements on the witness stand. *Corpus Christi Ry. & Light Co. v. Baxter* (Civ. App.) 217 S. W. 187.

99. — **Nature of former statement in general.**—Statements inconsistent to witnesses' testimony at the trial and showing motive for his testimony are admissible for purpose of impeachment. *St. Louis Southwestern Ry. Co. of Texas v. Felts* (Civ. App.) 195 S. W. 1173.

Where widow and minor children attacked her conveyance of community property during lifetime of husband on ground that she had not been abandoned and was not in needy circumstances when conveyance was made, testimony that she stated to others than grantee that she had been abandoned and was in need is admissible on question of her credibility. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

On cross-examination for purpose of laying predicate for impeachment, held, it was proper to inquire as to conversation of accused with prosecuting witness as to a former killing, and where accused denied same to have him contradicted by prosecuting witness. *Zarafonetis v. State*, 82 Cr. R. 120, 198 S. W. 938.

Where plaintiff testifying as to the value of his grass lands before the grass was burned, fixed the value at a sum considerably higher than the amount at which he rendered the land for taxes, defendant is, on cross-examination, entitled to bring that matter out. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 201 S. W. 1049.

In a prosecution for statutory rape, census reports showing the girl's age were admissible as contradictory statements of the state's witnesses. *Mireles v. State*, 83 Cr. R. 608, 204 S. W. 861.

In a purchaser's action against the seller of land for removing fixtures, evidence that the seller's agent, after the contract and deed had been executed, stated that the fixtures did not belong to the land, etc., could not affect the deed and contract and was not admissible as impeaching the agent's testimony that there was no reservation by the owner when the land was listed. *Alexander v. Anderson* (Civ. App.) 207 S. W. 205.

In a murder trial evidence of one witness as to what another witness told him after the killing was admissible, if sufficient predicate was laid, for the purpose of impeachment. *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201.

100. — **Former statement a mere opinion or conclusion.**—It was error to permit a witness in impeachment of another material witness to testify that such witness had told him that he knew that defendant was going to kill deceased. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

101. — **Written statements or instruments.**—Written statement by prosecuting witness in conflict with his testimony on trial should have been admitted. *Wrenn v. State*, 82 Cr. R. 608, 200 S. W. 397.

In prosecution for bigamy involving issue of whether defendant was in fact married to alleged first wife, where defendant had in his testimony questioned his parentage of child born to alleged first wife during her cohabitation with defendant, admission of defendant's letter to such child, calling her his little girl, expressing a desire to be present on her birthday, and regretting his inability to spend that day with the mother and daughter, held admissible. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

In an action against a railroad company for the value of a cow killed by a train, it was error not to admit plaintiff's written statement prior to the institution of the suit as to the value of the cow, which he placed at \$150, where he testified in the suit that the cow was worth \$200 or more, and obtained judgment for \$199. *Hines v. McDonald* (Civ. App.) 230 S. W. 1030.

102. — **Former testimony of witness.**—In a prosecution for cattle theft, the defendant should be allowed to show by another witness that the state's witness, an accomplice, testified at an examining trial, concerning a different cow, to a list of "all" of the thefts made by defendant, and omitted the matter as to the cow in question. *Bryant v. State*, 82 Cr. R. 250, 199 S. W. 467.

Where witness who had been near the scene of alleged assault to rape had given testimony favorable to defendant, it was proper on his cross-examination to ask questions as to condition of prosecutrix and defendant shortly after the occurrence, and, where he denied knowledge thereof, to ask him, as a predicate for impeachment, if he did not so testify before the grand jury, etc., and to show him the written statement. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

A witness may be asked what he testified to before the grand jury, for the purpose of impeachment. *Biscoe v. State*, 86 Cr. R. 249, 216 S. W. 174.

A witness may be asked as affecting his credibility whether at other times and places, in narrating the occurrences testified about, he gave testimony different from that now given, even though such other statements were made before the grand jury. *Lowe v. State* (Cr. App.) 226 S. W. 674.

103. — **Time of making statements and circumstances connected therewith.**—In action for injury to automobile in automobile collision, testimony as to statements made by driver of defendant's automobile made shortly after the collision was not res gestæ nor admissible as original evidence, but, in so far as it tended to contradict the testimony of such driver, was admissible for the purpose of impeachment. *Main Street Garage v. Eganhouse Optical Co.* (Civ. App.) 223 S. W. 316.

105. — **Witnesses who may be impeached by inconsistent statements.**—The state had no right to elicit from its own witness testimony which it knows in advance will be contrary to statements made by her in an affidavit, as a foundation for introducing affidavit itself, containing incriminating statements, for purpose of impeachment. *Briscoe v. State*, 81 Cr. R. 419, 196 S. W. 183.

The state cannot impeach its own witness by proving inconsistent statements, where such witness simply fails to remember, or refuses to state facts, or fails to make out state's case. *Id.*

In prosecution for adultery, where the paramour testified that she had had no sexual intercourse with defendant, it was improper to admit evidence that she had been promised immunity if she would testify, and that she had signed a written statement admitting the intercourse. *Messenger v. State*, 81 Cr. R. 465, 198 S. W. 330.

Where accused's mother, not having referred to the matter on direct examination, denied, on cross-examination by the state, that she had made statements to another, in absence of accused, as to what accused had told her, it was not permissible to impeach her by testimony of the other person that such statements were made. *Mitchell v. State*, 84 Cr. R. 36, 204 S. W. 767.

Evidence of a contradictory statement by a deceased witness should have been allowed to impeach her testimony admitted on a second trial as against objection of no predicate and that former testimony of the impeaching witness contained no such impeachment. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

106. — **Irrelevant, collateral or immaterial matters.**—Collateral matter cannot be used as a basis for impeachment of a witness. *St. Louis Southwestern Ry. Co. of Texas v. Felts* (Civ. App.) 195 S. W. 1173.

Where burglary was committed at L.'s place, and accomplice testified he and defendant went from there to C.'s place, sworn statement by state's witness that he went that night with defendant and accomplice to C.'s place was immaterial, and was inadmissible in behalf of state for impeaching testimony of such witness that he went to dance with defendant that night at P.'s place. *Payne v. State*, 83 Cr. R. 287, 202 S. W. 958.

In broker's action for commission for sale of land, where pleadings raised an issue as to the terms and conditions of the sale, cross-examination of principal as to the terms of the sale was not objectionable as tending to impeach witness on a collateral matter. *Britain v. Rice* (Civ. App.) 204 S. W. 254.

It was not permissible for the state to impeach M., witness for defendant on prosecution for a killing at a dance, by asking him if he did not hear J. tell S., who had testified that S., another witness for defendant, did not seem to be drunk, that he was too drunk, and if he did not behave himself he would lock him up, a collateral matter, and then allowing J. to testify that at the dance he told S. he would lock him up if he didn't behave himself. *Newman v. State*, 85 Cr. R. 556, 213 S. W. 651.

The offer of defendant to prove that one witness had told another witness that defendant's brother, who was under arrest, was not present at the time of the homicide, was properly rejected under the rule against impeachment of a witness upon a collateral issue. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a murder trial, a conversation between the sheriff when making the arrest and defendant's brother, in the presence of defendant, in which the brother asked if there was any one there who would hurt defendant, was admissible to impeach the witness, who denied asking such question; such testimony not being collateral. (*Per Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

A witness cannot be impeached by proof of immaterial statements which he denied making. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

Where defendant's witness on cross-examination denied that he had made a statement that defendant would get the deceased and wouldn't miss him, the state could not impeach such witness on such denial, as the statement referred to was a mere opinion of the witness and immaterial. *Theriot v. State* (Cr. App.) 231 S. W. 777.

See *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

108. — **Cross-examination as to inconsistent statements.**—Where plaintiff has testified to facts apparently contradictory to a statement made by him out of court, defendant has the right to fully cross-examine plaintiff as to such inconsistency. *Wichita Falls Motor Co. v. Meade* (Civ. App.) 203 S. W. 71.

In a prosecution for bigamy, where defendant on cross-examination asked the prosecuting witness if she had not signed a certain paper, and she admitted it, defendant cannot at that time impeach the witness by offering the paper in evidence, but must do so on putting in its own case, and the sustaining of an objection to the introduction of evidence with notice that it might be offered later was not error. *Burgess v. State* (Cr. App.) 225 S. W. 182.

109. — **Laying foundation for proof of inconsistent statements.**—A witness cannot be impeached by showing inconsistent statements unless the proper predicate is laid. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222; *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154; *Texas Co. v. Wimberly* (Civ. App.) 213 S. W. 286.

In action for breach of contract to ship good pickings, court properly refused to permit defendant to cross-examine plaintiffs' agent as to difference between statement as to condition of goods by witness and statement in letter to defendant from plaintiffs, where it is not shown that witness had anything to do with statement in plaintiffs' letter. *Robinson v. S. Samuels & Co.* (Civ. App.) 196 S. W. 893.

Where burglary was committed Friday night at L.'s place, and accomplice testified they went from there to C.'s place, sworn statement of state's witness that he went with defendant and accomplice to C.'s place Friday night could not be used to impeach such witness on ground of surprise, where burglary and particular night were not called particularly to attention of witness while making statement. *Payne v. State*, 83 Cr. R. 287, 202 S. W. 958.

In a personal injury action where it was claimed plaintiff's mental powers had been impaired, and defendant's witness testified that plaintiff before the injury stated that he was at times demented, it was not error to exclude further testimony of the witness that such statement was made when plaintiff was being threatened with a criminal prosecution; such fact not being necessary as a predicate to impeachment of plaintiff. *Panhandle & S. F. Ry. Co. v. Kornegay* (Civ. App.) 206 S. W. 708.

Where the proper predicate had not been laid to impeach the witness, the transcript of his evidence on the former trial was not admissible. *Southern Pac. Co. v. Henderson* (Civ. App.) 208 S. W. 561.

In personal injury action evidence of declarations of physician to plaintiff as to cause of injury was inadmissible in absence of a predicate being laid for inconsistent testimony. *Corpus Christi Ry. & Light Co. v. Baxter* (Civ. App.) 217 S. W. 187.

In a murder trial, where it appeared that defendant's shoes fitted tracks made at the scene of the homicide, and defendant swore that he wore boots on that day, it was not improper to ask defendant's mother whether when testifying on a previous habeas corpus trial, she knew that the state contended that defendant wore shoes, and not boots, on the day of the homicide; such interrogation being proper as a predicate leading to the question as to what she testified to at such hearing as to whether defendant wore boots or shoes, or whether she was asked such question. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

The mere fact that a witness, testifying for the state in telling about the killing soon after it occurred had not claimed that he had seen two persons at the time of the shooting did not render competent evidence of his statement of the occurrence, the defendant claiming that witness had only seen one person, and had not seen defendant, the mere fact that witness had not included defendant in statement being no

ground for impeachment; no predicate having been laid or any question asked the witness as to the statement. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

In suit for commission on sale of cattle, testimony of a witness that he and a buyer both intended to attend a cattle buyers' convention, but he could not, and told the buyer to go down there and if he found any cattle he thought worth the money to go ahead and buy them, etc., was not inadmissible on any theory that no predicate had been laid for impeachment; such testimony not being introduced for such purpose, and not tending to impeach the testimony of any one. *Lumsden v. Jones* (Civ. App.) 227 S. W. 358.

110. — **Admission or denial by witness of making of inconsistent statements.**—If a witness admits making contradictory statements, they cannot be proved by others. *Black v. State*, 82 Cr. R. 358, 198 S. W. 959.

That a witness disclaims recollection of his former testimony before the grand jury in a homicide case is a sufficient predicate for his impeachment. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

Witness' statement before the grand jury is admissible, he having made only a qualified admission of having made it. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

If a witness unequivocally admits making statements, proof as to the making of such statements is inadmissible for impeachment purposes; but if the matter is not clear, or is partially admitted or denied, such impeaching testimony is admissible. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

Defendant's witness having on cross-examination denied making a statement at a certain time and place, plaintiff's testimony that he heard him make it was admissible for purpose of impeachment. *Atchison, T. & S. F. Ry Co. v. Francis* (Civ. App.) 227 S. W. 342.

The objection of defendant to the admission of two applications for continuances which contradicted his testimony at the trial, that they were inadmissible because he had admitted signing them, cannot be well taken where his admissions were qualified. *Brooks v. State* (Cr. App.) 227 S. W. 673.

111. — **Competency of evidence of inconsistent statements in general.**—Accused's witness could not be impeached by written confession, purporting on its face to be made to the chief of police, but which was not in fact made to the chief, he not being present at the time, and his name appearing as part of the confession because the instrument was one of confessions in blank, printed by police department by the wholesale. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

112. — **Proof of oral statements and examination of impeaching witnesses.**—A witness testifying in impeachment of another may be asked the precise question put to the witness sought to be impeached in laying a foundation, and the question is not objectionable because leading. *Daniels v. State*, 82 Cr. R. 17, 193 S. W. 147.

115. — **Rebuttal of evidence of inconsistent statements.**—In a trial for murder, where during testimony of widow of deceased several predicates were laid for her impeachment, and she was impeached thereon, it was error to permit her to be again placed upon the stand by the state, and to allow her to then reiterate her former testimony, as after impeachment on proper predicate the matter should rest. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

When a witness in a criminal case is attacked by proof of a part of a conversation contradicting his testimony, the other side has the right to prove all that he said at the time relative to the same subject. *Cotton v. State*, 86 Cr. R. 337, 217 S. W. 158.

116. — **Evidence as to statements consistent with testimony.**—Unless witness was impeached, his corroborating statement that his testimony before grand jury was the same as that given at trial was inadmissible. *Baldwin v. State*, 82 Cr. R. 243, 199 S. W. 468.

Statement of witness, on redirect examination as to whether his testimony differed from that given before grand jury, that his testimony was practically that given before grand jury, though very general, was not error. *Waites v. State*, 82 Cr. R. 501, 200 S. W. 380.

That testimony of plaintiff's witness as to defendant's defamatory statements was impeached by cross-examination as to inconsistent testimony given in former deposition did not justify admission of testimony by plaintiff and other witnesses that witness had told them that defendant had made such statements. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In a murder trial, where the evidence was circumstantial and deceased's mother testified she saw deceased, her daughter, go off with appellant on the night of her disappearance, and on cross-examination defendant had her testify that on the night after deceased's body was found she told the district attorney she could not swear it was defendant who took her daughter off, but the man looked like him, it was not error to permit the sheriff to testify that on the night before that she told him it was defendant. (Per Prendergast, J.) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

Where sister of prosecutrix had testified to having seen her father in bed with and on top of prosecutrix, and defendant, on cross-examination, endeavored to make sister admit that she had told other parties that she had not so seen him and prosecutrix, and had introduced witnesses who testified that sister had stated that she had not so seen them, it was proper for state to corroborate testimony of sister by evidence that sister had made statements to others similar to the testimony given by her. *Armstrong v. State*, 86 Cr. R. 444, 216 S. W. 1098.

In a murder trial, where there was an attempt to impeach witness by showing contradictory statements, consistent statements were admissible, whether made before or

after the making of the impeaching statement. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a murder trial, where certain witnesses for the state detailed a conversation between defendant and his brother and between such brother and defendant's uncle, and upon cross-examination denied that they had made contradictory statements whereupon defendant introduced evidence to support them by showing that their testimony on examining trial was different from that then given, evidence by the state supporting such witnesses by statements made by them before the examining trial and consistent with the testimony given on trial of case held admissible. *Id.*

In a prosecution for assault to murder where it appeared that the person assaulted had stated to the surgeon that he did not know who fired the shot that struck him, proof that he had made subsequent statements that defendant shot him held admissible in corroboration. *Henry v. State*, 87 Cr. R. 392, 221 S. W. 1083.

Statements of donor of land made to third persons in the absence of the donee after an alleged gift had been made were admissible in support of the gift as against an attacking creditor, where at the time that they were made donor had no possible motive to fabricate, not only as declaration against interest, but to corroborate his testimony, where creditors introduced written statements by donor in which he claimed the property in controversy as his own and which tended to impeach his testimony on the trial in behalf of the donee. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

117. — **Explanation of inconsistency.**—In personal injury action in which portion of written statement of employé made out of court was introduced to show statements inconsistent with his testimony at trial, remaining portion of statement relating to matters immaterial on issue of inconsistency was properly excluded. *Wichita Falls Motor Co. v. Meade* (Civ. App.) 203 S. W. 71.

Plaintiff, after having offered in evidence both first and second deposition of same witness, could not explain the conflict between testimony contained in first with that contained in second by evidence as to prior unsworn statements of the witness. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In an architect's action against a corporation where neither of the letters introduced in evidence referred to any agreement that the architect should receive no compensation if the plans and specifications were not used, it was reversible error, after defendant's general local manager had been cross-examined thereon, to impeach his testimony to such agreement to refuse upon re-examination by defendant to allow witness to explain why he made no mention of it in his letters. *Emerson-Brantingham Implement Co. v. Roquemore* (Civ. App.) 214 S. W. 679.

Where defendant's counsel cross-examined a witness as to a contradictory statement, the state properly permitted the witness to explain the contradiction, for the purpose of restoring his credibility. *Williams v. State* (Cr. App.) 225 S. W. 177.

In a prosecution for murder, where a witness for the defense gave evidence of statements by decedent's wife when he (the witness) arrived at the scene, which was contradictory of her testimony, as ascertaining the circumstances, as well as the mental condition of the wife when such statements were made, it was proper to permit the state to ask the witness on cross-examination questions seeking to bring out that the wife was greatly agitated and wept constantly. *Taylor v. State* (Cr. App.) 229 S. W. 552.

118. — **Effect of impeachment by inconsistent statements.**—In a prosecution for rape of defendant's 15 year old stepdaughter, where she emphatically denied intercourse, evidence that she had admitted it to the county attorney introduced to impeach her is of no value to support a conviction. *Doherty v. State*, 84 Cr. R. 552, 208 S. W. 932.

The fact that a witness testified differently in another case did not affect the competency of his testimony, the former testimony being only matter for the consideration of the jury as to the effect to be given his testimony before them. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

In servant's action for injury, it was within province of jury to disregard statements signed by plaintiff before trial and impeaching his testimony, and to credit his testimony on trial. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

122. **Contradiction of testimony of witness—Disproving facts testified to by witness.**—In a prosecution for murder, where witness testified to seeing accused with a pistol in her hand behind her just before she crossed the street and shot deceased, others could testify that, from witness' position, he could not have seen the pistol. *Williams v. State*, 83 Cr. R. 26, 201 S. W. 188.

In a prosecution for murder of mother-in-law, which took place at deceased's residence when defendant went there to get his wife, who had left him, testimony that a third person living in the same house with deceased had accepted an apology from defendant concerning an alleged insult to his wife was admissible for the purpose of impeaching defendant's brother, who swore that such third person refused to accept an apology, and as a circumstance to prove that defendant's brother did not tell defendant that such third person refused to accept apology, defendant testifying that he was carrying the pistol with which he killed deceased because the third person was angry at him. *Smith v. State* (Cr. App.) 232 S. W. 497.

123. — **Testimony subject to contradiction in general.**—In prosecution of husband under Vernon's Ann. Pen. Code 1916, art. 506a, for procuring his wife to enter house of prostitution, wife having testified that relations with another man were brought about by brute force, held, it was proper to contradict her for impeachment, to show motive, and corroborate defendant. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

Where the state cross-questioned defendant's witness as to whether he did not make certain statements in the absence of defendant, and the witness denied making the

statements, the state was bound by his answer. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

In prosecution for homicide it was not error to question defendant as to his prior wanton cutting of buggy tires of the deceased, and on his denial thereof to bring witnesses to testify thereto. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

Where defendant testified that, in making footprints which were used for comparison, he did not make them with his bare foot, but that he had on his sock, proof in contradiction thereof was proper. *Moore v. State* (Cr. App.) 226 S. W. 415.

Where one side presents an issue and evidence in support thereof, the other side may deny, contradict, or explain such evidence, so as to show its falsity or break its force and effect; and this rule applies to the contradiction of character evidence. *Lasater v. State* (Cr. App.) 227 S. W. 949.

124. — Irrelevant, collateral or immaterial matters.—Where plaintiff, in his action for damages for injuries sustained when defendant's motorcar collided with his motorcycle, testified on cross-examination that he had never at any other time collided with an automobile while riding his motorcycle, defendant cannot contradict plaintiff by proof of another collision, for evidence of other negligent acts would be inadmissible, and the matter was collateral. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

In suit on note for labor and materials, wherein a defendant brought cross-action against defendant owner, court erred in permitting cross-complainant to ask defendant owner whether, in prior lien suits, he had interposed plea of homestead like that in present case, etc., and then, on receiving negative answers, to introduce answer in previous case filed by defendant owner, wherein he interposed similar plea of homestead, as a witness cannot be impeached by showing he swore falsely to an immaterial matter. *Reese v. Hamlett* (Civ. App.) 223 S. W. 346.

In a prosecution for statutory rape, where prosecutrix testified that defendant advised her to "go with some other boy and lay" the crime on him, and defendant's witness testified that he had related prosecutrix's accusation against another to the latter's mother, the court did not err in admitting the mother's testimony contradicting and thus impeaching defendant's witness. *Cook v. State* (Cr. App.) 228 S. W. 213.

Where issue was whether notary complied with statutes in taking acknowledgment of a married woman, the fact that on one or more other occasions he failed to properly take the acknowledgments of other married women was immaterial, and, being immaterial, he could not be contradicted in respect thereto, and court did not err in not permitting plaintiffs to lay predicate of impeachment by proving that notary did not properly take acknowledgments of other women. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

125. — Competency of contradictory evidence.—In action for breach of contract to ship good pickings examined by plaintiffs' agent in defendant's warehouse, court did not err in excluding testimony which would have contradicted testimony of plaintiffs' agent as to number and condition of bales of pickings, where it consisted of hearsay statements, irrelevant and immaterial, and not made in presence of plaintiffs. *Robinson v. S. Samuels & Co.* (Civ. App.) 196 S. W. 893.

Exclusion of evidence, in personal injury action, that plaintiff was conveyed from a house of ill fame shortly before the accident, was proper, as it would not tend to contradict her testimony that she had been receiving \$15 a week for piano playing in a theater. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

A witness cannot be impeached by proof of a conversation between two other persons at which neither he nor defendant for whom he testified were present, even though one of them made statements in such conversation which would tend to show that the testimony given by such witness was not true. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In an application for a temporary mandatory injunction to require delivery of possession of premises, where defendant claimed an option for the renewal of an oral lease for the term of one year, an affidavit, by a juror in a former action of forcible entry and detainer, brought before the expiration of the oral lease that defendant in that action made no claim of an option to renew, is admissible both to show the nonexistence of the option, and to contradict defendant's testimony at the hearing that she testified to such option at the forcible entry and detainer trial. *Hill v. Brown* (Civ. App.) 225 S. W. 780.

127. Corroboration of impeached or contradicted witness.—If witness is impeached by proof of drunkenness at time of events testified to, he can be supported just as any impeached witness can be. *Reed v. State*, 82 Cr. R. 657, 200 S. W. 843.

In prosecution for murder, where witness testified to having seen accused with a pistol in her hand behind her just before she crossed the street and shot deceased, others could testify that, from witness' position he could not have seen the pistol, and others could say that, witness having pointed out the positions, he could have seen what he testified to. *Williams v. State*, 83 Cr. R. 26, 201 S. W. 138.

Where defendant, while the state's witness was on the stand, laid a direct predicate for impeachment by proof of contradictory statements, and supported the attack by testimony of defendant's wife as to contradictory statements, the witness may be sustained by proof of his good reputation for truth and veracity. *Russell v. State* (Cr. App.) 228 S. W. 948.

128. — Testimony subject to corroboration.—Where defendant relied on alibi and offered evidence that he was at a particular point at such time that he could not have been at the place of the killing when it occurred, and the state offered testimony

to the effect that sufficient time had elapsed for defendant to have ridden from the place of the killing to the point where he was seen, contradictory evidence is admissible. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

129. — **Competency of corroborative evidence in general.**—In suit for breach of marriage contract, where a witness testified that he had received compromising letters from plaintiff, it was not error to exclude his testimony that he had exhibited such letters to an attorney. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

W. cannot be corroborated as to what occurred at or before homicide as who made certain tracks by testimony of T. that W. after the homicide, and in defendant's absence, told him such things. *Huey v. State*, 81 Cr. R. 554, 197 S. W. 202.

Where accused, cross-examining prosecuting witness, asked why he had not produced whisky he testified he had bought from accused, and witness answered that he had turned it over to another person, such person could testify that the witness did deliver him whisky on day alleged. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

Corroborating evidence is not required to be direct and positive; it may consist of facts and circumstances which tend to show that the direct evidence sought to be corroborated is worthy of credit. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

The state could not support a witness, who had been impeached by proof that his general reputation was bad, by showing that he had made at other times statements consistent with his testimony upon the trial. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

In a prosecution for robbery, testimony of a witness as to a conversation between himself and the person robbed, in defendant's absence to the effect that the person robbed recognized defendant as one of the guilty parties, held hearsay and inadmissible to support the testimony of the person robbed. *Buddy v. State* (Cr. App.) 227 S. W. 323.

In a prosecution for robbery, where it appeared that defendant, with others, went to a car containing Mexicans and assaulted some of them, and then went to another car, where the robbery was committed, evidence as to the time when the injured Mexicans arrived in town held material, as corroborating their testimony as to the assault. *Searcy v. State* (Cr. App.) 232 S. W. 799.

130. — **Former statements corresponding with testimony.**—Where testimony of witness for state was attacked by laying predicate to contradict her and to show denial on her part of any knowledge of crime, state was authorized to sustain her by showing statements by her corroborative of her testimony. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

That defendant's agent denied making alleged defamatory statements to plaintiff's witness, who had testified thereto, did not render admissible testimony by plaintiff and other witnesses that witness had told them that the agent had made such statements. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

Where effort is made to impeach witness by evidence of declarations inconsistent with his testimony tending to prove testimony a fabrication by reason of some influence existing at time of trial, evidence of declarations of witness corroborative of testimony made at a time when no such influence existed is admissible. *Id.*

In a prosecution for larceny, where the person who purchased the stolen groceries from defendant after discovery of the fact swore to a statement of facts before an officer, after defendant's attempt to discredit him as a witness by showing that his testimony on trial was pursuant to his agreement to testify for the state after dismissal of the case against him, it was permissible for the state to show that his testimony on trial corresponded with the sworn statement he had made to the officer. *Marable v. State*, 87 Cr. R. 28, 219 S. W. 455.

When a witness is discredited by proof of bad general reputation or the commission of other crimes, or when on cross-examination he contradicts himself, or tells his story badly, or develops a poor memory, he may not be sustained by showing of corresponding prior statements regarding the occurrence. *Id.*

When a witness is attacked by testimony, either his own admission or the word of others, which shows that on former occasions his narration was variant from that given on trial, he may be supported by proof of former statements similar to his present testimony. *Id.*

Where plaintiff in his rebuttal testimony acknowledged that he was mistaken in certain testimony given in chief, and that defendant's witnesses were correct in that respect, the original petition, since abandoned, may be introduced by plaintiff to show that he therein stated the facts in accordance with his testimony as corrected on rebuttal. *Hines v. Bost* (Civ. App.) 224 S. W. 698.

Where the secretary of an insurance company testified at the trial that when he wrote a letter he had no knowledge of the illness or death of insured, a collection slip returned to the company containing that information after the letter was written is admissible to corroborate his testimony. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

RULE 5. EVIDENCE MUST RELATE TO FACTS IN ISSUE AND TO RELEVANT FACTS

1. **Relevancy and importance in general.**—In county's action against tax collector for taxes collected and unlawfully retained, receipts for taxes given owners of property which he reported as delinquent were admissible in evidence, but it was not error to exclude testimony that the tax collector was solvent and able to pay his debts while in office, nor to exclude entire tax rolls, which included much immaterial matter. *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

In action to cancel oil leases for forfeiture by abandonment, injunction which in no way interfered with operation of wells by either defendant was improperly admitted. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

In action to cancel oil leases, where judgment could only prove title to land not in issue, judgment was inadmissible. *Id.*

In suit to foreclose trust deed, where defendant set up homestead, and the sole issue was whether the land was part of a rural homestead, testimony concerning defendant's understanding of a chattel mortgage should have been excluded as irrelevant. *First National Bank v. Porter* (Civ. App.) 204 S. W. 463.

In quo warranto to oust defendant from office and to recover salary paid defendant while occupying office to which plaintiff had been elected, where Supreme Court on writ of error affirmed judgment ousting defendant but remanded case as to salary, the writ of error and orders thereon were admissible, on retrial of case to recover the salary paid defendant, on issue of limitations, to show that the case was before the Supreme Court and that there was no final judgment showing plaintiff entitled to the office until the judgment was rendered by the Supreme Court. *Pease v. State* (Civ. App.) 228 S. W. 269.

2. Certainty.—Whatever evidence has a tendency to prove the agency of the bank to which a renewal premium was paid by insured is admissible on that issue, even though it is not full and satisfactory, since it is the province of the jury to pass upon the evidence. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

3. Remoteness.—Though witness had not seen motorcar for two months prior to the accident when it was derailed and plaintiff was injured, assignment of error to his testimony as to condition of the car goes to the weight and not the admissibility of his testimony. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

In action on accident insurance policy for total disability resulting from injury on a passenger train, evidence as to amount for which insured settled his judgment against the railroad on account of the injury, held too weak and remote to be admissible. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

In a bill of review to set aside a judgment, evidence that the children of defendant in the judgment had no knowledge that defendant had been served with citation was too remote to show absence of such service. *McBride v. Kaulbach* (Civ. App.) 207 S. W. 576.

In action for rent to November 1, 1915, evidence, as to intention of owner as to use of property in November, 1916, was inadmissible. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

In action involving reasonableness of Railroad Commission's order requiring construction of depot building, sidings, and spur tracks at certain place, evidence as to gross shipments to and from station $3\frac{1}{2}$ miles distant therefrom during past four years, though remote, is of aid to jury on issue of reasonableness, tending to show increase of business in that section. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

4. Tendency to mislead or prejudice.—In an action to recover for services rendered under an express contract to work at \$75 a month, plaintiff's testimony that part of the work done by him for defendant would cost from \$10 to \$15 a day if performed by experts was inadmissible. *Howell v. West* (Civ. App.) 227 S. W. 251.

In an action for damages for fraud in the sale of land, assuming that plaintiff had the right to prove that his wife was dead at the time of the trial, so that the jury might understand why she was not produced as a witness, he had no right to go into the particulars concerning her death and burial, and as a result thereof manifest such grief and distress as was calculated to arouse the sympathy of the jury. *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

Assuming that defendant's counsel had no right to ask plaintiff whether or not he had inherited money and invested it in land, when plaintiff answered that he had not invested the same in land, he was not entitled to follow it up with the further statement that he had used it to pay for a tombstone and other funeral expenses of his deceased wife, so as to arouse the sympathy of the jury. *Id.*

5. Negative evidence.—In a bill of review to vacate a judgment, on the ground that citation had not been served on defendant, in order that negative testimony that witnesses did not know that the citation had been served, may be given probative force. Positive facts that, if service had been made, witnesses would necessarily have known it must be shown. *McBride v. Kaulbach* (Civ. App.) 207 S. W. 576.

To meet plea and testimony of lessee, sued for rent, that there was an agreement acted on, that another should be substituted in her place as tenant, lessors' agent for collection of rents could testify that he made no such agreement. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

In action for injuries in collision of automobile with defendant's street car at street intersection, involving issue whether motorman sounded gong, admission of testimony that witness would have heard gong if it had been sounded held not error. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

6. Circumstantial evidence of facts in issue.—Proof of agency may be made by circumstantial evidence. *Dodge v. Lacey* (Civ. App.) 216 S. W. 400; *American Metal Co. v. San Roberto Mining Co.* (Civ. App.) 202 S. W. 360; *Daugherty v. Wiles* (Com. App.) 207 S. W. 900.

Existence of undue influence vitiating will may be proven by circumstances surrounding making of will, condition of parties, etc. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

In an action against a bank for money deposited, where the bank denied such deposit, it was proper for one who paid plaintiff certain money to testify that he started down a street that would take him to the bank. *Provident Nat. Bank of Waco v. Howard* (Civ. App.) 199 S. W. 658.

Scope of authority of agent may be shown by circumstances. *American Metal Co. v. San Roberto Mining Co.* (Civ. App.) 202 S. W. 360.

In landlord's action for rent and to foreclose lien, tenant claiming he was merely surety or guarantor, and not principal to lease, also that he had sold business, proof that during year in question place was listed in telephone directory in his name, as it had been, was admissible. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

Physical pain may be shown by circumstantial evidence, but the evidence must be such as to warrant a fair inference that physical pain was suffered, and not such as to warrant only a surmise whether or not such was the case. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

The fact that the special improvement fund of a county was mingled with the general fund by the county treasurer, and carried thus mingled by the bank, was admissible as a circumstance, with others, to prove plaintiff taxpayers' allegation to such effect in their suit to enjoin collection of the improvement taxes levied for diversion, while the explanation that the mingling of the funds in the depository was not intended as a transfer of the special funds to the general fund by the county commissioners was inadmissible because not explaining the fact of the mingled deposit. *Veltmann v. Slator* (Civ. App.) 219 S. W. 530.

8. Matters explanatory of facts in evidence or of inferences therefrom.—Where defendant claimed child's death was due to improper attention, and not to its poorly heated cars, admitting testimony that child's mother had no property or means, was not erroneous. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

In action for injuries in automobile collision, where defendants alleged the car involved was not theirs, and that they were present in their office, and a witness said he was in their office and received a check at the time of the accident, the check was admissible. *Figueroa v. Madero* (Civ. App.) 201 S. W. 271.

In suit to establish parol trust in land, plaintiff could testify in explaining the absence of her mother, who knew more about the case, that her mother was in bad health and not of strong mind. *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010.

In an action for a railroad employe's death by the derailment of a train, it was proper to permit a witness to testify for the plaintiffs that he was on the ground where the wreck occurred at defendant's instance, and that defendant had given instructions that when derailment occurred a board consisting of its officers and disinterested persons should convene to ascertain the cause; such testimony being proper to show that the witnesses were not volunteers. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

Where a receipt signed by the officers of the company and to be countersigned by the collecting agent, but which did not give the name of the agent, was admitted in evidence, a collection slip sent to the agent with the receipt was admissible to supply the name of the collector in support of the insurance company's contention that the premium was paid to an unauthorized agent. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

In a father's action for the custody of his child, brought against its maternal grandfather and grandmother, the grandmother's testimony as to what plaintiff's deceased wife said about his not coming to see her would not be admissible at defendant's instance, but would be at plaintiff's to explain why he did not visit the child after such conversation, and it is immaterial whether the wife made the statements, if plaintiff believed she did. Also the grandfather's evidence that there were indications that some one had tried to burn his barn was admissible to show why he had a shotgun during an interview with plaintiff near the barn, where plaintiff testified he did not thereafter visit his child because he believed the grandfather might shoot him; the reasonableness of such explanation being for the jury. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

See *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

9. Evidence irrelevant unless preceded or followed by other evidence.—Since when shipment is in charge of owner's representative, and carrier obeys his instructions, it is not liable for resultant damage, it is error to exclude evidence that conductor obeyed instructions of messenger who accompanied goods, although there was no direct evidence that messenger was hired by plaintiff. *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606.

In an action against fire insurance companies for conspiring to prevent plaintiff from obtaining insurance, that one of defendant's witnesses had refused to answer on the ground of privilege was properly excluded in the absence of a showing that defendants had suggested such refusal. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

In trespass to try title to determine boundaries in the absence of showing of relevancy of a judgment in a prior action between different parties involving the same facts, exclusion of such judgment cannot be ruled error. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

A party should not be permitted to introduce prejudicial and irrelevant evidence upon a mere speculation that it might become relevant. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

Recitals in ancient public archives showing an open, unequivocal, and positive claim of ownership are admissible as circumstances to prove, in connection with other evidence, a sale of a lost land certificate. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

In a personal injury action, the introduction of doctor's bills and the ambulance bill without proof that such bills were reasonable charges for the services alleged to have been rendered, and that plaintiff owed them, and that such charges in fact had been made by the doctor and ambulance company, held error. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

11. **Personal relations.**—In father's habeas corpus proceeding to procure custody of children from maternal grandparents, in whose care children had been placed upon mother's death, following her divorce from father, evidence of the adoption of the children by the grandparents was admissible. *State v. Jackson* (Civ. App.) 212 S. W. 718.

In an action involving a contract whereby parties were to divide profits from purchase and sale of land, a widow as administratrix having been substituted for a defendant, her testimony that there were nine children in the family, etc., was immaterial and likely to arouse the sympathy of the jury. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

12. **Nature and condition of property or other subject-matter.**—In action against feed company for death of horse, alleged to have been caused by rat poison in feed, evidence that defendant picked up sweepings from floor of warehouse and put them in sacks at some time prior to death of plaintiff's horse was admissible as tending to show how poison got in feed. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

In suit to restrain cutting of timber, testimony of certain witnesses as to what size of long-leaf timber was merchantable at the date of the deed, an issue not determined by prior litigation held admissible. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

13. **Character or reputation.**—In an action charging two defendants jointly with conversion and embezzlement, judgment for plaintiff will be reversed, where evidence is admitted as to general reputation for honesty and fair dealing of defendant not appealing, but whose testimony is material, unless defendants put it in issue by attempting to prove his good character. *Sikes v. Keller* (Civ. App.) 197 S. W. 311.

When it becomes permissible to offer evidence as to good character, such evidence must be confined to proof of general reputation, and the individual opinion of witnesses is not admissible. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

In a damage suit for assault and battery, defended on ground of self-defense, where only actual damages were asked for, and where there was no pleading that plaintiff was a bad and dangerous man, who would be likely to carry out threats, exclusion of evidence that plaintiff was a dangerous man, likely to carry out any threat, held proper, though there was evidence of threats having been made. *Pfluger v. Schoen* (Civ. App.) 221 S. W. 1090.

In an action for damages for assault and battery, court erred in admitting evidence that plaintiff and another who accompanied him had been indicted for assault in the same difficulty, and in requiring plaintiff to testify concerning the trial in the county court upon such charges, and in admitting evidence to the effect that plaintiff did not report the matter to the grand jury nor county attorney, and that grand jury did not indict defendant nor the county attorney file complaints. *Haverbekken v. Johnson* (Civ. App.) 228 S. W. 256.

15. — **Chastity and temperance.**—Where it was asserted that a motorist struck at a crossing was negligent, evidence of his reputation that he was in the habit of getting drunk and driving an automobile at dangerous and rapid speed was admissible on the issue of negligence, although evidence of isolated instances would not be. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

16. — **Right to prove specific facts.**—In suit by a bank on a note given to cover overdrafts, defendant's claim being that he had signed the note in blank, but that the cashier of the bank had acted fraudulently in filling in the particular amount, indictments against such bank cashier for forgery were not admissible at defendant's instance. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

17. **Pecuniary condition.**—In action for injuries resulting in death, statements from defendant's minute book showing the ownership of its capital stock held inadmissible as being immaterial. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

When more than one tort-feasor is sued for ordinary damages and punitive damages, the wealth or financial standing of one person cannot be shown, for the purpose of augmenting damages against him, because the admission of such evidence necessarily has the effect of improperly augmenting the damages against the other defendants, whether rich or poor. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

18. **Motive, intent and good faith.**—Cessation of work by lessees of oil lands is fact to be considered in determining their intention voluntarily to abandon leases. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

That a mayor presided at a meeting at which a speaker made charges against the city marshal is not admissible on the question of marshal's discharge by mayor being for political reasons or for unfitness, nor is evidence that the mayor intended to discharge the marshal, and that his political platform promised the discharge. *City of Antonio v. Newnam* (Civ. App.) 201 S. W. 191.

In trespass to try title, there was no error in admitting defendants' testimony as to what they were told as to title, on the issue of their good faith in making improvements. *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

In action by creditor against stockholders individually by reason of alleged overvaluation of an oil lease in statements to the secretary of state, any surrounding cir-

cumstances affecting the property, and methods of arriving at the valuation, were admissible to show good faith. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

In action on guaranty of accounts of mercantile company, testimony of plaintiff's vice president, as to refusal of plaintiff to extend indebtedness unless guarantors consented, and certain letters, held admissible to shed light on intention of parties, controlling issue. *Cooper Grocery Co. v. Eppler* (Civ. App.) 204 S. W. 338.

In an action by owner of building against cement company to recover an alleged agreed rebate, the owner's testimony as to his preference for a steel building over a concrete one, and the effort of cement company to induce him to change to concrete, and of his being so induced by confidential rebate agreement held relevant to the issue as to the amount of agreed rebate. *Southwestern Portland Cement Co. v. Schwartz* (Civ. App.) 212 S. W. 977.

Testimony by plaintiff that she did not have a cent, and if she had known the extent of her injuries she would not have signed a release, was admissible on the issue of settlement raised by the averment that defendant's agent took advantage of her needy condition to obtain the release. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

In a suit to cancel a deed given by a daughter to her father for land inherited from her mother, where defendant claimed to have purchased the land with his separate estate, it was error to exclude his testimony that the reason for deeding it to his wife was to avoid administration in case of his death; the testimony being material on issue of his intention to give the land to his wife. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In an action by one tarred and feathered by citizens because of his attitude towards the Red Cross, the court properly permitted great latitude in the introduction of evidence of prior acts and statements on the part of plaintiff, which would explain and cast light upon the act of provocation relied on, providing such prior acts and conduct were brought to the knowledge of the defendants; such facts affording an explanation of the motives and conduct of the defendants, so that testimony of witnesses that, prior to the act of provocation relied on, several persons had solicited plaintiff for the Red Cross, and that he refused to make a donation, and that he hardly looked up to see who they were was clearly admissible, if knowledge by one or more of the defendants of the incidents was shown; but the court properly struck out testimony that plaintiff said of a preacher, who led a crowd which whipped a man for not putting up a Red Cross sign, that "in place of being a preacher he was a damned hypocrite," as it did not tend to show plaintiff's attitude toward the Red Cross and after plaintiff had testified that he refused to join the Red Cross because he had been advised that its agents and nurses would furnish aid to the German wounded soldiers as well as American soldiers, and that he gave this reason to the committee for declining to contribute, and that he thought German wounded soldiers should be left to die on the battle field, court did not err in striking out subsequent testimony to the effect that he thought that leaving wounded German soldiers on the field was a part of civilized warfare; the matter under inquiry being plaintiff's attitude toward the Red Cross, and not as to what his belief was concerning what was the practice in modern warfare. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

Evidence of intention or agreements of husband and wife in acquiring land is admissible, in an action by the husband's heirs against the wife after the husband's death to recover part of the land, to determine the character of the ownership of the property, whether it was acquired partly as the separate property of the husband, or wholly as community property; the status of the land as thus fixed being binding on the husband and his heirs, and others dealing with the property with notice. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903.

19. **Knowledge or notice.**—In servant's action for personal injuries, plaintiff's testimony that notices required by Employers' Liability Law were not posted at defendant's well eight months after defendant's injury was admissible, where question of their ever having been posted was made an issue. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

In action against insurer of piano as garnishee, agent of the seller could testify that he went with debtor to insurance agent, whom the debtor instructed to pay part of the loss to the creditor, as bearing on waiver of exemption and notice to the company thereof. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

In an action by an injured servant based on negligence in hiring an inexperienced and incompetent servant, declaration made by plaintiff to one occupying the position of vice principal regarding such servant that "he would get somebody killed by putting that boy on the trap," was admissible to show that employer had notice of the incompetency. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

In an action by a purchaser claiming the land against vendor's subsequent grantee, in which the defense was that the first sale had been rescinded, evidence that after the vendor had brought suit to foreclose lien of the first sale the parties agreed it should be rescinded and the title revested in vendor that he might sell to defendant, while incompetent to prove vendor's title, was competent as affecting notice of alleged rescission. *Walls v. Cruse* (Civ. App.) 217 S. W. 240.

In action by receiver's supply creditors for payment, testimony as to a statement, made during a creditors' meeting by a person claimed to have represented bondholders, as to superiority of supply creditors' liens, held admissible on issue as to whether bondholders were privies to the receivership proceeding. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

In an action for the death of a shipper's employé assisting in placing flat car in position for loading, evidence of a custom in railroad yards for shipper to move a car,

when but a few feet of being in the proper place, after having been placed by railroad, held admissible on issue of whether railroad employes who moved cars on track, crushing deceased, were charged with notice that shipper's employes reasonably might be expected to go on track. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

Relative to negligence of train operatives in not keeping a proper lookout where child was killed on track, evidence of notice to the company's agents of a family with small children, living in a box car close to the track without fence between, was admissible. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

Where interveners claimed title to land by adverse possession, evidence that everybody in the country around knew it was the land of their predecessor in title was admissible and pertinent on the issue of notice. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

22. Statements and conduct of parties.—In personal injury action by railroad employe, company, having shown that he had several accident policies at time of injury, cannot complain that it was not permitted to show that employe had carried insurance for number of years and presented many claims for injuries. *Schaff v. Riha* (Civ. App.) 201 S. W. 210.

In proceeding to be appointed guardian of her children, declarations of applicant that she was owner of estate left by her husband's will to children were admissible as bearing on qualifications. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

That a father, who was seeking the custody of a child, had filed a suit for divorce charging the child's mother with infidelity, which was denied, and had been convicted of deserting the said child and mother, was admissible in a suit by the witness for custody of such child, to show an utter want of fatherly tenderness for the child, which he assumed to have by the suit. *Burchard v. Burchard* (Civ. App.) 223 S. W. 707.

In an action to recover cattle alleged to have been sold by an agent without authority, where agent claimed that he had authority to sell cattle to pay debts contracted for labor, etc., testimony of a witness tending to show that the agent had contracted debts was admissible, although the witness did not know what the contract between the owner and the agent was. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

In an action for injuries to a passenger in an elevator whose leg was caught in the door and held while the elevator descended, question by plaintiff's counsel to defendant's witness as to whether or not her doctor, claiming to represent defendant, met her and her husband and offered her \$10 to come to defendant's building for something with reference to her testimony, if asked in good faith, held admissible, counsel being within his right in propounding it. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

23. Customs and course of business.—Where manner of loading rice alleged to have been damaged in transit was shown by positive testimony, testimony as to manner in which rice was usually loaded was properly excluded. *Gulf Coast Transp. Co. v. Standard Milling Co.* (Civ. App.) 197 S. W. 874.

In action against carrier for refusing to deliver goods to a connecting line, evidence that it constantly refused to make such deliveries is admissible, where evidence conflicted regarding defendant's refusal to deliver and its reasons therefor. *Quantah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

While ordinarily evidence regarding similar wrongs inflicted on others is inadmissible, yet evidence showing a universal rule or system is admissible. *Id.*

To be admissible, custom must be so universal as to warrant inference parties contracted with reference thereto, and should be established by satisfactory evidence as having existed for length of time so as to become widely known to warrant presumption parties had it in view. *Beaumont Cotton Oil Mill Co. v. Sanders* (Civ. App.) 203 S. W. 372; *Same v. Reeves* (Civ. App.) 203 S. W. 375.

Where defendant cattle company pleaded over against defendant commission company for judgment in case it was held liable for failure of commission company's guaranty that cattle sold were immune from tick fever, evidence was admissible, as between them, as to the existence or otherwise of a custom among commission companies at the place of sale to make such representations or guaranties. *Hart v. Yturria Cattle Co.* (Civ. App.) 210 S. W. 612.

In action against sleeping car company for injury from being transported in an insufficiently heated car, testimony of the defendant's assistant superintendent as to the duty of the defendant's porter to build a fire in the sleeper was properly admitted. *Pullman Co. v. McGowan* (Civ. App.) 210 S. W. 842.

Consignees of cotton by rail were bound by the custom and usage of the railroad in making delivery of cotton at a compress company's warehouse. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465.

Evidence as to extent of shipment made by persons living in certain vicinity is admissible upon question of reasonableness of Railroad Commission's order that depot building and spur tracks and sidings be constructed at such point. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

A custom or usage contrary to law is void. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

Upon the issue of negligence of a bank in accepting check of drawee of draft attached to bills of lading in payment of the draft, proof of custom of banks in accepting checks of drawees was admissible. *Central Exch. Nat. Bank of Waco v. First Nat. Bank* (Civ. App.) 214 S. W. 660.

While ordinarily proof of a general custom of railroads to perform acts in a certain manner is admissible on the issue of negligence, yet, where a railroad company received a shipment of hogs and delayed forwarding them for 30 hours because of the movement

of troop trains, evidence that it was not customary to supply facilities for feeding and watering animals at small stations, such as the point where they were received, is inadmissible. *Hines v. Whiteman* (Civ. App.) 228 S. W. 979.

In an action for loss of a trunk, proof of custom or usage, as to the delivery of trunks, that it was customary to put them outside on the platform, was admissible as an evidentiary fact showing delivery, even in absence of allegation in the petition as to such custom. *Hines v. Talbert* (Civ. App.) 229 S. W. 679.

That buyer of cotton was dealing in cotton futures was admissible on the issue whether the cotton purchasing contract on which he sued was also a "future contract." *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

24. Value of services.—In suit to rescind purchase of a mare, plaintiff, over defendant's objection, was properly permitted to testify that he kept the animal in a wagon yard at the cost of \$81, that he knew the cost of oats and hay, and that it was a reasonable amount to charge for the services and feed; it not being necessary to show the market price of either the feed or the services. *McDonald v. Stafford* (Civ. App.) 213 S. W. 732.

25. Value or market price of property.—In arriving at the value of an oil lease, claimed to have been overvalued, it was proper to show what specific corporate stock sold for, or could have been sold for and to admit evidence of exchanges of property for stock of the corporation, where the value of such property was shown. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

Where damage claimed was loss of actual value of grass destroyed, and there was no evidence of market value of grass at time of destruction, there was no error in admitting evidence of actual value of grass to plaintiff for pasturage at time of fire. *W. R. Pickering Lumber Co. v. Childress* (Civ. App.) 206 S. W. 573.

In an action for a balance due under contract for the cutting and baling of hay which provided a stipulated price per ton, evidence that plaintiff arrived at the weight of the hay by weighing several bales different times a day, and averaging the weight, is admissible to show the weight. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

In absence of any evidence in plaintiff's suit tending to show there was any market value of grass, testimony as to what it may have been worth to plaintiff, or his wife, was properly admitted. *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

Supply and demand, the use and benefit, the quantity and quality, what buyers are willing to give and sellers to take, all enter into "market value." *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

Value is not fixed at the place where buyers and sellers meet, but is established or shown by sales, public or private, in the ordinary course of business. *Id.*

Testimony that witness was familiar with and knew the kind of grass that generally grew on the land of plaintiff that was burned, and that it was worth from \$2.50 to \$3 per acre for grazing stock, but had no market value when taken alone, is insufficient evidence of value to sustain a judgment in favor of the landowner not disclosing the value of the herbage to the landowner. *Gulf, C. & S. F. Ry. Co. v. Price* (Civ. App.) 219 S. W. 518.

In action against railroads for damage to shipment of cattle, if the proof showed no market value at destination, proof of intrinsic value at the time and place was admissible for use in establishing damages. *Lancaster v. Tudor* (Civ. App.) 222 S. W. 990.

Testimony that by reason of negligent handling by carrier of cattle carried they were depreciated at least \$5 per head does not meet the question of market value necessary to fix the damages. *Hines v. Edwards* (Civ. App.) 228 S. W. 1117.

26. — Time and place of valuation.—In vendor's cross-action for misrepresentation of purchaser as to solvency of maker of notes accepted by vendor in part payment, evidence of maker's insolvency should be with reference to time of alleged false representations or as to time when value of notes is to be determined. *Luse v. Rea* (Civ. App.) 207 S. W. 942.

Recitals in sequestration papers as to value of property made 17 months before the trial are not admissible to establish market value at time of trial. *Vaughn v. Charport* (Civ. App.) 213 S. W. 950.

29. — Comparison with other property.—In suit by railroad for reduction of its assessment, testimony as to value of real estate abutting upon that owned and occupied by railway was admissible to show value of land owned by railway and not devoted to railway purposes. *Baker v. Druesedow* (Civ. App.) 197 S. W. 1043.

In an action for damages for the burning of grass, testimony as to the value of the grass destroyed, based on the value of other grass lands, is inadmissible, where it did not appear that the lands taken as a criterion of value were essentially similar to that burned over. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 201 S. W. 1040.

In an action for the balance of the purchase price of cotton sold at 11½ cents, to be increased to 12 cents if the market advanced to that point within a certain time, evidence that plaintiff's cotton was better than the cotton of a witness who had sold his cotton for 12.65 cents was material. *Smith v. McBroom* (Civ. App.) 203 S. W. 1130.

In action against railroad for injury to a mare, it was error to admit testimony offered by plaintiff as basis for arriving at market value of his mare that the witness had paid for certain horses that he owned as much as \$125; it not being shown that the animals owned by such witness were of the same kind or character as that of plaintiff, nor when or where the witness purchased his animals. *Texarkana & Ft. S. Ry. Co. v. Wilson* (Civ. App.) 204 S. W. 491.

In a seller's action for price of blasting powder, where buyer reconvened for damages sustained because of misrepresentations as to the strength of powder, evidence as to the difference between the price paid for such powder and that paid for other powder

buyer was required to purchase held inadmissible, since market value is not to be shown in that way, and such proof would show exceptional and not market values. *Alba-Malakoff Lignite Co. v. Hercules Powder Co.* (Civ. App.) 219 S. W. 554.

30. — **Crops.**—In an action for the balance of the purchase price of cotton, sold under a contract whereby the buyer was to pay the price sued for if the market advanced to that point, evidence that the cotton graded three points above middling was admissible to support plaintiff's allegation that such cotton as his had sold at the market at the price contemplated by the contract. *Smith v. McBroom* (Civ. App.) 203 S. W. 1130.

In an action against a railroad company for damages for the burning of grass, proof that plaintiff had to spend 10 cents per head per day to feed his cattle, which he would not have been required to feed had the grass not been destroyed, was admissible and could be considered in arriving at the value to him of the grass for the purpose for which he leased the land. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.

31. — **Cost of property and amount received in general.**—In an action against a railroad for damage to a shipment of sheep through delay, the deposition of the salesman who sold the sheep, as to their weight and the price for which they were sold, held admissible. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

32. — **Cost of production.**—In action for wrongful destruction of cotton crop, evidence as to market value of cotton during the subsequent fall was inadmissible, in absence of evidence as to the expense of maturing, preparing, and placing the crop on the market. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

33. — **Rental value.**—The rent paid by plaintiff for pasture could not determine the market value of grass destroyed by fire, but, if there was no market value, the rent might be a circumstance to be considered in arriving at the value of the grass for the purpose for which it was intended. *Chicago, R. I. & G. Ry. Co. v. Word* (Com. App.) 207 S. W. 902.

37. — **Amount for which property will sell.**—In suit for conversion of scrap iron purchased by plaintiff of defendant, letters addressed to plaintiff and purporting to have been signed by iron and metal company, stating what such company would pay for scrap iron, were inadmissible to show market value of iron. *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

39. — **Circumstances adding to or detracting from value in general.**—Evidence of construction of side track, and that oil burning locomotives were parked near plaintiff's residence, was admissible only to aid jury in determining depreciation in market value of premises. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

Evidence that tract, part of which was sought to be condemned, was formerly the family homestead, and that the owners were born there, and that the owners intended later to use the tract as a homestead, held inadmissible. *Galveston, H. & S. A. Ry. Co. v. Schelling* (Civ. App.) 198 S. W. 1018.

In an action against a warehouseman to recover the value of personal property which plaintiffs alleged was unlawfully sold, testimony as to sentimental value of family pictures, etc., is inadmissible. *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

40. — **Animals.**—In action for value of horse killed by defendant's train, proof as to value of horse should be confined to its market value. *St. Louis Southwestern Ry. Co. of Texas v. Clayton* (Civ. App.) 199 S. W. 488.

In action for damages to shipment of horses, there being evidence that there was, at destination point, a market for kind of horses shipped, plaintiff properly testified as to market value of horses in condition in which they were delivered at that point. *Galveston, H. & S. A. Ry. Co. v. Gibbons* (Civ. App.) 202 S. W. 352.

50. **Marriage.**—In an action for divorce alleging a common-law marriage agreement in Texas followed by cohabitation there, evidence of a continuance of cohabitation in another state was admissible to show that the relation from its beginning was lawful, and not meretricious; the length of the status being proof of its existence. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In an action for divorce based upon an alleged common-law marriage, it was not reversible error to permit plaintiff to testify as to the effect the information of defendant's marriage to another woman had upon plaintiff's health. *Id.*

51. **Separation of husband and wife.**—Where husband when sued for goods sold wife alleged that she had abandoned him without his fault, portions of petition in wife's action for divorce showing cruel treatment held admissible under the pleadings. *Sanger Bros. v. Trammell* (Civ. App.) 198 S. W. 1175.

52. **Residence.**—In trespass to try title, the principal issue being whether deceased grantee was at time of accrual of cause of action a resident, so that his absence from the state would, under art. 5702, suspend statute of limitations, a statement of said grantee in an affidavit that his post office address was a named place within the state was admissible as a circumstance tending to establish residence. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

While an individual may testify to an intention to acquire a domicile, intent is more satisfactorily shown by acts than words. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

56. **Partnership and partnership transactions.**—In an action on a firm obligation, evidence of a contract showing that the obligation was an individual one of one of the partners, held admissible. *Rowse v. Woody* (Civ. App.) 197 S. W. 362.

In an action against a former partner for conversion of timber, where it appeared that defendant converted such timber in order to pay a note on which he was jointly liable with plaintiffs, a letter by a third person to plaintiffs notifying them that he had purchased the timber was properly excluded; it appearing that plaintiffs and defendants purchased such timber with full notice of such third person's claim. *Christian-Holmes Cedar Co. v. Dewees Cedar Co.* (Civ. App.) 221 S. W. 681.

In action involving the question of ownership of land as between plaintiff, who claimed to have purchased land at a trustee's sale, and defendant, who claimed that his partner, who had agreed to purchase the land at such sale for the copartnership, had conspired with plaintiff to deprive defendant of the land, an agreement between such partner and defendant, entered into subsequently to the trustee's sale, as to disposition of proceeds of crops grown on the land and as to proceeds of sale of land in the event of its sale by such copartnership, held admissible. *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

In an action for partnership accounting, where duress as to certain payments exacted by defendant was charged, and where it appeared that the partnership contract was highly advantageous to defendant, evidence as to the reason why plaintiffs entered into the partnership agreement, and implying oppressive and unfair conduct on defendant's part, held inadmissible, where plaintiff had not by the pleadings attacked the articles of partnership in any way. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

In an action against partners dealing in mules to recover for feed furnished, an assignment of error to the admission of testimony tending to show that one of the defendants was estopped from denying the partnership because of making representations to plaintiff of his own wealth, and thus influencing plaintiff not to levy on the mules, held immaterial; the issue being whether defendants owed the debt. *Steger v. Greer* (Civ. App.) 228 S. W. 304.

In an action on a note given by one copartner to another, where it was claimed as to the consideration that the maker had not accounted to the payee partner for about \$50,000, and checks and drafts were introduced in support of the payee's testimony to that effect, the entire bank account of the payee was admissible, falling within the rule that one person may introduce the remainder of an account when the other party introduces a part thereof, and was also admissible to show that such drafts and checks had not been charged against his account as claimed. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

58. **Injunction.**—In a suit to enjoin enforcement of a judgment recovered by a physician against an employer which was member of the 'Texas Employers' Insurance Association, the policy of insurance and proof of injury should not be admitted, but proof should be restricted to the fact that the employer was a member of the association. *Huddleston v. Texas Pine Line Co.* (Civ. App.) 230 S. W. 250.

59. **Partition.**—In suit for partition by a daughter against her father's widow, wherein general denial was pleaded, testimony of defendant widow that the lands in controversy were paid for with her separate means was improperly admitted. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

60. **Boundaries.**—Testimony of an old settler was admissible to show that calls in a grant were consistent with the footsteps of the surveyor. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, held that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant and an ambiguity appeared, court did not err in admitting evidence of surveyors as to the true location of the east boundary line of the leagues. *Barrow v. Murray* (Civ. App.) 212 S. W. 178.

In trespass to try title, where the question was one solely of disputed boundary, evidence of the contents of a letter written to plaintiff's predecessor, relating to a survey to locate the boundary, held improperly excluded upon objections that plaintiff's predecessor had testified and that the evidence was not offered in impeachment. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

In a suit to determine a boundary line, where it was agreed that a former fence had been on the true line, evidence establishing the division line according to the deeds was admissible to show the location of the picket fence, and a requested instruction withdrawing such evidence from the jury was properly refused. *Neill v. Pryor* (Civ. App.) 222 S. W. 296.

Neither an original tax receipt nor the recorded copy is admissible to determine the boundaries to land, since it was not the tax collector's duty to determine boundaries. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

65. **Payment.**—In action for amount due plaintiff by defendant, who, with funds furnished by plaintiff, had performed road building contract which had been sublet to plaintiff by original contractor, evidence of a statement between original contractor and defendant was admissible to show that defendant's note to plaintiff, deposited with contractor to secure what original contractor had advanced defendant for plaintiff, had been discharged by amounts retained by contractor out of amounts due defendant. *McFarland v. Ray McDonald Co.* (Civ. App.) 213 S. W. 946.

When pleadings allege payment, it is permissible for a witness to show how payment was made. *Wortman v. Young* (Civ. App.) 221 S. W. 660.

69. **Lien and waiver thereof.**—In an action on secured note and to foreclose mortgage securing vendor's lien held, that assignments of error to admission in evidence of vendor's lien note taken by plaintiff as part consideration of the secured note and deed

of trust, and also a judgment and deed thereunder to defendants' grantor, introduced as muniments of her title to the property before she sold it to defendants, will be overruled. *Blackmon v. Texas Securities Co.* (Civ. App.) 196 S. W. 590.

In action to enforce materialman's lien, testimony of a subcontractor for the contractor that he had placed the material, consisting of iron work in the building, held admissible to show its use. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

70. Liabilities on bonds.—In jitney bus passenger's action on jitney line operator's indemnity bond, operator's testimony that the car in which plaintiff was riding at the time of the accident and in which she was injured was under the protection of defendants' bond held admissible. *Interstate Casualty Co. of Birmingham v. Hogan* (Civ. App.) 232 S. W. 354.

74 $\frac{1}{2}$. Respective rights of landlord and tenant.—In action by tenant under a lease for one year against purchaser from his landlord for money received for pasturage, evidence that tenant had a verbal contract with one of former landlords, whereby he was to receive two-thirds of everything raised on the place, held admissible. *Id.*

75. Eviction of tenant.—In action to cancel oil leases for forfeiture by abandonment, court properly admitted amount of money spent on wells by defendant lessees after property was released by bankruptcy court, and proof of facts in reference to the bankruptcy; bankruptcy court having seized wells in litigation. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

In lessee's action against sublessee on express covenant to pay rent, defended on ground that sublessee's assignee had been accepted by owner as tenant and by lessee as their lessee, the check from sublessee's assignee to owner for rent installment was admissible in evidence to show lessor's acquiescence in assignee's lease and acceptance of assignee as tenant. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

In action by tenants against landlords for damages from unlawful eviction, testimony of wife of tenant that landlord's cattle would come up to patch of feed about barn, and she would drive them off, held admissible to show animus of landlords in instituting proceedings against tenants out of which suit grew. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In suit for damages from an unlawful and forcible eviction of plaintiff tenants from defendant lessor's land, proof of the expense incurred by plaintiffs was admissible on the issue of malice and consequent exemplary damages; proof of expense always being admitted on such grounds. *Evans v. Caldwell* (Civ. App.) 219 S. W. 512.

In suit for damages from an unlawful and forcible eviction of plaintiff tenants from defendant lessor's land, and the malicious withholding of farm products, household goods, kitchen furniture, etc., proof that defendant, while armed with a shotgun, assaulted plaintiffs and threatened to kill them, was admissible on the issue of malice, so that allegation of the fact in the pleadings was proper to that extent. *Id.*

76. Liability for rent.—In landlord's action for rent, leases between other parties executed two years before lease in question and assignment of another lease by third parties to defendant are inadmissible. *Kiam v. Stacy* (Civ. App.) 196 S. W. 341.

In landlord's action for rent against person owning fixtures in premises involved, lease from plaintiff to defendant's son and codefendant is inadmissible against the mother. *Id.*

In an action under a lease for rent, where defenses were that building was not constructed according to agreement between lessor and lessee and faulty construction, the court properly permitted plaintiff to introduce in evidence the plans and specifications for the building, and to show that water which accumulated in the basement was seepage water caused by the United States reclamation in handling water for irrigation purposes. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

79. Employment in general.—Where railroad company, denying that plaintiff was its servant, introduced evidence that he took orders from, made reports to, and was paid by agents of an independent contractor, evidence that they were also agents of the railroad company held admissible. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In an action for the death of an employé superintending repairs of a flagpole on employer's shop where defense was that he was not acting within scope of employment, plaintiff's evidence that employer directed other employés to finish the work was admissible. *Galveston, H. & S. A. Ry. Co. v. Bremer* (Civ. App.) 217 S. W. 253.

80. Authority of agent.—In action on note for price of automobile, defense being breach of warranty, plaintiff's president could testify that he had instructed salesman not to warrant the automobile. *Lewis v. Farmers' & Mechanics' Nat. Bank of Ft. Worth* (Civ. App.) 204 S. W. 883.

Agency cannot be established by proof of the acts of the agent, unless it appears that the principal knew of, or assented to them, but where the acts justified a reasonable inference that the principal had such knowledge and would not have permitted them if unauthorized, the acts are competent. *Daugherty v. Wiles* (Com. App.) 207 S. W. 900.

In an action for failure of guaranty that cattle sold were immune from tick fever, brought against a seller and its agents, evidence of commission merchant's custom as to making such guaranties was admissible, not to enlarge the powers conferred by employer upon agent, but as a means of interpreting and ascertaining the powers actually conferred. *Hartt v. Yturria Cattle Co.* (Civ. App.) 210 S. W. 612.

In an action against a bank cashier on a contract executed in his own name, which he claimed was the contract of the bank and as such ultra vires, where it appeared that

plaintiff refused to accept the bank's obligation instead of defendant's own obligation. Evidence that the directors instructed defendant to close the contract, and stated that the bank would pay the money thereunder, was inadmissible, as it could not affect plaintiff's rights. *Edwards v. Roberts* (Civ. App.) 222 S. W. 278.

Testimony by an officer of the bank that the bank was an authorized agent of an insurance company to collect premiums is not subject to the objection that the agency cannot be proved by declarations of the agent, since the bank, and not the cashier, was the agent of the insurance company, and the testimony was not a mere declaration, but was evidence in court. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

81. Contract in general.—That which would show in a criminal prosecution that a contract was in violation of the criminal law will also show in a civil action that such contract is illegal. *Pate v. Wilson Bros. Mercantile Co.* (Civ. App.) 208 S. W. 235.

In an action on a fire policy, which insured claimed covered clothing of customers in his possession for cleaning and pressing, where insured's predecessor, to whom the original policy, of which the one involved was a renewal, was issued, testified he told the agents he wanted the policy to cover such clothing, the agents may testify that insured's predecessor was told such clothing could not be insured. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

In action on an indemnity contract against liquidating agent of insolvent national bank on the ground that the bank was the real party principal on the contract, and against certain officers of the bank as sureties, proof that the bank agreed to keep on deposit with another bank a sum equal to the amount which the first bank borrowed under an arrangement to enable it to conceal the fact of its loan of more than a legal amount to a building company was admissible as against the objection that such arrangement was ultra vires, to show that the loan by the second bank was in fact made to the first bank, and hence that the indemnity, which was given to secure the payment to the building company of money due on a building contract, as against materialmen's liens, was really for the benefit of the first bank. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

82. Execution of contract.—In action for commission by real estate broker, evidence that principal, while sale was pending, inquired of witness whether he would be liable for commission if, having listed land for cash, he transferred it in trade or for notes, held admissible. *Britain v. Rice* (Civ. App.) 204 S. W. 254.

In an action on a fraternal benefit certificate issued to plaintiff's wife whereon liability was denied because of misrepresentations by insured as to the state of her health, it was not error to admit testimony by defendant's insurance solicitor that he had advised the medical examiner of an operation performed upon insured for appendicitis and also for abdominal wall adhesions. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

In suit by a city on special assessment paving certificates, a letter written by defendant, purchaser of the property, to the attorneys for the contractor, showing substantially that he, defendant purchaser, had a contract for the purchase of the property conditional on collection of a note placed with the then owner of the property for collection, and that if he got the property he would pay for the paving to be done by the contractor, held admissible as constituting a binding contract by defendant purchaser to pay the contractor the indebtedness sued on. *Leeson v. City of Houston* (Civ. App.) 225 S. W. 763.

83. Mistake in contract.—Where it was alleged there was a mutual mistake as to part of guaranty contract creating liability in excess of \$1,000, it was admissible to show that president of plaintiff corporation and its attorney had construed it as a guaranty for only \$1,000, and had originally sued for such amount. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

85. Construction of terms of contract.—In action for services in drilling oil well, facts showing that the defendant construed the contract so as to entitle plaintiffs for services in underreaming the casing, by payment for such services during certain months, and that defendant was estopped to deny liability for underreaming by plaintiffs, held admissible under the pleadings. *Eldora Oil Co. v. Thompson* (Civ. App.) 230 S. W. 738.

86. Performance or breach of contract.—Evidence that broker sent messenger to person subsequently purchasing part of ranch, and that he sent back word he would take the matter up, held admissible, when defendants denied plaintiff interested such purchaser in the land. *Ford v. Cole* (Civ. App.) 195 S. W. 661.

Testimony that owner of notes stated that for payment he would look to another person, who had assumed payment, with no statement that he released the maker was not admissible. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

Where property is transferred in consideration that debts will be paid from a certain fund as they mature and are presented, and upon a partial failure to transfer the property a sum less than the value of the property not transferred is withheld, in an action by a creditor against the transferee and its agent, testimony of the agent that the money already paid was disbursed at the direction of the debtor and the transferee is admissible. *American Loan & Mortgage Co. v. American Nat. Bank of Houston* (Civ. App.) 205 S. W. 146.

In a suit to cancel an oil lease, where plaintiff contended that part of the consideration consisted of actual development of the land by lessee, it was not error to exclude testimony that the lessee was not financially able to put down a well on the land, where it appeared that plaintiff fully understood lessee's financial inability at the time of the execution of the lease. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

In a broker's suit for commission on sale of cattle, testimony of a witness, one of the buyers, that before another buyer went to a convention where cattle were sold he told him not to be afraid of the number of cattle, but to go ahead and buy them through another broker, and that he (the witness) had asked such other broker to get a price of \$65 per head, etc., held admissible to show matter which would have tended to influence the buyer to purchase through such other broker. *Lumsden v. Jones* (Civ. App.) 227 S. W. 358.

In a suit to cancel an oil and gas lease on the ground of abandonment by the lessee, cessation of work and nonuser is admissible. *Hall v. McClesky* (Civ. App.) 228 S. W. 1004.

Evidence that a landowner had undertaken to pay all actual expenses of a broker was properly excluded in an action for commissions by a broker who had procured a purchaser, where the transaction failed because vendor's wife would not sign the deed, the property being a homestead, for the evidence excluded offered no excuse for failure to pay the amount agreed. *Carson v. Brown* (Civ. App.) 229 S. W. 673.

In a contractor's action against an irrigation district for balance due on construction work, the contractor's testimony that he completed the dam in substantial accord with the plans and specifications, and had given his personal attention to the work, held admissible. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

In an action on a note given to secure the establishment of a shipyard in a city for the construction of four wooden ocean-going ships, on the issue of what is an ocean-going ship, the court erred in not sustaining an objection to question as to how many boats Columbus had when he discovered America. *S. Lightburne & Co. v. First Nat. Bank of Rockport* (Civ. App.) 232 S. W. 343.

87. — **Contract of employment.**—In an action for plaintiff's salary as defendant's agent, the failure of defendant to pay plaintiff's past-due salary was a breach of contract, giving plaintiff a cause of action for past-due salary, and justified plaintiff in rescinding the contract, or refusing to work longer, but is not necessarily evidence of nor tantamount to plaintiff's discharge. *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374.

In an action by an employee claiming to have been wrongfully discharged, testimony as to plaintiff's abusiveness in speaking of his former employer was properly excluded, being immaterial to any issue. Also evidence offered by defendant employer, operating a peanut mill, that a shipment of peanuts which plaintiff employee personally bought had been hulled out and the employer had tried to sell them, but was unable to get the price of No. 1's for them, held properly excluded as immaterial. *Golden Rod Mills v. Green* (Civ. App.) 230 S. W. 1089.

In a suit for commission on procuring an exchange of defendant's store for a ranch, it was immaterial whether plaintiff broker put forth any efforts to get an abstract of title or not; there being no question of the title to the property, and it not devolving on plaintiff to procure an abstract. *Maier v. Langerhans* (Civ. App.) 231 S. W. 145.

In a suit for commission on procuring an exchange of defendant's store for a ranch, whether plaintiff praised defendant's property and commended the price fixed on it was immaterial; plaintiff having procured the exchange, and testimony sought to be elicited by defendant store owner from himself, constituting merely a conclusion or opinion of defendant, and irrelevant, was properly rejected. *Id.*

88. — **Contract of insurance.**—Testimony of insured claiming under accident policy that he gave insurer's local agent verbal notice of accident was admissible, though not a compliance with policy, as bearing on whether subsequent written notice was given within reasonable time. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

In proceedings by seller to garnish proceeds of insurance policy on chattel sold, on the issue whether the debtor had waived exemption of such proceeds by notifying the insurance company to pay the plaintiff's debt therefrom, a letter from the debtor to plaintiff, stating he had insured the chattel for plaintiff's benefit, was admissible. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

Where change of title, interest, or possession of insured goods is claimed to avoid a policy, possession of prospective purchasers, under their agreement to purchase in case the insurance company would transfer the insurance, is immaterial, except as throwing light upon question of change of title. *Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co.* (Civ. App.) 203 S. W. 382.

In an action on a fire policy, evidence as to the value of the remaining walls of the building, or the comparative cost of reconstruction, using such walls, or building entirely anew, is admissible on the issue of total loss. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

In an action on a fire policy where it appeared that the inventory taken before the policy was written was destroyed through no fault of insured, held that the submission of books and other data produced by the insured was proper. *Westchester Fire Ins. Co. v. Biggs* (Civ. App.) 216 S. W. 274.

In an action on a life policy, defended on the ground of suicide, which did not provide that the certificate of the attending physician and the findings of the coroner should be admitted in evidence to establish the cause of death, such certificates and findings were not admissible over objection if offered in evidence. *Green v. Missouri State Life Ins. Co.* (Civ. App.) 219 S. W. 552.

In a suit to establish and recover an interest in an insurance policy assigned to secure advances not exceeding a specified amount, a note and evidence relating thereto held admissible as indicating the extent of the interest under the assignment. *Hicks v. Emerson-Brantingham Implement Co.* (Civ. App.) 229 S. W. 348.

89. — **Contract of sale.**—In action to set aside a judgment for the price, evidence that goods shipped by seller to other parties were not as represented is inadmissible, where there was no proof that goods shipped to judgment debtor were not as represented. *Lyon-Taylor Co. v. Johnson* (Civ. App.) 195 S. W. 875.

Letters written subsequent to making of contract, giving seller notice that delay in delivery of timber was causing damage to buyer, were admissible, where damages thereafter accrued. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

In action for breach of contract to ship good pickings, exclusion of telegram, offered to show that plaintiffs requested defendant to ship pickings under different designation entitling them to lower freight rate, is not error where telegram does not mention pickings and may have referred to different goods. *Robinson v. S. Samuels & Co.* (Civ. App.) 196 S. W. 893.

The defense to action for price of lighting fixtures being that prisms thereon did not comply with contract, opinion of plaintiff's witness that they were artistically and practically equipped with prisms is immaterial. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.

In action for failure to deliver goods according to sample evidence that part of goods accepted was not equal to sample, though showing good faith in making rejections, was not admissible to show quality of that rejected. *Dallas Waste Mills v. Texas Cake & Linter Co.* (Civ. App.) 204 S. W. 868.

Under contract to buy mud shell at specified price per cubic yard "f. o. b. cars wharf Galveston," buyer is liable for quantity placed on board cars at wharf at Galveston, regardless of quantity at point of destination, which quantity may be shown by competent evidence of ascertainment thereof at wharf at Galveston, or by evidence of measurement at point of destination, and that none of the shell was lost in transit. *Freund v. Hanson's Sons* (Civ. App.) 215 S. W. 151.

90. — **Contract of carrier.**—Where a railroad's tenant did not sue to recover the value of cotton seed hulls burned in a car shipped to him, but for the value of his grain and seed house, situated on the road's right of way, and the hulls therein destroyed by fire communicated from the hulls in the car, testimony offered by the tenant, tending to show an admission on the part of the road that the car of hulls, when burned, was in transit, was properly excluded, as immaterial and irrelevant. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

In consignee's action for damage to bananas in transit, it was error to exclude contract between consignor and consignee authorizing employment of messenger to care for fruit, where carrier defended on the ground that its conductor obeyed instructions of messenger. *Gulf, C. & S. F. Ry. Co. v. Persky* (Civ. App.) 200 S. W. 606.

In an action by an assignee of a claim against a carrier for injuries to live stock in transportation, the court properly permitted a witness for plaintiff to testify as to the number of cattle paid for out of each shipment by the assignee, who insured the shipper against loss and the amount paid, where the carrier specially pleaded that it should not be held liable for more than the assignee paid the shipper. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

91. — **Marriage promise.**—In suit for breach of marriage promise, where defendant testified that he did not know exactly when he stopped "associating with" plaintiff, but that he had "refused to go" with her on the occasion of a party on a day named, evidence that the person who invited him to such party requested him to accompany plaintiff to the party was immaterial, and properly excluded. Evidence of previous unchastity of plaintiff or of alleged letters charging a witness with her pregnancy when she was not pregnant was admissible only in mitigation of damages. Testimony of a witness that he had lost confidence in defendant because defendant in conversation with him about plaintiff after the birth of her child, had misrepresented some little things to him should have been excluded. It was not error to permit plaintiff to testify that about all she owned "which could be called property" was a lot in a certain town, nor to refuse to permit defendant to testify that in his candidacy for nomination for county clerk in 1916 no issue was made against him except charges in this case, over plaintiff's objection that matter was immaterial and collateral, was not error. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

94. **Breach of covenant.**—In action treated as one for breach of covenant as to amount of incumbrances on land, a deed of trust and record thereof was not material evidence, where no issue of notice was submitted to the jury. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

In an action for breach of warranty of title of property conveyed in an exchange of properties, evidence as to the value of the property given by either party in exchange for property of the other is admissible to show the true consideration paid by the warrantee. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

95½. **Estoppel and waiver.**—In action to cancel oil leases, any fact evidencing intention of plaintiffs' predecessors in ownership of land to waive right of forfeiture of leases was admissible on issue of waiver. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

96. **Trust.**—In suit to establish resulting trust, plaintiffs basing right to recover on ground their father, after second marriage, invested in land funds belonging to community estate of himself and wife, plaintiffs' mother, and had land deeded to second wife, voluntary petition in bankruptcy, filed by father, etc., held admissible in evidence. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

In suit by grantor's grandchildren to establish parol trust upon land conveyed to defendant by her mother, introduction in evidence of prior deed to defendant held proper to show that defendant had received help from mother in view of evidence by defendant showing gift to grandchildren's fathers, but testimony that defendant had knowledge of provisions in previous will of grantor and in regard to acts relied upon to show exercise or control of premises by grantor was inadmissible. *Hambleton v. Dignowity* (Civ. App.) 196 S. W. 864.

Plats and deeds as well as statements of grantor made prior to her will executed four years before the deeds conveying the land were admissible as tending to establish subsequent declaration of trust. *Id.*

98. Specific performance.—In a suit for specific performance of contract to convey an oil and gas lease, evidence that plaintiff deposited a worthless check to bind the bargain is admissible, regardless of evidence that defendant falsely represented the check was good, and that she would shortly substitute the sum in cash. *Greenmeyer v. McFarlane* (Civ. App.) 220 S. W. 613.

In action to compel specific performance of a contract to convey a half interest in oil, gas, and minerals, under a certain tract of land, where title had not passed nor had the purchase money been paid, testimony was admissible to show that the acknowledgment of vendor's wife was not properly taken. *Crabb v. Bell* (Civ. App.) 220 S. W. 623.

99. Stockholder's liability.—In action against stockholders of insolvent corporation upon vendor's lien notes of the corporation, where defense was that plaintiffs had agreed to surrender notes in consideration of certain amount of stock, evidence that plaintiffs had foreclosed the notes, purchased the land, conveyed it to another corporation for amount of stock they had agreed to accept from former corporation, and had caused stock to be issued to subscribers of stock in former corporation in amount of subscription, held admissible in proof of such agreement. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

99½. Accounts.—Where defendant, treasurer of a lodge, agreed that each member of the association, after its dissolution, should share equally in the distribution of the funds in his possession, a suit therefor was on a stated account, and plaintiff was entitled to recover regardless of whether some portion of the fund was obtained by the association's unlawful sale of liquor, and evidence thereof was inadmissible. *Bellew v. Jacobs* (Civ. App.) 229 S. W. 928.

101. Title and possession.—Where one remainderman and a life tenant gave a deed of trust to extinguish a debt of the remainderman, evidence of the consideration given to such person was irrelevant in a suit by heirs of the other remaindermen to establish their title. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

In trespass to try title, where plaintiff claimed by adverse possession, a lease from defendant record owner to party occupying part of land is admissible. *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

Evidence in trespass to try title, in which neither party deraigned title from sovereignty, that C. did not get possession because W., under whom defendant claims, was in possession under lease from plaintiff's grantor, held not subject to objections that defendant did not know of lease, or that it was immaterial why C. did not get possession. *Crafts v. McAllen* (Civ. App.) 196 S. W. 729.

Proof that one did not render land for taxes after a certain time was admissible as a circumstance to show that the land was conveyed under a certain instrument. *Fretwell v. Pollard* (Civ. App.) 200 S. W. 183.

Since a subsequent patent must yield to the calls for boundaries in an older survey, and the grantees of such patent took nothing as to the portion involved in the conflict, their deeds were immaterial in an action of trespass to try title by claimants under the prior patent. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

In an action by purchasers in trespass to try title to obtain possession from vendor's lessees, the written lease was admissible to support defendants' right to possession. *Gilroy v. Rowley* (Civ. App.) 210 S. W. 623.

In trespass to try title, evidence as to the terms upon which plaintiff purchased the property from its immediate predecessor in title held immaterial and properly excluded. *Delta Land & Timber Co. v. Spiller* (Civ. App.) 216 S. W. 414.

In trespass to try title, in which plaintiffs' title rested on limitations for 10 years, testimony of a gift of the land to plaintiffs by their grandfather was admissible to show that plaintiffs were placed in possession by the grandfather, and that their father was never in possession. *Foster v. Guerra* (Civ. App.) 219 S. W. 295.

To overcome legal title and deprive the owner of his estate by adverse possession, every act or thing done or statement made by the possessor in respect of his holding, material and relevant to issue, should go to jury. *Davis v. Cisneros* (Civ. App.) 220 S. W. 298.

In a suit to quiet title to land which plaintiff had acquired by adverse possession, though his deed described a different tract, an agreement between defendants relating to the tract described is irrelevant and immaterial. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

In garnishment proceeding involving question of ownership of proceeds of drafts as between defendant and bank with which defendant had deposited drafts for collection, deposit slips showing the credit extended by the bank to defendant for the amount of the drafts and the ledger of the bank showing the condition of the defendant's account held admissible on issue of whether the bank became a purchaser for value of the drafts. *Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros.* (Civ. App.) 226 S. W. 806.

103. **Conversion.**—In suit for conversion of scrap iron purchased by plaintiff, plaintiff's testimony that between time of purchase and time of defendant seller's alleged conversion price of scrap iron had advanced was admissible to show reason for conversion. *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

105. **Trespass—By cattle.**—In action for injury to cotton crop from trespassing cattle, where plaintiff testified that the cattle were not permitted to stay in the cotton, but were from time to time driven out as soon as discovered, testimony as to how much cotton a cow could destroy in a day was inadmissible, because there was no basis in prior testimony for calculating the time the cattle were in the cotton. *Bowman & Blatz v. Raley* (Civ. App.) 210 S. W. 723.

106. **Negligence.**—Where plaintiff had pleaded negligence of railway company's employes in operating train, expert evidence showing that under circumstances it was improper to reverse the engine was admissible. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357.

In section hand's suit for injuries received when hand car upon which he was riding collided with cow on track, evidence that right of way was not fenced held admissible to show knowledge of danger. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

In suit against abstractor for damages from negligence, testimony as to indebtedness of owner of land to plaintiff bank, immaterial as to defendant's negligence in compilation of abstract, was inadmissible. *National Bank of Garland v. Gough* (Civ. App.) 197 S. W. 1119.

In an action for death of wagon driver when struck by a train at crossing in village, under allegation of negligence in failing to have crossing flagman, conversation of division superintendent and trainmaster discussing advisability of putting in warning bell at such crossing held admissible. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

In determining whether act of railway's foreman in directing four men to do certain work was negligent, fact that he knew, or should have known, in exercise of ordinary care, that force was insufficient, was material. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

Where in an action for injury of a servant by an explosion of coal dust, a witness was asked, "Can you get rid of that carbon in the air so there will be nothing in the air to explode?" to which witness answered: "Well, theoretically, a device could be possible in which no explosion would occur. Practically, I have never attempted it"—the question and answer were admissible on the issue whether defendant used due care in providing a safe place for work. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

In action for injuries to lineman's assistant when motorcar was derailed, evidence of prior derailments from the same cause was admissible, even in the absence of allegations thereof, to show the master's knowledge of the defects in the car. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

In action for death of employe involving question of whether employe realized dangerous character of work, foreman's testimony, "Wages were never raised because Mr. B. thought he did not have enough experience to justify it," held relevant and material. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

In action for death of employe, involving question of whether employe comprehended dangerous character of work, foreman's testimony that, "I am satisfied that G. [employe] did not understand dangers connected with handling of live wires and switches, on account of careless way in which he handled them, but he seemed to understand routine of work," was statement of facts, and was relevant. *Id.*

In an action for injuries received in a crossing accident testimony of the city's mayor and secretary concerning a conversation they had with the officials of the defendant relative to placing a flagman or electric bells at the crossing held admissible, as tending to show defendant's negligence. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

In an action against a railroad for damages for a cow killed in a cut closed at one end by cattle guard, evidence of railroad section foreman that he had written the company requesting it to remove the cattle guard was immaterial, especially where his reason for requesting its removal was that in times of rain it became full of water, making it difficult to get proper alignment of the rails. *Gulf, C. & S. F. Ry. Co. v. Messer* (Civ. App.) 208 S. W. 232.

In an action against a street railroad for damages resulting from collision with an automobile, it was not error to refuse to permit the street railroad company to prove that a mirror was not attached to the automobile where there was no evidence showing the facts necessary under the ordinance to require the use of a mirror. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In action for damages by fire caused by negligence of plumber hired by defendant, evidence that such employe was a tinner did not establish that he was an unlicensed plumber who was doing plumbing work unlawfully. *Cobo v. Rodriguez* (Civ. App.) 209 S. W. 196.

Where a servant was injured by the starting of machinery unexpectedly and automatically without human agency, the character of the accident and circumstances held to show defendant negligent in caring for the machine. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

In an action against a carrier for damages to shipment of cattle, the testimony of a witness that he asked the conductor to see if it was possible to get the engineer

to spot the cars with more care to save loss to owners was admissible. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

Evidence that it was the custom of street railroad company's cars to slow down for street crossings was admissible on the issue of contributory negligence of the driver of a motortruck, although such custom was not pleaded by him. *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275.

In action for negligence in driving cars against standing cars with such force as to cause standing cars to strike one crossing track located on an avenue, testimony as to use of avenue by public was relevant and admissible; but conveyances evidencing defendant's right to operate a railroad along the avenue held irrelevant and immaterial. *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

In an action by an injured servant based on negligence of the master in hiring inexperienced and incompetent trapper boy, testimony that witness had not seen him trap before and testimony of the boy that he had not trapped before is proper and admissible. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

Evidence as to the construction of wires in the alley in the rear of the residence of deceased, from which wires electricity was conducted into the house of deceased, was pertinent to the inquiry as to whether defendant was negligent in permitting an excessive current of electricity to enter deceased's residence. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

Testimony of a witness that he had placed a porcelain socket in residence of deceased and had told plaintiff, deceased's wife, that the socket was safe, and testimony of the wife that she had told deceased just before deceased attempted to attach electric iron to socket that electrician had told her there was no danger in using same, was pertinent on issue of contributory negligence of both deceased and plaintiff. *Id.*

The rate of speed at which an interurban electric car approaches a public crossing may be considered on a question of negligence, even though there is no statute regulating such speed. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

In an action for the death of a motorist struck at a crossing, evidence that he was drunk at the time is admissible as tending to show negligence. *Id.*

In an action for injuries in collision between an automobile and defendant's street car, testimony as to the damage done the automobile and as to the distance which the automobile was dragged before the street car stopped held admissible on the issue of whether street car was running at an unlawful speed. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

In an action for injuries in collision between an automobile and defendant's street car, the motorman's testimony as to how quickly and within what space he could stop the car held proper, as bearing on the issue of the speed at which car was running at time of accident; plaintiff testifying that automobile was dragged some distance before car was stopped. *Id.*

In a suit for damages for the drowning of plaintiff's minor son in defendants' swimming pool, evidence as to the depth of the water, condition of the pool, and as to decedent's previous cramping held competent, relevant, and material on the issue of contributory negligence. *Barnes v. Honey Grove Natatorium Co.* (Civ. App.) 228 S. W. 354.

109. Delay of carrier.—In action for damages to cattle from negligent handling and failure to transport expeditiously, proof of delay in transportation, causing cattle to reach destination on declining market, was properly admitted. *Baker v. East* (Civ. App.) 197 S. W. 1123.

In a consignee's action for carrier's refusal to seasonably deliver to connecting carrier, evidence that carrier placed derail on tracks connecting with line of connecting carrier held admissible, where carrier denied refusal. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

110. Delay in delivering message.—In an action for damages for delay in transmitting a death message, the admission of evidence that plaintiff, McGaughey, was sometimes called "McGoy," the addressee in the telegram, without showing defendant's knowledge thereof, held not error; evidence showing message could have been delivered regardless of spelling. *Western Union Telegraph Co. v. McGaughey* (Civ. App.) 198 S. W. 1084.

Where, in response to a service message inquiring as to the delivery of a message, the receiving office was informed that the message had not been delivered, the agent of the office where delivery was to be made, while entitled to testify that he did not send the reply, cannot give a conversation he had with the operator whom he claimed sent the reply. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

112. Ejection of passengers and others from trains.—Where negligence charged is permitting plaintiff's son to ride on freight train by brakeman, evidence of efforts, at time such child was not present, to prevent children boarding defendant's trains was immaterial. *Houston & T. C. Ry. Co. v. Lawrence* (Civ. App.) 197 S. W. 1020.

114. Malicious prosecution.—In action for malicious prosecution, admission of evidence showing financial condition and worth of defendant was error. *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

Evidence that prosecutor consulted and was advised by counsel is admissible upon issue whether he acted without malice. *Id.*

In landlord's action for rents and foreclosure of lien, defendants claiming damages under allegations landlord's agent in suing out distress warrant was moved by malice, testimony of agent that up to time he sued out warrant he knew defendant tenant owed good many creditors, and that several were pressing him, was admissible as material. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

117. **Libel and slander.**—In an action against a newspaper for libel, in which the truth and fairness of an account of a proceeding in court was not assailed, but only the fairness of comment and criticism, it was proper to inquire into the circumstances surrounding plaintiff. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168.

In an action for publication of an alleged defamatory article as to proceedings in justice court against plaintiff therein for violating the prohibition law, wherein he was discharged, etc., claimed to be privileged, evidence that plaintiff had testified he was transporting the liquor for export is inadmissible where it did not appear that the publisher's reporter was present, but the failure to state that the whisky was to be carried to Mexico would be no evidence of malice. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

In an action for slander where privilege was claimed, evidence as to the engagement and preparation for marriage of plaintiff and defendant's brother was permissible as tending to show a motive for defendant's making defamatory representations as to plaintiff and as a reason for ill will. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

120. **Fraud and fraudulent conveyances.**—In an action against corporate directors by plaintiff which extended credit to the corporation on faith of false statements given to commercial agencies, evidence as to dividends paid on subsequent bankruptcy of the corporation was admissible. *Durham v. Wichita Mill & Elevator Co.* (Civ. App.) 202 S. W. 138.

In an action for deceit, circumstances tending to show that declarations were made after consummation of transaction merely went to the weight of, and did not affect admissibility of, evidence that such representations were made at time of closing the transaction. *Askew v. Bruner* (Civ. App.) 205 S. W. 152.

If a deed alleged to have been fraudulent was executed and delivered prior to the date of representations made by the grantor to the plaintiff, evidence as to such representations is not admissible in a suit to set aside conveyance as fraudulent. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

In action by creditor to set aside conveyance by deceased to his wife as fraudulent, the inventory of the wife as community administratrix was admissible to show the condition of deceased's estate. *Id.*

In suit to set aside a fraudulent conveyance, evidence that the grantor paid taxes after the conveyance was not admissible. *Id.*

Where vendor obtained judgment of foreclosure against purchasers from vendee for interest on a vendor's lien note, and bought at the foreclosure sale for an extremely small amount, and resold for a large amount, that he fraudulently prevented the land from selling at a fair price was immaterial in an action by the vendor against the vendee on the note, where the vendee did not seek to have the sale set aside, nor claim damages on account of fraud. *Rector v. Brown* (Civ. App.) 208 S. W. 702.

In action against vendor of land for damages on account of fraudulent statements to effect that vendor had laid out a town site, and had contracted for 100 houses and that streets were then being graded, plaintiff was properly allowed to testify as to extent of improvements made; such testimony having some bearing on whether arrangements and contracts had been in fact made as represented. *Sims v. Ford* (Civ. App.) 209 S. W. 699.

In action involving question whether a conveyance from husband to wife was made to defraud subsequent creditors, evidence that prior to year of conveyance grantor was a close buyer, but that during said year he was a liberal buyer, was admissible both against husband and wife, who received benefit of such purchases and in some instances bought articles herself. *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

In an action by the purchasers for misrepresentations inducing a sale to them of a thresher, testimony of a purchaser that, immediately after rejecting the thresher, he signed a written order for another containing the same stipulations, which he read and understood, held properly excluded in the trial court's discretion, as being a collateral matter. *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

Evidence that the market value of the lots was only \$25 each was admissible in action for rescission of contract of purchase for alleged false representations of vendor, among others, that the lots were worth \$350 each. *Landfried v. Milam* (Civ. App.) 214 S. W. 847.

To prove that he relied on defendant's false representations concerning property taken in trade, it was permissible for plaintiff to testify concerning their friendly relations and business dealings. *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

In an action for fraud in inducing plaintiff to make a lease of oil land, where he alleged that defendants agreed to pay him the entire bonus or rental received, and failed to do so, plaintiff's testimony that he had refused a larger offer for a lease on the land which he leased to defendants was admissible. *Moorman v. Small* (Civ. App.) 220 S. W. 127.

In purchaser's action to rescind for false representations as to value of lots, evidence that vendors' agent had misrepresented that purchaser's neighbors had recently purchased lots and resold them at a certain profit held admissible to show that appellant relied upon the representations of the agents. *Massirer v. Milam* (Civ. App.) 223 S. W. 302.

In an action to cancel deed for fraud, testimony as to grantee's oral agreement to reconvey was admissible as against contention that such agreement was void under the statute of fraud, as a part of the fraudulent scheme to deceive in connection with other fraudulent representations, but could not have been relied on as an independent ground for rescission. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

In action by one brother against another to cancel deed on ground of fraud, refusal to permit defendant to state at least generally the acts done by him in lending and

advancing money to plaintiff under circumstances showing affection and kindness towards him prior to the execution of the deed held improper. *Id.*

In action to cancel deed to brother for fraud, in which it was claimed that plaintiff by delay waived the right to rescind for fraud, testimony by the mother of plaintiff and defendant as to her efforts, at plaintiff's insistence, to procure a reconveyance of the land from defendant to plaintiff, held admissible on the question of plaintiff's efforts to procure a rescission, and on the question of whether he affirmed or acquiesced in the sale. *Id.*

In suit to cancel conveyance of plaintiff's interest in certain mineral lands as procured by defendants' misrepresentations, in view of the circumstances, testimony of plaintiff that he repeated to his wife representations made him by a defendant as an inducement for the conveyance requested held admissible. *Holland v. De Walt (Civ. App.) 225 S. W. 216.*

In suit to recover money paid for oil stock on the ground that defendant promised, intending not to perform, to secure plaintiff for his advances, which should be returned to him in case he concluded not to exercise an option given him to take stock, evidence was properly admitted that defendants transferred to plaintiff as security the claim of an oil company; such evidence tending to corroborate plaintiff's contention that he was to have security. *Burchill v. Hermsmeyer (Civ. App.) 230 S. W. 809.*

In suit to recover money paid for oil stock on the ground of fraud, plaintiff's testimony as to what defendants told him in regard to another company's being after the oil property was inadmissible on the issue of fraud, in the absence of evidence that such statements on the part of defendants were false. *Id.*

121. Undue influence and mental incapacity.—In suit on promissory note and to foreclose vendor's lien, court properly admitted plaintiff's testimony that third person executed to him deed to land in controversy, that third person was then of sound mind, but was confined in insane asylum as habitual drunkard, etc. *Baldwin v. Drew (Civ. App.) 195 S. W. 636.*

Where will was asserted to be result of undue influence, evidence that a few months after its execution, testatrix and proponent indulged in unnatural and illicit intercourse, is admissible to overcome presumption of validity of will arising from testatrix's failure to revoke or destroy it before her death. *Beadle v. McCrabb (Civ. App.) 199 S. W. 355.*

Evidence that morphine was found on premises of testatrix after death, taken in connection with evidence as to her use of drugs, held admissible on question of condition of her mind. *Id.*

Evidence that proponent, a married man who had taken up his residence with testatrix, controlled her, regulated her household affairs, etc., is admissible on question of whether her will was result of undue influence. *Id.*

In suit by husband and wife to cancel their oil and gas lease, testimony tending to show a weakened bodily and mental capacity on the part of the husband when he signed the lease was relevant on the issue of any duress on the part of the other party procuring execution; that being the issue. *Turner v. Robertson (Civ. App.) 224 S. W. 252.*

In an action by heirs of a decedent to set aside a conveyance to two of his children on the ground that it was induced by undue influence, etc., a deed of rescission, thereafter executed by deceased, is admissible in evidence. *Kibby v. Kessler (Civ. App.) 225 S. W. 277.*

The will in favor of two only of testator's children, B. and W., having stated as a reason for excluding the others from participation that he had already advanced to them more than their inheritable interests, evidence of a greater advancement to W. than to any of the others is admissible on the issue of undue influence by W., to show an unjust and unnatural discrimination; likewise, in connection with such evidence, evidence that at time of execution of will W. had considerable property and the children excluded practically nothing. *Walker v. Irby (Civ. App.) 229 S. W. 331.*

122. Nuisance.—In a suit to restrain the operation of a cotton gin as a nuisance, evidence that the ordinary cotton gin makes and scatters dust, dirt, and lint, and makes a certain amount of noise in its operation, was admissible. *Moore v. Coleman (Civ. App.) 195 S. W. 212.*

In suit to enjoin erection of lumber yard buildings as nuisance, allegation that yard would constitute nuisance did not justify admission of testimony that yard would draw flies, rats, and cockroaches, and invite tramps, etc. *Shamburger v. Scheurrer (Civ. App.) 198 S. W. 1069.*

In an action against city for damages by flooding caused by dam erected to secure city water supply, evidence as to necessity for dam held improperly received. *Moore v. City of Dallas (Civ. App.) 200 S. W. 870.*

123. Damages.—In action against railroad for death of plaintiffs' minor son, testimony concerning plaintiffs' pecuniary condition was admissible as bearing on their reasonable expectation of aid from their son. *Galveston, H. & H. R. Co. v. Sloman (Civ. App.) 195 S. W. 321.*

In action against a railway company for injuries to residence property resulting from construction of side track, it was proper to allow plaintiff to testify as to cost of building residence. *St. Louis, B. & M. Ry. Co. v. Green (Civ. App.) 196 S. W. 555.*

In action against a railway company for injury to residence property resulting from maintenance of side track, testimony as to market value of property, including improvements just prior to and immediately after acts complained of, was admissible. *Id.*

In action to recover for breach of contract to ship good pickings the difference between contract price and market price of goods received at time and place received, evidence as to what plaintiffs had done with goods received is properly excluded, on cross-examination, as irrelevant. *Robinson v. S. Samuels & Co. (Civ. App.) 196 S. W. 893.*

In action for delay in transportation of hogs to be exhibited, evidence showing probability of plaintiff having won prize money is admissible. *Kansas City, M. & O. Ry. Co. v. Bell* (Civ. App.) 197 S. W. 322.

In abutting owner's action for damages from construction of street railroad viaduct occupying part of street, evidence that it prevented improvement on that side of street, or any evidence of special damage, was admissible on question of damages. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

In action for conversion of note, contract under which it could have been exchanged for equity in land held relevant, material, and admissible. *Farmers' State Guaranty Bank v. Pierson* (Civ. App.) 201 S. W. 424.

In action for death of adult son, evidence that son had stated that he was going away to work a few weeks for spending money because he received no pay from plaintiffs, and that he intended to stay with plaintiffs, parents, until their death, was admissible on issue of parents' expectancy of future aid from son. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778.

In suit by parents for death of adult son, evidence that father was suffering with typhoid fever nine years before, from which he had never fully recovered, was admissible since it showed that father was in such condition as to require services of son. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778.

In an action on contract of guaranty, evidence of expenses incurred by guarantor in procuring a change of venue was immaterial, where the issues were as to the scope of the contract, which was in writing and unambiguous. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

In suit against railroad for damages from fire destroying fruit and shade trees in rear of plaintiff's residence, testimony was admissible to show value before injury and extent of injury. *Stephenville, N. & S. T. Ry. Co. v. Baker* (Civ. App.) 203 S. W. 385.

In action against innkeeper for loss of traveling salesman's grip from his custody, letter of district attorney notifying plaintiff company owning grip that goods recovered from thief were ready to be redelivered, was admissible on issue of delay in delivery, and to show extent of liability. *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

In an action against a carrier for damages to a shipment of cattle, evidence as to the difference in market value of the cattle in the condition in which they arrived, and in "good condition," held admissible. *Baker v. Herndon* (Civ. App.) 209 S. W. 165.

In an action by insurance agent for breach of an employment contract where he had the exclusive right to represent the company in 42 wealthy and populous counties, evidence of profits the agent had made held a sufficiently accurate standard to enable the jury to estimate the amount of profit the agent would have received under the contract had employer not breached it. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

In action for damage to shipment of cattle, evidence as to the condition of the cattle at the time of their sale, ten days or two weeks after arrival at destination, was admissible as tending to show the actual and real condition of the cattle and the true extent of the damages sustained. *Ft. Worth & D. C. Ry. Co. v. Hill* (Civ. App.) 213 S. W. 952.

Upon the issue of negligence of bank in accepting check of drawee of draft attached to bills of lading in payment of the draft, testimony that the bills of lading were forged was admissible to show they were worthless. *Central Exch. Nat. Bank of Waco v. First Nat. Bank* (Civ. App.) 214 S. W. 660.

In an action against a railroad company for damages resulting from the burning of grass, evidence as to the amount of hay plaintiff could have cut from the land had the grass not been burned and the turf destroyed was admissible, since plaintiff was entitled to have the damages measured by the extent of the injury to the grass and land for any lawful purpose. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.

In an action against the city for damages to real property resulting from street improvement, permitting the city to show the character of other houses in the neighborhood, and not limiting it to evidence as to plaintiffs' houses, held not error, in view of the wide scope allowed to both parties in the matter of evidence. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

In an action by a widow against her father-in-law to recover damages for the burial of her husband's body contrary to her wishes, evidence of her unchastity is admissible on the issue of damages. *Foster v. Foster* (Civ. App.) 220 S. W. 215.

Plaintiff in action for damages for nondelivery of goods could state his prospects for making sales of goods. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

In an action for death, evidence that one of the children of deceased was going to school when his father was killed and afterwards went to work, and that deceased had supported his family by labor, was not improper as immaterial and calculated to arouse sympathy. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

In an action to recover damages for mental anguish suffered from failure to promptly deliver a telegram announcing the illness of plaintiff's mother, court did not err in permitting plaintiff to testify that she was especially devoted to her mother. *Western Union Telegraph Co. v. Gresham* (Civ. App.) 223 S. W. 1052.

In an action to recover damages for mental anguish suffered from failure to promptly deliver a telegram, announcing the illness of plaintiff's mother, who died before plaintiff received the message, court properly permitted plaintiff to testify that she was pained, and made "awfully nervous" by her inability to reach her mother; the condition of mind expressed by the term "awfully nervous" being a natural condition produced by a realization that she would be unable to see her mother alive. *Id.*

In an action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a fireman who had previously acted as locomotive engineer, evidence showing decedent's probable chance of being again employed as engineer and the wages he would then receive is admissible. *Hines v. Walker* (Civ. App.) 225 S. W. 837.

Where plaintiff claimed his cattle had been depreciated in value during transit by defendant railroad exposing them to ticks and fever, testimony regarding the result of exposing cattle to such diseases is admissible. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

In determining the damages to purchaser for fraud, the purchaser is not bound by the price at which the vendor sold stock given by the purchaser in exchange for the property, but is entitled to credit for the value of the stock as shown by the evidence. *Dingman v. Pahl* (Civ. App.) 226 S. W. 446.

It is proper in action, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for death of a son, to inquire into the financial and physical condition of the beneficiaries. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

124. — **Personal Injuries.**—In action for injuries, evidence as to purpose of operation performed on plaintiff's nose held competent on question of nature and extent of injuries and pain and suffering endured. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003.

In action for injuries at interurban railroad's crossing, it was proper and material for plaintiff to show his inability to use his leg after the accident, and showing was not necessarily objectionable because it appeared on voir dire examination that plaintiff had been subjected to another accident. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In an action for personal injury, plaintiff's testimony as to his income during a period of from 3 to 10 years preceding the accident was admissible, not as a measure of damages, but as a guide in enabling the jury to determine the proper amount by knowing what kind of remuneration would be open to plaintiff in a business he understood, and would and could resume were he not prevented by his injuries. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

In action for death, court properly permitted proof that efficiency of deceased as a stenographer was increasing, and would probably increase in future, so that her earning capacity would be greater than at time of her death. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

In an action by an injured brakeman against railroad receivers, testimony of plaintiff that he was in line of promotion from brakeman to conductor was admissible. *Lancaster v. Hynes* (Civ. App.) 214 S. W. 957.

In an action for personal injuries sustained by the station agent of one railroad while assisting employes of another in handling freight, plaintiff's testimony as to the treatment he underwent and the pain and suffering caused thereby held admissible on the issue of damages. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

In a brakeman's action for injuries against the federal director general of railroads, his testimony that in the railroad service there was a promotion that a brakeman could reasonably look forward to, that to the position of freight conductor, and specifying the wages of such a conductor, was admissible in view of his proof of reasonable chance of promotion. *Hines v. Glasgow* (Civ. App.) 217 S. W. 1114.

In an action for personal injuries suffered by plaintiff when the automobile in which she was riding ran into an iron bar extending from a railroad car, where plaintiff asserted that because of her injuries she was unable to accompany as a nurse a patient for whom she had been caring, evidence that plaintiff was an inmate of a disorderly house, which did not contradict her statement that she was nursing a patient therein, held properly excluded; plaintiff seeking no damages on account of outraged feelings or sensibilities. *St. Louis Southwestern Ry. Co. of Texas v. Ristine* (Civ. App.) 219 S. W. 515.

In an action for personal injuries sustained by plaintiff, struck by defendant's railroad train at a railroad crossing, evidence as to property owned by plaintiff, consisting of live stock and land, was admissible to show the extent and character of plaintiff's business and the pecuniary loss resulting from the injuries which prevented his looking after and attending to his property and affairs. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

In an action for personal injuries sustained by plaintiff by being struck by defendant's railroad train at a crossing, admission of evidence as to property owned by plaintiff, consisting of land and live stock, held not erroneous as calculated to prejudice the jury against defendant, and as showing that plaintiff was a man of wealth, and that it would require a large sum to compensate him. *Id.*

In an action for the death of a locomotive fireman, brought under the federal law, evidence that deceased was in line of promotion from fireman to engineer is admissible on the issue of damages. *Payne v. Allen* (Civ. App.) 231 S. W. 148.

In an action against a city for injuries to a jitney bus passenger, when the car left the street and plunged into a ravine, testimony of the injured passenger, a woman, that the bones of her nose were broken, the roof of her mouth pushed up to the top of her nose, etc., held admissible, as was also the testimony of a medical witness to the same effect, plaintiff having sought to recover for mental anguish and suffering, the result of the disfiguring injuries which she described. *City of Dallas v. Maxwell* (Civ. App.) 231 S. W. 429.

**RULE 6. FACTS ARE RELEVANT WHEN SO CONNECTED WITH A FACT IN ISSUE
AS TO FORM PART OF THE SAME TRANSACTION OR SUBJECT-MATTER**

Relation to issues in general.—A prenatal congenital malformation of skull of one person is not evidence that an abnormal condition somewhat similar in the skull of an-

other is not due to postnatal injury. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149.

In suit for personal injuries to pedestrian, struck by swinging door on passing train, testimony for plaintiff that witness had seen loose and swinging car doors at other times and on other cars was admissible, to show that it was not unusual or improbable for a car door to be loose and swinging. *Lancaster v. Settle* (Civ. App.) 204 S. W. 772.

In an action for damages for breach of a contract leasing land to plaintiff on shares, it was competent for plaintiff to show, for the purpose of ascertaining the damages occasioned by the breach, the character and amount of crops raised on the land during previous years it had been cultivated by the plaintiff. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

Profits in business depend on many contingencies, and past profits can only in exceptional cases be taken as a basis for estimating what profits would have been made, except for defendants' wrongful act. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

In trespass to try title, where it appeared that survey made when plaintiff's predecessor acquired title was erroneous, evidence that surveyor, in making survey of other tracts, never discovered any breaks in the line as claimed was immaterial and properly excluded. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

In action involving validity of trust created by will for erection and maintenance of hospital as against contention that the estate was not sufficient for the maintenance and erection of such hospital, testimony as to the cost of other hospitals in other cities held admissible on the question of the expense of equipment and maintenance of hospitals. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

In a father's action for custody of his child, testimony of his attending a dance while the child's mother was sick, at a time when they were living apart, would only show lack of affection for his wife, now deceased, which was not an issue, and would not prove his lack of love for the child, and was inadmissible. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

— **Difference in time.**—In action for damages from fire from defendant's locomotive, evidence of price paid for pasturage during one season was no criterion by which to arrive at market value of grass for pasturage at time of fire during following year, where there was no showing that pasturage at time of fire contained grass of like kind and quality, or of same value. *W. R. Pickering Lumber Co. v. Childress* (Civ. App.) 206 S. W. 573.

Evidence, in action for price of articles, of their condition at time of trial, as not complying with contract, is admissible, in connection with evidence that they were in same condition as when received. *J. Kennard & Sons Carpet Co. v. Houston Hotel Ass'n* (Civ. App.) 197 S. W. 1139.

Where goods were shipped, destination weights and grades being guaranteed by shipper, proof of weights at point of shipment, when not followed by other evidence showing there could have been no change in the weight after the car left the point of shipment, was inadmissible to show what the weights were at destination. *D. S. Cage & Co. v. Amsler* (Civ. App.) 217 S. W. 1094.

— **Associated or explanatory transactions.**—In an action by a servant for injury from explosion, the testimony of another servant, tending to support defendant's theory that plaintiff received no shock, for the reason that witness did not, although closer to the explosion, was erroneously excluded. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

In an action involving whether a bank had received a draft by mail on or before May 1st, letter containing draft being found in bank some time later, no one knowing when letter had arrived, evidence that many persons other than plaintiff had called at bank demanding delivery of checks contained in the same letter was material; the banker undertaking to recite facts to demonstrate that his attention before May 1st was called to the loss or delay of the letter; the fact that many persons were demanding checks tending to make bank employes observe all mail until the envelope was found, and tending to show that the letter must have arrived and been mislaid prior to May 1st. *Texas Co. v. Wimberly* (Civ. App.) 213 S. W. 286.

— **Similar wrongful acts.**—In action for damages in collision with automobile, compelling defendant to testify that he had been sued for a similar collision, held error. *Mumme v. Sutherland* (Civ. App.) 198 S. W. 395.

Evidence of other negligent acts on the part of plaintiff, unconnected with the accident involved, is inadmissible to raise an inference that he was negligent at the time of the accident. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

In a bank's suit on a note, wherein defendant maker did not claim that his signature was forged, but only that the amount written in by the bank's cashier, who had full authority from defendant to fill such blank to cover an overdraft, was fraudulent, testimony of a witness that other fraudulent entries, unconnected with defendant and his note, were found in the books of the bank, and had been made by the cashier, held inadmissible as irrelevant. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

In an action wherein damages were sought for fraud, in that a seller of land represented that an irrigation plant would supply sufficient water, testimony as to a statement to such effect, made to third persons, was admissible, being a representation involving the same character of fraud as that alleged in the action. *Wortman v. Young* (Civ. App.) 221 S. W. 660.

In an action to cancel an oil and gas lease, where proper taking of acknowledgment by notary was in issue, evidence as to notary's failure to comply with the statutes in taking acknowledgments of other married women held not relevant. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

— **Similar transactions.**—In action against railroad for failure to furnish car within a reasonable time after application therefor, as required by Interstate Commerce Act (U. S. Comp. St. § 8563, subd. 2), evidence that defendant railroad furnished another shipper a similar car on a subsequent application before car was furnished plaintiff was admissible in evidence of unreasonable delay. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

In an action for burning fodder where the railroad pleaded contributory negligence in stacking the fodder near the track without protection, the admission of evidence that plaintiff had similarly stacked fodder on the same premises for years before time of the fire was inadmissible. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

Exclusion as res inter alios acta.—Letters exchanged between defendants are not admissible against plaintiff, they not being attached to a deposition, nor the facts stated therein sworn to by any witness. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Where defendant counterclaimed for plaintiff's breach of contract to rent to him agricultural land on shares, evidence as to controversies between plaintiff and other tenants concerning leasing of his land is inadmissible. *Lott v. Ballew* (Civ. App.) 198 S. W. 645.

In action for assault and battery, it would not have been proper to admit testimony, even on plaintiff's cross-examination, with reference to difficulties he might have had with other persons in no manner connected with defendant, and at other times. *Hall v. Hayter* (Civ. App.) 209 S. W. 436.

In suit to recover an amount paid under false representations for cancellation of an oil and gas lease, testimony of third persons that when defendant obtained leases from them no representations were made except those contained in the contract, which did not provide that defendant should obtain a drilling contract within a specified time, was properly excluded. *Ware v. Campbell* (Civ. App.) 223 S. W. 593.

In action to cancel oil and gas lease on ground of alterations in instrument after delivery, court did not err in refusing to permit defendant assignees to give evidence of other leases taken by lessee with other parties in the same vicinity; the purpose being to show that the same erasures and interlineations appear in them as in the lease in question. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

Similarity of conditions.—In action for damages to plaintiff's land from erection of a dam, admission of evidence as to flooding of other lands on stream in time of high water was improper, where it was not shown that those lands were subject to the same conditions as plaintiff's. *Moore v. City of Dallas* (Civ. App.) 200 S. W. 870.

In action against railroad for failure to furnish car within a reasonable time after application therefor, as required by Interstate Commerce Act (U. S. Comp. St. § 8563, subd. 2), evidence that plaintiff applied to another railroad for a similar car which was furnished in less time than that in which defendant furnished car was inadmissible, where it was not shown that conditions with reference to the two orders were the same. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

In an action for breach of contract to lease land for a certain year, evidence as to the amount of crops raised on the land during previous years, when cultivated by plaintiff, was immaterial and not pertinent, in the absence of proof of the terms upon which plaintiff rented the premises for the year in question. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

In action for death of locomotive fireman caused by defects in a spur track, admitting proof of defects at other points than where the accident occurred, was not erroneous where it appeared the track was in the same condition throughout its entire length. *Hines v. Walker* (Civ. App.) 225 S. W. 837.

Showing intent or malice or motive.—When the intention with which an act is done is in issue, evidence of other acts of the party is admissible, but such acts must be of a similar nature and so connected with the transaction under consideration in point of time so that they may be regarded as part of the system. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

Where two original policies were applied for and issued at the same time, the two policies cannot be deemed so unrelated that past dealings with regard to waiver or forfeiture for nonpayment of premiums when due would be inadmissible, upon the question of intent to later waive the forfeiture of either policy, and of another policy to which one of them was intended to be converted. *Dunken v. Aetna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

— **Fraud.**—In action to rescind sale of real estate and cancel deeds on ground of fraud, evidence that defendant was guilty of similar acts and conduct at or about same time held admissible to explain motive. *Posey v. Hanson* (Civ. App.) 196 S. W. 731.

When the intent with which a fraudulent act is done becomes material, it is competent to resort to other fraudulent acts, precisely similar, to ascertain the real purpose moving the perpetrator of the wrong, by measuring him by the standard of his similar frauds connected in point of time with the transaction under investigation, systematically indulged in by him with respect to other parties similarly situated. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

In an action for damages for fraud in inducing plaintiff to lease lands, testimony as to defendants' statements to witnesses who leased lands at the same time was admissible to show intent. *Moorman v. Small* (Civ. App.) 220 S. W. 127.

Custom or course of business and part of series showing system or habit.—In suit by buyer of cotton for seller's failure to deliver, seller defending on ground contract was illegal as a dealing in futures, testimony that about the time the contract was made the witnesses and the buyer made like contracts, the witnesses being told that no delivery

need be made, but only a money settlement, was admissible. *Puckett v. Wilson Bros. Mercantile Co.* (Civ. App.) 211 S. W. 642.

In an action for damages by one tarred and feathered in May, 1918, on account of his attitude towards the Red Cross, evidence that plaintiff refused to join the Red Cross in December, 1917, was admissible as one of a series of acts tending to show that plaintiff was unpatriotic calculated to arouse anger. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

In action by purchaser to rescind for false representations, evidence as to false representations that certain neighbors of purchaser had purchased lots and had resold them to other neighbors held admissible to show a system to defraud purchaser. *Mas-sirer v. Milam* (Civ. App.) 223 S. W. 302.

In action on note defended on ground that payee had taken, in payment of balance of note, stock in certain corporation of which he had been named a director, where payee denied knowledge that he had been named a director in such corporation, testimony of another named director that he had no knowledge of having been so named, held admissible in corroboration and as showing the method and scheme in launching the corporation. *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

Other injuries or accidents from same or similar causes.—Upon question of duty to maintain outlook, testimony that other animals had been killed or struck by defendant traction company's cars at or near the crossing where plaintiff's animal was killed was admissible to show that defendant and its employes knew that animals were running at large in the vicinity of the crossing. *Jefferson County Traction Co. v. Giles* (Civ. App.) 206 S. W. 224.

In action against a feed company for death of a horse, alleged to be due to poison in feed, issue being as to what killed horse, it was proper to allow veterinarian to testify that, when he called to see plaintiff's horses, four of them were sick; the horse in question being one of the four. *W. T. Wilson Grain Co. v. Fitch* (Civ. App.) 208 S. W. 556.

In action for death of husband due to his receiving electric shock while attempting to connect electric iron to socket in his residence, evidence as to electric shocks received by others in their homes a few days before the death of deceased was admissible; electricity being supplied to others through same transformer. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

In an action for damages to shipment of stock by reason of negligent delay and improper bedding, it was permissible for plaintiff to testify as to whether he ever had any cattle killed in the same quantity at any other time when shipped over defendant's road. *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

Showing value—Sales of other property in general.—Proof that other notes and accounts belonging to bankrupt estates had been sold in territory does not, in action for breach of agreement to transfer to plaintiff notes and accounts of bankrupt purchased by defendant, establish any market value for such property. *Taylor v. Lafavers* (Civ. App.) 193 S. W. 651.

In arriving at the value of an oil lease on ten acres, it was not improper to admit evidence of price of fractions of acres sold adjoining such land. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify to sales of land four or five miles from his own, against objection that there was no showing whether the sales were for cash or credit, or whether there were any improvements on the lands sold, where the owner stated that there were no improvements on one tract sold, except a small box house, etc. *Gulf & Interstate Ry. Co. of Texas v. Stephenson* (Civ. App.) 212 S. W. 215.

In an action against a railroad company for damages, the contention that the value of the grass burned should be determined by what rental other persons paid for pasture land is not tenable, since what plaintiff and others paid per acre may or may not have been the value of the land for pasturage or other purposes at the time of making the rental contract, and at the time of the fire the value of the grass might have been more or less than the rental price. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.

Value of other property.—In action for one-half of rice crop alleged to have been damaged in transit, testimony as to condition at destination of other half shipped over same route was inadmissible, where proof failed to show that it was handled similarly to that in controversy. *Gulf Coast Transp. Co. v. Standard Milling Co.* (Civ. App.) 197 S. W. 874.

In arriving at the value of a certain oil lease at a certain time, it was proper to show the value of a similar adjoining lease, the conditions regarding the two leases, improvements, quality, etc., being alike, and what the adjoining lease could have been sold for under the existing conditions. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

RULE 9. THE BEST EVIDENCE IS TO BE PRODUCED

3. **Necessity and admissibility of best evidence.**—Existence of better evidence.—In a father's action for custody of a child, evidence of his general reputation as to being unkind to the child was inadmissible, since such fact is susceptible of better proof. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

6. **Contents of writing, and facts or transactions described in or evidenced thereby.**—In a suit to recover half interest in land by one claiming as heir by adoption, parol

admissions by adopting parent held admissible over objection that written instrument of adoption was best evidence. *Lane v. Sanders* (Civ. App.) 201 S. W. 1018.

8. — **Ownership, possession or control.**—Testimony that witness was present and knew of the transaction by which his father acquired title to land, it being asserted that the deed had been lost since the father's death, cannot be excluded as an effort to prove conveyance of real estate by parol testimony. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

In trespass to try title there was no error in refusing to allow a witness to testify that the lands involved were regarded by the entire family of the defendant and plaintiff as being owned by plaintiff, and not by defendant; titles to lands being fixed by deeds and other muniments of title. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

9. — **Judicial acts, proceedings and records.**—The judicial proceedings of a foreign court may be proven, as at common law, by testimony of competent witnesses. *Nease v. Broadwater Mercantile Co.* (Civ. App.) 206 S. W. 692.

The verity of proceedings of commissioners' court, as disclosed by its minutes, may not be challenged by testimony of a commissioner indicating the court's intent that an approved minute entry should provide for receiving bids for county work on a certain day, as stated in the minutes, as the court, being a court of record, speaks through its minutes. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

10. — **Official acts, proceedings and records.**—The rendition sheet is the best evidence of the fact of rendition, and not the tax rolls. *Horn v. Price* (Civ. App.) 200 S. W. 590.

Where judgment debtor was disclaiming ownership of property levied on, an objection, to a question as to whether he did not render the property in his own name, on the ground that the tax rolls were the best evidence, was erroneously sustained. *Id.*

Whether a sheriff's deed was executed by virtue of the requisite authority may be established by competent secondary evidence, and the question is not foreclosed by the fact that the execution docket contains no entry of the issuance of an order of sale. *Richards v. Rule* (Com. App.) 207 S. W. 912.

The plat filed as a part of the description of a survey by the original surveyor, showing a river to be the southern boundary of the survey, is the best of evidence that the river is such boundary in fact. *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

In a quo warranto proceeding to determine title to the office of county judge, where there was positive proof of the existence of the ballots, it was improper to permit the voters to testify as to how they voted, because such testimony was secondary evidence not admissible without accounting for absence of the best evidence. *Griffith v. State* (Civ. App.) 216 S. W. 469.

In action involving validity of Indian allottee's deed because of infancy, the Indian's testimony as to his age at time of execution of deed was inadmissible, under Act Cong. May 27, 1908, making enrollment records of the Commissioner of the Five Civilized Tribes conclusive evidence as to age of the freedmen of such tribes. *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (*Civ. App.*) *Newsom v. Langford*, 174 S. W. 1036.

A ceremonial marriage may be proved by the testimony of eyewitnesses, without the production of the marriage certificate or explanation of its absence. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

In a prosecution for embezzlement, if the postmaster had an independent recollection that defendant had made certain remittances through money orders issued by him, his testimony on the subject should have been received. *Grice v. State* (Cr. App.) 225 S. W. 172.

In trespass to try title, record of a certificate of the secretary of state, to the effect that charter was granted to a land and trust company on a specified date, and that no charter had ever been granted to a land and trust company of a name slightly different, was not an instrument required or permitted by law to be recorded by the county clerk, the original was not an archive of his office, and its record amounted to no more than a certified copy made by the clerk of the certificate of the secretary of state, hence it was not the best evidence of the fact sought to be proven. *Bomar v. Runge* (Civ. App.) 225 S. W. 287.

11. — **Corporate acts, proceedings and records.**—In an action against a surety company on an indemnity bond originally executed by another company, but reinsured by defendant company, a letter, written by surety company, stating that it had reinsured bond, although not the best evidence of the assumption of the obligation, was competent evidence thereof. *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798.

In shipper's action for damage to live stock, testimony as to contents of official Railway Equipment Register was not admissible to prove capacity of cars, over objection that it was not best evidence. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

Court did not err in permitting witness to testify as to the demise of a subordinate lodge; there being nothing to indicate that it was demise by formal resolution, or that any minutes or memoranda of such demise was ever made. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

12. — **Conveyances, contracts and other instruments.**—Since a lease itself is the best evidence of its contents, statements by lessee as to the contents of the lease are inadmissible as secondary evidence. *Green v. Montgomery* (Civ. App.) 211 S. W. 471.

In an action by members of a truck growers' association for breach of a contract to furnish onion crates, the written, signed, and accepted contract itself was the best evidence as to the number of crates to be delivered and as to the time of delivery. *May-*

new & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n (Civ. App.) 216 S. W. 225.

Parol evidence was not admissible to show the description of property intended to be conveyed in an assignment of an oil lease, which omitted the legal description, where no reason was shown why the lease itself, either the original or a certified copy, was not offered in evidence. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

13. — **Books of account, private memoranda, statements and correspondence.**—In action to enforce materialman's lien, deposition as to items furnished, given by one familiar with shipments, held admissible over objection that original books of entry would have been the best evidence. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

In an action involving book accounts as evidence of the value of a business transferred, plaintiff's testimony that the business was worth "around \$14,000" held not subject to exclusion on objection that it was the conclusion of the witness and that the volume of the business that was done would be reflected by the books, which would be the best evidence, where it appears that the books which plaintiff testified he kept were in evidence and were accessible to defendants. *Cochran v. Hamblen* (Civ. App.) 213 S. W. 374.

In an action on a note given by one copartner to another, where it was asserted that over \$50,000 had been charged to the payee copartner for which the maker had not accounted, and drafts and checks claimed to have been charged to the payee's account were introduced in connection with the payee's testimony, the entire bank account of the payee was admissible, despite the contention that it was not the best evidence, to show that checks and drafts were not charged to his account as claimed. *Gray v. Stolley* (Civ. App.) 230 S. W. 866.

15. **Fact of making or existence of writing.**—In suit against notary and sureties by buyer of land for damages from notary's having taken certificate of acknowledgment to deed without knowledge of identity of party who acknowledged, where there was no dispute that purported owner of land executed and delivered a deed from himself to plaintiff for which he received \$500, it was unnecessary to offer in evidence deed itself to prove existence. *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

16. **Writings collateral to issues.**—In a habeas corpus proceeding to obtain the custody of petitioner's child, proof that plaintiff was prosecuted for desertion was properly permitted by parol, the question being, "There was a criminal prosecution against you for desertion, for deserting this baby and wife, wasn't there?" although the plaintiff went further and testified that he was convicted; the contents of the indictment and judgment not being made an issue directly by the question asked. *Burchard v. Woodward* (Civ. App.) 223 S. W. 707.

When the amount of an insurance company's deposit in a bank is merely a collateral issue in a suit between the insurance company and the bank as bearing on the manner of remitting the renewal premium paid to the bank to the insurance company, the cashier of the bank can testify to the amount of such deposit if he has personal knowledge thereof, without producing the books or deposit slips. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Declarations and admissions of a grantor against interest as to the contents of the instrument are receivable without producing it or accounting for its absence when no question arises as to its execution, but where its execution is directly involved declarations by the grantor of its execution are inadmissible in the absence of proof of its execution or existence. *Sanders v. Lane* (Com. App.) 227 S. W. 946.

17. **Original writing as best evidence—Copies in general.**—An original or duplicate copy of a testimonio or protocol of title to land was an original instrument, and was admissible in evidence. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

19. **Original writing as best evidence—Letters and telegrams.**—Copy of telegram received by one party purporting to have been sent by another is not admissible, being secondary evidence. *Couch v. Biggers* (Civ. App.) 198 S. W. 1101.

21. — **Public records or documents.**—Copies of letters found in the archives of a Mexican town held admissible in evidence, after admission of evidence as to genuineness of the originals, as compared copies to show equitable title in the grantee from a Mexican state prior to the ceding of the territory by Mexico, in an action in trespass to try title. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683.

22. **Grounds for admission of secondary evidence.**—In action for cattle feed sold, where defendant was accountable for confusion in plaintiff's books, secondary evidence of amount furnished held admissible. *Avery v. Llano Cotton Seed Oil Mill Ass'n* (Civ. App.) 196 S. W. 351.

24. **Preliminaries to admission of secondary evidence.**—In action upon an accident policy classifying insured as a traveling salesman, for which the rate was \$20 per year, providing that rates fixed and filed with insurance department should control, testimony that a witness knew the rate, where it was not shown that proposed rate was so fixed and filed, or that it could not be obtained from insurance department, was properly excluded. *Metropolitan Casualty Ins. Co. v. Edwards* (Civ. App.) 210 S. W. 856.

In an action by a paving contractor for damages against the seller of a defective cement mixer, copies of the written contracts between plaintiff and the city for paving held admissible in evidence over objection that they were secondary evidence; proper predicate having been laid by the testimony of the mayor of the city that the contracts introduced were the reduction to writing of those awarded plaintiff, etc. *Standard Scale & Supply Co. v. Chapin* (Civ. App.) 218 S. W. 645.

25. — **Proof as to existence of primary evidence.**—In an action of trespass to try title, testimony that the witness saw a deed to his father held sufficient predicate to warrant evidence of contents of the lost deed, particularly as the whole subject was finally submitted to the jury. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

28. **Character and degrees of secondary evidence.**—The fact that the best evidence of a sheriff's authority to sell is not available, and that proper predicate has been laid for secondary evidence, does not alter the rule that recital in a sheriff's deed is not competent evidence of his power to sell. *Richards v. Rule* (Com. App.) 207 S. W. 912.

30. — **Subscribing witnesses.**—In trespass to try title, depending upon whether a deed was forged, where it appeared that the deed was destroyed, and the parties, witnesses, and notary had died, declaration by a witness that an attesting witness said he had seen the grantor sign the deed, in corroboration of other testimony, was not inadmissible as hearsay. *Rodgers v. Bell* (Civ. App.) 207 S. W. 630.

32. — **Copies and counterparts.**—In action for conversion of ore, deed executed after suit brought, showing it was executed in lieu of prior deed, which had been lost, was admissible in support of evidence plaintiff's purchase of claim had been made prior to attempted relocation by defendants. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

A paper being lost so that it could be proved by parol, a written statement of its contents, made at time of its examination by witness which he could swear was correct, was admissible. *Sandmeyer v. Doljisi* (Civ. App.) 203 S. W. 113.

Where original of letter showing terms of contract could not be produced, carbon copy held admissible. *Bay Lumber Co. v. Snelling* (Civ. App.) 205 S. W. 763.

The rule applied to admission in evidence of ordinary copies and letterpress copies also applies to carbon copies. *Givens v. Turner* (Civ. App.) 225 S. W. 403.

Carbon copies of "outturn" sheets and confirmation notices were not admissible as duplicate originals where the originals were partly printed and partly typewritten, the carbon copies not including the printed portion. *Id.*

33. — **Sufficiency.**—Evidence, if sufficient to show the existence and destruction of a deed from plaintiff's ancestor to defendant's predecessor, held insufficient to support a finding that it covered the section in controversy. *Hutchison v. Massie* (Civ. App.) 226 S. W. 695.

34. — **Records.**—As there is no statutory requirement in Texas that a sheriff's deed shall contain a recital of the authority under which it is executed, such recital is not competent secondary evidence of the sheriff's power to sell. *Richards v. Rule* (Com. App.) 207 S. W. 912.

RULE 10. SECONDARY EVIDENCE OF THE CONTENTS OF A WRITING IS ADMISSIBLE WHEN THE PAPER IS IN THE HANDS OF THE OPPOSITE PARTY AND NOTICE TO PRODUCE IT HAS BEEN GIVEN

Proof as to possession or control of primary evidence.—Admitting testimony that notices of mechanic's lien claim had been mailed to property owner, held not erroneous, where mailing was shown by registered mail return receipts and originals were found in possession of defendant property owner or his agent. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

The writer of a letter may introduce the carbon copy thereof in evidence where the adverse party to whom the letter was addressed has failed, on notice, to produce the original. *Bonnett-Brown Sales Service Co. v. Denison Morning Gazette* (Civ. App.) 201 S. W. 1044.

Where a warehouseman asserted that the contract of storage was contained in a receipt delivered by him to plaintiffs, and plaintiffs, on being notified to produce, denied having received such receipt, a carbon copy of the original is admissible. *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

Plaintiff may testify to the contents of his deed to defendant, claimed to be a mortgage; it not being in plaintiff's possession but having been left with defendant, who, though given notice to produce it at the trial, failed to do so. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699.

In an action on a beneficial certificate against a fraternal order which had assumed the insurance contracts of the order which decedent originally joined, under the facts tending to show that the original contract of merger between the two orders was executed in duplicate, and one copy filed with the Commissioner of Insurance pursuant to art. 4841, and defendant order at any rate having been notified to produce the original contract on trial, or that secondary evidence would be offered, the agreement of merger produced in court and certified to by the commissioner held admissible, as well as the agreement transcribed in the minutes of the order which decedent originally joined, which two instruments, together with certain oral testimony as to the adoption of the contract by the two orders, established it as made. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

Notice to produce primary evidence—Necessity in general.—A notice to produce a writing may be excused where from the nature of the proceeding the pleadings, and the like, knowledge by the other party of the fact that the instrument will be required will be presumed, in which case a failure to produce it will, without notice, enable its proponent to introduce other evidence of its contents. *Givens v. Turner* (Civ. App.) 225 S. W. 403.

In a suit involving an accounting in which plaintiff pleaded that certain sales of cotton had been made to him, certain cotton delivered, and that the "outturns" were as shown by exhibit attached to his pleading, defendant must have known that plaintiff would charge him with possession of all original notices of confirmation and statements of "outturns" sent him, and that the instruments would be required in order to have the accounting contemplated by the pleadings, and hence plaintiff was properly permitted to introduce evidence of their contents without having given defendant notice to produce the writings. *Id.*

A notice to produce a writing may be excused where from the pleadings knowledge by the other party of the fact that the instrument will be required will be presumed, in which case a failure to produce it will, without notice, enable its proponent to introduce other evidence of its contents. *Id.*

A copy of an instrument was properly admitted in evidence, although the notice required by Vernon's Sayles' Ann. Civ. St. 1914, art. 3700, was not given, and the original was not filed among the papers, where plaintiff alleged that such instrument had been recorded and was in the possession of defendant, and called upon defendant to produce the same in court upon the trial. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

RULE 11. WHEN A WRITTEN INSTRUMENT IS LOST, DESTROYED OR MUTILATED, OR IS OUT OF REACH OF A SUBPŒNA DUCES TECUM, SECONDARY EVIDENCE IS ADMISSIBLE

See *James v. State* (Cr. App.) 228 S. W. 941.

Mutilation, destruction or loss of primary evidence.—By party offering secondary evidence.—Where execution and loss of a lease are proved, an identified copy thereof is admissible. *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

After loss or destruction of original lease has been proved, testimony that original lease was duly executed and that instrument shown witness is true copy thereof is admissible. *Id.*

The rules governing secondary evidence of written instruments are fully complied with by proof that the deed was signed, acknowledged, and delivered to grantee, the names of the grantees and grantors, the property conveyed, and other contents, that it was lost before recording and could not be found after diligent search. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

In action for personal injuries, plaintiff having proved loss of his state license to act as insurance agent, parol testimony of himself and wife that he had such license was admissible. *Rick Furniture Co. v. Smith* (Civ. App.) 202 S. W. 99.

In proving a lost deed, it was not error to permit witnesses to testify that the instrument executed was a deed, though they did not give the language of the instrument, where they testified that it described the land in controversy, and two of the witnesses were lawyers, one of whom wrote the instrument, and the grantors testified that they did not afterwards claim the land. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

Writings in general.—Where tax collector's original returns were burned by order of court, secondary evidence of their contents was admissible. *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

Testimony that one under whom plaintiff claimed executed a deed to defendant's father, that the deed with a box of jewelry was stolen, that the robbers were pursued to the borders of a foreign country, and that nothing was recovered, is a sufficient showing of loss and inability to produce the instrument. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Affidavits filed to meet the statutory requirement of evidence of title when the assignee of the original grantee applies for a duplicate certificate, which show that the original certificate had been transferred to claimant, but that the certificate and the transfers had been lost, are not objectionable as secondary evidence, a further showing that search in the land office for the original certificate would be unavailing being unnecessary. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

Orders, warrants and negotiable instruments.—Proof of delivery of original invoice to another than the party seeking to introduce a copy thereof did not prove its loss, nor raise presumption in that respect, so as to lay proper predicate for admission of copy. *Federal Ins. Co. v. Munden* (Civ. App.) 203 S. W. 917.

Proof as to destruction or loss of and search for primary evidence.—Method of proof.—Evidence as to search held sufficient to establish loss of letter and to make secondary evidence of its contents admissible. *Slaughter v. Morton* (Civ. App.) 195 S. W. 897.

In action by assignee of purchaser's interest under a contract to recover a purchaser's deposit, evidence held sufficient to show that original assignment was lost and to show proof of its execution. *J. M. Frost & Sons' v. Cramer* (Civ. App.) 199 S. W. 838.

The method prescribed by art. 3700, of introducing written instruments in evidence without proving their execution as at common law, by filing affidavit before trial, does not make such a prerequisite to proving the execution of lost deed by subscribing and other competent witnesses. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

When the execution of an instrument of adoption is in issue, the acts and declarations of the adoptive party concerning its execution are inadmissible unless it be

first shown that the adoption paper or the record of it has been lost or destroyed. *Sanders v. Lane* (Com. App.) 227 S. W. 946.

Under art. 7749, in trespass to try title by heirs of a deceased wife against the purchaser from the surviving husband, who sold to pay community debts, certified copy of deed from the surviving husband to defendant purchaser held properly admitted in evidence, though there was no affidavit made to show loss of or inability to produce the original. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

— **Letters and telegrams.**—Evidence that person to whom letter had been written more than two years before the trial did not know where the letter was, but that he had not made a search for it because he did not keep his letters, and that it was probably destroyed, held proper predicate for admission of secondary evidence as to contents of letter. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.) 225 S. W. 383.

Primary evidence beyond the court's jurisdiction.—In an attorney's action against a bank for fees, included in a judgment against a third person, recovered by the bank, a carbon copy of plaintiff's letter to such third person was admissible where such person was dead, and his wife was beyond the court's jurisdiction, and had not been heard of for a year and a half. *People's Sav. Bank v. Marrs* (Civ. App.) 206 S. W. 847.

Determination of question of admissibility of secondary evidence.—Where sufficient predicate to allow testimony as to existence and loss of deed was laid in absence of jury, the refusal of the court to allow a rebutting witness to testify was not an abuse of discretion, as such witness would again have to be heard by the jury. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

RULE 12. THE BURDEN OF PROOF LIES ON THE PARTY ASSERTING A FACT ESSENTIAL TO HIS RIGHT OF ACTION OR DEFENSE AND PUT IN ISSUE BY THE PLEADINGS OF THE ADVERSE PARTY

I. Presumptions in general.

4. Presumption on presumption.—Pyramiding surmises and presumptions is not permissible. *American Bonding Co. of Baltimore, Md., v. Fountain* (Civ. App.) 196 S. W. 675.

Presumption that officials do their duty would not supply proof that defendant collected or received salary, in the absence of the further presumption that money with which to pay the salary was available, and such train of presumptions would not be permissible under the rule that one presumption cannot be based upon another. *Pease v. State* (Com. App.) 208 S. W. 162.

In suit for taking of cattle claimed by one defendant as having been stolen from him and having passed to plaintiff, to make out defendant's ownership of the cattle, it was not permissible to build on a conclusion that the V brand on the cattle was defendant's, established by circumstantial evidence and presumptions, the further conclusion that thief had made a change in ear marks to conceal theft. *Stovall v. Martin* (Civ. App.) 210 S. W. 321.

6. Personal status and condition in general.—That defendant made deposit to credit of himself and another would raise no presumption that defendant and such other person were corporation. *Krueger v. State*, 82 Cr. R. 404, 199 S. W. 629.

In father's habeas corpus proceedings to secure custody of children, whom he has never supported, and to whom he has been cruel, it will not be presumed that the best interests of the children will be subserved by placing them in father's custody. *State v. Jackson* (Civ. App.) 212 S. W. 718.

If a parent is not in any way disqualified to have the care and custody of his child, the law conclusively presumes that it is for the best interest of the child that he should have such custody. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

7. Nature and condition of property or other subject-matter.—Surviving wife's right to remove husband's body after burial is subject to the right of the court to require reasonable cause to be shown therefor; the presumption being against a change. *Curlin v. Curlin* (Civ. App.) 228 S. W. 602.

9. Love of life and avoidance of danger.—In action for death of pedestrian struck by train at crossing, the presumption that the deceased exercised ordinary care for his own protection and did not voluntarily place himself in a position of peril is proper to be considered by the jury. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Com. App.) 228 S. W. 159.

In an action for death of automobilist at crossing, the presumption is, in the absence of evidence to the contrary, that he took the ordinary precautions. *Hines v. Richardson* (Civ. App.) 232 S. W. 889.

10. Innocence.—Unless the facts alleged clearly show that a contract was unlawful, it will be presumed that it did not violate the law. (Per *Boyce, J.*) *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries to a railroad employee, caused by railroad's violation of Ash Pan Act (U. S. Comp. St. § 8624), it will be presumed that the ash pan placed on the locomotive complied with the requirements of the statute. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

In a suit for divorce on the ground of the wife's adultery, the wife is entitled to the same presumption of innocence as if she were being prosecuted for the offense. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

11. **Character.**—On a denial of a divorce sought on the ground of infidelity of the wife, the charge is presumed to have been false, in view of the presumption of the chastity of a woman, in the absence of evidence to the contrary. *Burchard v. Woodward* (Civ. App.) 223 S. W. 707.

13. **Sanity.**—Failure of respondent in lunacy proceedings to deny in habeas corpus proceeding brought by her that she is a lunatic was of no consequence; the presumption of law being that she was of sound mind. *White v. White*, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

14. **Intent.**—Presumption of good faith attends sales of community property by survivor for payment of community debts, and disproportion between value of property sold and debt, in absence of fraud, is unimportant. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

The question of waiver of breach of sale contract is mainly one of intention, and such intention cannot be inferred from acts performed under circumstances such as render the acts involuntary or compulsory. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

15. **Knowledge of law.**—See *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Without evidence to the contrary, it will be presumed that both the carrier and the shipper knew the law as to validity of contract requiring shipper's action on claim to be brought within six months after cause of action accrued. *Chicago, R. I. & G. Ry. Co. v. Shroyer* (Civ. App.) 197 S. W. 773.

A stockholder purchasing bank stock is presumed to know the law imposing statutory liability on bank stockholders, under arts. 459, 552, and 556. *Brooks v. Austin* (Civ. App.) 206 S. W. 723.

A purchaser of what purports to be county bonds is presumed to know the provisions of the law authorizing their issuance and is required to examine into the steps taken by the commissioners' court in that respect, whether referred to on face of the bonds or not. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Every man is presumed to know the law. *Richardson v. Bermuda Land & Live Stock Co.* (Civ. App.) 210 S. W. 746.

As a matter of law, one dealing with an agent must know that ordinarily such agent may not deliver to another in payment of his personal obligation his principal's property. *F. L. Shaw Co. v. Dalton Adding Mach. Co.* (Civ. App.) 211 S. W. 833.

Persons dealing with a corporation to render it their debtor are not charged with knowledge of the facts relevant to the legality of its organization, but are chargeable with knowledge of the law, and in his subsequent suit the receiver of the company, a banking corporation, cannot assert ignorance by represented creditors of its illegality under Const. 1876, art. 16, § 16. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

It must be presumed that parties dealing with a milling company having a grain elevator knew the law that prohibited a public warehouseman from issuing warehouse receipts against its own property. *New England Equitable Ins. Co. v. Mechanics' American Nat. Bank of St. Louis* (Civ. App.) 213 S. W. 685.

A bank, purchasing road bonds under Loc. & Sp. Acts 33d Leg. (1913) c. 70, providing that such bonds be sold to the highest bidder for cash, must be held as matter of law to know that a sale and purchase of the bonds partly on credit, or deferred installment payments, was in violation of the law and void. *People's Guaranty State Bank of Tyler v. Castle* (Civ. App.) 218 S. W. 519.

Contracting parties are conclusively presumed to have entered into their contract with full knowledge of all existing laws upon the subject which may affect the validity, formation, performance, operation, discharge, interpretation, or enforcement thereof, and such laws enter into and become a part of the contract, binding the parties. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

Parties to public contractor's bond were presumed to know the provisions of art. 6394f, requiring such a bond. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

It is a matter of common knowledge that, in the absence of a will, all testator's children will inherit equally, and testator will be presumed to have known the law in that respect. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

16. **Knowledge of fact.**—Jurors will be presumed to have knowledge of the length of time consumed in travel between two designated places; such facts being facts of general knowledge. *Baker v. Brown* (Civ. App.) 210 S. W. 312.

Dealer, having authority to sell particular truck in certain city, will be presumed to be well informed as to the market value of the truck in such city, and in city in which he himself purchases the trucks. *Kansas City, M. & O. Ry. Co. of Texas v. O'Connell* (Civ. App.) 210 S. W. 757.

In purchasing the surface rights of land from lessors of the oil and gas rights to a company and its trustees, plaintiff must be presumed to have known that the trustee lessees had the right to sink a well on his lot, and that thereby he and his family, if in occupancy, would be inconvenienced and perhaps endangered during drilling. *Grimes v. Goodman Drilling Co.* (Civ. App.) 216 S. W. 202.

A defendant, having been brought regularly into court by process, is in legal contemplation "in court" until the final disposition of the cause, and is presumed to be cognizant of every step taken in its progress. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

It is a presumption of law that a party to an action knew the contents of a judgment therein entered in his favor, and such presumption is aided by the fact that he

personally went with his antagonist's attorney to the courthouse, where, in his presence, such attorney stated the terms of the agreement to the court which rendered the judgment. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

17. Continuance of fact or condition.—There is a presumption against a terminal carrier which delivers goods in bad condition that the damage occurred on its own line, though it may have transported the goods over its line in the same through and sealed car in which it received them. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Civ. App.) 212 S. W. 208.

Where a marriage is once established, it is presumed to continue until the contrary is proved. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

Where defendant admitted that ordinance had been certified by city secretary in January, 1915, the admission of ordinance in evidence in action more than 2½ years thereafter, without requiring proof that the ordinance was in effect at the time of the trial, held proper; the continued existence of ordinance being presumed. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

When the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the personal relation or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised from the nature of the subject in question. *Id.*

There is no presumption, in an action for the burning of goods while in the carrier's possession, that the boxes when delivered to the carrier by a storage company contained all the goods that were in them when stored by him some time before with the storage company. *Hines v. Warden* (Civ. App.) 229 S. W. 957.

19. Regularity of course of business or conduct of affairs.—In view of interstate carrier's right to contract as to time within which shipper's action on claim may be brought, and of equal treatment of shippers required by Interstate Commerce Act, it will be presumed that carrier was conducting its business lawfully, and that such a contract was lawful. *Chicago, R. I. & G. Ry. Co. v. Shroyer* (Civ. App.) 197 S. W. 773.

An agent selling stock for corporation having entered into void contract to accept notes for stock in violation of Const. art. 12, § 6, it will be presumed that parties acted thereafter in accordance with its terms. *Cattlemen's Trust Co. of Ft. Worth v. Swearingen* (Civ. App.) 200 S. W. 596.

Presumption is that defendant compress company, with whom plaintiff stored cotton, was doing a lawful business in a lawful way. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

One intending to become a passenger, who was injured in the depot while waiting for his train, and who subsequently boarded the train, must be presumed to have paid the regular fare. *Ft. Worth & D. C. Ry. Co. v. Brown* (Civ. App.) 205 S. W. 378.

Where the only evidence tending to show that goods shipped had a market value at destination on date when they should have been delivered greater than that at which they were sold by plaintiff consignor, after buyer consignee refused to accept them, was the sale made by plaintiff to consignee, the court had the right to assume that sale to consignee was at market price. *Houston & T. C. R. Co. v. Westbury* (Civ. App.) 208 S. W. 333.

In eminent domain proceedings by a city, even if the fee to the street adjacent to the land taken is in the city, the presumption obtains, by reason of the long existence of a sidewalk condemned, that it had been placed where it was by the consent or requirement of the city, which had no right to remove it without compensating the owner of the lot. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

The custom of others engaged in like business is not the absolute test of negligence in failing to provide safe working place appliances, but, where master was conducting his business in accordance with the uniform custom of others it devolves upon servant to show that custom is negligent; the presumption being that persons in like business are reasonably prudent. *Taylor v. White* (Com. App.) 212 S. W. 656.

In the absence of specific agreement with respect to the kind of crops that would be planted upon rented land, and the amount of rentals to be paid, the usual custom of the country determines such questions. *Rupert v. Swindle* (Civ. App.) 212 S. W. 671.

One who was in possession of land under claim of ownership and under deed duly recorded, and rendered it for taxation during 10-year period, will be presumed, in absence of a contrary showing, to have paid taxes when due; he being dead and the tax records destroyed. *Morris v. Moore* (Civ. App.) 216 S. W. 890.

Payment of draft on bank by bank's cashier held not willful misapplication of the bank's funds within cashier's bond, in absence of affirmative showing that payment was without consent of his superior officers; the presumption being that payment was rightful. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

There is a presumption of good faith and performance of duty on the part of an agent, but such presumptions do not obtain where it is shown that the agent acted as an individual, and not in his fiduciary capacity. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

20. Making, validity and genuineness of writing.—Where there has been a long-continued claim of title by one person asserted in such open manner as to charge the other party with knowledge of the claim, and a corresponding acquiescence by the other party, it may be presumed that the claim originated in a proper conveyance, and strict proof of the execution and contents of the lost conveyance is not required, but this presumption is merely one of fact to be considered by the jury in connection with other facts and circumstances. *Hutchison v. Massie* (Civ. App.) 226 S. W. 695.

Where the alleged grantee in a lost deed and those claiming under him paid no taxes on the land for more than 30 years, and the only assertion of a claim of title was to an unidentified section of land in a named county, and was made in private conversations a thousand miles or more away from the land and from those who might be adversaries in the claim so made, there was no presumption in favor of the deed, and clear proof of its execution and contents was required. *Id.*

21. Mailing and delivery of mail matter.—There is a presumption of fact that a letter properly addressed and mailed was delivered in due course of mail to the addressee, but such presumption is subject to rebuttal by proof of nondelivery, or by proof of delivery out of due course of mail. *Texas Co. v. Wimberly* (Civ. App.) 213 S. W. 286.

In an action on a mutual assessment insurance policy, testimony of the secretaries of defendant association that they mailed notices of assessment to insured, with postage prepaid, and properly addressed to insured at the post office address given by him on the records of the association, constituted prima facie proof that insured received the notices. *Hobson v. Wise County Home Protective Ass'n* (Civ. App.) 214 S. W. 583.

The legal presumption that a letter was delivered to the addressee arises only after proof that the letter was properly addressed, stamped with the proper postage, and mailed, and that the usual time for transmission of mail between the points had transpired. *Bruck Bros. v. Lipman, Speir & Hahn* (Civ. App.) 228 S. W. 303.

The uncertainty of the mails during the war with Germany is well known, so that, to raise the presumption of delivery of a letter canceling an order before the goods were shipped, the probable time necessary for transmission of the letter should have been proved. *Id.*

22. Corporate acts and records.—Execution of mortgages by president or vice president of a corporation to secure payment of corporate debts will be presumed to be a corporate act. *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205.

Where a deed from a corporation is offered in evidence, purporting to be signed by its proper executive officer, under the seal of the corporation, it will be presumed that such person was such officer, and that he was duly authorized to execute such deed, where nothing appears in the evidence to the contrary. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

23. Evidence withheld or falsified.—Failure to produce evidence within a party's control raises a presumption that, if produced, it would operate against him, and every intendment will be in favor of the opposite party. *Green v. Scales* (Civ. App.) 219 S. W. 274; *Burnett v. Anderson* (Civ. App.) 207 S. W. 540; *Clover v. Clover* (Civ. App.) 224 S. W. 916.

Where an employer, sued for injuries, offers no proof to support the allegation that notice of provision for compensation had been given to servant by employer, as required by Employers' Liability Act, pt. 3, §§ 19, 20 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx), it must be presumed that no such notice had been given. *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

24. — Failure of party to testify or giving evasive answers.—Where the issue was whether defendant authorized the drawing of a draft and its payment by his codefendant, his failure to testify that he did not, although he had pleaded a denial, raises the presumption that if he had testified, his testimony would not have supported his plea. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400.

In former employe's action to recover stock from trustee to whom corporation had issued stock to be held for employe until specified date with right of cancellation on termination of employment before such date, in which employe claimed that right of cancellation was waived by failure to cancel with knowledge of termination of employment, the trustee, being in possession of facts as to whether it had knowledge of cessation of employment, and not having testified relating thereto, will be held as a matter of law to have had knowledge of such termination of employment. *Donoghue v. Lee* (Civ. App.) 228 S. W. 957.

Where defendant accused of slander did not deny under oath any of the allegations made against him, it will be concluded that he had no evidence against plaintiff and that the accusations against plaintiff's character could not be sustained. *Vogt v. Guidry* (Civ. App.) 229 S. W. 656.

25. — Failure to call witness.—Where proof showed fraud on part of plaintiff's vice principal, plaintiff's failure to introduce him warranted presumption his testimony would have been adverse. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

In a contest of a will by one claiming to be the wife of deceased, but claimed to be the wife of another, held, that there was no presumption that the alleged first husband of contestant was under the control of the contestant, and that he would testify concerning his alleged marriage with the contestant differently from contestant merely because she did not produce him upon the trial, it having been shown that contestant had threatened to prosecute him for inducing her to go through the form of a marriage with him when he had a wife living. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

26. — Suppression or spoliation of evidence.—The suppression of testimony is proper to be considered as a circumstance against the party suppressing the same, and where a fact is peculiarly within the knowledge of a party, and he does not produce

evidence thereof, it is legitimate argument that evidence does not exist. *Texas Electric Ry. v. Gonzales* (Civ. App.) 211 S. W. 347.

The voluntary destruction of a deed under which title had never been openly claimed by the person alleged to have been named as grantee strengthened the presumption that the deed was insufficient to support the right subsequently asserted under it, if it did not absolutely preclude him, and those in privity with him from establishing its contents by parol evidence. *Hutchison v. Massie* (Civ. App.) 226 S. W. 695.

27. Laws of other states.—Where foreign law is not alleged and proved, it will be presumed to be same as in state of forum. *Givens v. Givens* (Civ. App.) 195 S. W. 877; *Western Union Telegraph Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516; *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180; *Thompson v. Thompson* (Civ. App.) 202 S. W. 175; *Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake* (Civ. App.) 207 S. W. 367; *Hare v. Pendleton* (Civ. App.) 214 S. W. 948; *American Nat. Bank of Oklahoma City, Okl., v. Garland* (Civ. App.) 220 S. W. 397; *Walker v. Garland* (Civ. App.) 220 S. W. 399.

In absence of showing law of state wherein note was given as to which the statute of limitations might have accrued, had there not been letters preventing bar, the court must presume such law to be the same as the law of the state wherein the action was brought. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 202 S. W. 981.

Without proof to the contrary, it will be presumed that the laws of Kentucky are the same as the laws of Texas (art. 3480), forbidding sale of any property of an estate without an order of the court authorizing a sale by executor or administrator. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

In an action in Texas against blank indorser of notes executed, indorsed, and payable in the territory of Oklahoma, defendant, to defeat recovery upon the ground of the Oklahoma territory law, must prove and allege that the law as construed in Oklahoma territory was different from the law in Texas. *Lamb v. Hardy*, 109 Tex. 414, 211 S. W. 445.

In the absence of competent proof as to the effect of a foreign divorce decree under the foreign statutes, the rights of the party under the decree are to be determined by the laws of the forum, so that a remarriage not forbidden by its laws is valid. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

In the absence of proof of the laws of the state of defendant fraternal order's organization, the Court of Civil Appeals may presume it had power under the laws of such state, as such orders have under the law of Texas (Vernon's Sayles' Ann. Civ. St. 1914, art. 4841), to make mergers or amalgamations with other societies as provided by the laws of the order. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

It will be presumed, in the absence of pleading and proof to the contrary, that the law and interest rates of the state of New York where a contract was made are the same as in the state of Texas. *Pierce Oil Corporation v. Gilmer Oil Co.* (Civ. App.) 230 S. W. 1116.

In an action against the ancillary administrator in Texas for legal services rendered the Oklahoma executor, it will be presumed in the absence of proof as to the laws of Oklahoma in reference to probate of wills and handling estate of decedent that they are similar to the laws of Texas. *Pendleton v. Hare* (Com. App.) 231 S. W. 334.

28. Laws of foreign countries.—In the absence of evidence, it will be presumed that, like the laws of Texas, the laws of Canada do not permit a carrier to limit its common-law liability for loss of baggage. *Woodbury v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 209 S. W. 432.

29, 30. Judicial proceedings.—In general.—Under art. 1812, where petition was filed within period of limitation, delay in issuance and service of citation held to raise no presumption of laches making limitations applicable. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Where the sufficiency of sureties on an attachment bond is attacked it will be presumed that they are sufficient, in absence of evidence. *Lundy v. Little* (Civ. App.) 227 S. W. 538.

31. — Administration of estate.—In trespass to try title constituting collateral attack on long past order of probate court authorizing administrator de bonis non to sell unlocated balance of land certificate, community property of decedent and his wife, it must be conclusively presumed that court, before ordering sale, found fact of existence of debts owing by decedent, condition precedent to its power to authorize sale. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

In action in which answer set up, as res adjudicata, judgment rendered for temporary administratrix, it will be conclusively presumed, nothing appearing to the contrary in the record of the former case, that the temporary administratrix had authority to sue, though original petition did not allege authority. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Where the order of probate attempted to confirm an oil lease executed by the temporary administrators, reciting that the administrators were authorized by the order of appointment to make the lease, which was contrary to the fact, no presumption can be indulged in to support the order of ratification, and the lease is void. *Allar Co. v. Roeser* (Civ. App.) 217 S. W. 442.

34. — Judgment.—See *Conner v. McAfee* (Civ. App.) 214 S. W. 646; *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

A probate court is a court of general jurisdiction, and its judgments, within the scope and power granted to it by law, are entitled to the same presumptions in favor

of their validity as those of any other court of record of general jurisdiction. *Waterman Lumber & Supply Co. v. Robbins* (Com. App.) 206 S. W. 825.

In a suit on a note secured by deed of trust where the prayer is for judgment for plaintiff for its debt and for judgment of foreclosure for plaintiff and the trustee, and plaintiff is awarded a recovery of the debt and foreclosure of the lien is provided for in general terms without stating that such foreclosure is awarded plaintiff and the trustee, foreclosure will be presumed to have been awarded both plaintiffs. *Gregory v. South Texas Lumber Co.* (Civ. App.) 216 S. W. 420.

In suit to enjoin enforcement of judgment, recitals that the court, at a regular term, considered the evidence, heard in vacation, do not preclude the presumption that sufficient other facts were proved to sustain the judgment, against objection that cause was heard in vacation. *Kerr v. Hume* (Civ. App.) 216 S. W. 908.

In suit to enjoin enforcement of judgment, although record does not show affirmatively jurisdiction of defendant's person by service or answer, the judgment is not void for that reason, as, where the record is silent on the point, it will be presumed they had notice or were present at the trial. *Id.*

In case of a judgment otherwise valid sought to be vacated as entered by agreement of attorneys unauthorized to that end, it will be presumed, until the contrary is shown, that all of the parties before the court in the prior proceeding consented to the terms of the decree that was entered. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

Where, in trespass to try title, plaintiffs offered in evidence a judgment in a suit brought by them against the unknown heirs of a person, it is presumed, in the absence of a showing to the contrary, that they introduced their chain of title in such suit. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Where a judgment of divorce, which was attacked in action to set the judgment aside on the ground of fraud recited that matters of fact as well as of law were submitted to and determined by the court, it will be presumed that the court disposed of every issue presented by the pleadings. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

38. Conflicting presumptions of fact.—The presumption of continuation of a status is weaker than the presumption of innocence in making a contract which might possibly be construed as illegal. (Per *Boyce, J.*) *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

39. Rebuttal of presumptions.—Fact of prior marriage is not sufficient to overcome presumption of legality of second marriage. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

On proof that deceased had been married to both women claiming to have been his lawful wife at time of his death, the presumption, in absence of other proof, is that the subsequent marriage was lawful and that he had obtained a divorce from wife by first marriage; but such presumption is rebutted by proof that no divorce has been granted. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

In an action for death benefit, involving question of whether deceased's first or second wife was entitled thereto, evidence of interlocutory divorce judgment against first wife held to break down prima facie case for second wife established by proof of her marriage and to present issue as to whether deceased had married second wife without being divorced from first wife, in rebuttal of presumption of validity of second marriage; such judgment not severing bonds of matrimony with first wife and negating any presumption that divorce had been obtained in any other jurisdiction. *Id.*

Where land is purchased by a husband with his separate funds and the deed is taken in the name of his wife, a prima facie presumption arises that he intends to make a gift to his wife, but such presumption may be overcome by competent proof that husband's intention was not to make a gift. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

To overcome presumption that the construction of the common law of another state is the same as that in state in which action is brought, the construction of the other state must be pleaded and proven. *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642.

41. Negotiable instruments.—There is a presumption that a document regular on its face has been duly executed, and this applies to bills and notes. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 833.

It is presumed that all the makers of a joint and several note were equally liable with each other. *Lockett v. Farmers' State Bank of Vernon* (Civ. App.) 205 S. W. 526.

The rule that plaintiff's possession or production in court of a note sued on is prima facie evidence of ownership had no application, where the pleadings and evidence showed that he was not in possession of a note sued on, but that it was held in escrow, and that its production was procured by an order requiring it to be brought into court. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Where notes were made payable to the order of the maker and indorsed by him and transferred, it will be presumed that they were indorsed and transferred at the time of their execution. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

41½. Arbitration and award.—Nothing will be presumed against an award, but every presumption not contradicted by proof will be indulged in favor of it. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

42. Boundaries.—When a deed, by reference to a plat or by descriptive calls, shows that the land conveyed is bounded by a strip of land dedicated or reserved as a private or public right of way or easement, in the absence of express provisions, it is presumed

that it was the grantor's intention to convey to grantee the fee to the easement strip as far as the grantor's title extended therein, provided it did not extend beyond the strip, in which case the deed only conveys title to the center thereof. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

Owners of a tract of land not being interested in a claim that the west boundary line of another tract extended to their east line, their acquiescence in such claim cannot raise any presumption that it extended that far west. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

It cannot be presumed a landowner knew whether the land owned by another extended to his east line, where his survey was located 25 years before the other. *Id.*

44. Contracts.—Where the record does not show that a transaction was interstate commerce, it will be presumed otherwise when questioning the legality of a contract therefor. *Pennsylvania Rubber Co. v. McClain* (Civ. App.) 200 S. W. 586.

A novation which does not clearly appear will not be presumed. *Hix v. Tomlinson* (Civ. App.) 200 S. W. 897.

Where a contract fixes no time for performance, the law presumes the parties intended a reasonable time. *Aycock v. Reliance Oil Co.* (Civ. App.) 210 S. W. 848.

In an action for breach of warranty of title of land conveyed in an exchange of properties, there is no presumption, on the issue of damages, plaintiff offering the deeds to him which recite a consideration for the conveyances of \$8,000, that either party obtained an advantage in the trade. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

One provision alone of a contract cannot be taken and a presumption raised upon it at variance with the effect of its other provisions. *Fink v. Brown* (Com. App.) 215 S. W. 846.

A subcontractor is presumed to undertake his work subject to conditions and limitations in the contract between the principal contractor and the owner, if he knows these conditions and limitations; the presumption being conclusive if latter contract is made a part of the former contract. *Hartwell v. Fridner* (Civ. App.) 217 S. W. 231.

The presumption is that all stipulations in a contract are dependent. *Echols v. Miller* (Civ. App.) 218 S. W. 48.

Where two or more written instruments are executed on the same day, relate to the same subject-matter, and one refers to the other, the presumption is that they evidence but a single contract. *Barber v. Herring* (Com. App.) 229 S. W. 472.

45. Damages.—In counterclaim for damages for breach of warranty in a sale of riparian rights, evidence that 95 per cent. of the land sold was submerged and 5 per cent. was not submerged did not afford any basis for estimating damages, as there could be no presumption that the unsubmerged land was worth only 5 per cent. of the purchase price, as a basis for estimating damages. *Westervelt v. Meuly* (Civ. App.) 216 S. W. 680.

Where there is no proof that parents suing for death of their minor son could have reasonably expected him to continue to contribute to their support after attaining his majority, it will be presumed that his contributions would cease at such time. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

When a child reaches its majority, parent's legal duty to support it ceases, and, in the absence of proof, it cannot be presumed that such support will be continued so as to justify recovery under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for loss thereof through the parent's death. *Hines v. Walker* (Civ. App.) 225 S. W. 837.

47. Delivery of deed.—In absence of proof as to when deed was delivered, there is presumption that it was delivered on day of its date. *Evans v. First Guaranty State Bank of Southmayd* (Civ. App.) 195 S. W. 1171.

Recording of a deed is presumptive evidence of its delivery. *Watts v. McCloud* (Civ. App.) 205 S. W. 331.

That a deed is found in the possession of a grantee will raise the presumption that it was delivered to and accepted by him, but such presumption may be rebutted. *Benavides v. Benavides* (Civ. App.) 218 S. W. 566.

Where a duly executed and acknowledged deed had been on record for about 30 years, it was presumptively delivered. *Berry v. Godwin* (Com. App.) 222 S. W. 191, reversing order (Civ. App.) 188 S. W. 30.

49. Fraud.—Fraud is never presumed, but must always be proven. *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767; *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

Good faith held presumed in transaction whereby one financially interested in proposed railroad loaned money on note which borrower thereupon gave to railroad as gratuity or donation. *Handly v. Adams* (Civ. App.) 195 S. W. 888.

No legal presumption of fraud arises from the mere fact that debts were contracted after husband's conveyance of his property to his wife. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

57. Priority of lien.—No presumption of priority of right arises from the filing of a claimant's bond and affidavit for property against which execution was issued, where the sheriff had not taken possession of the property under the writ. *Moore-De Grazier Co. v. Hawley* (Civ. App.) 230 S. W. 1069.

58. Marriage.—In the absence of allegation that plaintiffs, claiming homestead, were married, the fact of marriage cannot be presumed from the fact that plaintiffs settled on the land claimed as homestead, resided there, and raised crops thereon. *Arispe v. Clark* (Civ. App.) 204 S. W. 373.

That persons were married and for several years thereafter lived together is sufficient prima facie to raise a presumption of fact that the prior marriage relation of one of them with another had been dissolved. *Tanton v. Tanton* (Civ. App.) 209 S. W. 429.

On proof that deceased had been married to both women claiming to have been his lawful wife at time of his death, the presumption, in absence of other proof, is that the subsequent marriage was lawful and that he had obtained a divorce from wife by first marriage. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

When there has been a formal marriage according to legal requirements, the law will presume the competency of the parties to enter into marriage contracts, and will presume that any former marriage of either was dissolved by death or divorce, but such presumption does not extend to a cohabitation with an agreement that the parties would marry, since the law merely tolerates common-law marriages, and does not encourage them. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

A ceremonial marriage may be proved by the testimony of eyewitnesses without the production of the marriage certificate, or explanation of its absence, and proof of a ceremonial marriage in a foreign country carries the presumption that it was in accordance with that country's laws. *Id.*

60. Negligence in general.—Where plaintiff has met the burden of proving that fire originated from an engine, the law presumes negligence, and he is entitled to recover unless railroad company proves that engine was provided with the best approved apparatus for arresting sparks, and was properly operated. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 212 S. W. 645.

62. — Contributory negligence.—In suit against railroad for death in crossing collision, in absence of evidence it will not be presumed that decedent was guilty of wanton negligence in attempting crossing ahead of train in his automobile. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

In absence of testimony, law presumes that one driving a wagon over interurban railroad crossing was exercising ordinary care. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In an action for the death of a servant caught in machinery, where there is no evidence as to how the injury occurred, deceased is entitled to the presumption that he exercised due care for his safety. *Hutcherson v. Amarillo St. Ry. Co.* (Com. App.) 213 S. W. 931.

63. — Carriage of goods.—Presumption of negligence of carrier from goods being received from it in damaged condition is no evidence thereof; the evidence not showing that they were in good condition when received by it. *Galveston, H. & S. A. Ry. Co. v. John Muennink & Son* (Civ. App.) 195 S. W. 613.

In the absence of proof to the contrary, it will be presumed that the loss of and injury to goods in an intrastate shipment was caused by the negligence of the carriers. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

Presumption of negligence against a carrier from the arrival of a shipment of cattle, which had been unaccompanied, in an injured condition is rebutted by showing that there was no delay in handling the cattle and that they were transported without negligence. *Leon v. Hines* (Civ. App.) 223 S. W. 239.

65. Notice.—It will be presumed that a requirement of a telegraph company that notice of claim be made within a specified time has been complied with, unless failure to do so is specially pleaded, under art. 5714. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

67. Payment.—Presumption of payment after lapse of 20 years applies in a suit to recover alleged delinquent taxes where there was no proof of delinquency other than assessment itself on which penalty and interest had been computed at a time obviously long after levy. *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472.

The presumption of payment of note created by long lapse of time is only prima facie, and other evidence relating to issue of payment, together with long lapse of time, is to be considered by jury in determining such issue. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Possession by debtor of evidence of indebtedness raises the presumption of payment. *J. W. Jenkins' Sons' Music Co. v. Truex* (Civ. App.) 204 S. W. 872.

68. Existence of agency and extent of authority.—See *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

A telegram received by a telegraph company over its telephone line, maintained for business purposes, was presumably received by an authorized person; a presumption becoming conclusive in the absence of contrary proof. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

Evidence that defendant owned the car causing injury, that the driver was in its employment, that after the accident the driver telephoned the employer about the occurrence, and that it sent a physician, held to raise the presumption that the driver was acting in the employer's business, in the absence of affirmative proof to the contrary. *City Service Co. v. Brown* (Civ. App.) 231 S. W. 140.

69. Ownership and possession.—Where the burden rests upon one asserting limitations, a presumption supporting the claim should not be indulged, especially when the evidence will not more certainly support a presumption in consonance with the right than in derogation thereof. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

In stockholders' suit, court must presume that company's assignment to private trustee would not have undertaken to convey realty unless company really owned it. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

Burden of proving all facts rests on claimant by adverse possession; every presumption being in favor of possession in subordination to the rightful owner. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

Where claimants under a senior patent had fenced a strip of land in dispute and cultivated, used, and enjoyed it, these facts raised a presumption of title and entitled them to recover in trespass to try title against one showing no better title. *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

In trespass to try title, proof that plaintiffs' possession, if any, was under a void deed negatived any presumption of title from plaintiffs' showing of prior possession. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

In action to recover title to land, where there was no evidence that defendants or those under whom they claimed ever had actual possession and no proof of a reliable paper title connecting defendants with the original patentee under whom they claimed, plaintiffs' prior possession alone was sufficient to support a presumption of title in them. *Thomas v. Calahan* (Civ. App.) 229 S. W. 602.

70. Public lands.—In action to recover land formerly owned by plaintiffs' ancestor wherein defendants claimed their predecessor had purchased land from ancestor prior to Act of Fourth Congress of Republic of Texas requiring sale of land to be evidenced by written instrument, evidence of continuous possession under claim of right by defendants and predecessors for more than 70 years, and of no claim being asserted thereto during such time by plaintiffs or ancestor, together with other facts and circumstances, held to raise presumption that such sale had been made. *Morris v. Moore* (Civ. App.) 216 S. W. 890.

72. Sales.—In the absence of evidence as to the terms of the contract of pledge or the procedure by which the pledgee's lien was foreclosed, it will be presumed that the pledgee in selling collateral followed and did not violate the law as to the manner of sale. *Haynes v. Western Union Telegraph Co.* (Com. App.) 231 S. W. 361.

73. Validity of statutes.—Since the Thirty-Sixth Legislature was lawfully in session, and had the inherent right to legislate upon the question of fixing the salaries of judges, the courts will presume that such Legislature had not incapacitated itself from enacting into law Senate Bill No. 32 by defeating at the same session a bill similar in substance, contrary to Const. art. 3, § 34, and will not suffer such presumption to be rebutted. *King v. Terrell* (Civ. App.) 218 S. W. 42.

75. Malice.—Malice may be presumed in action for malicious prosecution where want of probable cause is shown. *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

II. Presumptions on Appeal or Writ of Error

77. In general.—Where a judgment against a garnishee recites that both plaintiff and the garnishee appeared, and that all matters of fact, as well as of law, were submitted to the court, the appellate court will presume that Rev. St. 1879, art. 214, which requires an issue to be formed in such cases before trial, was complied with by the parties' consenting to the formation of verbal issues, in the absence of a written issue from the record. *Swearingen v. Wilson*, 2 Civ. App. 157, 21 S. W. 74.

Where record did not show how notice of sale was to be made under deeds of trust, appellate court will not presume, on objection to allowance of item for advertising notice of sale thereunder, that they provided for notice by posting instead of advertisement, in view of arts. 3757, 3759, as to notices of sales of real estate. *Adams v. Kelly* (Civ. App.) 196 S. W. 576.

In action for damage to cattle from delay in transit, in absence of evidence to show delivery was accepted by consignee on cars, and that stockyards company at destination acted for consignee in unloading, Court of Civil Appeals cannot assume stockyards company was not performing duty incumbent on carrier. *Panhandle & S. F. Ry. Co. v. Crawford* (Civ. App.) 198 S. W. 1079.

Where appellant brings up a record showing only part of the proceedings, every reasonable presumption will be indulged in favor of the court's rulings, which will be reversed only when they cannot be upheld upon any possible state of the case. *Pruitt v. Blesi* (Civ. App.) 204 S. W. 714.

Where defendants the unsuccessful parties to an arbitration proceeding made no exception below on the ground that the arbitration agreement was not filed with the clerk as required by statute, the appellate court will presume that it was waived. *Temple v. Riverland Co.* (Civ. App.) 228 S. W. 605.

78. Burden of showing error.—On appeal from judgment finding railroad company receiving road after termination of receivership liable for negligence of receiver, burden is on company to show that receiver was appointed by federal court to avoid operation of arts. 2139, 2141, making company liable for negligence of receiver. *Ft. Worth & R. G. Ry. Co. v. Burleson* (Civ. App.) 214 S. W. 617.

When petition for a stock law election under art. 7235 was received and passed upon favorably by the commissioners' court, the legal presumption is that it was sufficient, and, the court below having sustained the petition, the burden was on contestants of the election to show lack of qualification in the signers claimed by them. *Reid v. King* (Civ. App.) 227 S. W. 960.

79. Grounds and forms of action or defense.—Where the justice court judgment showed that the action was for a specified sum with interest and attorney's fees, and

foreclosure of a mortgage lien and the charge in the county court stated that it was an action on notes and to foreclose a mortgage lien, while the judgment in that court stated that it was on a liquidated account, it must be presumed that the action was on notes and for the foreclosure of the mortgage securing them. *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 538.

80. Jurisdiction.—When the record is silent as to the appointment of a special district judge by consent of the parties to a case, which the regular judge is disqualified to try, the appellate court must presume, in the absence of exceptions in limine, that the parties exercised their constitutional right to empower the special judge, by consent, to try the case. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Where judgment entered by special judge recited that he had been agreed upon by the parties to try the case, and nothing in the bill of exceptions conflicts with such recital, the court on appeal must presume that a legal and binding agreement was made. *Rusk County v. Hightower* (Civ. App.) 202 S. W. 802.

83. Process and appearance.—Where appellants had appeared by answer, in absence of evidence to contrary, it will be presumed on appeal that they were present at trial and had notice that appellee was seeking to foreclose lien. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

Where plaintiff made unknown heirs parties defendant, as provided by art. 1875, it must be presumed on appeal that unknown heirs appeared and answered where attorney signed answer as answer of all defendants, and court did not appoint an attorney ad litem to represent unknown heirs, as required by article 1941. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

On appeal in an action where there were several defendants, and where a deposition was filed prior to the convening of the full term of court, on the first day of which the court entered an order to the effect that service in said cause was not complete, and the cause was continued until the next term of court, it will be assumed, in support of a ruling of the court overruling a motion to suppress the deposition, made by all the defendants jointly at the second term of court, that at least part of the defendants were required to answer at the first term of court. *Panhandle & S. F. Ry. Co. v. Clarndon Grain Co.* (Civ. App.) 215 S. W. 866.

84. Pleading.—Since delay in filing plea in abatement and fact that plea was not sworn to may be waived, it will on appeal be assumed that they were waived where facts do not appear from record and all parties went to trial on issue raised by plea. *Stone v. Bare* (Civ. App.) 198 S. W. 1102.

Where pleadings in justice court are oral, and no record made on appeal, the presumption on appeal from intermediate court is that they were consistent with the rulings of the trial court. *Ravel v. Haymon Krupp & Co.* (Civ. App.) 206 S. W. 211.

Where on appeal from county court in cause instituted in justice court no statement of the pleadings is shown by the transcript, it must be presumed that they justified the introduction of evidence sustaining the judgment, but, where the record affirmatively shows the pleadings, none can be presumed, nor can allegations be presumed in conflict with the record. *Alvis v. John G. Harris Hardware & Furniture Co.* (Civ. App.) 218 S. W. 538.

Where a written pleading in a case originating in justice court, involving liability to a physician for fees, does not comply with the provisions of art. 5736, for registration of physicians, it will be presumed on review of the county court's judgment affirming the judgment of the justice that the necessary issues were raised by oral pleadings; the record not showing to the contrary. *Home Life & Accident Co. v. Cobb* (Civ. App.) 220 S. W. 131.

85. — Demurrer.—Where there was nothing in record to show that appellant's general demurrer or special exceptions were presented to trial court for ruling, or that any order was entered with reference thereto, it will be presumed that they were waived. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

Where there is nothing in the transcript to show that the action of the court on special exceptions to the petition was ever invoked, such exceptions are presumed to have been waived. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

Arts. 1829a, 1829b, requiring verification of a plaintiff's original pleading, having been repealed by Acts 34th Leg. (1915) c. 101, the Court of Civil Appeals should assume that the trial court's order sustaining exception to a clause of the petition was not based on the ground that the petition was not verified by affidavit. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Where the record on appeal is silent as to whether a demurrer was presented or acted upon, it will be deemed to have been waived. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

Where a statement fails to show that the court ever acted on special exceptions to the petition, and the record is itself silent on the subject, the presumption must prevail on appeal that the court did not act on the exceptions, and consequently there was nothing done by the trial court upon which a decision of the appellate court could be evoked. *Modern Order of Praetorians v. Neimann* (Civ. App.) 226 S. W. 438.

86. — Amendments.—Trial amendment of petition, reciting that it was filed with leave of court, will be presumed to have been filed upon proper leave. *Figuroa v. Madero* (Civ. App.) 201 S. W. 271.

Where defendant's motion for continuance for absent witnesses was excepted to on ground that there is no pleading on which to predicate the testimony, that testimony was not material, and that no diligence was shown, and court overruled motion without

showing basis of his ruling in his order, court's ruling is available as error, on appeal, notwithstanding inadmissibility of testimony under general denial, since it will be assumed that defendant would have amended pleading if motion had been overruled on such ground. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

88. Interlocutory proceedings.—Though order showed sustaining of exception to answer on which case was tried, held, that it might be presumed that the trial judge changed his mind and submitted the issue as one properly pleaded. *Matheson v. C-B Live Stock Co.* (Civ. App.) 198 S. W. 641.

A replevin bond, valid on its face and adjudged valid, will not be presumed invalid because of an order quashing the writ of sequestration or other defect not shown and not urged on motion for new trial. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Where it appears plea in abatement was not disposed of at term to which filed, if trial court had held plea waived, in absence of showing of record as to why it was not disposed of, Court of Civil Appeals would sustain action below on presumption no sufficient reason existed for failure to dispose of plea. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120.

Where there is nothing but the application for habeas corpus, which shows that defendant was placed in jail following an adjudication that he was in contempt of the district court for refusing to answer questions before a grand jury, the Court of Appeals is unable to decide upon what the judgment was rendered, and must dismiss the application upon the presumption that the commitment was regular, and was based upon proper facts. *Ex parte Berry*, 85 Cr. R. 204, 210 S. W. 799.

In the absence of a showing to the contrary, it will be presumed that a deposition was filed one entire day before the trial. *Texas Moline Plow Co. v. Grimminger* (Civ. App.) 217 S. W. 747.

Where it appears from the record that petition was filed with clerk of court on a certain date, and order appointing receiver bears the same date, and there is nothing in the record to show that the order was made before the petition was filed, contention that appointment is void because made before petition was filed will be overruled; presumption being that proceedings of trial court were regular and legal. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

90. Conduct of trial.—Where judgment, reciting that upon hearing the court decided that there was no question to be submitted to the jury, is the only evidence before the court on appeal of what the actual proceedings were, the conclusive presumption arises that defendants waived any right to a jury trial; no exception having been taken to court's action. *Andrie v. Fajkus* (Civ. App.) 209 S. W. 752.

Where on writ of error it is objected that special charges are not to be considered because not submitted to opposing counsel as required by Acts 33d Leg. 1913, c. 59, § 3 (art. 1973), it will be presumed, in the absence of a showing to the contrary, that the trial judge performed his duty as to such submission. *Shiple v. Missouri, K. & T. Ry. Co. of Texas*, 110 Tex. 194, 217 S. W. 137.

91. Admissibility and reception of evidence.—In support of trial court's ruling, it will, in absence of evidence to contrary, be presumed that ordinance was published as required by law. *San Antonio & A. P. Ry. Co. v. Boyed* (Civ. App.) 201 S. W. 219.

Where plaintiffs alleged, in action for wrongful death, abandonment of wreck and their son as one of acts of negligence, and it does not appear from record that such allegation was excepted to, court on appeal is authorized to conclude that court properly admitted evidence to effect that son was not removed for some time after accident. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778.

Evidence showing that intestate was on top of train, it will be presumed on appeal, in absence of evidence to contrary, that he was there in obedience to rule of defendant company requiring freight brakemen to be on top of trains approaching stations, etc. *Id.*

Where no objection was made as to the qualification of witnesses to express opinions, it will be presumed that the court satisfied himself of their qualification, and that appellant was satisfied therewith. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

Where, in an action to recover demurrage charges paid under protest, the court admitted an expense bill to show the amount of demurrage and rendered judgment therefor after having sustained exceptions thereto, and that portion of the petition suing for demurrage was not stricken out, it will be presumed on appeal that the court changed his mind. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

92. Dismissal or direction of verdict.—On appeal from order dismissing, for lack of prosecution, suit against resident and nonresident defendants, where it does not appear that plaintiff requested to be permitted to proceed as against resident defendants who had been served, it will be presumed in favor of action of trial court in dismissing suit for want of prosecution, that he did not so request. *Cain v. Wharton* (Civ. App.) 196 S. W. 952.

On appeal it will be presumed in support of judgment of dismissal that on plea in abatement plaintiff did not move for continuance to make necessary parties, where it did not appear of record. *City of Ft. Worth v. Cotton* (Civ. App.) 198 S. W. 1015.

In determining whether trial court should have given peremptory instruction for plaintiff, it is proper to view case in accordance with defendants' pleadings and evidence. *Craig, Thompson & Jeffries v. Barreda* (Civ. App.) 200 S. W. 868.

In considering whether the giving of a peremptory charge in favor of plaintiff was proper, only the evidence of defendant is to be considered, and, if sufficient to authorize a finding in his favor, giving of charge must be held improper, even though all of such evidence was controverted. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

In determining the correctness of peremptory instruction for defendant, the Court of Civil Appeals must give plaintiff's evidence its strongest probative effect. *Irwin v. Moore* (Civ. App.) 212 S. W. 710.

Court of Appeals, in determining correctness of lower court's action in refusing to direct verdict for defendant, must take plaintiff's evidence as giving the true version of the matter at issue. *Courchesne v. Brown* (Civ. App.) 216 S. W. 674.

In the absence of any showing to the contrary, the grounds of a motion to dismiss cross-action granted must be assumed true. *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 222 S. W. 665.

Where the record does not show that the direction of the verdict was based upon allegations in the trial amendment to the petition, and the original petition was sufficient to sustain the judgment and was supported by evidence which established its allegations beyond room for reasonable difference as to the facts, the appellate court will presume the directed verdict was based on the original petition, and not the trial amendment. *Faulkner v. Otto* (Civ. App.) 230 S. W. 447.

93. Instructions.—Where the court did not submit delay as one of the causes of injury to a shipment of live stock, and there was no special charge requested on the subject, it will, on appeal, be presumed that the evidence did not authorize such a charge. *Mexico Northwestern Ry. Co. v. Williams* (Civ. App.) 208 S. W. 712.

94. Custody and conduct of the jury.—It must be presumed that jurors understood and obeyed the instructions of the court. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387; *Lancaster v. Mays* (Civ. App.) 207 S. W. 676; *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 207 S. W. 904.

Where the court did not submit delay as one of the causes of injury to a shipment of live stock, the appellate court will not presume that the jury took into consideration delay in assessing damages, etc. *Mexico Northwestern Ry. Co. v. Williams* (Civ. App.) 208 S. W. 712.

In determining whether or not instructions are misleading, jurors are presumed to be not only men of ordinary intelligence, but men endowed with common instinct of fairness, which enables them, when not otherwise restrained, to determine issue of act according to accepted rules of right. *Funderburgh v. Skinner* (Civ. App.) 209 S. W. 452.

Although when jury has been misdirected it will be presumed that directions have been obeyed and erroneous verdict rendered, there is no presumption that they have blundered simply because they had the opportunity to do so under the instructions. *Id.*

Court on appeal will presume that jury followed court's instruction to disregard improper remarks of counsel, unless the contrary is made to appear. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Civ. App.) 216 S. W. 682.

The court on appeal in passing on argument of counsel claimed to have improperly influenced the jury will proceed upon the presumption that the jury has ordinary intelligence. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

95. Verdict.—After verdict for plaintiff, appellate court must assume that testimony for plaintiff is true. *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668; *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347; *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Court deemed to have made findings as to matters not included in special verdict, see notes under art. 1985.

It will not be presumed that the jury considered memoranda describing a brass bed, inadvertently omitted from the petition in replevin, because such bed is included in their verdict, where plaintiff testified as to the bed and there is no showing that it is described in the memoranda. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Where, in action for personal injuries against railroad, other issues of negligence on which recovery could be based, were properly submitted, and one issue of negligence, without support in evidence, was submitted, it will be presumed verdict for plaintiff was based on issues supported by evidence. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

A finding that defendant was not indebted to plaintiffs in any sum will be presumed to have been warranted by testimony in the absence of an attack on it, notwithstanding contention of plaintiffs that the evidence was insufficient to sustain finding that defendant had turned over to plaintiffs cotton worth a specified amount, the determination that one of the findings was not supported by testimony not being in effect a determination that the other was also without the support of testimony where the testimony might not have shown the cotton to be worth such amount and yet have shown it to be worth enough to satisfy the amount due. *Longley & Reeves v. Miller* (Civ. App.) 232 S. W. 566.

96. Findings of court.—It will be presumed on appeal that the trial court found all facts necessary to support a judgment within the scope of the pleadings. *First Nat. Bank v. Crespi & Co.* (Civ. App.) 217 S. W. 705; *Brown v. First State Bank of Weimar* (Civ. App.) 199 S. W. 895; *Walker-Smith Co. v. Bilao* (Civ. App.) 204 S. W. 777; *Brannan v. First State Bank of Comanche* (Civ. App.) 211 S. W. 945; *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Where the trial is by a court without a jury, and there are no findings of fact in the record, it will be presumed on appeal in support of the judgment that the court did not consider improper testimony although admitted. *Kingsville Cotton Oil Co. v. Dallas Waste Mills* (Civ. App.) 210 S. W. 832; *Western Union Telegraph Co. v. Streeter* (Civ. App.) 205 S. W. 940; *Stovall v. Martin* (Civ. App.) 210 S. W. 321; *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

Where there is evidence justifying such finding, it will be presumed on appeal trial court found facts to be in favor of judgment. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68; *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

Conclusions of trial court not being of record, and there being testimony upon which to base findings, this court is compelled, if any of theories advanced would uphold findings, to adopt same. *Lewis v. Houston Oil Co. of Texas* (Civ. App.) 198 S. W. 607.

In overruling a plaintiff's motion to withdraw announcement of ready for trial, the court must be presumed to have found in favor of defendant's contention as contained in his affidavit in answer thereto. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

In the absence of a special finding on rendering a general judgment, it will not be presumed that the trial court allowed more than was asked for in the petition for certain items of damages, although the court orally stated that damages on such items were an amount in excess of that asked for. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

Since statute requires a party who desires specific findings of fact to make requests therefor when the case is tried before the court, in the absence of such requests, the appellate court will view the evidence in the light most favorable to the judgment. *Id.*

Where judgment of the county court striking out defendant's plea of privilege shows on its face that it is based on conclusion that the plea is defective, no presumption can be indulged by the court on appeal that it was based on a finding of waiver. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

Though there be no copy of a city's charter in the statement of facts, it will be presumed the trial judge had a copy before him from which he quoted the provisions shown in his findings of fact. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

Correctness of finding of trial judge as to contents of a city's charter will be presumed, in the absence of a showing by copy of the charter, or otherwise, of error in the finding. *Id.*

If the conclusion of the trial court is not properly deducible from the facts set forth in his findings of facts, it will be presumed to have been established by other competent testimony given on the trial of the case. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

In an action to set aside a default judgment rendered after hearing evidence against a subsequent purchaser, the assumption of vendor's lien notes by the purchaser is presumed to have been properly found by the trial court. *Strictland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

Where there was no request for a finding as to the consent of the owner of a mining claim to the removal of ore therefrom, and there was evidence affirmatively disproving such consent, it will be presumed that the trial court found against such consent, to support its judgment for plaintiff. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

97. Order granting or refusing new trial.—In absence of showing to contrary, trial court's order overruling motion for new trial will be presumed to have been correct, and, if necessary to support order, presumption will be indulged that defendant's application for filing of findings of fact was withdrawn or waived. *Ft. Worth & R. G. Ry. Co. v. Tuggle* (Civ. App.) 196 S. W. 910.

Appellate courts treat with great deference action of lower courts on motions for new trial. *Cotulla State Bank v. Herron* (Civ. App.) 202 S. W. 797.

Where trial court made no findings of fact in denying new trial for misconduct of jurors in discussing amount plaintiff would have to pay attorneys in case he recovered, it will be presumed that judge concluded that discussion did not influence verdict, evidence being sufficient to warrant such conclusion. *West Lumber Co. v. Tomme* (Civ. App.) 203 S. W. 784.

An order vacating an order granting new trial, dated same day that final judgment was entered, will be presumed, in absence of anything to the contrary, to have been rendered prior to entry of final judgment under presumption that it was regularly and lawfully made. *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

In absence of showing of testimony, presumption on appeal is that such as was presented on the issues attempted to be raised on certain grounds of defendant's motion for new trial was such as to justify trial court in overruling it. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

In an action by alleged common-law wife for death of husband defended on ground of prior existing marriage, appellate court will presume to uphold denial of new trial for newly discovered evidence as to marriage that affidavit for continuance showing that deceased was married in Mexico was filed as of date of application for continuance, and came to knowledge of movant at that time. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

99. Judgment.—Every presumption not inconsistent with facts appearing of record will be indulged in favor of judgment, and all actions and orders in judicial proceeding will be presumed to have been made for good reasons and on proper grounds, nothing appearing to contrary of record. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120; *Cain v. Wharton* (Civ. App.) 196 S. W. 952; *Diltz v. Dodson* (Civ. App.) 207 S. W. 356; *McClintic v. Brown* (Civ. App.) 212 S. W. 540.

Appellate court in passing upon the sufficiency of the evidence to support verdict or finding will give due weight to the testimony tending to support the judgment, and indulge all reasonable presumptions in favor of the judgment. *Modern Woodmen of*

America v. Acheson (Civ. App.) 219 S. W. 537; *International Life Ins. Co. v. Stuart* (Civ. App.) 201 S. W. 1088.

Where in action by state to recover taxes judgment denied penalties reciting tender in open court on trial, it will, in absence of showing to contrary, be presumed that tender made before accrual of penalties, was kept good by payment of amount into registry of court. *State v. Hoffman*, 109 Tex. 133, 201 S. W. 653.

Where assignment challenges judgment for purchaser of purchase-money notes only in so far as it grants foreclosure of vendor's lien securing notes, it will be assumed that defendant was entitled to judgment for amount of notes. *Nobles v. Long* (Civ. App.) 202 S. W. 752.

Where there are statements in the court's conclusions that a cross-action was deemed subject to general demurrer, but the judgment does not specifically dispose of the cross-action, on appeal it will be construed as a final judgment denying relief. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Where there is no evidence that defendant initial carrier required connecting carrier to furnish an unloaded car, as required by art. 6688, the court on appeal may, in aid of judgment below, assume that defendant's loaded car was delivered to connecting carrier pursuant to an agreement. *St. Louis Southwestern Ry. Co. of Texas v. Morehead* (Civ. App.) 207 S. W. 336.

Where judgment is the only evidence before the court on appeal as to actual proceedings, mere showing that prior to actual trial an affidavit of inability to provide for a jury fee had been filed would not impeach the judgment, since every reasonable presumption must be indulged in its favor. *Id.*

On seller's appeal, in buyer's action for damages for fraud, Court of Civil Appeals must presume that seller was given credit for land, which buyer received in part payment for one of the machines, at the agreed value of the land, and that the same was its market value. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

Where judge's name does not appear in the blank constituting part of the form required by district court's rule 48 (142 S. W. xxi) following the judgment copied in the transcript, it will be presumed, for the purpose of giving court on appeal jurisdiction of the appeal, in the absence of such attack on the verity of the record as is permitted by law, that the clerk performed his duty in making out and certifying transcript as required by arts. 2108, 2114, and that judgment was entered under direction of judge under article 1694, since such direction may be oral. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Where case is tried without a jury, the presumption is that there was testimony to support the judgment rendered. *Stark v. Haynes* (Civ. App.) 211 S. W. 343.

Where the authority of plaintiff to sue for the use and benefit of a necessary party to the suit did not otherwise appear, it will be presumed, in support of judgment for plaintiff, that such party was personally present at the trial directing the suit so far as it affected his interests. *Perkins v. Terrell* (Civ. App.) 214 S. W. 551.

The appellate court will not indulge the presumption that trial court heard evidence and adjudged Jack Reed on whom garnishee service was made to be the Jack Reeves sued, where the judgment was by default and it therefore appears no evidence was received. *Reed v. McCutcheon & Church* (Civ. App.) 217 S. W. 174.

In an action on a building contractor's bond, where the contractor and the bondsmen filed a joint answer pleading the contractor's discharge in bankruptcy, and containing a suggestion by the bondsmen of suretyship, and asked judgment over against the contractor for any recovery against them, but the issue between the contractor and the sureties was not called to the court's attention, no instruction upon it was sought, and no objection to a peremptory instruction for plaintiff against the sureties was made for failure to submit the cross-action, it may be presumed in favor of the finality of the judgment that the sureties waived and abandoned their cross-action, or that a dismissal or discontinuance was had with reference thereto. *Burton Lingo Co. v. First Baptist Church of Abilene* (Com. App.) 222 S. W. 203, reversing judgment (Civ. App.) 198 S. W. 1013.

Court of Civil Appeals must assume trial court disregarded any portion of testimony of interested witness which he regarded as colored by her interest, if assumption is necessary to sustain judgment rendered. *Hcuse v. House* (Civ. App.) 222 S. W. 322.

In an action for specific performance, of contract binding plaintiff to convey "2,100 acres, more or less," which the contract described as being 2½ sections, which ordinarily would be but 1,600 acres, and neither the original petition nor supplemental petition alleges any mistake in drafting the contract, court on appeal must presume in support of the judgment for specific performance that the evidence explained the discrepancy, or that some agreement with reference to it was made, and that the court did not arbitrarily fix the amount of the judgment, where the contract fixed the price per acre. *Ward v. Graham* (Civ. App.) 224 S. W. 294.

Where the equities are most strongly with the defendant in error, all doubts as to the construction of law arising out of the situation should be resolved in his favor. *Smith v. Tipps* (Com. App.) 229 S. W. 307.

In a suit for the collection of delinquent taxes tried by the court without a jury, there is no presumption that there was evidence sufficient to support the judgment, where there is an agreed statement of facts containing all the evidence; presumptions being indulged only in the absence of proof and not against proof. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

101. **Costs.**—Where probate of a will offered by appellant was denied, as was probate of an earlier alleged will offered by one of the contestants, held that, where all of the costs were taxed against appellant, the original proponent, it will be presumed on appeal.

in favor of the judgment, there being nothing in the record to show that the action of the contestant increased the costs, that contestant was the successful party, and hence under art. 2035, entitled to recover all her costs. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

103. Making and contents of bill of exceptions, case, or statement of facts.—Presumptions in absence of statement of facts, see note 68, under art. 2068.

III. *Res Ipsa Loquitur*

106. The fact speaks for itself.—Where a railroad's bed, equipment, train, etc., are shown to have been under management of road or its servants, and a derailment, injuring a passenger, is such as in ordinary course does not happen if those in charge use proper care, a presumption of negligence arises. *Texas & P. Ry. Co. v. Stivers* (Civ. App.) 211 S. W. 319.

Neither negligence nor contributory negligence will be presumed from the mere fact of accident or injury. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 327.

Where a caretaker of stock and household goods was injured in a derailment while riding on the car containing the shipment, and alleged specific acts of negligence on defendant's part relative to the roadbed and speed of the train, the rule of *res ipsa loquitur* does not apply, and an instruction placing the burden on defendant to establish its lack of negligence was error. *International & G. N. Ry. Co. v. Bartek* (Com. App.) 213 S. W. 602.

Petition, alleging that electric shock resulting in death of plaintiff's husband was proximately and directly caused by negligence of defendant "in permitting a dangerous, excessive, and deadly current of electricity to traverse the wire running to and into said house of deceased," sufficiently alleged manner in which injury occurred; the doctrine of *res ipsa loquitur* being applicable in case of death by electric shock. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

In action for damage to sheep by reason of delays, evidence that a wreck occurred on track ahead of sheep train made a prima facie case of negligence under doctrine of *res ipsa loquitur*. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Civ. App.) 217 S. W. 208.

In a passenger's action for injuries sustained by exposure when compelled to walk four miles to a town after a derailment of the car wherein he was riding, where the allegations of negligence were general the rule of presumptive negligence from the fact of derailment obtained, and, in order to overcome such prima facie case of negligence, it was necessary for defendant to show that the accident could not have been avoided by the exercise of the utmost care reasonably compatible with the prosecution of its business. *Dowdy v. Southern Traction Co.* (Com. App.) 219 S. W. 1092.

Where shipper of hogs which were injured in transit alleged negligent delay, failure to feed and water, etc., an instruction that, if the hogs were received in good condition and delivered in an unduly damaged condition, the burden was on the carrier to show want of negligence, was improper; the rule as to presumption of negligence arising from such fact not applying where there are specific averments as to the negligence. *Hines v. Whiteman* (Civ. App.) 228 S. W. 979.

The loss alone of personal effects of a passenger while occupying a berth of a sleeping car is not sufficient on which to base a finding of negligence against the company. *Pullman Co. v. Bullock* (Civ. App.) 231 S. W. 1112.

IV. *Burden of Proof in General*

107. Nature and scope in general.—Ordinarily defendant seeking exception from liability under statutory proviso has burden of proving such exception. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

Under art. 7786, providing that the burden of proof is on one claiming ownership of property in the hands of a judgment debtor on which execution is levied, the fact that the judgment creditor was permitted to open and close did not shift the burden of proof, or entitle the court to place the burden on such creditor. *Horn v. Price* (Civ. App.) 200 S. W. 590.

In suit in the nature of quo warranto contesting an election and seeking to oust defendant from the office of mayor, judicial knowledge of the act of the Legislature incorporating the city and fixing the salary of the office of mayor would not relieve relator of the burden of proving that defendant collected or received the salary of the office. *Pease v. State* (Com. App.) 208 S. W. 162.

In an action for wrongful death resulting from a crossing accident, the operation and control of the particular street car which caused the injury was an issuable fact, which must be established by evidence. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In action for injuries to automobile in crossing accident, where there was undisputed evidence that railroad took charge of automobile and refused permission to examine car and ascertain damage, and there was no evidence as to what railroad did with car or its value or condition after injury, plaintiff will not be held to strict proof as to market value after accident; the railroad being the only one in position to give exact information. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

The state, in its litigation with its citizens, has no special immunities or privileges as to rules of burden of proof. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

Where a fact is peculiarly within the knowledge of a party, and cannot, in the nature of the case, be known to his adversary, the party having the knowledge has the burden of proving that fact. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

108. **Party asserting or denying existence of facts.**—Generally, burden of proof remains on party offering a fact in support of his case and does not change in any aspect of the cause, though the weight of evidence may shift from side to side, according to the nature and strength of the proof offered in support or denial of the main fact to be established. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553; *Fritsche v. Niechoy* (Civ. App.) 197 S. W. 1017.

Where defendant pleaded contributory negligence of plaintiff, he assumed the burden of proving it. *Schoellkopf Saddlery Co. v. Crawley* (Civ. App.) 203 S. W. 1172; *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

The burden is always upon a plaintiff to prove every fact necessary to establish his right to recover. *Rooney v. Porch* (Civ. App.) 223 S. W. 245; *Quanah, A. & P. Ry. Co. v. Novit* (Civ. App.) 199 S. W. 496.

In an action on an open account brought more than two years after the cause of action accrued, it was not sufficient for plaintiff to allege that defendant was a non-resident without supporting such allegation by proof. *Neal Commission Co. v. Golston* (Civ. App.) 197 S. W. 1124.

Woman who intervened in wife's suit against deceased husband's employer for death benefit, claiming a legal marriage, held to have assumed burden of proving there had been no valid decree of divorce from herself entered in favor of deceased prior to alleged marriage to plaintiff. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

Plaintiff suing for balance due was not entitled to recover on testimony disproving defendants' case as made by their pleadings, but must have recovered on testimony proving case made on his own pleadings. *Jennings v. Pollard* (Civ. App.) 208 S. W. 415.

Defendant had burden of proving his plea of compromise and settlement of the claim evidenced by his check sued on by plaintiff. *Weller v. Burns* (Civ. App.) 210 S. W. 861.

Where a seller after refusal of the buyer to accept resold the flour, and his action for damages was based on the propositions that he had made such a tender as to place him in the position of having done all that he was required to do to transfer title to the buyer, or, if not, that he had made such an offer of tender as relieved him of an actual tender, proof of such facts are essential to recover. *El Paso Grain & Milling Co. v. Lawrence* (Civ. App.) 214 S. W. 512.

In an employe's action against the owner of a mine and his lessee for injuries, issue being whether the lessee, who hired plaintiff, was an independent contractor, plaintiff, who alleged that the contract was a sham, assumed burden of proving such fact. *Higrade Lignite Co. v. Courson* (Civ. App.) 219 S. W. 230.

As the statute interposes a general denial on behalf of plaintiff, a defendant who set up affirmatively defensive matter in the answer has the burden of proving such matter. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

In an action by vendee for the recovery of land together with its rental value, the burden was on defendant the vendee of adjoining lands to establish facts sufficient to make out a prima facie title by agreement or estoppel as to boundaries as pleaded. *Davies v. Rutland* (Civ. App.) 219 S. W. 1114.

One attacking on habeas corpus a warrant for extradition, which is regular on its face, etc., has the burden of showing that the prima facie case of regularity was not in accordance with the facts. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

In an action for damages for X-ray burn, where defense was that plaintiff had a hypersensitive skin, it devolved upon defendant physician to prove that plaintiff had such a skin. *Hamilton v. Harris* (Civ. App.) 223 S. W. 533.

In an action against a gas company for unlawful discrimination in rates, it devolves upon plaintiffs to produce affirmative proof to support their averments, and they must show a difference in rate, that the conditions under which gas was supplied were substantially the same, or such as to present no good reason for the rate difference. *Cock v. Marshall Gas Co.* (Civ. App.) 226 S. W. 464.

In an action on county road warrants, defendants, in order to take advantage of a defense that the warrants were issued in contravention of Const. art. 11, § 7, requiring provision for payment to be made at the time the warrants were issued, must prove such defense. *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702.

In a lessor's suit to cancel an oil and gas lease on the ground of abandonment, the burden of showing abandonment was on plaintiff. *Hall v. McClesky* (Civ. App.) 228 S. W. 1004.

A corporation sued for injuries from servant's negligence, claiming exemption on the ground that it is a charitable institution, must affirmatively plea and prove the facts necessary therefor. *Barnes v. Providence Sanitarium* (Civ. App.) 229 S. W. 588.

In an action to recover a good faith deposit on a contract by which plaintiff was to dispose of defendant city's bonds upon their approval by plaintiff's attorney whose opinion was adverse in which plaintiff claimed damages because of greater cost in disposing of bonds than that agreed to in the contract, the burden was on the city to prove fraudulent or capricious conduct of plaintiff's attorneys, and in the absence of evidence of collusion between plaintiff and his attorneys, and the city having failed to show lack of reasonable foundation for the attorney's adverse opinion, plaintiff is entitled to judgment for the return of the deposit with legal interest thereon from date of demand therefor. *Grant v. City of Mineral Wells* (Civ. App.) 230 S. W. 854.

Where intervener in chattel mortgage foreclosure asserted, as ground for giving preference to his unfilled prior mortgage, that there was no consideration for plaintiff's mortgage and that plaintiff took it with notice of his lien, and plaintiff did not allege that it had advanced a valuable consideration or was without notice of intervener's

mortgage, but was content to rely on intervener's failure to prove his case, intervener had the burden of proving his allegations; the fact that proof of a negative allegation was required not changing the rule with reference to burden of proof. *First Nat. Bank v. Todd* (Com. App.) 231 S. W. 322.

The general rule is that the burden of proof to establish the affirmative of an issue involved in an action rests on the party alleging the facts constituting that issue, and remains there until the end. *Cotten v. Willingham* (Civ. App.) 232 S. W. 572.

109. Proof of negative.—In a suit by the state to recover land within its borders, where it makes a prima facie case, the burden rests upon defendants to show a grant from the state, and that the land sued for lies within the boundaries of the grant; but the burden of proof on the whole case does not shift, although the burden of introducing proof shifts back and forth, according to affirmative issues. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

The fact that proof of a negative is required to sustain an allegation does not change the rule as to the burden of proof. *First Nat. Bank v. Todd* (Com. App.) 231 S. W. 322.

110. Extent of burden in general.—To rebut prima facie case made out by showing that fire emanated from a railroad company's locomotive, it is not necessary for company to establish by preponderance of evidence that its employes in charge of locomotive exercised ordinary care to prevent escape of sparks therefrom. *St. Louis Southwestern Ry. Co. of Texas v. Johnson* (Civ. App.) 199 S. W. 1175.

One suing to recover a statutory penalty must produce proof that brings his case strictly within the terms of the statute. *Green v. Prince* (Civ. App.) 201 S. W. 200.

Damages must be established with reasonable certainty; absolute certainty not being required. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

When the party on whom the burden of proof rests has made out a prima facie case, the burden of overcoming the prima facie case shifts to the other party. *Thornell v. Missouri State Life Ins. Co.* (Civ. App.) 229 S. W. 653.

111. Failure to sustain burden.—In trespass to try title, burden was on plaintiffs to prove extent of interest, and, having failed, they have no right to complain that interest awarded was less than that owned. *Broom v. Pearson* (Civ. App.) 200 S. W. 191.

Where defendant upon his plea to abate plaintiff's suit because of another suit pending did not upon the record sustain the burden of proving that he filed his amendment in the other suit, making plaintiff a party at an earlier hour than plaintiff's suit was filed, both filings being on the same day, his plea was properly overruled. *Bragg v. Bragg* (Civ. App.) 202 S. W. 992.

112½. Adoption.—Where plaintiffs, parents of a member of an insurance order, claimed the proceeds of a benefit certificate on the ground that the beneficiary named was not the adoptive child of the member, and plaintiffs introduced an instrument of adoption which was invalid, that shifted the burden of showing a valid adoption to defendants. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

114. Limitations and adverse possession.—One asserting title to land by limitation has the burden of proving every fact necessary to give such title; inferences never being indulged in favor of a limitation claimant. *Stringer v. Johnson* (Civ. App.) 222 S. W. 267; *Thomas v. Ash* (Civ. App.) 199 S. W. 670; *Trabue v. Ash* (Civ. App.) 200 S. W. 415.

In action on open account, plaintiff held to have burden of showing defendant's absence from the state for such periods as would reduce the time to less than two years. *Neal Commission Co. v. Golson* (Civ. App.) 197 S. W. 1124.

In suit for certain land inclosed by defendant's fence, the burden was on defendant to show what portion he was entitled to, by virtue of the statute of limitations. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

Where the holder of a vendor's lien note claimed that the fraudulent concealment by the grantor of the land of the fact of his ownership stopped the running of limitations in his favor, the holder of the note has the burden of showing the fraudulent concealment, his ignorance of the facts, and that he could not by reasonable diligence have discovered the fraud. *Raley v. D. Sullivan & Co.* (Com. App.) 207 S. W. 906.

In an action on notes wherein defendant pleaded limitations, the burden of proof as to such issue was on him under the pleadings, remaining with him throughout the case, though the burden of introducing evidence might be shifted to plaintiff by defendant's introducing evidence of such character as to entitle him to a peremptory instruction if plaintiff did not rebut it or show matter in avoidance. *Puig v. Rodriguez* (Civ. App.) 219 S. W. 291.

The burden to show that plaintiff consignee's cause of action for destruction of part of the shipment was barred by limitations was on defendant carrier. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Com. App.) 221 S. W. 571, affirming judgment (Civ. App.) 187 S. W. 354.

One asserting limitations must prove every fact necessary to sustain his plea. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

In action against administrator on rejected claim, claimant was not required to prove that claim was not barred by limitations, but burden of pleading and proving the claim was barred was on the administrator. *Hooks v. Martin* (Civ. App.) 229 S. W. 592.

115. Alteration of instruments.—A grantee, who introduces in evidence deed containing alterations and interlineations to disprove that he had assumed payment of certain notes, which he had at one period in his testimony admitted, has burden to account for the altered appearance of the instruments. *Green v. Roos Bros.* (Civ. App.) 219 S. W. 519.

117. **Attorney and client.**—Attorneys, suing for compensation, are not required to prove that they acted in good faith; the rule that burden of proving good faith is upon attorney having no application to a mere contract whereby attorney's compensation is fixed upon employment. *Laybourn v. Bray & Shifflet* (Civ. App.) 214 S. W. 630.

In suit to set aside a judgment entered by agreement of attorneys on the ground that the attorneys who signed agreement acted without authority, complainants have the burden to prove the facts upon which they rely. *Pierce v. Foreign Mission Board of Southern Baptist Convention* (Civ. App.) 218 S. W. 140.

119. **Bills and notes.**—Since it will be presumed that all the makers of a joint and several note were equally liable with each other, the burden of showing the contrary rests upon such of the makers as allege that their liability is limited and different from that of the other makers. *Lockett v. Farmers' State Bank of Vernon* (Civ. App.) 205 S. W. 526.

Plaintiff suing wife on note has burden of proving that the note was one that a married woman was authorized by law to make. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

Defendant maker has the burden of showing why plaintiff payee should not recover on notes according to their tenor and legal effect. *Brenard Mfg. Co. v. Barnett* (Civ. App.) 210 S. W. 990.

Drawee, seeking to recover from payee amount paid on drafts before discovery that attached bills of lading were fictitious, has burden of proving that payee, in forwarding drafts with forged bills of lading attached, was so negligent in not detecting forgery as to make it responsible for drawee's loss. *Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co.* (Civ. App.) 211 S. W. 946.

120. **Bona fide purchasers.**—In view of art. 6824, declaring a deed valid, though unrecorded, as to all subsequent purchasers with notice or without valuable consideration, so making it void only as to purchasers for value without notice, a person undertaking to establish the invalidity of a deed has the burden to prove he is within the protected class. *Keith Lumber Co. v. Houston Oil Co. of Texas*, 257 Fed. 1, 168 C. C. A. 213.

Burden is on him who asserts a prior equitable title as against legal title to prove that holder of the legal title did not pay value. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

In trespass to try title, burden was upon defendant claiming under warranty deed from R. to show that owner of judgment against R. at time he recorded abstract thereof had notice of the unrecorded conveyance to defendant; defendant's deed being unrecorded. *Ives v. Culton* (Civ. App.) 197 S. W. 619.

Although note stated that it was part of purchase money for a dredge, title to which was to remain in payee, burden was on defendant to show some additional fact requiring purchaser to anticipate probable failure of dredge. *Harty v. Keokuk Sav. Bank* (Civ. App.) 201 S. W. 419.

In action by landlord against purchaser of crops on which he has landlord's lien, purchaser has burden of proving himself to be innocent purchaser. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

In a controversy between a holder of a prior unrecorded deed and a "creditor" under art. 6824, the holder of the unrecorded deed has the burden of showing that the creditor had notice at the time his lien attached or prior thereto. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

Under art. 5655, providing that chattel mortgages shall be void as against subsequent mortgagees or lienholders in good faith unless forthwith deposited and filed in the office of the county clerk, the burden is upon the subsequent mortgagee or lienholder to show by a preponderance of the evidence that he was a bona fide purchaser or holder for value. *First Nat. Bank v. Todd* (Civ. App.) 212 S. W. 219.

In view of art. 6824, one holding an unrecorded deed or contract subject to registration has the burden of showing that a creditor of the grantor had notice of such instrument, or of facts sufficient to charge him with notice, at the time the creditor procured a lien on the land by virtue of the law, as by filing and indexing an abstract of judgment, as distinguished from a lien by contract. *Newman v. Phalen* (Civ. App.) 214 S. W. 958.

Since the title to community land, legal title to which stood in the name of the husband, which descended to children upon the death of their mother, is an equitable and not a legal title, the burden of showing notice of such title to a purchaser from the surviving husband is upon the children asserting the equitable title. *Johnson v. Masterson Irr. Co.* (Civ. App.) 217 S. W. 407.

One who depends on the equitable right to rescind a contract of sale for the buyer's fraud has the burden to prove that a subsequent purchaser, resisting the action, took the property with notice of the fraud. *Cox v. Collom* (Civ. App.) 217 S. W. 1102.

Where all rights in land acquired by defendant were through a junior conveyance, in order for him successfully to defend against prior unregistered deed, which retained vendor's lien, burden rested on him to show he had no notice of prior conveyance. *Ackers v. Frazier* (Civ. App.) 220 S. W. 426.

Burden to show notice to junior purchaser of land of senior purchaser's unregistered title is on senior where he has only equitable title while the junior has legal title. *Id.*

Maker of note sued by assignee, conceding execution and delivery and assignment before maturity, has burden of proof on defense that consideration failed and that assignee had notice thereof. *Kirby v. Arkansas Bank & Trust Co.* (Civ. App.) 222 S. W. 1118.

If the deed of plaintiff in partition to defendants' predecessor was valid, then defendants had legal title, and the burden was on plaintiff to show that defendants and

their vendors were purchasers without value and with notice of the facts constituting the deed a mortgage. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

In a suit to set aside an oil and gas lease as a cloud on title, where plaintiffs claimed title free of the mineral lease, the burden was on them to plead and prove want of actual notice thereof. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

121. Boundaries.—In action to establish boundary line, plaintiff has the burden of showing not only title, but that boundary line was where he claimed it to be on the ground. *Ball v. McDuffie* (Civ. App.) 212 S. W. 844; *Land v. Dunn* (Civ. App.) 226 S. W. 801.

In trespass to try title, where evidence suggests a conflict between surveys, the burden is upon the party claiming under a junior patent to show that his land does not conflict with that held under a senior grant; but it is not incumbent upon one holding under a junior grant well defined and located on the ground to locate surrounding grants of uncertain description. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

In suit for certain land described by metes and bounds and inclosed by defendant's fence, the burden was on defendant to show what portion he was entitled to, and, where he showed title only to part, the court erred in refusing judgment for plaintiff for the remainder because it was not described in the pleadings or evidence so that a description thereof could be made in the judgment. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

In a boundary suit by the state, where the determining question was as to whether a corner was located by the surveyor on the bank of a river as it existed at the time of the suit or on the bank of a channel through which the river previously flowed, it was error to refuse to instruct that the burden was on plaintiff to establish the location of the corner on what it claimed was the abandoned portion of the river. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

One claiming under a boundary as fixed by surveyed line had the burden of proving the actual location of such line on the ground, before a call for course and distance, giving him a smaller area of land, could be ignored. *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

In garnishment by a judgment creditor against a bank which collected a draft drawn by judgment debtor, burden of proof rested upon the plaintiff to show that the money was not property of another bank named as payee in the draft and was the property of the judgment debtor. *Provident Nat. Bank of Waco v. Cairo Flour Co.* (Civ. App.) 226 S. W. 499.

In garnishment proceedings against a bank, the burden is on the plaintiff to prove that the bank knew that the debtor owned or had an interest in an account standing in the name under which he did business, where the evidence at the hearing to establish that fact came from a confidential source not open to the general public, and the plaintiff gave no information thereof to the bank at the time of the garnishment proceedings, or for 2½ years thereafter, and until the account had been withdrawn. *Magnolia Petroleum Co. v. Lockwood Nat. Bank* (Civ. App.) 227 S. W. 363.

122. Brokers.—In broker's action for commission for sale of land, burden of proving commission agreed upon is upon broker. *Britain v. Rice* (Civ. App.) 204 S. W. 254.

Where the broker produces a purchaser acceptable to the owner, it is not necessary to prove that the purchaser was ready, able, and willing to buy. *Waurika Oil Ass'n No. 1 v. Ellis* (Civ. App.) 232 S. W. 364.

123. Carriers.—In consignor's action for misdelivery, defendant carrier had burden of showing that individual to whom delivery was made was either a partner or agent of consignee partnership. *Missouri Iron & Metal Co. v. Texas & P. Ry. Co.* (Civ. App.) 198 S. W. 1067.

Under arts. 6687-6691, requiring carriers to forward goods via connecting lines provided empty cars be exchanged for loaded forwarded cars, defendant has burden of showing that its failure to forward was excused by not receiving empty cars. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

Weights of goods shipped stated in the bill of lading being prima facie evidence of the amount received, the burden is on the carrier to show that it did not receive such amounts. *Baker v. H. Dittlinger Roller Mills Co.* (Civ. App.) 203 S. W. 798.

Under the Harter Act, § 3 (U. S. Comp. St. § 8031), providing that if the owner has properly equipped, supplied, and manned a seaworthy vessel he shall not be liable for losses from certain causes, where cotton shipped in proper condition arrived in damaged condition it devolved on the vessel owner to prove that the loss was occasioned by a cause enumerated in the statute. *Mallory S. S. Co. v. Harriss-Irby Cotton Co.* (Civ. App.) 204 S. W. 789.

As railroad is required to furnish cars for goods accepted, and as facts excusing its failure to furnish cars when proper request is made and freight is offered are peculiarly within railroad's knowledge, the burden is upon railroad to establish facts constituting an excuse for failure to furnish cars. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

When plaintiff proves delivery of goods to common carrier, and failure of carrier to deliver goods at point of destination, he makes prima facie case, and burden is upon carrier to prove that loss was occasioned by act of God or of the public enemy, or by reason of inherent defect, or on account of fault of consignee. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 209 S. W. 775.

In an action for injuries to a shipment of cattle, the burden is on the shipper to show that the cattle were in good condition when delivered to the carrier for shipment, and after that is shown the burden is on the carrier to show that damage suffered during shipment was caused by the inherent vice and defect of the cattle. *Leon v. Hines* (Civ. App.) 223 S. W. 239.

In an action against connecting carriers for damage to shipment under art. 1830, subd. 25, requiring apportionment between connecting carriers when requested by either party, the last carrier is presumed to have been at fault and has burden of proving itself not at fault, or proving the proportion of damage for which it was not at fault, in which case the burden of proof is shifted to the next preceding carrier to acquit itself in the same way. *Crenwelge v. Ponder* (Com. App.) 228 S. W. 145.

To recover for goods burned while in the carrier's possession, the shipper must prove what goods were delivered to the carrier. *Hines v. Warden* (Civ. App.) 229 S. W. 957.

124. Contracts in general.—In suit for specific performance of oral contract to cancel notes given by plaintiff, an attorney, to his client, since deceased, plaintiff, a vigorous young lawyer, had burden of proving that contract was fair. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

In action to recover money paid in part performance of an executory contract for sale of realty, plaintiff had the burden of showing that he fully complied with conditions of contract under which he was entitled to a return of the money paid. *Lieber v. Nicholson* (Com. App.) 206 S. W. 512.

Those who deal with telegraph corporations are entitled, if they insist upon it, to have their messages transmitted and delivered free from all conditions or limitations, except those imposed by the law of the land, and, when a surrender of any part of that right is claimed, the telegraph company must be able to establish a valid agreement to that effect. *Western Union Telegraph Co. v. Armstrong* (Civ. App.) 207 S. W. 592.

Under a contract to settle a controversy under a building construction contract, whereby part of the agreed price was placed in escrow subject to completion of the contract by plaintiff, and which provided that if the tin work was not done the owner might complete the work and recover for it as itemized statements from competent workmen showed actual cost, the burden was on the owner to show the cost of completing the tin work in order to recover therefor. *Spinner-Hay Lumber Co. v. Applebaum* (Civ. App.) 207 S. W. 624.

125. Want or failure of consideration.—Where a deed recited receipt of consideration, the burden is upon the person suing to cancel it for lack of consideration to show that the consideration was not paid. *Russell v. Beckert* (Civ. App.) 195 S. W. 607.

Maker of note sued by assignee, conceding execution and delivery and assignment before maturity, has burden of proof on defense that consideration failed. *Kirby v. Arkansas Bank & Trust Co.* (Civ. App.) 222 S. W. 1118.

126. Corporations.—In action against stockholders of insolvent corporation on notes of the corporation, defended upon ground that plaintiffs had agreed to surrender the notes for stock of the corporation, plaintiffs had burden of establishing their case, but burden of proving agreement was upon defendants. *Donoho v. Carwile* (Civ. App.) 214 S. W. 553.

126½. Custody of child.—One seeking to withhold custody of child from its natural parent held to have burden of showing that best interests of child demand that its custody and care be taken from parent. *Dugan v. Smith* (Civ. App.) 199 S. W. 654.

In habeas corpus proceedings by father to recover possession of his child from its grandparents, the grandparents have the burden of proving that the father was unfit to have charge of the child, or that its best interests would be subserved by the grandparent's custody. *Cardenas v. Barrera* (Civ. App.) 216 S. W. 474.

Where a parent who surrendered custody of his child to a third person brought habeas corpus to regain the custody, the third person has the burden of establishing facts necessary to overcome the legal presumption in favor of the parent's custody, but it is sufficient if the third person show that the best interests of the child demand that it remain in his or her custody, and it is improper to grant the parent the custody of the child, regardless of all else, unless his unfitness be shown. *Dunn v. Jackson* (Com. App.) 231 S. W. 351.

127. Damages.—Plaintiff in action for personal injury has the burden of establishing by a fair preponderance of evidence its nature, extent, and probable permanency. *Haynes v. Sosa* (Civ. App.) 198 S. W. 976.

To recover compensatory damages for negligence of a bank for failure to promptly notify drawer of the nonpayment of a draft, the burden of proof is upon plaintiff to show that it could and would have recovered and applied to drawee's indebtedness money of the drawee on deposit in another bank, and such burden never shifts. *Terrell v. Commercial Nat. Bank* (Civ. App.) 199 S. W. 1133.

In action against buyer of cotton seed for failure to receive and pay therefor, if seed, after refusal, was not sold to best advantage by sellers, buyer should show fact. *Beaumont Cotton Oil Mill Co. v. Sanders* (Civ. App.) 203 S. W. 372; *Same v. Reeves* (Civ. App.) 203 S. W. 375.

Before recovery can be had for expenses incurred by one injured as result of defendant's wrongful conduct, it must appear that the amount claimed for such expenses or the amount recovered is a reasonable amount, proof of payment of items of expense not showing that it was reasonable. *Kuehn v. Neugebauer* (Civ. App.) 204 S. W. 369.

Though price at which agent was authorized to sell was less in telegram as transmitted than in message filed, it is necessary for recovery from company, to prove the value of goods exceeded the amount realized from agent's sale. *Early-Foster Co. v. Mackay Telegraph Co.* (Civ. App.) 204 S. W. 1172.

In parent's action for loss of services during minority of their ten year old boy injured by defendant's train, it was not incumbent on parents to prove boy would have

worked and earned money for them, but only that he had capacity and ability. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 206 S. W. 382.

To entitle a shipper of live stock to recover for negligent delay which caused loss in weight, he must show the difference between the market value of the animals on arrival, and what would have been the market value if promptly delivered. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Civ. App.) 207 S. W. 166.

Under a contract of guaranty to pay notes, where it was duty of creditors to turn notes over to attorney to be selected by guarantors for collection by suit, and, if money could not be made by execution, guarantors were to pay same upon the due transfer of the judgment to them, upon refusal of the guarantors to reduce notes to judgment and their denial of liability thereon, the measure of damages was prima facie the face value of the notes, and burden rested upon guarantors to show any matter which would reduce or mitigate the damages. *Bank of Miami v. Young* (Com. App.) 208 S. W. 656.

Buyer, suing seller for breach of contract to deliver wheat f. o. b. cars at certain station within certain time, was not entitled to judgment for damages, where he introduced no evidence of the market value of wheat at such station, notwithstanding evidence of market value at point of destination and at other stations. *Hallam v. Duckworth* (Civ. App.) 209 S. W. 222.

Where plaintiff, who sued to recover a balance due on a contract for the cutting of hay, set up claims for loading the hay, etc., but no contract was shown as to the amount to be paid for such service, recovery cannot be allowed without proof of the reasonable value of the service. *Cochran v. Taylor* (Civ. App.) 209 S. W. 253.

In action against carrier for damages to mules in transit, there having been intrinsic value of the mules at destination after injuries, it should have been shown what the value was before damages could have been legally awarded. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Civ. App.) 210 S. W. 853.

It is not essential to the right of recovery for wife's impaired capacity to perform her household duties that the pecuniary value of the same be shown with any mathematical accuracy or in dollars and cents. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

Shipper suing carrier for damages to live stock shipment cannot recover for expenditures for extra feed and labor necessitated by negligent delay in absence of evidence that the charges paid for such feed and labor were reasonable. *Ft. Worth & D. C. Ry. Co. v. Hill* (Civ. App.) 213 S. W. 952.

Solvent mercantile corporation, which has delivered its stock to creditors' committee with authority to conduct business and pool proceeds with proceeds of other insolvent concerns being conducted by it for the purpose of paying the debts of the several concerns, cannot recover from the committee the proceeds of its business without proof of the amount derived from sales in its business. *Kaplan Dry Goods Co. v. Sanger Bros.* (Civ. App.) 214 S. W. 485.

In personal injury action there must be evidence of the reasonableness of expenses incurred for medical attendance and for medicine; the reasonableness thereof not being inferred from the fact that the sums were exacted. *Corpus Christi Ry. & Light Co. v. Baxter* (Civ. App.) 217 S. W. 187.

In action against carrier for loss of baled cotton by fire, plaintiff had the burden of showing the amount of his damage, which was not discharged by evidence failing to show the grade of the cotton or number of pounds destroyed. *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

An owner whose grass had been fired by train has the burden of proving the value of grass destroyed. *Gulf, C. & S. F. Ry. Co. v. Price* (Civ. App.) 219 S. W. 518.

In a shipper's action against a carrier for failure to ship certain mules according to contract wherein special damages were claimed on the ground that the mules had been purchased for sale to the government for war purposes, it was necessary for plaintiff to prove that the live stock was up to the government standard, and would have passed inspection. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

Where soda fountain outfit sold was claimed by buyer to be of inferior quality, and in action for balance of the price he prayed judgment for the amount paid the seller therefor, in which action the buyer, who had not returned the goods but had used them, gave evidence of substantial defects but did not show the amount of damage or loss sustained by reason thereof, judgment that neither party take anything was error, as the measure of damages from failure to deliver goods of the character contracted for, when they are accepted by the buyer and used is the difference between the contract price and the market value of the goods actually delivered, which damages must be proved. *Liquid Carbonic Co. of Texas v. Migurski* (Civ. App.) 229 S. W. 661.

One occasioning loss to another has the burden of showing that the complainant could have prevented the loss by reasonable care. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

When expenditures are made necessary by the wrong of another, the party making expenditures, before he can recover the amount paid, must show that there was a necessity for incurring the expense and that the amounts paid were reasonable. *Nunn v. Brillhart* (Civ. App.) 230 S. W. 862.

132. **Election contest.**—In suit contesting election of drainage commissioners, party challenging voter has burden to prove vote was illegal. *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656.

133. **Condemnation of property.**—In a proceeding by a city which sought to condemn land for a waterworks, the burden is on the landowner, part of whose land was taken, to show the amount of damage he suffered. *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

135. Writ of execution.—Where the sheriff did not take certain property from a company's possession on writ of execution served in another company's behalf, the company first mentioned as claimant had the affirmative of the issue and the burden of proof to establish its right to the property, possession of which was taken by the sheriff under execution to another, the findings showing that the company first mentioned never had any possession except that acquired by filing claimant's bond and affidavit, and such possession not carrying the presumption of right thereto in favor of the company, which presumption would have existed only in the event of the sheriff's having taken the property from such company under the writ of execution followed by the company's retaining possession through filing claimant's bond and oath. *Moore-De Grazier Co. v. Hawley* (Civ. App.) 230 S. W. 1069.

136. Administration of estate.—In action by wife against executor of her husband's estate, burden was on executor to show that wife had relinquished her rights under bill of sale upon which suit was based. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

In action upon vendor's lien note, where plaintiff's pleadings showed that it had been the property of an estate of which an administrator was appointed in Kentucky and been placed with a bank under an escrow agreement between one of the owners and the administrator, the burden was on plaintiff to show an order of court under art. 3480, authorizing a sale or assignment by administrator to him. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

139. Fraud and duress.—In an action to recover money paid under duress, it must appear that defendant ought not in justice and good conscience to retain the money. *C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson* (Civ. App.) 196 S. W. 262.

Although wide latitude is allowed to prove fraud, yet it must be established by facts or circumstances sufficiently strong to warrant a finding that fraud existed, or inferences or presumptions based on such facts. *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

In trespass to try title by judgment creditor against his debtors' grantee, burden was on plaintiff judgment creditor to show insolvency of the debtors when they made conveyance. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

To set aside conveyance to one who paid full value, it devolved upon complaining creditor of grantors to establish, not only conveyance was made by grantors with fraudulent intent to hinder, delay, or defraud creditors, but also intent was known to grantee. *Id.*

The allegation of fraud which invalidates an instrument places the burden upon the party making it to establish the fraud by the preponderance of the evidence. *Campbell v. Turley* (Civ. App.) 224 S. W. 528.

In cases of fraudulent sales the first step for the creditor is to show it was the purpose and intent of the insolvent debtor to place his property beyond the reach of his creditors, and, this having been done, the purchaser must show he has paid value, whereupon the burden again shifts to the creditor to show that the purchaser had notice of the fraudulent purpose and intent of the insolvent debtor. *Ford v. Honse* (Civ. App.) 225 S. W. 860.

Where conveyances by a widow to her children were supported by consideration valuable in law, the creditor has the burden of establishing the necessary facts to show fraud. *Durrett v. Chenault* (Civ. App.) 230 S. W. 771.

A widow, who was indebted, having in settlement of her husband's estate conveyed land to her children, and received herself the fee in some of the lands, and a life interest in others, as well as notes, the conveyances, being supported by a consideration deemed valuable in law, were not prima facie void so as to cast on the children the burden of showing that the widow was possessed of remaining property sufficient to pay her debts. *Id.*

141. Garnishment.—In garnishment proceedings the burden of proof that the funds in the hands of garnishee belonged to the debtor rests upon the plaintiff. *Denison Bank & Trust Co. v. People's Guaranty State Bank of Tyler* (Civ. App.) 218 S. W. 561, 562.

142. Guardian and ward.—In suit on guardianship bond, defendants had the burden of showing that the guardian had accounted for the guardianship fund. *Davis v. White* (Civ. App.) 207 S. W. 679.

In an action on the bond of a guardian who had been executor and trustee under the will of his wards' father which provided a fund for their education and maintenance, where it appeared that the guardian checked out the fund, and it did not appear that he invested it as required by arts. 4140-4147, the burden was on the sureties seeking to avoid liability for interest to show that the expenditures by the guardian for the education and maintenance of the wards were from the earnings of the fund in his hands as guardian. *Wyatt & Wingo v. White* (Com. App.) 228 S. W. 154.

143. Homestead.—When it is shown that a homestead once existed the burden rests upon those who contest its discontinuance to show that it has been abandoned. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415; *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

Defendant has burden of showing that property sought to be partitioned by his wife's heirs constituted his homestead. *Evans v. Fortner* (Civ. App.) 198 S. W. 626.

One seeking to avoid a trust deed on the ground that the property covered thereby was the homestead of himself and wife, has the burden of showing every element of homestead as defined by Const. art. 16, § 50. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

143½. Community property, and separate estates.—In suit for state school surveys, defendant, claiming under conveyance from wife alone, on ground that she had been compelled to leave husband and was selling for her support, held to have burden of

proving cause for leaving husband, necessity of sale and threats of husband, and plaintiff the burden of proving value of land for grazing purposes. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

In wife's suit for conversion of her personalty by defendant foreclosing a mortgage given by the husband, it was not necessary for the wife to show from what source she acquired the property, but only that it was her separate property. *Burkitt v. Moxley* (Civ. App.) 206 S. W. 373.

Where a husband asserted rights in lands standing in his wife's name, on the theory that he had out of his separate funds paid for improvements, the husband has the burden of showing wherein his separate estate is entitled to reimbursement. *King v. King* (Civ. App.) 218 S. W. 1093.

145½. Injunction.—To entitle a lot owner to enjoin an encroachment upon an alley, it is not necessary that all access to his lot therefrom be cut off, and the fact that the obstruction did not cut off all access is a matter of evidence as to special or peculiar damage, which it rests upon plaintiff to prove to secure an injunction. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

In a suit to enjoin the maintenance of a road opened by the commissioners' court the burden was on plaintiff to show by a preponderance of the evidence an abuse of discretion by the commissioners' court. *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

147. Insane persons.—Plaintiff suing an insane person on a note had the burden to show that the contract was entered into by him during a lucid interval. *Beasley v. Faust* (Civ. App.) 217 S. W. 179.

148. Insurance.—In an action on an insurance policy, wherein defendant alleged that losses were payable to the mortgagee, the burden was upon it to show that plaintiff did not have an interest sufficient to support the action. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

Burden to make out their case, resting upon plaintiffs suing on accident policy, was met by proof that insured's death was caused by external and violent means, a presumption of law then arising that the death was caused by accidental means, thus making a prima facie case. *Georgia Casualty Co. v. Shaw* (Civ. App.) 197 S. W. 316.

Where it is shown that deceased met his death as the result of external and violent means, there arises a presumption against suicide, the force of which is to place upon the insurer the burden of establishing that insured's death was caused by his own hand, or by voluntarily exposing himself to danger. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

In suit on accident policy containing exception clauses, such as a clause providing that the policy shall not cover accidents resulting from trying to enter a moving conveyance using steam as motive power plaintiff has the burden of establishing that the accident on which suit is based does not fall within the exceptions; the exception clauses being construed as taking something out of the general portion of the contract so that the promise is to perform only what remains after the part excepted is taken away. *Travelers' Ins. Co. v. Harris* (Com. App.) 212 S. W. 933.

In an action on a fire policy, the burden is upon plaintiff to show that his cause of action does not fall within excepting clauses in the policy. *Northwestern Nat. Ins. Co. v. Westmoreland* (Civ. App.) 215 S. W. 471.

In an action on a life certificate, where the fraternal society interposes a defense that the certificate sued on is invalid and was forfeited by reason of failure of the member to notify the clerk of his local camp of his employment in an extrahazardous occupation, the burden is upon it to prove the invalidity of the certificate. *Sovereign Camp of Woodmen of the World v. Akins* (Civ. App.) 219 S. W. 492.

In an action on a life policy, the burden of proof as to the defense of suicide was on the insurer. *Green v. Missouri State Life Ins. Co.* (Civ. App.) 219 S. W. 552.

In an action on an insurance policy, where defendant claimed that insured had made a false answer to a question in her application regarding prior rejections, the date of the application being important, the burden was on the insurer to sustain its claim as to the date of the application; application having been lost. *American Nat. Ins. Co. v. Mayo* (Civ. App.) 220 S. W. 349.

Under a policy insuring against damage by tornado, windstorm, or cyclone, expressly excepting from the risk any loss or damage through tidal wave, high water, or overflow, and damage caused by water or rain, whether or not driven by the wind, burden was on insured to show that loss was not among those excepted. *Coyle v. Palatine Ins. Co.* (Com. App.) 222 S. W. 973, affirming judgment (Civ. App.) *Palatine Ins. Co. v. Coyle*, 196 S. W. 560.

In action on fire policy following destruction of insured's house by explosion in adjoining building and ensuing fire, plaintiff was required to plead and prove that her loss did not fall within an excepted explosion clause in policy providing that insurer should not be liable for damage caused by an explosion. *Northwestern Nat. Ins. Co. v. Mims* (Civ. App.) 226 S. W. 738.

As under the Employer's Liability Act, pt. 1, § 3 (art. 5246i) and pt. 4, § 2 (art. 5246yyyy), employes of subscribers have no right of action against their employer, but are remitted for recovery to the association created by law or the insurance company carrying the risk involved, it is essential to recovery against an insurance company by an employe to show that such insurer was carrying the risk. *U. S. Fidelity & Guaranty Co. v. Nelson* (Civ. App.) 228 S. W. 616.

In an action against a fire insurance company for loss sustained, where the company had neglected to renew policies under an agreement with its agent, the burden was on defendant to show that it was prohibited by law from complying with its verbal con-

tract or agreement on the ground that the fire insurance commission had ordered all policy forms changed, under arts. 4891, 4895. *Austin Fire Ins. Co. v. Adams-Childers Co.* (Civ. App.) 232 S. W. 335.

In a beneficiary's action it is incumbent on the defendant pleading suicide to prove it by a preponderance of the evidence. *Woodmen of the World v. Holmes* (Civ. App.) 232 S. W. 575.

150. Judgment or order.—See *Van Neqs v. Crow* (Civ. App.) 215 S. W. 572.

When subject-matter of two suits is not same, it devolves upon those invoking estoppel by prior adjudication to show by record or evidence that particular question has been previously determined. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

Where a verdict was general and fails to show upon which count in complaint recovery was awarded, burden is upon one in a subsequent suit to show by evidence that recovery was upon count on which he bases a plea of *res adjudicata*. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 210 S. W. 558.

To secure vacation of a judgment by a direct suit on the ground of fraud, accident, or mistake, the party seeking relief has the burden of showing that he was prevented from urging some valid defense, and that this prevention resulted from fraud, accident, or the act of the other party, and it is not enough merely to show that injustice has been done, or that a valid defense existed. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

On a motion to set aside a default judgment alleged to have been taken in violation of an agreement, the burden was on defendant to show such agreement. *Winniford v. Lawther Grain Co.* (Civ. App.) 232 S. W. 853.

151. Landlord and tenant.—In an action by tenant under a lease for one year to recover from his landlord's grantee money received for pasture, plaintiff must establish his claim that he was entitled to two-thirds of Johnson grass under his contract with his former landlords. *Cooke v. Ellis* (Civ. App.) 196 S. W. 642.

In action by tenants against landlords for breach of rental contract, if there was any reason why tenants' failure to replevy land after sequestration by landlords was negligence on part of tenants, burden was on landlords so to allege and show. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In an action by a lessee against a sublessee on the rent contract, it is not plaintiff's duty to show that he had paid the rental on the land leased due from him as lessee, to the owners of the land; such matter being defensive. *Green v. Montgomery* (Civ. App.) 211 S. W. 471.

152. Libel and slander.—Where a communication is qualifiedly privileged, the inference of malice is rebutted prima facie, and it devolves upon the party complaining to allege and prove malice. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238; *Foley Bros. Dry Goods Co. v. McClain* (Civ. App.) 231 S. W. 459.

Under art. 5597, providing that newspapers can publish accounts of court proceedings, etc., the burden is on one suing for libel to show falsity and unfairness, or that a publication was actuated by malice. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168.

In an action for libel, malice may be inferred from the falsity of the charge or imputation, unless the occasion is privileged, but, if the occasion be privileged, a proper and sufficient motive is shown repelling the inference of malice and giving rise, in view thereof, to the presumption that the communication was made in good faith, whereupon it devolves upon plaintiff to establish malice in fact. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

The publication of judicial proceedings being privileged, plaintiff has burden of proving malice. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

154. Malicious prosecution.—Burden of establishing want of probable cause, presence of malice, and that plaintiff was not guilty of theft of mule is upon plaintiff in action for malicious prosecution. *Bukowski v. Williams* (Civ. App.) 198 S. W. 343.

155. Mandamus.—In mandamus to compel clerk of district court to approve super-seedeas bond, the burden is on relator to show that the sureties are sufficient. *Bean v. Folk* (Civ. App.) 226 S. W. 1106.

157. Master and servant in general.—When a contract of employment gives the employer the right to discharge, he may exercise it, but the employee may call the honesty and good faith of his act in question; the burden being on the employee to prove his case by the preponderance of the evidence. *Golden Rod Mills v. Green* (Civ. App.) 230 S. W. 1089.

158. Mechanics' liens.—The burden was on claimants of liens as a materialman and as a mechanic to establish, not only the verity of their claims, but the existence of their liens under the contractor's order on funds in the hands of the owner or his agent. *Leeper-Curd Lumber Co. v. Barbuzza* (Civ. App.) 216 S. W. 216.

In a proceeding to foreclose a mechanic's lien the burden of proof is upon materialmen to establish the notice required by art. 5623, as it read prior to the amendments by the Thirty-Fourth and Thirty-Fifth Legislatures (Acts 34th Leg. [1915] c. 143, and Acts 35th Leg. [1917] c. 17 [Supp. 1918, arts. 5623, 5639a]), upon the owner, or his duly authorized agent. *Burns & Hamilton Co. v. Denver Inv. Co.* (Civ. App.) 217 S. W. 719.

159. Mortgages.—Under Bankruptcy Act, July 1, 1898, c. 541, §§ 60a and 60b, 30 Stat. 562 as amended in 1910 (U. S. Comp. St. § 9644), trustee in bankruptcy suing to set aside bankrupt's deeds of trust and his payment of cash must affirmatively show that defendants had reasonable cause to believe that enforcement of deeds and payment would effect a preference. *Brown v. First State Bank of Weimar* (Civ. App.) 199 S. W. 895.

In mortgagee's action against purchaser of mortgaged property for conversion, defended on ground that mortgagee had waived lien, where mortgagee proved existence of lien, its registration, and conversion of the property, the burden of proving the waiver of the lien was upon purchaser. *Weeks v. First State Bank of De Kalb* (Civ. App.) 207 S. W. 973.

Defendant mortgagee, who included in his loan money wherewith to discharge indebtedness secured by first mortgage, and who claimed as purchaser at sale under first mortgage, which was transferred to him, had burden of proving that it was the intention of the parties that there was to be no merger of debts and securities, or that there was some equitable ground requiring them to be kept separate for his protection. *Amicable Life Ins. Co. v. Slovak* (Civ. App.) 217 S. W. 200.

In a proceeding to foreclose a deed of trust lien on real estate, the burden was upon a defendant whose title was based on an attachment proceeding antedating the trust deed to introduce extrinsic evidence identifying the land claimed by him as the land in controversy; extrinsic evidence being necessary to explain terms used in the sheriff's return. *Lemm v. Kramer* (Civ. App.) 224 S. W. 560.

The party asserting that a deed absolute on its face was in fact a mortgage has the burden of so showing by preponderance of the evidence. *Young v. Blain* (Civ. App.) 231 S. W. 851.

160. Ordinance.—Burden of establishing unreasonableness or discriminatory character of ordinance is upon party seeking to enjoin its enforcement. *Gray v. S. T. Woodring Lumber Co.* (Civ. App.) 197 S. W. 231.

162. Notice.—Where it is sought to hold a retired member liable by one who has dealt with the partnership prior to its dissolution, the burden of proof to establish due notice or knowledge is upon such member. *Thompson v. Harmon* (Com. App.) 207 S. W. 909.

162½. Novation.—The burden rests upon him who would rely on a novation. *Hix v. Tomlinson* (Civ. App.) 200 S. W. 897.

167. Payment.—While ordinarily burden of proof is on one alleging payment, yet after 20 years burden shifts to creditor. *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472.

A purchaser has the burden of proving payment by him of the notes secured by vendor's lien, in order to establish his legal title to the premises, and he cannot object to the admission in evidence against him of the deed to a subsequent purchaser, where he made no proof of the payment of consideration. *Head v. Moore* (Civ. App.) 232 S. W. 362.

168. Agency and authority.—Persons dealing with an assumed agent, whether he be a general or a special one, are bound at their peril to ascertain not only the fact of agency, but the extent of his authority, and in case either is controverted the burden of proof is on them to establish it. *Kelly v. Pelt* (Civ. App.) 220 S. W. 199; *J. I. Case Threshing Mach. Co. v. Morgan* (Civ. App.) 195 S. W. 922; *Rhodes v. Smith* (Civ. App.) 230 S. W. 227.

In an action against a principal, where actual authority does not exist, the burden is upon plaintiff to bring himself within the rule of apparent authority. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

In action against automobile dealers for death of one killed by their demonstrator, the burden of proof was upon plaintiff to show the demonstrator was acting within the scope of his employment when the accident occurred. *Van Cleave v. Walker* (Civ. App.) 210 S. W. 767.

Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with notice of, but in case of controversy have the burden of showing authority assumed to have been in fact possessed. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

In action for delay in transmitting death message, the burden of proof is on the telegraph company, receiving messages by phone for transmission, to show that the person who answered the telephone and actually received the particular message was some person wholly unauthorized so to act. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

Where a bank knew the agency its customer had established for its cashier to fill in a note signed in blank by the customer to cover overdrafts, in its suit on the note the bank had no burden to establish the relation of agency between the customer and its cashier; the only fact to be established being whether the amount of the note was filled in correctly by the cashier. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

In suit for specific performance by the buyer of land through defendant owner's agent to sell, if notice of revocation of the agent's authority was essential to render it effectual as to plaintiff, the burden was on defendant owner to show it. *Morgan v. Harper* (Civ. App.) 219 S. W. 838.

170. Title and ownership.—In trespass to try title, the burden is on the plaintiff to show title. *Johnson v. Marti* (Civ. App.) 214 S. W. 726; *Webb v. Goldsmith* (Civ. App.) 221 S. W. 690.

Where defendant was in possession of automobile by purchase from third person, it was duty of insurer of an automobile against theft, claiming car as that for loss of which it had reimbursed insured, to prove better title than prima facie title of defendant. *Federal Ins. Co. v. Munden* (Civ. App.) 203 S. W. 917.

In suit for taking of cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, to overcome plaintiff's prima facie proof of title, by showing possession under a purchase, it was incumbent on defendants to identify

cattle as included in those stolen from owner defendant, and so to do they had burden, not only to show that his V brand was placed on them by owner defendant, but also that his earmark of a slit had been changed by the thief to an underbit. *Stovall v. Martin* (Civ. App.) 210 S. W. 321.

In trespass to try title, where there was evidence that both parties claimed under M., who was not shown to have had any title, as a common source of title, defendant also showing the acquisition by him of the interest of the heirs of a person admitted to have previously had title, burden is on defendant to show that M. had not acquired an equitable title from the former owner. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

The rule that the burden is upon a parent purchasing property from a child to establish the fairness of the transaction does not apply where the property in fact belonged to the father, but the title was in the daughter as her mother's heir. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In action of trespass to try title, where plaintiffs asserted title to one half interest in the lands and a contract for purchase of the other half, while defendant who pleaded not guilty also alleged ownership of an oil lease on the other half from record owner, the burden of proving title was on plaintiffs, and direction of verdict for them without proof of title was error. *Canon v. Scott* (Civ. App.) 217 S. W. 429.

In grantee's action for breach of warranty under warranty deed conveying land in Oklahoma because of existence of superior title in another, under Comp. Laws 1909, § 1202, grantee, in order to recover, must affirmatively show that the deed under which he claimed was made in substantial compliance with the provisions of the Oklahoma act of which such statute was a part. *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (Civ. App.) *Newsom v. Langford*, 174 S. W. 1036.

In trespass to try title by those claiming under a duplicate certificate against the heirs of the patentee, the burden is on plaintiffs to establish the missing links in their chain of title; that is, the transfer of the lost certificate by the preponderance of the evidence. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

In an action for the killing of a horse on a railroad, the defendant railroad company's ownership of the railroad must be proved. *Texas & N. O. Ry. Co. v. Sims* (Civ. App.) 227 S. W. 694.

Where plaintiff bank, suing in trespass to try title, held legal title to the whole of the land sued for, one tract by mesne conveyance from the ancestor of certain defendants, the other by such conveyances from the ancestor of the other defendants, the burden was on defendants, claiming equities in such land superior to such legal title, to show facts subordinating such legal title to their equities. *Yates v. Buffalo State Bank* (Civ. App.) 229 S. W. 619.

In trespass to try title by a prior purchaser from the common source, recital in the junior purchaser's deed of payment of the purchase money is not evidence against the prior purchaser, and the burden of proof is on the junior purchaser. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

172. Receivers.—Parties relying on a release executed by the receiver of an insolvent corporation have the burden of showing the receiver's authority. *Lanham v. West* (Civ. App.) 209 S. W. 253.

In action against railroad, after termination of receivership, to recover damages from operation of road by receivers, plaintiff has burden of proving that profits of operation of road by receivers were paid over to company or invested in betterments, or that railroad was made liable for the receiver's debts by order or decree of court. *Best & Russell Cigar Co. v. William Reese Co.* (Civ. App.) 210 S. W. 317.

In an action against a receiver of a railroad company for personal injuries to plaintiff, in the absence of special plea denying that defendant was receiver, it was unnecessary for plaintiff to prove such fact. *Baker v. Gohman* (Civ. App.) 226 S. W. 691.

173. Reformation of Instruments.—Defendant, who by cross-action seeks reformation of a deed, has the burden of proof. *Compton v. Franks* (Civ. App.) 222 S. W. 988.

174. Release.—The burden of proof is on the party asserting the invalidity of release. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

176. Sales.—See *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881.

Where seller of automobile, taking buyer's old car in part payment, on its own breach and rescission by the buyer desired to return the old car, the burden rested on it to prove it was in as good condition as when delivered to it, and it was not incumbent on the buyer to prove its condition. *Alamo Automobile Co. v. Schmidt* (Civ. App.) 211 S. W. 804.

In suit to rescind purchase of a mare, it would have been clearly improper for the trial court to have placed on plaintiff the burden of proof as to the defense that the mare was accepted by plaintiff without any warranties of soundness. *McDonald v. Starford* (Civ. App.) 213 S. W. 732.

Where a seller agreed to deliver 1,000 barrels of flour, but part of the shipment was damaged, the seller cannot hold the buyer liable on the theory that by letter he tendered delivery of other flour, and that the letter was returned to him without proof as to how the letter was delivered or returned. *El Paso Grain & Milling Co. v. Lawrence* (Civ. App.) 214 S. W. 512.

In an action on notes by a seller of a piano, silverware, and advertising matter, to be given away as prizes in connection with defendant's mercantile business, seller agreeing to refund to defendant, in the event the annual sale of merchandise did not amount to a certain sum, 3 per cent. of the deficiency of the sale, defendant had the burden of proof to show a substantial compliance with his part of the contract in order to set up

against the amount due on the notes the 3 per cent. of the deficiency in sales. *Brenard Mfg. Co. v. Watkins* (Civ. App.) 224 S. W. 522.

179½. Specific performance.—In suit for specific performance of oral contract to cancel notes given by plaintiff, an attorney, to his client, since deceased, it was incumbent on plaintiff to show terms of contract with certainty and by evidence clear and satisfactory. *Bright v. Briscoe* (Civ. App.) 202 S. W. 183.

181. Taxes and taxation.—In an action on secured note and to foreclose vendor's lien, taxes provided for in deed of trust having been paid by plaintiff at the written request of defendants and under a stipulation in deed of trust that same were valid liens, and that plaintiff would thereby be subrogated, plaintiff was not required to prove a proper assessment and rendition of the property for taxes as a prerequisite of foreclosure of such tax lien. *Blackmon v. Texas Securities Co.* (Civ. App.) 196 S. W. 590.

In suit to review action of board of commissioners in levying reassessment against plaintiff and her property, burden was on plaintiff to show that defendant had been guilty of unreasonable delay in having reassessment made. *Texas Bitulithic Co. v. Henry* (Civ. App.) 197 S. W. 221.

Burden is on one claiming exemptions from taxation to bring himself clearly within statute or Constitution. *Trinity Methodist Episcopal Church v. City of San Antonio* (Civ. App.) 201 S. W. 669.

Nevada corporation whose dredgeboat and equipment were in Texas and rendered for taxation by it held to have the burden of showing that the property was not taxable, and not to have sustained such burden. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

183. Recovery of lands in general.—Burden of proof is upon one seeking to show ambiguity in deed. *McDougal v. Conn* (Civ. App.) 195 S. W. 627.

Where plaintiffs, defendants in a cross-action of trespass to try title, made out a prima facie case of outstanding legal title, it was necessary for the interveners, who had the burden of proof, in order to recover to meet such prima facie case by counter-vailling proof. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

184. Conversion of property.—In cases of conversion of personal property, market value of property at place and date of conversion must be shown to warrant recovery. *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

Shipper suing for conversion, by delivery other than to shipper's order, contrary to bill of lading, has burden not only of showing this, but also that he was injured thereby. *Owosso Mfg. Co. v. Chicago, R. I. & P. R. Co.* (Civ. App.) 203 S. W. 815.

In an action against a railway for conversion of cotton, a judgment for plaintiff cannot stand, where there is no proof that the cotton was ever delivered to the railroad, or any evidence concerning the quality or weight of the cotton. *Texas & N. O. Ry. Co. v. Spencer* (Civ. App.) 210 S. W. 989.

In shipper's action against carrier for conversion where defense was that goods had been taken from carrier under writ of attachment, the burden of establishing such defense was upon carrier. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 217 S. W. 737.

185. Trusts and following trust property.—In suit to establish resulting trust, burden of proof to establish that any trust funds were used in paying for land is on plaintiff. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

The burden is upon the party claiming a resulting trust in land to trace the funds claimed as his own into the property purchased. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

The rule requiring persons claiming that land is held in trust to show that they paid some part of the consideration is not applicable in cases of express trusts. *Holmes v. Tennant* (Com. App.) 231 S. W. 313.

187. Vendor and purchaser.—Purchaser suing for specific performance of option contract has the burden of proving tender of performance by him within the required period. *Wilbanks v. Selby* (Civ. App.) 227 S. W. 371.

If the seller of oil and gas rights had sought to avoid the effect of the opinion of the buyer's attorney that his title was invalid on the ground that such opinion was not rendered in good faith, the contract making the opinion the test of whether the buyer's deposit should be returned to him, the burden would have been on such seller. *Lea v. Helgeson* (Civ. App.) 228 S. W. 992.

191. Negligence—Injuries to person in general.—In action for injuries at crossing interurban railroad it was plaintiff's duty to introduce testimony establishing prima facie that road's servants were not exercising ordinary care. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

Where railroad employé who received injuries while engaged in switching gave notice to company to furnish record showing nature of service in which the cars being switched at time of accident were engaged, company has burden, employé having made out a prima facie case of injuries occurring while he was engaged in interstate commerce service, of showing that injuries did not so occur. *Southern Pac. Co. v. Stephens* (Civ. App.) 201 S. W. 1076.

One into whose eye hot cinder is thrown by railroad engine 174 feet distant has burden of proving negligence. *Missouri, K. & T. Ry. Co. of Texas v. Langford* (Civ. App.) 201 S. W. 1087.

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman, the question whether a foreign car was inspected before being placed in charge of a train crew was a fact lying peculiarly within defendant's knowledge, and the burden of proof therein. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

The burden of proof is upon the injured plaintiff to establish that defendant's employé operating its train actually discovered plaintiff's peril in time to have avoided the injury. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

In action for injuries sustained by plaintiff switch tender when thrown under a moving train, because of his stumbling over a pipe left by defendant in such position as to partially obstruct a path along the track, the burden was upon plaintiff to show that defendant was guilty of negligence that proximately caused the injury. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

Deceased's death being the result of an electric shock resulting from an excessive voltage, defendant which furnished electricity to deceased's dwelling had the burden of showing that excessive voltage was not due to its negligence. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

To entitle plaintiff to recover for defendant's improper acts in an emergency after he had discovered plaintiff's peril, it need not be shown that defendant's acts were wanton or reckless. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 282.

To show that a refinery company's employé was employed as an independent contractor to stop a leak in a tank oil car, it was incumbent upon employing railroad sued for his injuries to plead and prove special facts negating prima facie showing that he was employed as any other employé, though possessing special skill. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

Where evidence as to the extent of defendant railroad's control of the car which killed its brakeman was within defendant's knowledge, in the absence of showing to the contrary it will be presumed the car was controlled by defendant as part of its equipment. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

192. — **Proximate cause of injury.**—To recover for negligence in failing to ring bell for crossing, it is incumbent upon plaintiff to show affirmatively that bell was not rung, and that such failure was proximate cause of accident. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

The burden of proof of negligence as proximate cause of injury on street sued for against city and its street repair contractor rests on plaintiffs. *Peterson v. City of Houston* (Civ. App.) 224 S. W. 580.

194. — **Assumption of risk.**—In an action for injuries to servant, the defendant must plead and prove its defense of assumed risk. *Southern Pac. Co. v. Hazelbusch* (Civ. App.) 200 S. W. 268.

In action for injuries sustained by plaintiff switch tender when thrown under a moving train, because of his stumbling over a pipe left by defendant in such a position as to partially obstruct a path along the track, the burden was upon defendant to prove that plaintiff knew of the obstruction and realized the danger. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

195. — **Contributory negligence.**—In shipper's action for damages to shipment of live stock, burden of proving his contributory negligence was on carrier. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668; *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

Where passenger's destination was called before train reached that point and passenger alighted and suffered injuries in riding on horseback to her destination, burden of proving that she was guilty of contributory negligence was on the railroad company. *Gulf, C. & S. F. Ry. Co. v. Gentry* (Civ. App.) 197 S. W. 482.

Where the carrier alleged contributory negligence of a person who fell over a tongue of an express truck on the platform, it had the burden of showing such negligence by a preponderance of the evidence. *Wells Fargo & Co. v. Lowery* (Civ. App.) 197 S. W. 605.

In action for injuries at interurban railroad crossing, it was road's duty to rebut plaintiff's prima facie case to prove that driver of wagon was guilty of contributory negligence. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In an action for damages resulting from crossing accident, the burden was on the street railroad company to show that the automobile was so curtained or covered as to obstruct or obscure the view of its driver to the rear, under which condition the city ordinance required a mirror, in order to establish driver's contributory negligence in not having the vehicle so equipped. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In action for injuries sustained by plaintiff switch tender when thrown under a moving train, because of his stumbling over a pipe left by defendant in such position as to partially obstruct a path along the track, defendant had the burden of showing that no prudent person would have used the path in question at night when there was a clear path on the other side of the track. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

In action for damages growing out of a collision between plaintiff's automobile and defendant's interurban car at a street crossing, held, that burden was upon defendant to prove contributory negligence. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457.

In action for injuries by being struck by an interurban car, while plaintiff, an intending passenger, was endeavoring to stop it, the burden of proof was upon defendant on the issue of contributory negligence. *Texas Electric Ry. v. Hooks* (Civ. App.) 211 S. W. 654.

In an action against a railroad for death of plaintiff's son struck in an automobile at a crossing, the burden rested on the railroad to establish the son's contributory negligence excusatory of its own negligence. *Moye v. Beaumont, S. L. & W. Ry. Co.* (Com. App.) 212 S. W. 471.

In action under Employers' Liability Act, where intoxication of employé is pleaded as a defense, defendant has burden of affirmatively establishing intoxication. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

In an action for injuries to jitney passenger in collision with street car, where street railroad pleaded as an affirmative defense that the accident was caused solely by the negligence of the driver, the street railroad had the burden of sustaining such plea. *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

To establish the defense of contributory negligence, defendant must prove, not only that plaintiff was negligent, but also that such negligence was the proximate cause of the injury. *Id.*

The burden of proof was on defendant employer, in suit for death of its servant, on the issue of the servant's negligence; the presumption being against such fact. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

The law presumes that one killed at a railroad crossing was doing whatever was reasonably necessary for his own safety, so the company sued for his death must prove he was not, to relieve itself of the consequences of its failure to give the crossing signal. *Missouri, K. & T. Ry. Co. of Texas v. Merchant* (Com. App.) 231 S. W. 327.

197. — **Delay and failure to deliver telegrams.**—Though error in transmission of message may be so gross as to be prima facie evidence of negligence, the mere fact that there may have been an error in the message as received is not of itself sufficient proof of negligence, and the burden is on plaintiff, in such cases, to show negligence. *Western Union Telegraph Co. v. Ferguson Bros.* (Civ. App.) 209 S. W. 446.

198. — **Carriage of goods and live stock.**—Where carrier undertook to precool refrigerator cars and to ice them during transit and shipment was injured for failure to properly precool and ice cars, carrier has burden of proving that it exercised due care, notwithstanding it had no precooling plant at place of shipment. *Wells Fargo & Co. v. Sprague* (Civ. App.) 199 S. W. 657.

Carriers sued for damages to shipment of cattle held to have burden of showing that shipper's agent undertook to load the cattle and roughly handled them in so doing. *Massey v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 409.

When animals are delivered to a carrier in sound condition, and the shipper does not accompany them, and they arrive at destination dead or in an injured condition, the burden rests on the carrier to show that it is not liable. *St. Louis, B. & M. Ry. Co. v. Sutherland* (Civ. App.) 207 S. W. 982.

A carrier must show that conditions in a contract for the shipment of live stock relative to the shipper's duty to inspect cars, etc., were reasonable. *Mexico Northwestern Ry. Co. v. Williams* (Civ. App.) 208 S. W. 712.

In action against carrier for goods lost, where carrier proves that loss occurred by act of God, burden shifts to plaintiff to prove that, notwithstanding such act of God, negligence of carrier was proximate cause of loss. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 209 S. W. 775.

In action for injuries to a shipment of cattle while in transit, the burden is upon plaintiffs to show that they were negligently handled en route, where one representing plaintiffs accompanied the cattle throughout the entire trip. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Civ. App.) 214 S. W. 721.

Carrier of intrastate shipments has burden of showing that it was free from any negligence contributing to the damage, but when it has been shown that damage resulted from inherent infirmity of the goods transported under circumstances not showing negligence, burden of proving negligence devolves upon the plaintiff under Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa). *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070.

A prima facie case of unreasonable delay having been shown in an action by a shipper for damages to a shipment of stock, it was incumbent upon the defendant to prove a valid excuse. *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

Where the shipper proves an unreasonable delay, resulting in loss or injury to his property, which the carrier seeks to excuse by showing the existence of unusual conditions, it must assume the burden of pleading and proving the validity of the excuse. *Galveston, H. & S. A. Ry. Co. v. Buck* (Civ. App.) 230 S. W. 891.

200. — **Killing or injuring live stock.**—In an action against a railroad for killing a mare at a place where the track could not be fenced, burden is on plaintiff to prove negligence of the railroad which was the proximate cause of the killing. *Hines v. Collins* (Civ. App.) 221 S. W. 1108.

201. — **Injuries to third persons by acts of servants and independent contractors.**—When employer institutes suit against employé for damages through latter's negligence, he is not called upon to prove he could not reduce damages by suit against another, in relation to whom employé's negligence occurred, as that burden rests on the employé. *Commercial State Bank v. Van Hutton* (Civ. App.) 208 S. W. 363.

The burden is on plaintiff, seeking to hold the master for an injury inflicted by the servant, to show that the servant did the wrong while acting within the scope of his employment, and the act must be done in furtherance of the master's business and for the accomplishment of the object for which the servant was employed. *City Service Co. v. Brown* (Civ. App.) 231 S. W. 140.

V. Sufficiency of Evidence to Sustain Burden of Proof in First Instance

202. **Prima facie case.**—Architect's causing removal of wall of church under construction was prima facie or conclusive evidence he did so properly under powers granted by

contract to determine whether work was properly done. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where, in a suit on a note, plaintiff produced the note without objection, apparently for all evidentiary purposes, as also the order for goods for which note was given and letter of defendant requesting delay in filling the order, a prima facie case was made. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

Plaintiff establishing a prima facie case by evidence that at destination corn near doors of car was wet, defendant railroad company failed to rebut same by evidence that it tested the car door by turning water from a hose on it; there being no evidence that the car did not leak while running against a blowing rain. *Rhodes v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 815.

A prima facie case is one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all of the evidence to the contrary be disregarded (citing *Words and Phrases, Prima Facie Case*). *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

In suit against innkeeper for loss of salesman's grip, proof of delivery and failure to redeliver on demand entitled plaintiff prima facie to recover, and, if innkeeper desired to avoid liability by showing his extreme care, he had burden to allege and prove it. *W. R. Case & Sons Cutlery Co. v. Canode* (Civ. App.) 205 S. W. 350.

The person in whose name money is deposited in bank is prima facie the owner of the deposit. *Hulshizer v. First State Bank of Robstown* (Civ. App.) 207 S. W. 534.

In action for taking cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, plaintiff's purchase of cattle from a third person, and his possession and title under the purchase at time defendants took cattle, was prima facie proof of title in plaintiff, entitling him to recover in the absence of prima facie proof by defendants that cattle were among those stolen from owner defendant, and his property when taken. *Stovall v. Martin* (Civ. App.) 210 S. W. 321.

There was prima facie proof of plaintiff's ownership, claimed in his petition, of the certificate for curbing, issued by the city to another, sued on; it having at the trial been in his possession and introduced in evidence without objection. *Dillon v. Whitley* (Civ. App.) 210 S. W. 329.

Where a deed recited that grantee was to assume the payment of vendor's lien notes, and release filed recited that the grantee had paid such notes, such instruments were prima facie evidence that grantee paid such notes. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

In action for breach of warranty of title, the recitals in each of the two deeds to plaintiff that the consideration for the conveyance was \$8,000, though placed therein at his suggestion, were prima facie evidence of the value put upon the property, real and personal, which he gave for the conveyances. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

Possession of land is prima facie proof of ownership. *Allen v. Vineyard* (Civ. App.) 212 S. W. 266.

In seller's action for price of bottles, proof that buyer had received bottles in good condition and had made no complaint that any of the bottles were broken in transit within eight months after delivery held to make a prima facie case of delivery according to the contract. *Woytek v. King* (Civ. App.) 218 S. W. 1081.

In an action for damages from delay in delivering a telegram sent to the addressee in care of a company, testimony of messenger boys that it was the habit of one of them to deliver such messages to the company's manager, and that the other boy believed he delivered the message to such manager, who was not called as a witness for plaintiff, though present, constituted prima facie proof that the message was offered to the manager. *Western Union Telegraph Co. v. Price* (Civ. App.) 219 S. W. 869.

"Prima facie evidence" is merely that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. *Dodson v. Watson*, 110 Tex. 355, 220 S. W. 771, 11 A. L. R. 583.

A certificate of assessment for improvements in street when introduced in evidence establishes a prima facie case, hence it is not necessary for plaintiff in an action on such a certificate to also introduce the ordinance levying the assessment and authorizing the issuance of the certificate. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

In an action by brokers to recover a commission for furnishing purchasers under a listing contract, where defendant affirmatively alleged he contracted with plaintiffs that no commission should be paid unless sales were actually consummated, and plaintiffs assumed responsibility for getting the signature of defendant's wife to the deed, proof by plaintiffs of the listing contract and furnishing of purchasers ready, willing, and able to buy on terms stated, constituted a prima facie right to recover, and the burden of proving plaintiffs were not to have any commission unless sales were actually consummated and defendant's wife signed the deeds, was on the defendant; such matters alleged in defense being in the nature of pleas in confession and avoidance. *Cotten v. Willingham* (Civ. App.) 232 S. W. 572.

VI. General Rules as to Weight and Sufficiency of Evidence

203. **Weight and conclusiveness in general.**—The jury is not bound by general averages in life insurance tables in determining life expectancy. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

Decisions of English courts are not conclusive proof of what common law of England really is, although entitled to great weight, and decisions of different states of Union

which have adopted common law of England may be looked to, to determine what common law is. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

The rule that, where no issue is raised as to identity of persons, the identity of names is sufficient to establish such identity, applies where parties claim as heirs of persons named in a deed or grant. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

204. Number of witnesses.—A verdict for plaintiffs in personal injury case is not contrary to decided preponderance of evidence, because appellees had only two witnesses to accident, one of whom was one of the appellees, while appellant had three disinterested witnesses. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

A parol trust may be ingrafted on a deed absolute on its face by the testimony of one witness, without proof of corroborating circumstances. *Allen v. Williams* (Civ. App.) 218 S. W. 135.

205. Positive and negative evidence.—Negative testimony of the driver of an automobile struck at a crossing and another person that they did not hear the bell rung as the train was approaching held insufficient to sustain a finding that the bell was not rung. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

Affirmative evidence such as that witnesses heard a whistle is entitled to more weight than merely negative evidence. *Hines v. Roan* (Civ. App.) 230 S. W. 1070.

206. Circumstantial evidence.—Fraud in a conveyance may be proved by circumstances as well as by positive evidence. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

See *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

Showing undue influence inducing execution of will, see *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

A fact may be proved by circumstantial evidence alone which does not exclude every other hypothesis. *St. Louis, B. & M. Ry. Co. v. Moss* (Civ. App.) 203 S. W. 777.

In an action for wrongful death resulting from a street car collision, defendant's ownership and operation of the street car in question need not be shown by direct affirmative evidence, but may be proved by circumstances. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

A master's negligence and the proximate cause of injury to a servant may be established by circumstantial evidence. *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

Direct evidence on an issue is not required by law, but juries can indulge all reasonable inferences from facts revealed by the evidence or deducible by unbiased and rational minds from such facts. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

It is not essential in all cases that the amount of damages be shown by direct evidence. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

While any fact may be established by circumstantial evidence, such evidence must have probative force sufficient to constitute the basis of a legal inference, and not be such as to permit of merely speculative conclusions. *Baker v. Loftin* (Com. App.) 222 S. W. 195, reversing judgment (Civ. App.) 198 S. W. 159.

In a suit against an insurance company on a life policy, the death of insured may be established, like any other fact, by direct proof or circumstantial evidence, and after expiration of seven years the presumption of the death of a party will arise from an unexplained absence without information concerning him. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

Proximate cause is ordinarily a question of fact, which may be established by circumstantial evidence. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

207½. Conclusiveness as to party introducing.—Appellants cannot contend that the appellate court is authorized to discredit the testimony of an adverse party, whom they placed on the stand and whom the jury believed. *Leahy v. Timon* (Civ. App.) 204 S. W. 1029.

Where plaintiff offered an unloading certificate in evidence, it became his own evidence, subject to any legal objections as to its introduction, although brought out by cross-interrogatories propounded by defendant, who did not offer it. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

208. Evidence introduced by adverse party.—In trespass to try title, where defendant, relying on a deed, introduced the same in evidence, the recitals in the deed were available to the plaintiff in the establishment of his title, although defendant was also relying on a quitclaim deed from heirs of a former owner. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Defendant having introduced in evidence a letter written by him to plaintiff after commencement of action, stating that plaintiff owed him \$35 for pasturage, this could be considered against his claim at trial of a greater amount due on his cross-action, though, had plaintiff offered it, it would be subject to objection on the ground that it was written for purpose of effecting a compromise. *Madole v. Walker* (Civ. App.) 223 S. W. 280.

209. Evidence improperly admitted.—Parol evidence varying a written instrument will be disregarded, although not objected to. *Shropshire v. Alvarado State Bank* (Civ. App.) 196 S. W. 977; *John E. Morrison Co. v. Riley* (Civ. App.) 198 S. W. 1031.

Though it may have been improper to permit accused to cross-examine witness as to immaterial matters merely for purpose of contradicting him later, accused was bound by answers then given. *Gray v. State*, 82 Cr. R. 24, 197 S. W. 990.

Hearsay testimony, unsupported, is insufficient to establish an essential fact. *Texas Midland R. Co. v. Cummer Mfg. Co.* (Civ. App.) 207 S. W. 617.

210. Uncontroverted evidence.—The jury were not bound to believe the testimony of two witnesses although not directly controverted. *Booker v. Booker* (Civ. App.) 207 S. W. 675.

Where evidence tends to establish a fact which is within the power of and to the interest of opposing party to disprove, if false, his failure to disprove it strengthens the probative force of the evidence. *Stark v. Haynes* (Civ. App.) 211 S. W. 343.

The trial court is not bound to find in accordance with testimony if he believed it to be contradicted by circumstances. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

211. Degree of proof in general.—Juries are not permitted to render verdicts on mere possibilities, surmises, or suspicions. *Kirby Lumber Co. v. Boyett* (Civ. App.) 221 S. W. 669.

212. Sufficiency to support verdict or finding.—In an action to recover land, admissions in answer which followed a plea of not guilty, making it incumbent on plaintiff to show a prima facie right to the property, will not support a judgment in favor of plaintiff and relieve him of the burden of showing a prima facie case. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

When suit is instituted by an attorney, plaintiff cannot show reasonable diligence to have citation issued, and so to institute suit by simply showing that she employed an attorney to bring the suit and depended upon him to prosecute. *ruig v. Rodriguez* (Civ. App.) 219 S. W. 291.

Testimony that raises a mere suspicion or surmise of the existence of a fact sought to be established in legal contemplation falls short of being sufficient to sustain an affirmative finding by the trial court or jury that such fact existed. *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537.

215. Particular facts or issues.—In an action against a railroad company for burning grass, evidence held to support finding that the grass burned had no market value. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.

In employé's action for services, in which employer instituted cross-action for money misappropriated, evidence held to sustain finding that employé used employer's funds to support and maintain the business of a partnership of which he was a member without the authority, knowledge, or consent of employer. *Nordmeyer v. McAllen State Bonded Warehouse Co.* (Civ. App.) 220 S. W. 1112.

In an action by plaintiff injured while sawing a tree in accordance with the express directions of the foreman of the lumber company, evidence held to warrant a finding that under the circumstances the foreman was negligent in requiring the sawing of such tree. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

Evidence held insufficient to show that an employer should have known or anticipated that a rolling door which it failed to block would be used by an employé in climbing through a nearby opening in the floor, to brace or balance himself. *Dawson v. King* (Com. App.) 222 S. W. 164, affirming judgment (Civ. App.) *King v. Dawson*, 192 S. W. 271.

In an action by a foundry employé, injured while standing on a ladder shaken by a crane, so that he caught the rail on which the crane traveled with his hand, to save himself from falling, evidence held to warrant a finding that plaintiff's injury was due to the breach by defendant employer of its nondelegable duty to give warning of the crane's approach. *Murray v. Houston Car Wheel & Machine Co.* (Com. App.) 222 S. W. 219, reversing judgment (Civ. App.) *Houston Car Wheel & Machine Co. v. Murray*, 181 S. W. 241, and opinion of Supreme Court conformed to (Civ. App.) 227 S. W. 1109.

Proof that one who converted a crop of cotton to his own use by seizing it under a chattel mortgage executed by one not the owner, bought it on the basis of middling lint cotton, and resold it so that the owner had no opportunity to establish the grade, is sufficient to warrant a finding that the cotton was of that grade where the tort-feasor made no proof that it was of a lesser grade. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

That buyers' letter addressed to seller's predecessor was received by seller held not sufficient to prove that seller was doing business under name of predecessor, so as to be chargeable with knowledge of buyers' shipment of goods to predecessor in rescinding contract. *Associated Mfg. Co. v. Jordan* (Civ. App.) 223 S. W. 1050.

Evidence held sufficient to support the findings that plaintiff was in defendant lumber company's employ, that defendant's agents were guilty of negligence proximately causing his injury while riding on an engine, and that he was not guilty of contributory negligence. *Kirby Lumber Co. v. Henry* (Civ. App.) 224 S. W. 814.

In an action by a servant for injuries received when struck by a crane after falling on a rail from a defective ladder, evidence held sufficient to sustain a finding of negligence on the part of the master. *Houston Car Wheel & Machine Co. v. Murray* (Civ. App.) 227 S. W. 1109.

In an action by a servant for personal injuries received when he fell from a defective ladder upon a rail and was struck by a crane, evidence held to sustain a finding of the jury that defendant's foreman was a vice principal. *Id.*

In an action by servant for injuries received when he fell from a defective ladder upon a rail where he was struck by a crane, evidence held to sustain a finding that the injuries were not proximately caused by the plaintiff's own negligence. *Id.*

In an action by a servant for injuries received when he fell from a defective ladder upon a rail and was struck by a crane, evidence held to sustain finding that the injuries did not proximately result from risks, hazards, and dangers assumed by plaintiff. *Id.*

In an action for injuries from electric shock when repairing wires on a pole by the employé of an electric company held sufficient to sustain the jury's finding that defendant company was guilty of negligence in leaving severed wires on the poles in

connection with main primary wires carrying high voltage, and that such negligence was the proximate cause of the injury. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

It is only essential that the terms of an oral contract with a decedent to cancel notes in consideration of services be shown by evidence sufficiently clear for the court to determine what those terms were, without resorting to inference or conjecture. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

Where, eliminating every allegation not substantially supported by evidence, and eliminating all proof not fairly alleged, there is left sufficient evidence of a contract which meets the requirements of law, it cannot be said there is not sufficient evidence to support a judgment for the plaintiff on the issue as to whether the contract was made as alleged. *Id.*

RULE 13. PUBLIC OFFICERS ARE WHAT THEY ARE REPUTED TO BE

De facto officers in general.—The acts of a judge elected in the absence of the regular judge by the bar of a county are valid on the principle that he was a de facto officer, since he had possession of a legally constituted office under color of authority. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Neither informality and irregularity of appointment to the office of assessor and collector of school district, by the board authorized to choose such officer, nor failure of the appointee accepting to take or give the prescribed oath or bond, prevents him being a de facto officer; one being such where he enters into possession of an office and discharges its functions, under color of title or authority, which may be acquired from an election or appointment, however irregular or informal. *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

In order for there to be a de facto officer there must be a de jure office, and hence an attempted election of trustees for an independent school district, under an act which had not yet become effective, was not only irregular and informal, but void. *Gray v. Ingleside Independent School Dist.* (Civ. App.) 220 S. W. 350.

RULE 14. THE REGULARITY OF OFFICIAL ACTS IS PRESUMED

In general.—The presumption that public officers do their duty prevails, in the absence of proof, and not against it. *Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. of Texas* (Civ. App.) 204 S. W. 1176.

Presumption that officials do their duty would not supply proof that defendant collected or received salary, in the absence of the further presumption that money with which to pay the salary was available, and such train of presumptions would not be permissible under the rule that one presumption cannot be based upon another. *Pease v. State* (Com. App.) 208 S. W. 162.

It will not be presumed that defendants, board of directors of irrigation district in question, will ever attempt to violate any of the provisions of the Constitution limiting the taxing powers of the district in the amount of indebtedness it may incur. *White v. Fahring* (Civ. App.) 212 S. W. 193.

The legal presumption prevails, in the absence of contrary proof, that public officers have not culpably neglected, but have properly performed, their official duties, and that their acts are regular and in compliance with law. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

Of municipalities and their officers.—Presumption is that board of commissioners of a city will act within spirit and intent of law. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

In suit by a city marshal removed by the mayor to recover salary after an illegal removal, the presumptions that the mayor properly performed his duty in relation to the removal casts on plaintiff marshal the burden to prove that the mayor removed him for political reasons alone, contrary to the charter, and that reasons of incompetency, etc., were fraudulently assigned by the mayor, or were not placed in the hands of the clerk for filing when the removal took place. *City of San Antonio v. Newnam* (Civ. App.) 218 S. W. 128.

When a city marshal previously removed by the mayor swore to conversations in which the latter gave political reasons for removal, a prima facie case was made, and the presumption destroyed that the mayor had given the true reasons for the removal in the statement he filed with the city clerk as required by charter, and the burden was cast on the city, in the removed marshal's suit for salary, to sustain the reasons for the discharge by showing that they had a basis in unfitness of the marshal. *Id.*

Under the charter of the city of San Antonio, providing that "any appointive officer or employé may be removed or discharged only by a majority vote of the commissioners on charges preferred in writing and after a public hearing of such charges by said commissioners," the offenses for which employés may be removed are lodged in the discretion of the commissioners, and no one can attack the exercise of that discretion without showing a gross abuse of it or fraud, after the removal or discharge has taken place, and from no principle of law or equity can a court presume, on allegations of threats of dismissal made by a fire chief, that the officers clothed with authority to remove would do it regardless of the requirements of the charter. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

Of officers in land department.—In state's action to cancel sale of public land sold as dry agricultural land for \$1.50 an acre, upon the ground that land was legally ap-

praised at \$2 an acre at the time of the sale, and that the Commissioner of the General Land Office had not notified the county clerk of county in which land was situated of classification of land and the appraisal thereof at \$1.50 an acre, under Act of 1897, c. 129 (10 Gammel's Laws, p. 1238), it will be presumed that the Commissioner in awarding land to the purchaser had classified the land as agricultural and had appraised it at \$1.50 an acre, and that the county clerk had been notified of such classification and appraisal in the manner prescribed by the statutes in force at such time, the burden of proof being upon the state to rebut such presumption by direct and affirmative evidence. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

Of counties and their officers.—The proclamation of the county judge, declaring the result of an election adopting the law prohibiting hogs, goats, and sheep from running at large, raises the presumption that everything necessary to a legal election had been done, so that evidence such proclamation was issued is sufficient to show the validity of the election without evidence as to the manner of counting and tabulating the votes. *Coleman v. Hallum* (Com. App.) 232 S. W. 296, reversing *Hallum v. Coleman* (Civ. App.) 214 S. W. 989.

Under orders of road boards in Navarro county under which they are to pay county engineer employed on state highway No. 14, federal project No. 58, 3 per cent. of the amounts apportioned by the boards respectively, totaling \$120,000, the court cannot anticipate that in the payment of such per cent. the boards will attempt to violate the provisions of the special road law, wherein the compensation of the county engineer is limited to \$3,000 per year for his services in each of such districts respectively. *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

Of clerks of courts.—There is a presumption in favor of the regularity of official acts, as the clerk's file mark on petition for writ of error. *Zarate v. Cantu* (Civ. App.) 225 S. W. 285.

It must be presumed, in absence of opposing evidence, that an indorsement was made by the clerk on the order of sale in proceedings to foreclose a tax lien "of the several items of the bill of costs to be collected," as required by art. 3729. *Brown v. Bonough* (Sup.) 232 S. W. 490.

Of sheriffs and constables.—Recital in sheriff's deed that it was made under alias execution on a judgment, after proper levy and advertisement, is not, long after date of such deed, conclusive, but merely some evidence such execution was issued and levied. *Menefee v. Colley* (Civ. App.) 200 S. W. 182.

There is a prima facie presumption that official acts are regular, but the presumption of the regularity of a sheriff's acts as recited in his deed applies to such recitations only as are made by virtue of statutory requirement, and the presumption cannot be indulged to the extent of supplying the necessary authority for the sheriff's acts. *Richards v. Rule* (Com. App.) 207 S. W. 912.

There is a presumption that a sheriff did his duty and executed writ of sequestration sued out by plaintiff as soon as temporary injunction against execution procured by defendant was dissolved. *Spero v. Peters* (Civ. App.) 219 S. W. 514.

Of state officers in general.—Until he has acted otherwise, it cannot be assumed by the court on appeal that Attorney General, in determining whether bonds for improvement of public highway have been issued in accordance with law, will ignore any legal or constitutional defect which will invalidate bonds. *Smith v. Reaves* (Civ. App.) 208 S. W. 545.

Where an extradition warrant was signed by the acting Governor and duly certified by the secretary of state, the presumption is in favor of the regularity of the acts of the acting Governor, and in the absence of showing to the contrary his acts will be upheld. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

The presumption is in favor of the Commissioner of Insurance and Banking of the state having done his duty under art. 4841, requiring that a merger between life insurers must be evidenced by a contract in writing setting out the terms and conditions in full and filed with the commissioner, etc. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

Of surveyors.—Where there is nothing to indicate that surveyor did not actually survey lines of section of public lands located by railroad, and locate them on ground, presumption obtains that he did so, particularly where he fixed location of corner by natural objects. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

The presumption that surveyor did not cross a navigable stream in violation of law is one of fact only. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

Assumption that, because no marks of the beginning corner of a block of surveys are now on the ground, the surveyor was not there and never marked the point, is against the presumption of law. *Standefer v. Vaughan* (Civ. App.) 219 S. W. 484.

The presumption is in favor of surveys that were made as called for by the field notes, and the burden is on the party attacking to show they were not so made. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

RULE 15. COURTS WILL, WITHOUT PROOF, TAKE NOTICE OF FACTS OF A PUBLIC OR GENERAL NATURE

2. **Matters of common knowledge in general.**—A court is authorized to take judicial cognizance of the length of time consumed in travel by the present modes of conveyance between two designated places; such facts being facts of general knowledge. *Baker v. Brown* (Civ. App.) 210 S. W. 312.

It is a matter of common knowledge that the telephone is a means of communication of almost universal use. *Western Union Telegraph Co. v. Campbell* (Civ. App.) 212 S. W. 720.

3. **Course and laws of nature.**—Court of Civil Appeals cannot base reversal of judgment for tenants who, in their landlords' action of trespass to try title, have recovered for breach of rental contract by eviction, on its judicial knowledge that particular season was dry, and that no crops were made in that part of country. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

4, 5. **Qualities and properties of matter.**—The court may judicially know that rubber on a car step merely worn smooth will not become "slick" from this cause alone, so as to invite a slipping of the foot. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

It is a matter of common knowledge that substances such as naphtha, crude oil, and ordinary gasoline will emit gas. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

It is a fact known to every one that gasoline can be and is used with safety to propel motorcars and other kinds of machinery over the land, notwithstanding the fact that while being so used it is kept in close proximity to sparks of fire which explode small quantities of the gasoline as it is fed from the receptacle in which the supply is contained, and that it is kept with safety in storage in filling stations in almost every town in the country without danger of explosion when properly stored. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

6. **Operation and effect of natural forces.**—The court must judicially know that in August at 6 o'clock in the evening at Paradise, Tex., the sun cast a shadow on the east side of a train facing north, and on the steps on the east side of a coach. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

8. **Geographical facts.**—Court judicially knows that land in controversy in Webb county is in dry and semiarid portion of state, and that it was policy of Spanish and Mexican governments, in making grants, to give front, if possible, on some stream. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

9. **Historical facts.**—The court will take judicial notice that, at the time a particular judgment was rendered, war existed between the United States and Austria-Hungary. *Galveston, H. & S. A. Ry. Co. v. Blankfield* (Civ. App.) 211 S. W. 808.

10. **Statistical facts.**—In considering a question of excessiveness of verdict for personal injuries, court may take judicial knowledge of fact that wages have increased, and that purchasing value of a dollar has been decreased many times. *Ward v. Cathey* (Civ. App.) 210 S. W. 239.

The Court of Civil Appeals will take notice that wages and prices during the years between 1917 and 1920 were abnormal, and perhaps should not be looked to as furnishing a future criterion as to earning capacity of a plaintiff suing for injuries, or for comparison as to wages received before and after. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

11. **Phenomena of animal and vegetable life.**—It is matter of common knowledge that in the latitude of Texas wheat is sown in the autumn and harvested the following summer. *Jordan v. Dinwiddie* (Civ. App.) 205 S. W. 862.

The Court of Civil Appeals takes judicial notice that prairie dogs are great pests upon the cattle ranches of Western Texas, that they eat the grass and are otherwise objectionable, and that cattlemen wage a constant warfare upon them. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

The courts will take judicial notice of the fact that in inhabited districts some injury must result to neighbors from the raising and slaughtering of hogs, but this fact alone will not make the raiser and slaughterer liable for trifling damages caused thereby. *Royalty v. Strange* (Civ. App.) 220 S. W. 421.

It is a matter of common knowledge that the cultivation of crops of corn and cotton in Wharton county at the time of tender by plaintiff optionee and demand by him was practically complete, and that such crops were either partly matured or rapidly approaching maturity. *Roberts v. Armstrong* (Com. App.) 231 S. W. 371.

12. **Facts relating to human life, health, habits, and acts.**—It is common knowledge that a child of 18 months cannot walk a distance of 135 yards very rapidly. *St. Louis Southwestern Ry. Co. of Texas v. Wallace* (Civ. App.) 200 S. W. 178.

It is well known that tetanus, or lockjaw, usually, if not invariably, arises from wounds inflicted under certain peculiar circumstances. *Ft. Worth & R. G. Ry. Co. v. Fleming* (Civ. App.) 212 S. W. 233.

Relative to duty of carrier to assist female passenger, it is a matter of common knowledge that often women resent the laying of hands on their person under any pretense. *Chicago, R. I. & G. Ry. Co. v. Wisdom* (Civ. App.) 216 S. W. 241.

14. **Weights, measures, and values.**—The Court of Civil Appeals, as a matter of common knowledge, knows that cotton marketed in Texas in any year differs in grade, and that its value materially depends upon its grade. *Smith v. Coburn* (Civ. App.) 222 S. W. 344; *Brass v. Texarkana & Ft. Smith Ry. Co.*, 110 Tex. 281, 218 S. W. 1040.

It is a matter of common knowledge that valuation of household furniture and ladies' wearing apparel is, to a large extent, a matter of opinion. *Royal Ins. Co. of Liverpool, England, v. Humphrey* (Civ. App.) 201 S. W. 426.

In action against seller for damages for refusal to deliver under a sale price per pound certain bales of linters cotton, where plaintiff alleged that defendant was bound to ship 200 bales, "to be of 500 pounds weight each," proof of usage and custom or general understanding as to weight was necessary, as the court cannot judicially know the weight of cotton bales. *Early-Foster Co. v. Tom B. Burnett & Co.* (Civ. App.) 224 S. W. 316.

It is a matter of common knowledge that there would have to be very exceptional circumstances to make the use of property for a year worth 50 per cent. more than its value. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

The courts will take judicial notice of the fluctuating value of real estate as the result of discovery of gas in the vicinity. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

15. Management and conduct of occupations.—The existence of hoisting machinery for lifting heavy weights is a matter of such common knowledge that evidence to that effect is not required. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

In an action for wrongful death caused by a street collision, the court could not take judicial knowledge that defendant owned the street railway, and was operating the particular line and the car in question. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In oil and gas leases, it is a matter of common knowledge that the development of the oil and gas is, in most instances, the main inducing consideration to the lessor, that the privilege of paying rentals in lieu of such development is for the benefit of the lessee, and that undue delay in prospecting often produces a serious loss to the lessor. *Young v. Jones* (Civ. App.) 222 S. W. 691.

It is a matter of common knowledge that state and national banks are almost daily making loans secured by the capital stock of other banks. *Citizens' Nat. Bank v. Stevenson* (Com. App.) 231 S. W. 364.

16. — Railroads.—Court will not judicially know that a connecting carrier in handling through shipment acts as the agent and employé of carrier from whom it receives shipment, and not as an independent carrier. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In an action against a railway company for the death of its brakeman, struck by a passenger train going 25 to 30 miles per hour in passing a freight train waiting on a siding, the court cannot take judicial notice that the speed was negligent even on a stormy night. *Sorrell v. Missouri, K & T. Ry. Co. of Texas* (Civ. App.) 230 S. W. 768.

17. Customs and usages.—The fact that vehicles to be supplied with gasoline from a filling station, maintenance of which is sought to be restrained, will be driven across the sidewalk and to a place inside the premises may not be common to all filling stations, but as matter of common knowledge it is true of most of such stations, as well as business of other kinds, such as wholesale commercial houses and manufacturing plants. *City of Electra v. Cross* (Civ. App.) 225 S. W. 795.

18. Corporations and associations and members thereof.—Judicial cognizance will be taken of the fact that subordinate lodges usually demise by failure of their members to attend, and their failure to comply with regulations of the Grand Lodge under which they hold their charters, and that usually no minutes are kept of the demise. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

19. Matters relating to government and its administration in general.—It is common knowledge that much of the delinquent taxes accrued against former owners. *Hunt v. State*, 110 Tex. 204, 217 S. W. 1034.

The courts will take judicial notice that one who signed an extradition warrant as acting Governor was the duly elected and qualified Lieutenant Governor, and had the authority, and was required, in the absence of the Governor, to act as such. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

It is a matter of common knowledge that surveys located under alternate script issued as a bonus to railway companies were located in larger blocks and rarely, if ever, were the lines of each survey actually run on the ground, the method usually followed being to run a base line for an entire block, and on this line plat a system of 640-acre surveys. *Hamman v. San Jacinto Rice Co.* (Civ. App.) 229 S. W. 1008.

Where suit was brought against a railroad company and the Director General of Railroads, who was thereafter, before trial of the case, dismissed and succeeded by the Agent of the President under Transportation Act 1920, the court will take judicial notice of the fact that the latter was agent for the company prior to the trial and that the former Director General was no longer entitled to represent the government at that time. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

20. Political divisions and bodies—Counties and county seats.—The Court of Civil Appeals judicially knows that Fannin county is a subdivision of the state of Texas. *Dickerson v. Dickerson* (Civ. App.) 207 S. W. 941.

The court knows judicially that funds raised from taxes for the road and bridge fund of the county may be used in defraying current expenses for improving and maintaining the public highways unless appropriate orders have been made setting apart all or a portion of it for some other purpose. *J. I. Case Threshing Mach. Co. v. Camp County* (Civ. App.) 218 S. W. 1.

21. Cities and other municipal corporations.—The court will not take judicial notice that the crossing of Latta street and Alameda avenue is within the corporate limits of El Paso, so as to be subject to an ordinance of that city relating to street traffic. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

Court of Civil Appeals judicially knows that Corsicana is in Navarro county. *Cecil v. Fox* (Civ. App.) 208 S. W. 954.

Judicial notice will not be taken that a certain town is in a certain county, where it is not shown to be a county seat. *Cassidy-Southwestern Commission Co. v. Chupick Bros.* (Civ. App.) 225 S. W. 215.

The Court of Civil Appeals cannot take judicial notice of the fact that a town is incorporated and has levied taxes, or that a school district has incorporated as an

independent district and has levied taxes. *Ammerman v. Bourland* (Civ. App.) 230 S. W. 804.

Courts will take judicial knowledge that Waco is a city located in McLennan county. *Strawn Merchandise Co. v. Texas Grain & Hay Co.* (Civ. App.) 230 S. W. 1094.

22. Foreign governments.—Court of Appeals will take judicial notice that Carranza was head of a military government in northern Mexico at time ores in question were imported, that such government could seize and sell property for military purposes, and that by such sale by its authorized officers title would pass to purchaser. *De la O v. Consolidated Kansas City Smelting & Refining Co.* (Civ. App.) 202 S. W. 1027.

The Court of Civil Appeals will take judicial notice of the fact that the government of the United States recognized the government of Carranza as the de facto government of the republic of Mexico on October 19, 1915, and as the de jure government on August 31, 1917. *Terrazas v. Donohue* (Civ. App.) 227 C. W. 206.

23. Laws of the state—Public statutes.—The Court of Civil Appeals will take judicial notice that art. 1903, as amended by Acts 1917, c. 176, has for its two primary purposes, the enabling of a party pleading privilege to be sued in county of his residence to negative, by general averment, the existence of any exceptions to the general venue statute, and the providing of right of appeal directly upon a judgment sustaining or overruling the plea without awaiting trial on merits. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

In action involving the question of whether public contractor's bond executed under art. 6394f, protected laborers and materialmen, the court will take judicial notice that such statute was enacted to protect laborers and materialmen who in many cases were left unpaid. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

25.—Charters of private and public corporations.—Judicial notice will be taken of Houston city charter enacted by general legislative act. *Woods v. Bell* (Civ. App.) 195 S. W. 902.

Courts will take judicial notice of the provisions of a city charter granted by the state Legislature. *Cawthon v. City of Houston* (Civ. App.) 212 S. W. 796.

26. — Municipal ordinances.—Courts do not take judicial notice of city ordinances. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077.

27. Laws of United States.—The resolution of Congress of July 16, 1918 (U. S. Comp. St. Ann. Supp. 1919, § 3115½x), and the proclamation of the President, taking control of telegraph and telephone lines, as well as all public orders issued thereunder, are part of the law of the land, of which all courts, state and federal, must take judicial notice. *Western Union Telegraph Co. v. Condit* (Civ. App.) 223 S. W. 234.

Resolutions of Congress are facts of which the courts, both state and federal, take judicial knowledge. *Western Union Telegraph Co. v. Robinson* (Civ. App.) 225 S. W. 877.

The appellate court will take judicial knowledge of all public acts and resolutions of Congress and proclamations of the President thereunder. *Houston, E. & W. T. Ry. Co. v. Tanner* (Civ. App.) 227 S. W. 713.

28. Laws of other states.—In action on sister state judgment, the defense being pending appeal from judgment, court cannot take judicial knowledge of laws of that state as to effect of appeal. *Van Natta v. Van Natta* (Civ. App.) 200 S. W. 907.

31. Terms of courts.—Judicial notice will be taken that several terms of Bexar county district court must have been held during two years. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

The Court of Civil Appeals must take judicial knowledge of the time for holding sessions of the district court in Montague county, in the Sixteenth judicial district. (art. 30, subd. 16), and also that a determination of a primary election contest cannot take place at a regular session thereof until after the November election. *Pollard v. Speer* (Civ. App.) 207 S. W. 620.

The Court of Civil Appeals cannot take judicial notice of the order of the commissioners' court fixing term of justice's court. *Poole v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 209 S. W. 706.

33. Judicial proceedings and records.—State courts and courts other than the initial court of bankruptcy are not required to take judicial cognizance of the proceedings in a bankruptcy court. *Houston v. Shear* (Civ. App.) 210 S. W. 976; *Coppard v. Gardner* (Civ. App.) 199 S. W. 650.

On consideration of a demurrer or exception, the federal court may, under the Texas law, take judicial notice of the former steps taken in the case. *Ben C. Jones & Co. v. West Pub. Co.* (C. C. A.) 270 Fed. 563.

Judicial notice cannot be taken of the amount of a judgment to which the defendant in the case on trial was not a party, though adjudicated in the same court and by the same judge. *Southwestern Surety Ins. Co. v. Gulf, T. & W. Ry. Co.* (Civ. App.) 196 S. W. 276.

In trespass to try title, court could not take judicial notice of all facts stated in pleadings in former suit and all facts proven in that cause, as presented in transcript and statement of facts, making record on appeal of that case to Court of Civil Appeals. *Zarate v. Unknown Heirs of Zarate* (Civ. App.) 204 S. W. 697.

On petition in pending suit under allegation that no final judgment had been entered, the court may take judicial notice of the character of the judgment previously made. *Jones v. Chronister Lumber Co.* (Civ. App.) 204 S. W. 704.

In an action in the same court in which a receivership proceeding was pending, that court may take judicial notice that no order had been procured authorizing the receiver to execute a release, etc. *Lanham v. West* (Civ. App.) 209 S. W. 258.

Where application for writ of garnishment is filed at the same time as the main suit, or prior to final judgment, it is ancillary to and part of the main suit, and the court will take judicial knowledge of the proceedings in the main suit and consider them together; but where the original suit is terminated at the time of the institution of the garnishment proceedings, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment, without proof of a valid, subsisting, and unsatisfied judgment. *Tripplitt v. Hendricks* (Civ. App.) 212 S. W. 754.

Where a judgment on an insurance policy was rendered for defendant, but not entered upon the minutes of the court during the term, and a new trial was awarded at a subsequent term, resulting in a judgment for plaintiff, defendant was not required to plead the judgment first entered in bar to further proceeding upon the second trial; both trials being in the same tribunal and on the same cause of action, and the court being bound to take judicial cognizance of its previous action. *Ætna Ins. Co. v. Dancer* (Com. App.) 215 S. W. 962.

Though the records of a court prove themselves when offered in evidence, yet in the trial of one case the court can no more take judicial notice of the record in another case in the same court without its formal introduction in evidence than if it were a record in another court. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

35. Official proclamations and orders.—Proclamations of the President, and orders thereunder, are facts of which the courts, both state and federal, take judicial knowledge. *Western Union Telegraph Co. v. Robinson* (Civ. App.) 225 S. W. 877; *Western Union Telegraph Co. v. Condit* (Civ. App.) 223 S. W. 234; *Houston, E. & W. T. Ry. Co. v. Tanner* (Civ. App.) 227 S. W. 713.

The appellate court judicially knows that on October 28, 1918, the Director General of Railroads promulgated his General Order No. 50, and that the President assumed the control, possession, and operation of the Houston, East & West Texas Railway, and that same was under the control of the United States government in September, 1919. *Houston, E. & W. T. Ry. Co. v. Tanner* (Civ. App.) 227 S. W. 713.

37. Official proceedings and acts.—The court will take judicial notice that the land office of the state of Texas during the first seven months of the year 1866 was open for business, and that land certificates were during such period located and returned to the General Land Office from many counties and have been recognized as valid by the state. *Fielder v. Houston Oil Co. of Texas* (Com. App.) 208 S. W. 158.

RULE 16. ANCIENT WILLS, DEEDS AND OTHER INSTRUMENTS MORE THAN THIRTY YEARS OLD, WHEN OFFERED IN EVIDENCE, UNBLEMISHED BY ALTERATIONS AND COMING FROM SUCH CUSTODY AS AFFORDS A REASONABLE PRESUMPTION IN FAVOR OF GENUINENESS, WITH OTHER CIRCUMSTANCES OF CORROBORATION, WILL BE ADMITTED IN EVIDENCE WITHOUT PROOF OF THEIR EXECUTION

In general.—In trespass to try title, where defendants claimed under an alleged lost deed, tax receipts issued 30 years before trial by the proper officer, which identified the persons paying the same by name and described the land, held properly admitted as against objection that there was no proof of execution or identity. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Receipts showing payments by defendant's ancestor to one under whom plaintiff claimed executed more than 30 years before trial held admissible as ancient documents; such receipts having been attached to a deposition taken in another cause wherein they had remained on file for more than 10 years. *Id.*

The contents of an ancient affidavit in public archives are not inadmissible because the affiant is still living, where he stated in his deposition that he could no longer remember the facts. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

Deeds.—Where land was conveyed to "Sheldon E. Bell," and there appeared in plaintiff's chain of title a conveyance from "E. S. Bell," made shortly thereafter, which referred to a conveyance by the original grantor, held that, while the recitals in the two deeds, both of which were ancient documents, as to the name of the grantor, were admissible in evidence, they were not conclusive that "Sheldon E. Bell" and "E. S. Bell" were the same persons. *Dittman v. Cornelius* (Civ. App.) 218 S. W. 109.

Land certificates.—A recital in an ancient transfer of the duplicate certificate that it was a duplicate of one transferred by the grantee in the original certificate, and ancient pleadings in a suit against the holder of the original certificate, are admissible to show a claim of ownership of the land certificate and the land, whether or not actual possession was shown of the certificate or of the land. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

RULE 17. THE EXISTENCE OF A DEED MAY BE PRESUMED FROM POSSESSION UNDER CLAIM OF TITLE CORROBORATED BY OTHER CIRCUMSTANCES

In general.—Since an owner of valuable property usually asserts claim thereto, an inference that an apparent owner has parted with his title is justified from evidence of a long-asserted and open claim adverse to that of the apparent owner, and of acquiescence by the apparent owner in the adverse claim. *Magee v. Paul*, 110 Tex. 470, 221 S.

W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

Where plaintiffs had a broken possession of the land from some time in the '80's until 1901, twice cut timber from the land and undertenants cultivated, used, and enjoyed it, and, from 1886 to 1919, from year to year, permitting them to become delinquent now and then, they paid the taxes assessed against it, and there was no claim on the part of defendants and those under whom they claimed until 1913, held, that the facts raised an issue of a presumption of a grant from the heirs of the common source of title to plaintiffs' predecessor and those claiming under him. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

Possession is not an indispensable prerequisite to the presumption of the existence of a deed, but it is essential that the claim of title be made in some tangible form calculated to bring notice to those who are adversely affected thereby, so as to create a presumption of acquiescence in such claim by the adverse parties. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 49.

The presumption in favor of the existence of a conveyance of land is one of fact and not of law. *Id.*

RULE 18. A GRANT MAY BE PRESUMED IN SUPPORT OF A JUST AND LEGAL CLAIM, FROM LONG AND UNINTERRUPTED POSSESSION

In general.—Long-continued possession of land under a claim of ownership, varying in length of time according to circumstances, is sufficient as a basis for presuming that a grant has been issued by the government. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

A grant from the government being shown by presumption, and plaintiff having connected himself by a perfect chain of title with such grantee, the court did not err in finding for plaintiff upon the ground that he had record title to the land. *Id.*

Neither general reputation nor rumor have any weight in establishing a deed from certain tenants in common to another, unless of such general notoriety as to raise a presumption that the parties sought to be affected knew thereof; and, where such parties were in comfortable circumstances and the supposed grantee was poor, his possession must be attributed to indulgence rather than presumption of the deed. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

Where plaintiffs had a broken possession of the land from some time in the '30's until 1901, twice cut timber from the land and undertenants cultivated, used, and enjoyed it, and, from 1886 to 1919, from year to year, permitting them to become delinquent now and then, they paid the taxes assessed against it, and there was no claim on the part of defendants and those under whom they claimed until 1913, held, that the facts raised an issue of a presumption of a grant from the heirs of the common source of title to plaintiffs' predecessor and those claiming under him, which should have been submitted to the jury, both on the theory of an actual transfer and whether it was more reasonably probable that such a transfer was made than that it was not made. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

RULE 19. A FACT MAY BE INFERRED FROM THE PROVED EXISTENCE OF A RELEVANT FACT IN THE ABSENCE OF OPPOSING EVIDENCE

In general.—In absence of testimony sender of telegram announcing death of wife, sendee's sister, would have delayed funeral, also of testimony as to time of burial, it could not be inferred from language of telegram: "Delia died. * * * If any of you can come answer quick"—whether sendee would have reached place in time, had he gone. *Western Union Telegraph Co. v. Mobley* (Com. App.) 206 S. W. 833.

Juries can indulge all reasonable inferences from facts revealed by the evidence or deducible by unbiased and rational minds from such facts. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

A cause being shown which was calculated to produce an explosion, it was a warrantable inference, in the absence of a showing of other causes, that the one shown was the operating agency in bringing about the result. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 215 S. W. 444.

A litigant should not lose his property, or be required to pay his money as damages, when his liability for such damages rests only on inference, especially where the fact necessary to establish liability, if it existed, was within the exclusive knowledge of the opposing party, who testified in the case and failed to state such fact. *Western Union Telegraph Co. v. Mobley* (Civ. App.) 220 S. W. 611.

Fraud and conspiracy.—Grantee's intention not to perform a promise which was the consideration for a conveyance cannot be inferred merely from the fact of nonperformance. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

RULE 20. PAROL OR EXTRINSIC EVIDENCE IS GENERALLY INADMISSIBLE TO CONTRADICT, VARY OR ADD TO THE TERMS OF A WRITTEN INSTRUMENT

1. Judicial records and proceedings.—The statute, relative to the appointment of commissioners in condemnation proceedings, not requiring their appointment or oath to be in writing, parol evidence is properly admitted to show that a commissioner was sworn. *Dallas, P. & S. E. R. Co. v. Day*, 3 Civ. App. 353, 22 S. W. 538.

Decree of partition created statutory warranty in writing similar to general warranty expressed in deed, and such statutory warranty cannot be enlarged or restricted by parol evidence. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

In action involving validity of judgment set up as *res adjudicata*, claimed by plaintiffs to be void for insufficiency of description, where it was apparent by reversing calls that Twentieth street was the beginning call instead of Twenty-Third street, as recited in judgment, and where description stated the land to be part of certain tract, evidence that Twenty-Third street did not touch such tract held admissible. *Pearson v. Loyd* (Civ. App.) 214 S. W. 759.

In a suit to set aside a default judgment in a tax suit and the sheriff's deed thereunder and recover the land, parol evidence was admissible to contradict a recital in the judgment of service of citation. *Rowland v. Klepper* (Com. App.) 227 S. W. 1096.

4. — **Affecting jurisdiction.**—In collateral attack upon a judgment of a domestic court of general jurisdiction regular on its face, inquiry by evidence aliunde the record into any fact which the court rendering such judgment must have passed upon is precluded; "jurisdiction" meaning simple power to determine and give judgment. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

5. **Official records and documents—Plats and surveys.**—In an action where the location of a boundary line was in controversy, evidence of the existence of a marked line, which did not conform to the description of natural and artificial monuments in the patent, and conflicted with the courses and distances in the field notes, is inadmissible as parol evidence contradicting the field notes. *Braumiller v. Burke* (Civ. App.) 232 S. W. 906.

6. — **County records or proceedings.**—In view of art. 2276, where tax collector sues county for fees for preparation of a delinquent tax record, under an order of the commissioners' court, parol evidence that the order did not correctly describe the contract is inadmissible, as contradicting the record. *King v. Marlon County* (Civ. App.) 202 S. W. 1052.

7. **Corporate records and proceedings.**—Parol evidence held admissible to show one corporation successor of another by amendment of charter, to clear doubt as to identity of beneficiary of charitable legacy. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

8. **Wills.**—Where an alleged spendthrift trust was complete and unambiguous, testator's explanatory declarations held inadmissible. *Nunn v. Titcher-Goettinger Co.* (Civ. App.) 196 S. W. 890.

Where the instrument is free from doubt, and the intention of the testator is expressed with sufficient intelligence and clearness to make the will incapable of more than one construction, there is no need of parol evidence, and such evidence will not be admitted to show that the will did not express the intention of the testator. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

17. **Leases.**—In action to cancel oil lease, evidence of representations by lessee's agent, made to induce lessor to execute lease, was inadmissible, where at variance with terms of the written lease, in absence of an allegation that representation was omitted from written instrument by mutual mistake or fraud practiced upon lessor. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

18. **Mortgages.**—There was no error in refusing to allow defendant to testify that he owed plaintiff less than admitted in writing; no fraud or mistake being shown in procuring defendant's admission of indebtedness and execution of mortgage as security. *Bejil v. Blumberg* (Civ. App.) 215 S. W. 471.

19. **Contracts in general.**—Where plaintiff purchased defendant's interest in a business and defendant agreed not to enter into competition, held, that his testimony that he did not sell good will of the business was incompetent because tending to contradict terms of contract. *Schluter v. McLeod* (Civ. App.) 199 S. W. 311.

In the absence of fraud, accident, or mistake, parol evidence is not admissible to show that it was intended to convey less than the contract called for. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233.

Where there is no ambiguity in a written contract, the intention of the parties is to be gathered from the language used. *Taylor Cotton Oil Co. v. Early-Foster Co.* (Civ. App.) 204 S. W. 1179.

The terms of a written instrument constituting a contract cannot be varied by parol. *Leeson v. City of Houston* (Civ. App.) 225 S. W. 763.

A receipt, issued by warehouseman, stating the amount or quantity of goods received and also the conditions under which the same are to be stored, is more than a mere receipt, and is in fact a contract fixing the rights of the parties, and parol evidence is inadmissible to vary its terms in absence of fraud or mistake. *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

20. — **Completeness of writing and presumption in relation thereof.**—Where a written instrument is ambiguous or incomplete on its face, parol evidence is admissible to show what the real contract was. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell*, 108 Tex. 422, 195 S. W. 184.

Where entire contract was not in writing, parol evidence was admissible as to those matters upon which contract was silent. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

21. **Contracts of employment.**—Evidence that at the time a broker's written contract of employment was executed the owner had informed him that he was then negotiating a sale himself was properly excluded as contradicting a written instrument. *Poppewell v. Buchanan* (Civ. App.) 204 S. W. 874.

22. **Contracts for buildings and other works.**—Where contract for excavating and hauling dirt failed to show which party was to furnish cars, parol evidence held admissible to establish the real contract. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell*, 108 Tex. 422, 195 S. W. 184.

23. **Contracts of sale.**—Where buyer and seller entered into a contract over the telephone without an agreement that the contract was to be reduced to writing, the mere fact that buyer subsequently filled out an order blank, and that on receipt thereof seller sent buyer a letter of confirmation, did not make the contract a written one, so as to come within the parol evidence rule. *Taylor Milling Co. v. American Bag Co.* (Civ. App.) 230 S. W. 782.

24. **Bonds.**—In a purchaser's action against the seller of land for removing fixtures, evidence that the seller's agent, after the contract and deed had been executed, stated that the fixtures did not belong to the land, etc., could not affect the deed and contract. *Alexander v. Anderson* (Civ. App.) 207 S. W. 205.

25. **Bills and notes.**—Where the language of a note is plain, parol evidence is not admissible to change the due date specified therein.—*Gregory v. South Texas Lumber Co.* (Civ. App.) 216 S. W. 420.

Where a note sued on is not ambiguous, it cannot be varied by parol evidence. *Stamps v. Platt* (Civ. App.) 218 S. W. 47.

30. **Release.**—A contract of release of damages cannot be modified by parol testimony. *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

31. **Memoranda or writing not constituting contract or disposition of property.**—In an action for loss of barges while in defendant's possession, testimony of a plaintiff as to the agreement between the parties held not inadmissible as varying the terms of any written contract; a letter not having been considered by the parties as constituting the contract. *Freeport Town-Site Co. v. S. H. Hudgins & Sons* (Civ. App.) 212 S. W. 287.

32. **Writing incomplete on its face.**—When a contract does not disclose in what character a party has signed a contract, it may be shown by evidence what his relation to the contract was and that he was a surety. *Webber v. Swift & Co.* (Civ. App.) 226 S. W. 509.

Where a contract is not in itself a complete expression of the intention of the parties, valid and known usages, if not inconsistent with the express terms, are admissible to supply matters as to which the contract is silent. *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432.

34. **Evidence extrinsic to writing in general.**—As a circumstance identifying cotton sequestered by plaintiff warehouse company, in action against a compress company, as cotton embezzled from plaintiff's warehouse by M., assertion of claimant, to whom the compress company had issued receipts therefor, on refusal to surrender it, that it had bought it of M., was admissible on trial of right of property. *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.

36. **Matters not included in writing or for which it does not provide.**—In action for price of tractor under contract not specifying the design of the engine to be supplied, it was not error to admit testimony tending to show defective design. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 198 S. W. 676.

Where contract under which broker was to sell cotton for defendant did not limit the time in which the sale was to be made, delivery made of the cotton, and the transaction closed, evidence was admissible of a custom among cotton buyers that a trade for the purchase and sale of cotton shall be closed by 8 o'clock in the evening of the day when made, as such custom would not be inconsistent with or vary any term of the contract. *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432.

37. — **Judicial records and proceedings.**—In a habeas corpus proceeding brought by a juvenile, evidence by the county judge that relator's parents had not been notified of the proceedings held improperly excluded. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

41. — **Contracts in general.**—Where subscription contract did not state when stock was to be issued and delivered, testimony that it was understood between all parties that stock was not to be delivered until notes given therefor had been paid was admissible; contract being incomplete and executory. *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

Where a contract giving a materialman's lien upon homestead for material for "the erection, repairs, and improvements on our homestead" contained no itemization or description of material, it could be shown by parol the quantity, pieces, or articles that were agreed on, and that they were thereafter actually delivered. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

45. **Parties to instrument or obligation.**—A third person, who prepared a bill of sale for an automobile, may not claim that a company whose name appears as signed thereto was a grantor, where the language of the instrument is not ambiguous, and designates the other signer as grantor. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

Exception, based on the parol evidence rule, was properly overruled to allegation in petition that the indemnity contract sued on, although executed in the name of a named building company as principal, was in fact the contract of a certain bank for which the building company was acting, where the petition did not disclose that plaintiff knew that the building company when it signed was acting for the bank as the real party in interest; the rule being that real party, if another than the one signing a nonnegotiable instrument or contract not under seal, may be shown by parol evidence, where the beneficiary at the time of accepting the contract does not know that the party signing is not the real party in interest. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

Where the beneficiary, at the time he accepts a contract, knows that the party signing is not the real party in interest, parol evidence is not admissible to show the relation of the real party in interest to the contract, for there is then no undisclosed principal and the beneficiary can proceed alone against the party signing, because,

knowing the facts, he is held to have elected to rely upon the obligation of the agent or substitute. *Id.*

Where a buyer signed contracts in the name of a firm as its agent, he could not be permitted to contradict the plain statements of the written agreement by testifying that he signed them for his own benefit and was doing business in such other party's name. *Martin v. Hemphill* (Civ. App.) 221 S. W. 333.

47. Existence of condition or contingency—Contracts in general.—Parol testimony is not admissible to ingraft a condition upon a plain contract. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

49. — Bills and notes.—In an action on a check, evidence by defendant of an oral agreement that he was not to be required to pay until financially able was inadmissible as affecting a written instrument. *Merriman v. Swift & Co.* (Civ. App.) 204 S. W. 775.

50. Existence of custom or usage.—Established or notorious custom or usage with reference to subject-matter of contract may be shown for purpose of construing contract. *Yoakum v. Gossett* (Civ. App.) 200 S. W. 582.

Where contract for sale of cotton oil did not provide for washing-out process, custom of washing out such sales could not be set up to vary contract. *Planters' Oil Co. v. Gresham* (Civ. App.) 202 S. W. 145.

Where defendant requested a quotation on oranges, and plaintiff quoted a price f. o. b. point of origin, and defendant directed shipment by a particular road, and a bill of lading naming him as consignee was mailed direct to him, a custom permitting the buyer to inspect and reject at destination was not controlling, as the contract was clear, unambiguous, and its construction free from difficulty. *Alexander v. Heidenheimer* (Com. App.) 221 S. W. 942, reversing judgment (Civ. App.) *Heidenheimer, Stfassburger & Co. v. Alexander-Baird*, 205 S. W. 458.

Where judicial construction has affixed to a contract a certain meaning and has defined the rights and liabilities thereunder, its legal effect or import cannot be varied by proof of a usage giving to the contract a different meaning. *Id.*

When a contract is clear and complete, new terms cannot be added by usage. *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432.

52. Existence or accrual of liability.—A defendant being sued on a written instrument is not precluded from showing by parol evidence the fact of nondelivery to defeat the effectiveness of an obligation. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

55. Nature and extent of liability—Bills and notes and indorsement thereof.—Parol evidence is always admissible, between signers and indorsers of negotiable instruments, to show the real character of the obligation intended to be assumed by them. *Carver v. Caldwell* (Civ. App.) 208 S. W. 555.

57. — Principal or surety.—Parties executing note secured by mortgage on horse suing to recover the horse after foreclosure, held entitled to show that they were sureties, though the note did not disclose this relationship. *Billingsley v. West* (Civ. App.) 197 S. W. 1054.

58. Effect of writing as to persons not parties thereto or privies.—Parol representations by the owner of a subdivision to lot purchasers that all subsequent conveyances of lots would contain certain restrictions are admissible against a subsequent purchaser who was found to have had knowledge of the restrictions in conveyances of other lots at the time he made his purchase. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

59. Writings collateral to issues in general.—In action involving ownership of attached automobile claimed by third party, parol evidence of claimant's telegrams to attachment defendant for purpose of showing title was admissible without accounting for their absence; the telegrams not being basis of the action. *Frost v. Smith* (Civ. App.) 207 S. W. 392.

60. Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.—Where a contract in writing is certain in its terms, fair and just in its provisions, and capable of being enforced with fairness to both parties, equity will enforce it by specific performance, and the certainty of the contract may be aided by proof of extrinsic facts: *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

62½. Showing discharge or performance of obligation—Construction of instrument.—It is always permissible to show what the parties did under their contract, as disclosing their construction of its purpose. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

In action against the officers of a bank as sureties on an indemnity contract on which the bank was the undisclosed principal, testimony of plaintiff, who was an officer in another bank, that the money held by him, and to secure the payment of which to the first bank the indemnity contract was given, was placed to the credit of the first bank, was admissible, as it is always permissible to show what the parties did under their contract, as disclosing their construction of its purpose. *Id.*

In an action to have a trust declared in land, evidence that plaintiff went into possession of property as manager after the conveyance of land to defendant, that he had charge of the whole matter, paid out and borrowed money, paid the bills for the firm, composed of the defendant and himself, that the capital used by the firm was money borrowed by him and checked out by him, that certain notes introduced in evidence, signed in the firm name, were executed by him, and that it was agreed between the parties that the interest due the state upon certain sections of the ranch property should be paid by all of the firm, and a statement as to how he paid the interest, that he did not pay the taxes for certain years as the property was rendered in defendant's name,

but that the taxes were paid by the firm's check, was admissible as tending to show a practical construction of the alleged trust agreement by the parties, and that the parties had recognized and acted upon such agreement. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

RULE 21. CONTEMPORANEOUS WRITTEN AGREEMENTS RELATING TO THE SAME SUBJECT ARE TO BE CONSTRUED TOGETHER, AND SEVERAL DISTINCT STIPULATIONS ARE TO BE CONSTRUED SO AS TO GIVE EFFECT TO ALL. A PRIOR OR CONTEMPORANEOUS PAROL AGREEMENT CONSISTENT WITH AND FORMING A PART OF THE CONTRACT IS TO BE CONSTRUED WITH THE WRITTEN PART THEREOF.

1. Connection of contemporaneous writings.—Parol evidence is admissible to prove that two or more writings executed contemporaneously constitute but one contract. *Lawton v. Nesbit* (Civ. App.) 206 S. W. 227.

Note and mortgage and mortgagor's application for loan all bearing the same date and having reference to the same matter must be considered together as constituting one agreement. *Fidelity Trust Co. v. Fowler* (Civ. App.) 217 S. W. 953.

3. Prior and contemporaneous collateral parol agreements in general.—Generally all antecedent agreements are merged in the written contract. *Messinger v. McLean* (Civ. App.) 227 S. W. 247; *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531; *Barnes v. Early-Foster Co.* (Civ. App.) 228 S. W. 248.

Where the contract sued on was separate and distinct, a former contract should not be looked to in construing it. *Harris v. G. M. H. Wagner & Sons* (Civ. App.) 195 S. W. 351.

The rule that a legally binding written unambiguous instrument cannot be varied, added to, or contradicted by proof of prior or contemporaneous agreements, not only applies to the parties, but to their privies. *John E. Morrison Co. v. Riley* (Civ. App.) 198 S. W. 1031.

Where agent gave principal a release in full upon termination of contract, and principal contemporaneously therewith signed contract agreeing to sell agent an automobile at a reduced price in consideration of release by agent of all claims against principal, parol evidence was admissible to explain any conflict between the two writings when read together as part of one contract. *Lawton v. Nesbit* (Civ. App.) 206 S. W. 227.

Evidence of an oral agreement that a contract should run six months, instead of twelve months, as stipulated in written contract later executed by the parties, is inadmissible. *Brenard Mfg. Co. v. Barnett* (Civ. App.) 210 S. W. 990.

In determining whether one has contracted in writing to perform an obligation in a particular county so as to control the venue under art. 1830, subd. 5, the written contract alone can be looked to; parol provisions of the contract being immaterial. *Russell v. Green* (Civ. App.) 214 S. W. 448.

The execution of a contract in writing is deemed to set aside all oral agreements theretofore made, and any representation made prior to or contemporaneously with the execution of the contract is inadmissible in the absence of accident, fraud, or mistake of fact to contradict, change, or add to the plain terms. *D. Sullivan & Co. v. Schreiner* (Civ. App.) 222 S. W. 314.

Impression which owner of standing timber got in negotiations for sale thereof as to what he was to receive therefor cannot avail for rescission of his subsequent written contract of sale, complete in its terms; all prior negotiations and agreements being merged in the written contract. *Jones v. Eastham* (Civ. App.) 224 S. W. 223.

5. — Leases.—In landlord's action for rent and to foreclose lien, testimony of tenant that when he signed lease with another defendant he and landlord's agent agreed in parol that he should not be liable as principal, but only as guarantor or surety, was inadmissible as varying a writing. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

In suit by lessor and lessee against sublessees, the latter cannot defend on the ground of a parol statement made before the sublease or assignment was executed, so that proof that the sublessor falsely represented to his lessees that he owned 20,000 acres of land over which their cattle could graze, thereby inducing the sublessees to lease, would have been inadmissible as varying the terms of the writing by a parol contemporaneous agreement to furnish lands not specified. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

In an action on a written contract of lease of a farm and dairy stock, defendant was not entitled to show an agreement on the part of the plaintiff to furnish an engine, where plaintiff had not agreed to furnish such engine under the written contract, in the absence of a showing in defendant's cross-bill that it was a new contract on a valuable consideration. *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

6. — Mortgages, security or trust deed.—A parol agreement that a chattel mortgage should be subordinate to another to be later executed cannot be given effect, either by the mortgagor or the subsequent mortgagee, in contravention of a stipulation in the earlier mortgage that the property should be free from all other incumbrances. *John E. Morrison Co. v. Riley* (Civ. App.) 198 S. W. 1031.

8. — Contracts for buildings and other works.—Where a contract to compensate an architect was in writing, parol evidence contradicting, varying, or modifying its terms by showing an oral agreement of the architect to finance the building was inadmissible. *Ellerd v. Sodeberg* (Civ. App.) 222 S. W. 674.

9. — Sale or exchange of real property and deeds.—Where land contract was made conditional upon the execution of water contract between purchaser and company

supplying water for irrigation simultaneously with execution and delivery of warranty deed, and made no further reference to a supply of water, parol evidence was not admissible to prove that the vendor guaranteed sufficient irrigation. *Harper v. Lott Town & Improvement Co.* (Com. App.) 228 S. W. 188.

10. — **Sale of personal property.**—In suit to recover money paid for stock in an oil company upon the ground that at the time the subscription contract, which was in writing, was entered into, the individual defendants orally agreed to return to plaintiff said money in the event oil was not developed, held that, aside from the allegations of fraud, evidence of the oral contract alleged was in violation of the rule that parol testimony cannot be received to vary, add to, or subtract from a valid written instrument. *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767.

In suit by the buyer of merchandise to recover difference between what the seller had agreed to account for, on account of sales after the transaction, but before possession changed, and what he actually did account for, merely because the written contract showed the seller was the owner prior to a certain date, he was not necessarily excused from responsibility for what he had disposed of previously, there having been an oral arrangement to that effect. *Adams v. Sims* (Civ. App.) 214 S. W. 838.

Where a sale of a legal publication was silent as to the time within which all the different volumes of the set were to be issued, the purchaser is not entitled to contradict the legal implication that the volumes were to be issued within a reasonable time, by showing a contemporaneous oral agreement fixing two to five years as the time within which the work was to be completely issued. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881.

The rights of parties under a bill of sale are to be measured by the terms of the written contract, and cannot be enlarged or diminished by contemporaneous or prior stipulations, in the absence of fraud, accident, or mistake in merging the agreement into the written contract. *Houston Transfer & Carriage Co. v. Williams* (Com. App.) 221 S. W. 1081, reversing judgment (Civ. App.) 201 S. W. 712.

Stock subscription contracts could not be added to, varied, or changed by ingrafting thereon a parol contemporaneous agreement as to the character of the "securities" called for as an alternative to payment in money by the subscriber. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

11. — **Bills and notes or indorsement thereof.**—In action on note, contemporaneous oral agreement that at time of execution of note nothing was due plaintiff because of a sum due to defendant upon a proper accounting could not be shown. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

In action on note for corporate stock, under defendant's plea of failure of consideration court could not admit evidence showing contemporaneous parol agreement, contradictory of note, that defendant should not pay it, unless from commissions for selling stock. *Denman v. Kaplan* (Civ. App.) 205 S. W. 739.

In a life insurance company's action on assigned lien notes secured by its policies also on a policy loan note, defendant's oral testimony, that at the time of execution of the last note it was agreed between him and plaintiff company that the amount collected on a policy should be first applied to payment of a balance due on a prior vendor's lien note, held inadmissible as varying the written contract between the parties and contradicting its legal effect. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 218 S. W. 1109.

In suit by life insurance agents on a premium note given them by a physician whom they had appointed medical examiner for the insurance company, the note providing that it was to be paid by medical examinations, testimony as to another agreement varying the written note or contract should have been excluded on the objection of plaintiff agents. *Dobbs v. Johnson* (Civ. App.) 230 S. W. 1035.

15. **Completeness of writing.**—Where a contract is part in writing and part verbal, parol evidence is admissible to establish that part which is verbal. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Where note and deed of trust made no provision concerning sale of land in its entirety, or the payment of the note before the expiration of the five-year term, parol testimony was admissible to prove an agreement whereby a portion of the principal represented interest at a certain per cent. for the five-year period, and that upon payment thereof before expiration of such period payee would refund the amount of such interest that had not been exhausted, such testimony being within the exception to the rule against receiving contemporaneous parol agreements, where the evidence is consistent with the writing, and where it is apparent that the instrument was not intended as the complete embodiment of the undertaking. *Davidson v. Guarantee Life Ins. Co.* (Civ. App.) 220 S. W. 582.

If it is apparent from a written contract that it contains only a part of the agreement, oral testimony will be permitted to supply the omission. *D. Sullivan & Co. v. Schreiner* (Civ. App.) 222 S. W. 314.

Where a written instrument forms a part of a more comprehensive transaction, the terms of which are not attempted to be expressed in writing, parol testimony as to such parts of the transaction as were not reduced to writing is admissible. *Harness v. Luttrall* (Civ. App.) 225 S. W. 810.

17. — **Contracts of employment.**—Where a contract between their employer and cigar salesmen was silent concerning the employer's duty as to filling orders solicited by the salesmen, whether promptly or otherwise, proof on the point was admissible. *Martinez v. Cathey* (Civ. App.) 215 S. W. 370.

18. — **Contracts for buildings and other works.**—Contract for excavating and hauling dirt, held to show on its face existence of parol agreement as to certain provi-

sions justifying admission of explanatory evidence. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell*, 108 Tex. 422, 195 S. W. 184.

22. Relation of oral agreement to writing.—The rule which excludes parol evidence to contradict or vary terms or effect of written instruments has no application to collateral undertakings or cases in which written instrument was executed in part performance or an entire oral agreement. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

Where a national bank loaned money to the statutory limit to a company, and, that the company might have further funds, agreed with defendants, its vice president and a controlling stockholder of the company, to discount their notes, paying the proceeds to the company, and to apply in extinguishment of the notes deposits subsequently received from the company, the agreement was collateral to the promise in the note sued on, executed pursuant to it, and was not merged in the note, being provable by parol and valid as a defense, whether made orally or in writing. *Goldstein v. Union Nat. Bank of Dallas* (Civ. App.) 216 S. W. 409.

Where A. made note payable to R., A. to become the apparent owner of corporate stock which R. was to pay for by discounting the note, R. to be the real owner of the stock and to repay the note and hold A. harmless, parol evidence was admissible to show the oral agreement of R. to hold A. harmless; such agreement being collateral to and forming no part of A.'s contract with the corporation. *Reeves v. Anderson* (Civ. App.) 217 S. W. 745.

24. — Merger of separate agreements.—Seller, having agreed by writing to furnish certain specified machinery and do certain specified things with reference to the installation of the irrigation machinery sold, was not bound beyond the obligations specifically imposed, since all negotiations relating to installation of the machinery were merged in the written contract. *Southern Gas & Gasoline Engine Co. v. Richolson* (Com. App.) 216 S. W. 158.

In suit for breach of contract for shipment of car of seed grain, held, under the evidence, that there was no new contract made or any merger of the original contract by one of a later date. *Pittman & Harrison Co. v. Knowlan Machine & Supply Co.* (Civ. App.) 216 S. W. 678.

RULE 22. WHERE THE MEANING OF THE WORDS IN A WRITTEN INSTRUMENT ARE DOUBTFUL, IT MAY BE READ IN THE LIGHT OF SURROUNDING CIRCUMSTANCES, AND PAROL EVIDENCE OF CUSTOM AND USAGE IS ADMISSIBLE TO SHOW ITS MEANING

1. Grounds for admission of extrinsic evidence.—Parol testimony is not admissible to change, alter, or vary the terms of a written contract, but is admissible to explain ambiguous terms. *Barnes v. Early-Foster Co.* (Civ. App.) 228 S. W. 248; *Hodge v. City of Ft. Worth* (Civ. App.) 196 S. W. 583; *Rowles v. Hadden* (Civ. App.) 210 S. W. 251.

Where the language employed in a contract is unmistakable and certain, resort may not be had to parol evidence to show that the intention of the parties was other than that clearly expressed. *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157; *Arcola Sugar Mills Co. v. Farmer Hamlett's Co.* (Civ. App.) 220 S. W. 385.

Where provision in deed as to partial release of vendor's lien was unambiguous, and the meaning ascertainable from deed itself, parol evidence by one of the parties as to the meaning of such provision was inadmissible. *White v. Tegnell* (Civ. App.) 206 S. W. 213.

Statements by agents who wrote a fire policy, made after loss, as to their opinion of the meaning of the description, are not admissible, unless they be an expression of the understanding of the terms of the policy had at the time of issuance. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

Although a contract of partnership or joint adventure standing alone was unambiguous, parol evidence was admissible to show that sums recited to be paid therein and things recited to have been done were not in fact true, and to clarify uncertainty arising by reason of such recitations. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

Certainty of a contract may be aided by proof of extrinsic facts. *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

When a conveyance is made to carry out a prior executory agreement, the two agreements, though not contemporaneous, are part of the same transaction, and, if there is any doubt as to the intention as evidenced by the conveyance, the prior agreement is admissible to aid in the construction of the conveyance. *Richardson v. Wilson* (Com. App.) 213 S. W. 613.

It is permissible, if there be any uncertainty as to the meaning of a written instrument, to ascertain the condition of the parties at the time the same was executed, and to construe the language of the instrument in the light of such circumstances. *New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis* (Civ. App.) 213 S. W. 685.

The rule that the contract must be read in the light of surrounding circumstances in arriving at a just interpretation of the terms does not admit of a violation of the express language which the parties have employed in defining their obligations, nor the reading into the contract of terms which its express provisions exclude. *Southern Gas & Gasoline Engine Co. v. Richolson* (Com. App.) 216 S. W. 158.

2. Nature of ambiguity or uncertainty in instrument in general.—Parol evidence of circumstances surrounding testator is admissible that his will may be read in the light of the conditions existing around him. *Ladd v. Whitledge* (Civ. App.) 205 S. W. 463.

If consideration of parol evidence tending to explain the expression whereby testa-

trix designated devisees was necessary in order to enable the court to reach a proper understanding of the item of the will, the court was required to consider it. *Id.*

In proceedings involving boundaries, oral evidence is admissible as against the objection that it contradicts the written field notes where it tends to show that the calls in the field notes are inconsistent, and to show which call is true and which is false. *Wilson v. Giraud* (Sup.) 231 S. W. 1074.

3. — **Deeds.**—Where a deed described land by metes and bounds, chain of title, and reference to prior deeds, and by a name which was erroneous, testimony of the grantee therein was admissible to explain the deed. *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

Where a deed conveying land with reference to an established line did not call for any objects, natural or artificial, conflicting with the true line, the grantee takes to the true line, though it did not correspond with a survey made at the time of the conveyance; for if the calls in a grant, when applied to land, correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they were not the calls of the survey as made. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

A deed to a county judge in trust for school purposes to have and to hold, together with all and singular the rights and appurtenances thereto in any wise belonging "unto the said county judge and his successors (Merriman school district)," etc., is not ambiguous in any sense, except as to the identity of the beneficiary, and this may be ascertained as any other fact. *Taylor v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 670.

4. — **Contracts in general.**—A contract calling for clearing a basin held ambiguous. *Hodge v. City of Ft. Worth* (Civ. App.) 196 S. W. 583.

In an action on contract for purchase of assets of bank by plaintiff, evidence of negotiations between plaintiff and one of individual defendants who signed contract leading up to execution of contract, which was ambiguous, held admissible. *Langford v. Power* (Civ. App.) 196 S. W. 662.

In a contract between defendant and a sawmill owner for the joint conduct of a sawmill enterprise on defendant's land, a provision that defendant would furnish all necessary cash for operating the mill "until same is in operation, that is, as soon as the mill is moved to the land location," was not so clear and free from ambiguity as to preclude the admission of parol testimony to explain what the parties really intend. *Porter v. McKinnon* (Com. App.) 221 S. W. 574. Affirming judgment (Civ. App.) *McKinnon v. Porter*, 192 S. W. 1112.

Where oil and gas lease referred to a number of similar leases contemporaneously executed, and required lessee to drill well in area of land covered by all leases, without designating particular land on which well was to be drilled, the uncertainty as to where well might be drilled did not render lease ineffectual, but could be explained by extrinsic evidence to show the meaning the parties placed on it. *McCaskey v. Schrock* (Civ. App.) 225 S. W. 418.

Provision in a contract between an association and an individual providing that the individual should pay the salaries of officers of the association was not ambiguous or uncertain to admit parol evidence as to the intention of the parties. *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

5. — **Contracts of sale.**—Contract for sale of car of corn, evidenced by letters and telegrams, held ambiguous leaving it uncertain as to what was meant by the words "delivered" and "inspection allowed." *Marlin Lumber Co. v. Samuel Hastings Co.* (Civ. App.) 198 S. W. 1076.

A contract for exchange of lands, limiting purchasers' assumption of liabilities to \$10,500, held to fix the limit to that amount only, and not ambiguous as manifesting a double intent so as to warrant resort to extraneous proof of intended obligation of parties. *Riggins v. Post* (Com. App.) 213 S. W. 600.

A contract transferring a half interest in a drug business, including the stock of merchandise, furniture, fixtures, etc., and guaranteeing the grantee "against all claims of any character against the said property or said business according to bill of sale conveyed to me by Lowe Brothers," held so ambiguous as to authorize admission of parol evidence relative to prior agreements and transactions to explain it. *Richardson v. Wilson* (Com. App.) 213 S. W. 613.

Testimony is admissible as to the meaning of provisions of a written contract of sale of linters, they being ambiguous, in the sense that their meaning is not clear to one not familiar with the preparation of and dealing in cotton seed mill products. *Dallas Waste Mills v. Early-Foster Co.* (Civ. App.) 218 S. W. 515.

A contract for the sale of syrup held to contain no doubt or ambiguity in its language justifying the admission of parol explanatory evidence. *Arcola Sugar Mills Co. v. Farmer Hamlett's Co.* (Civ. App.) 220 S. W. 385.

Contracts to sell "about 3,000 bushels" of oats, "cars to be loaded as fast as threshed and sacked," held unambiguous; parol evidence that it was intended that seller should deliver only such oats as were produced on his farm being inadmissible. *Barnes v. Early-Foster Co.* (Civ. App.) 228 S. W. 248.

Order for goods to be shipped "at once with M. Gro. Company," being ambiguous as to time of shipment, could be explained by parol testimony. *Gladney Milling Co. v. Dement* (Civ. App.) 230 S. W. 1038.

9. **Patent ambiguity.**—A patent ambiguity is one apparent on the face of the instrument, and which remains uncertain after all the evidence of surrounding circumstances and collateral facts admissible under the proper rules of evidence is exhausted so that it cannot be said that there is patent ambiguity in deed if court placing itself

in situation of parties could ascertain what they meant. *McDougal v. Conn* (Civ. App.) 195 S. W. 627.

Courts are reluctant to declare wills void for uncertainty, and it is only when the instrument is unintelligible or uncertain, after admission of extrinsic evidence as to situation of parties and circumstances, that a true patent ambiguity is established. *Adams v. Maris* (Com. App.) 213 S. W. 622.

10. Latent ambiguity.—A latent ambiguity is one where the writing appears on the face of it certain and free from ambiguity, but the ambiguity is introduced by evidence of something extrinsic or by some collateral matter out of the instrument. *McDougal v. Conn* (Civ. App.) 195 S. W. 627.

If there was latent ambiguity in description of ward's land in order of sale by her guardian, it could be removed only by consulting other parts of probate record, in subsequent action of trespass to try title, and not by testimony of witnesses as to what they thought the term "estate of H.," meant at the time. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

There was a latent ambiguity in an oil lease providing that lessor "drill the fourth well drilled in C. F. field on these lands or forfeit contract," and evidence was competent to show whether it was the intention of the parties that the well should be the fourth one drilled by the lessee or the fourth well drilled by any one in the field. *Texas Pac. Coal & Oil Co. v. Harris* (Civ. App.) 230 S. W. 237.

11. Custom controlling construction.—Incidents sought to be imported into contract by custom must not be inconsistent with its express terms or any necessary implication therefrom. *Planters' Oil Co. v. Gresham* (Civ. App.) 202 S. W. 145.

Evidence of customs and usages may be admitted to explain or aid in the interpretation of a contract which is ambiguous, unprecise, incomplete, or inconsistent, but not to contradict, restrict, or enlarge what requires no explanation. *Alexander v. Heidenheimer* (Com. App.) 221 S. W. 942, reversing judgment (Civ. App.) *Heidenheimer, Strassburger & Co. v. Alexander-Baird*, 205 S. W. 458.

Where the carrier sought reformation of a bill of lading on the ground of mutual mistake to make the bill of lading conform to the waybill, evidence of a general custom to handle such shipments on the waybill was admissible to show that the cattle were handled in the manner intended by the shipper's agent in giving directions for the billing and in corroboration of the contention of the carrier as to the mistake. *City Nat. Bank of El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

The office of a usage is to interpret the otherwise indeterminate intentions of parties, to understand the nature and extent of their contracts, and to fix and explain the meaning of words and expressions of doubtful or various senses. *Dallas Cotton Mills v. Huguley* (Civ. App.) 230 S. W. 432.

Evidence held insufficient to show that under the usages and customs of the trade defendant seller of oil had the right to satisfy its contract by requiring the buyer to deal direct with another party for the oil. *Tecumseh Oil & Cotton Co. v. Gresham* (Civ. App.) 231 S. W. 468.

13. Meaning of words, phrases, signs or abbreviations.—Under contract of sale of "saw timber," such words are descriptive of the subject-matter of sale, and have no legal significance, and it is proper to hear evidence to disclose their meaning as used. *Butcher v. Smith* (Civ. App.) 195 S. W. 1180.

Parol evidence to explain a testamentary provision should be confined to facts illuminating or discovering the meaning attached by testator to words used. *Nunn v. Titche-Goettinger Co.* (Civ. App.) 196 S. W. 890.

A contract for sale of car of corn being ambiguous as to meaning of words, "inspection allowed," therein, testimony as to meaning attached thereto among shippers and buyers of carload lots, when used in such a contract, is admissible. *Marlin Lumber Co. v. Samuel Hastings Co.* (Civ. App.) 198 S. W. 1076.

Intention of parties in using certain words in contract controls all ordinary definitions, and, if intention can be derived from document, no evidence of ordinary meaning of words is admissible. *West v. Carlisle* (Civ. App.) 199 S. W. 515.

A contract providing that purchasers of land should have "fifteen acre feet per annum of its water, or so much water as would be necessary to irrigate fifteen acres of land," etc., held not ambiguous so as to allow consideration of the acts of the parties in construing the contract, the term "acre foot" expressing a technical, definite, and specific volume or quantity of water, 325,850 gallons, or the amount of water which will cover one acre one foot in depth. *Rowles v. Hadden* (Civ. App.) 210 S. W. 251.

The words "this" and "notes," in an alleged will consisting of an envelope addressed to payees and with the word "Notes" indorsed and a letter asking payees to accept "this" held not unintelligible and inconsistent with themselves to the extent that parol evidence was not admissible to aid their meaning. *Adams v. Maris* (Com. App.) 213 S. W. 622.

Evidence seeking to vary, by proof of custom, the well-established meaning of the words "f. o. b.," held inadmissible. *Lee v. Gilchrist Cotton Oil Co.* (Civ. App.) 215 S. W. 977.

Stock subscription contracts could not be added to, varied, or changed by ingrafting thereon a parol contemporaneous agreement as to the character of the "securities" called for as an alternative to payment in money by the subscriber, nor could the meaning of "securities" be modified or limited by showing a parol interpretation on exe-

cution of contracts, which were not ambiguous. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Parol evidence was admissible to show the facts and circumstances surrounding the transaction, though subsequent thereto, which tended to show construction placed upon the words "as she has always done," in a reservation in a deed providing that the grantor was "to continue using said lot, as she has always done, so long as she may live." *Ahrens v. Lowther* (Civ. App.) 223 S. W. 235.

Provision of contract for sale of sacks reading, "Apply usual quantity differentials," could be explained by parol testimony that the prices stated were for lots of 1,000, but that, if sacks were shipped in greater quantities, a less price should be paid for them. *Taylor Milling Co. v. American Bag Co.* (Civ. App.) 230 S. W. 782.

Where a banker testified that an advice card sent by him to another bank "among bankers means what it says on its face," and that it had no meaning peculiar to the banking business, and where he was permitted to state what the meaning thereof was, refusal to allow him to make an oracular explanation of its meaning held proper. *Stockyards Nat. Bank v. Wilkinson* (Civ. App.) 230 S. W. 1040.

14. Relation and application of language to facts in general.—Language of guaranteeing telegram and circumstances surrounding the parties at the time will be looked to in determining the parties' intention. *El Paso Bank & Trust Co. v. First State Bank of Eustis* (Civ. App.) 202 S. W. 522.

The question of what is reasonable time for the performance of a contract must necessarily depend upon the conditions affecting its performance, existing and in contemplation of the parties at the time the contract is executed. *Langben v. Crespi & Co.* (Civ. App.) 218 S. W. 144.

The question of whether a contract conveyed the minerals or merely a right to explore for minerals is not necessarily determined from the language used by the parties to define the legal effect of the instrument, but is to be determined by an examination of the entire instrument in the light of the circumstances surrounding the contracting parties. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

15. Identification of parties.—Parol evidence is admissible to identify a legatee, when under the terms of the will there is ambiguity thereon. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

Where contract provided that note given as part of purchase price for goods should be applied by sellers to payment of all claims against the goods, parol evidence was admissible to show who were creditors of sellers. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Where parties denied being bound by written contract purporting to have been made on their behalf, testimony as to statements, made at time contract was prepared and signed, as to whom contract was being made on behalf of, was admissible and not objectionable as tending to vary terms of contract. *Donoho v. Carwile* (Civ. App.) 214 S. W. 533.

In proceedings to determine the construction of a will giving the property of testator possessed by the wife at her death to their respective families, evidence of the financial condition of testator's relatives at the time of making the will and of his affection for them was admissible as an aid in determining whom he meant by the expression "family." *Norton v. Smith* (Civ. App.) 227 S. W. 542.

19. Identification of subject-matter—In conveyances, contracts and writings in general.—Parol testimony is admissible to identify property in a chattel mortgage, but not to add property which clearly appeared from the face of the instrument not to have been covered thereby. *John E. Morrison Co. v. Riley* (Civ. App.) 198 S. W. 1031.

20. — Of real property in general.—Parol evidence held admissible to aid imperfect description in contract: vendor's "553-acre farm in A. county." *Stroburg v. Walsh* (Civ. App.) 203 S. W. 391.

While the calls for course and distance cannot be limited by reference to objects found on the ground as indicating the footsteps of the surveyors which are not mentioned in the field notes, evidence of such objects is admissible to aid a call found in the field notes by removing an ambiguity, and to determine which one of conflicting calls shall prevail. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

In trespass to try title, evidence that description in a deed claimed to be ambiguous did not embrace the land in controversy held insufficient to support finding for interveners. *Blackwell v. Scott* (Civ. App.) 223 S. W. 334.

21. — Application of description to subject-matter.—In suit to foreclose a mortgage upon all crops "grown on the farm I am now living on," the situs of the land could be made certain by parol evidence. *Perkins v. Alexander* (Civ. App.) 209 S. W. 789.

The location of surveys on the ground must necessarily be determined by parol evidence, which is therefore admissible. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, held that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant, and an ambiguity appeared, court did not err in admitting original English field notes, maps, plats, and field notes of adjoining grants, and evidence of surveyors as to the true location of the east boundary line of the leagues. *Barrow v. Murray* (Civ. App.) 212 S. W. 178.

Where plaintiff in trespass to try title to a 100-acre tract of land claimed under a deed granting 87½ acres in a certain survey, "being the remaining part and interest in 400 acres deeded to me," evidence of a prior parol sale of the tract in controversy to

a third party after a division of the entire tract into parcels, one containing 87½ acres and another 100 acres, was admissible to identify the land conveyed under plaintiff's deed. *Delta Land & Timber Co. v. Spiller* (Civ. App.) 216 S. W. 414.

22. — Property or interest included.—Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant subsequent to the conveyance claimed the timber on the land in controversy and sold it to another held not inadmissible as contradicting the written instrument. *Delta Land & Timber Co. v. Spiller* (Civ. App.) 216 S. W. 414.

While parol evidence is often admissible to ascertain what lands are embraced in the description of a deed, such evidence cannot make the deed operate upon land not embraced in the descriptive words. *Buie v. Miller* (Civ. App.) 216 S. W. 630.

Oral evidence was not admissible to show that oil, gas, and minerals were not conveyed under a deed conveying fee-simple title to county judge in trust for school district. *Taylor v. County School Trustees of Eastland County* (Civ. App.) 229 S. W. 670.

23. — Boundaries.—Parol evidence is admissible to prove that the lines and corners of the tracts of land called for in a deed were not located on the ground at the point called for by the field notes in the deed, since the rule against varying the terms of a written instrument by extraneous evidence is not infringed by extraneous evidence explaining the calls in field notes, and thereby applying the field notes to the ground and identifying the location of the land intended to be conveyed. *Stevens v. Robb* (Civ. App.) 229 S. W. 891.

When the calls are not inconsistent and no ambiguity arises when they are applied to the subject-matter of the description, the instrument speaks for itself, and parol evidence is not permissible to vary the calls. *Hamman v. San Jacinto Rice Co.* (Civ. App.) 229 S. W. 1008.

24. — Sufficiency of description to admit parol evidence.—Where defect in description of deed is patent on face and is such that does not convey any land described, deed is void, and extrinsic proof cannot be resorted to to make description certain, but where description of deed omitted two calls, but did not show on face land could not be located, court properly admitted extrinsic evidence in support of description. *Fortenberry v. Cruse* (Civ. App.) 199 S. W. 523.

Despite deficiencies in description of mortgaged chattels, it was sufficient as to one who purchased knowing of incumbrance; parol evidence being admissible to supply any deficiency in description. *Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson* (Civ. App.) 200 S. W. 197.

A written agreement to convey 29 acres in a survey containing approximately 1,500 acres will not support specific performance, where the writing in no way described the particular 29 acres, and, aside from the word "Damon" at the top of it, in no way described the survey out of which the tract was to be carved; for there was not enough to render admissible extrinsic evidence to show the land intended. *Kellner v. Ramdohr* (Civ. App.) 207 S. W. 169.

26. — In sale of personal property.—Where by written contract defendant agreed to purchase and plaintiff to sell all of a certain grade of lumber at plaintiff's mill and to be cut, except local bills, testimony by officers of plaintiff, explaining that lumber sold to third persons was not at the mill, but was at a railroad siding at the time the contract was made, was admissible to explain its terms, and could not be objected to on the theory that it tended to vary the terms of a written contract. *Adamson Lumber Co. v. J. E. King Lumber Co.* (Civ. App.) 227 S. W. 702.

28. Showing intent of parties as to subject-matter.—Where written contract was ambiguous, testimony tending to show what the parties intended by the use of the language contained was admissible. *Ferguson v. Johnson* (Civ. App.) 228 S. W. 338; *Altgelt v. Aue* (Civ. App.) 198 S. W. 606; *Benton v. Jones* (Civ. App.) 220 S. W. 193.

In absence of fraud or mistake warranting cancellation or mutual intention to use words to express meaning other than their ordinary meaning, defendant held bound by intention expressed, and evidence of a different intention was not admissible. *Flores v. Flores* (Civ. App.) 200 S. W. 1157.

Where agents by plain terms of contract bound themselves, parol evidence was not admissible to show that it was their intention to bind their principals. *Queiroil v. Whitesides* (Civ. App.) 206 S. W. 122.

Papers consisting of an envelope indorsed, "Notes," and a letter asking payees of notes inclosed to accept "this" for the kindness shown, are ambiguous as to whether deceased writer and maker intended a present or a testamentary gift, and parol evidence is admissible to aid construction. *Adams v. Maris* (Com. App.) 213 S. W. 622.

While the statute requiring wills in writing precludes ascribing to testator any intention not expressed, yet there is an obligation to give effect to the intention which the will properly expounded contains, and therefore evidence simply explaining the writing is admissible. *Id.*

In construing stock subscription contract, which clearly evidences agreement to buy and sell the stock, representations of corporation's agent are inadmissible to show parties' intent, in absence of pleading and proof that there were stipulations entering into the contract which were omitted from agreement by mistake, accident, or fraud. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Where an owner of certain goats executed a bill of sale and placed it in the hands of a third person, with instruction to deliver it to the vendee upon payment of purchase price, but such bill of sale was never delivered, it was competent in an action by the owner for conversion against one who seized and replevied the goats in the vendee's possession to show that it was the intention of the parties that title should not pass

at the time of delivery to the vendee. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

Where time was not expressly made the essence of the written contract, proof that it was agreed that the usage of the parties in not regarding time as the essence of contracts that had been entered into between them during the years they had been dealing with each other, held not objectionable as contradicting the written contract. *Taylor Milling Co. v. American Bag Co.* (Civ. App.) 230 S. W. 782.

Where a will is ambiguous to the extent that the intention of the testator cannot be ascertained from the language of the will itself, extrinsic evidence is admissible. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

29. — **In construction of deeds in general.**—In suit on promissory note and to foreclose vendor's lien, plaintiff's testimony that third person executed to him deed to land in controversy, that third person was of sound mind, but confined in insane asylum as habitual drunkard, etc., and letters and ex parte statements of third persons, held admissible as circumstances to show deed from plaintiff to defendant was quitclaim. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

In determining intention of parties to deed as to whether instrument conveyed land or merely chance of title, jury could consider oral evidence admitted in case in arriving at conclusion, and were not confined to consideration of deed itself. *Id.*

To aid in interpreting a clause of a deed as to use of the property by the grantee, testimony in regard to the agreement of the parties and the negotiations in regard to execution and delivery of the deed is admissible. *Red River, T. & S. Ry. Co. v. Davis* (Civ. App.) 195 S. W. 1160.

30. — **In description of property.**—Where the description in a deed is plain, clear, and unambiguous, parol evidence is inadmissible to show that it was intended by the parties to convey land not described. *Scheller v. Groesbeck* (Com. App.) 231 S. W. 1092.

31. — **In extent or interest conveyed.**—Property conveyed to the wife, without any recitation showing it to be her separate property, may, as between the husband and wife or their representatives, and as against all persons not purchasers for value without notice, be shown to be her separate property, by parol as well as other evidence. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

33. **Showing purpose of writing.**—A written contract for sale of land providing for a deposit "placed as a forfeit" cannot have its terms varied by parol evidence to show that the money was deposited as earnest or escrow money and not as liquidated damages or forfeit. *Richardson v. Terry* (Civ. App.) 212 S. W. 523.

A written contract of sale of two sets of books cannot be contradicted by parol to show that it was a sale of one of the sets, which was being published volume by volume, and but a loan of the other. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 881.

RULE 24. PAROL EVIDENCE IS ADMISSIBLE TO CONTRADICT THE RECITAL OF PAYMENT IN A DEED, RECEIPT, OR OTHER INSTRUMENT, AND TO SHOW THE AMOUNT ACTUALLY PAID OR THE REAL CONSIDERATION

What constitutes receipt in general.—Ordinarily a warehouseman's receipt is a contract which cannot be impeached by parol testimony. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324; *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

Where release was the consummation of an executed contract containing no agreement on the part of the insurance company, and the statement of the consideration was in the nature of a receipt or recital of its payment, the release was not contractual as to the company and it was permissible to add to or vary its statement of the consideration. *Anders v. California State Life Ins. Co.* (Civ. App.) 214 S. W. 497.

The rule permitting the true consideration of written instruments to be shown by parol does not apply, where the statement in the contract as to the consideration is more than a mere receipt or acknowledgment of payment and is of a contractual nature. *D. Sullivan & Co. v. Schreiner* (Civ. App.) 222 S. W. 314.

Deeds in general.—Parol evidence is admissible to show the true consideration of a deed. *Sanger v. Futch* (Civ. App.) 208 S. W. 681; *Red River, T. & S. Ry. Co. v. Davis* (Civ. App.) 195 S. W. 1160; *Hanrick v. Hanrick*, 110 Tex. 59, 214 S. W. 321; *D. Sullivan & Co. v. Schreiner* (Civ. App.) 222 S. W. 314.

Where a deed of land recited that it was given in full settlement of a claim, parol evidence is competent to show that a bill of sale executed on the same date was also intended as part consideration, and was part of the settlement. *Trabue v. Ash* (Civ. App.) 200 S. W. 415.

Parol evidence is admissible to show that an agreement to make a will was an additional consideration for a deed. *Faville v. Robinson* (Civ. App.) 201 S. W. 1061.

Parties may show real consideration for deed, regardless of expressed consideration, except that, where recitation with reference to consideration is of contractual nature, it cannot be disputed, altered, contradicted, or modified by oral evidence. *Delano v. Delano* (Civ. App.) 203 S. W. 1145.

In mother's deed conveying fee simple title to son, recital of consideration of cash paid, and that son's stepdaughter should receive same interest in land as his own children, was not contractual, so that, in son's suit for partition against brother, parol evidence was admissible to show deed was intended as advancement to son. *Id.*

Plaintiff, in an action for fraudulent representations as to time for which lease could be renewed, inducing his purchase of certain land and lease of other land, can show

that part of the recited consideration in the deed to him of the land bought was for the lease. *Harris v. Mann* (Civ. App.) 207 S. W. 156.

Testimony to show the true consideration in a deed is always admissible and, notwithstanding the recital of consideration, it may be shown that the property was a gift to the grantee, and therefore his separate property. *Burns v. Nichols* (Civ. App.) 207 S. W. 158.

Where a deed recited that the consideration was \$1 and other considerations, parol evidence is admissible to establish the true consideration. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

In action to cancel warranty deeds alleged to have been executed for accommodation of defendant for use as collateral for loan without intention to fully pass title, evidence as to agreement at time of execution, whereby plaintiff's wife was to continue collecting rents from property, was admissible to prove that such agreement was part of consideration. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

In an action for breach of warranty of title, the recitals in each of the purchasers' deeds of \$8,000 as consideration being prima facie evidence of the value put upon the property exchanged for the conveyances, the grantor or seller had the right to show that the consideration expressed in the deeds was not the real consideration, but the burden of proof was on him to show the real consideration. *Northcutt v. Hume* (Com. App.) 212 S. W. 157.

In suit on vendor's lien notes, testimony of defendant buyer with reference to a contract he had with plaintiff, the assignee of the notes from the vendor, at the time the notes were executed, held admissible to sustain the defense set up by the buyer, the recited consideration in his deed not being contractual, so that parol evidence was admissible to show the real consideration. *Conner v. McAfee* (Civ. App.) 214 S. W. 646.

Despite the parol evidence rule, plaintiff, who bought land on which was located a well, was entitled to testify that lease of pipes which had been used to carry water from the well was part of the consideration, though the deed expressly recited a consideration. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

Recital, in deed of father and stepmother to their son, that it was in consideration of his relinquishment of all the claim which he might have at any time in the future to any estate which they might have, held contractual in the sense that it was subject to the parol evidence rule. *Martin v. Martin* (Civ. App.) 222 S. W. 291.

Where a deed recited that the consideration was a credit on a note and the payment of other debts to a specified amount which were a lien on the property, and further provided that the grantee did not release or change any security it had on other property to secure the balance due on the note or any of the debts of the grantor due it, but that all such other security was specially retained, such provision could not, in the absence of accident, fraud, or mistake, be contradicted by evidence that the grantee agreed to cancel all the grantor's indebtedness, though the evidence was offered under the guise of showing the true consideration. *D. Sullivan & Co. v. Schreiner* (Civ. App.) 222 S. W. 314.

Parol proof was admissible to show the consideration for a trust deed, and that it was money advanced to contractor constructing a building on the property. *Barber v. Herring* (Com. App.) 229 S. W. 472.

Assumption or payment of debts or incumbrances.—The indebtedness mentioned in an instrument, executed by defendant and a company, which the company agreed to satisfy on payment of a certain sum by defendant, not being definitely stated, and the instrument contemplating that a pending suit, in which the company and another asserted claims against defendant, should be dismissed, she, so pleading, could testify that the company's agent, who procured her signature, agreed as consideration that the company would satisfy all claims asserted against her in the suit. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

In action for damages for breach of covenant against incumbrances, consisting of retention of possession of the granted premises by a tenant of the vendor for several months after the conveyance, parol evidence is inadmissible to show that the plaintiff grantee assumed the burden imposed by the tenant's occupancy, and took the land subject to the tenant's right of possession. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

Parol evidence is admissible to show that the grantee in a deed containing a covenant against incumbrances agreed to assume certain charges against the property conveyed. *Leeson v. City of Houston* (Civ. App.) 225 S. W. 763.

Acknowledgment of payment in deed.—A recital in a deed that the purchase money has been received is prima facie evidence of payment. *Russell v. Beckert* (Civ. App.) 195 S. W. 607.

Ordinarily the recital of a consideration in a deed precludes the grantor from disputing generally the facts of consideration; but where a deed recites a consideration paid in full, it may be shown between the parties and those having notice that such consideration was in fact not paid. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171.

Contracts in general.—Consideration recited in written contract can be explained or contradicted by parol, except where parol proof of consideration shows an entirely different contract, and the fact that statute requires all facts to be alleged and plea of failure of consideration to be verified does not change rule of evidence that parol evidence showing an entirely different contract, making payment of note conditional, is inadmissible. *Denman v. Kaplan* (Civ. App.) 205 S. W. 739.

Recitation of consideration in contract, whereby defendant agreed not to engage in his former business in town, being contractual, evidence that there was no consideration for agreement not to engage in business would be inadmissible in suit to enforce

agreement, in absence of allegation of fraud or mistake. *Schlag v. Johnson* (Civ. App.) 208 S. W. 369.

Where the real consideration for execution of an oil lease was the promise of the lessee to drill an oil well within six months, a promise made with specific intent of not fulfilling it, whereby the lessors were fraudulently induced to execute the lease, the lessors attacking the instrument may allege and prove that the recited consideration of one dollar was not paid, and what the true consideration was. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

In an action to cancel an oil lease, which gave the lessee the option to sink an oil well before a certain time, the court properly refused to permit plaintiff to testify that the consideration recited, of \$10 for the option, was not considered by either of the parties as any consideration supporting the contract and was only nominal, and was not paid as an inducement for the execution of the lease contract, and that the sole inducement was a hope entertained by the lessor that he would secure the sinking of a test well near the land and royalties, etc., on objection that such evidence was a conclusion, and violated the parol evidence rule. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

Where a mineral lease contained a promise by lessee which was sufficient consideration for the lease though the stated money consideration was never paid, parol evidence is not admissible to show that the consideration was an oral agreement by the lessee's agent. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

Contracts of sale or exchange.—The right of a buyer to urge want or failure of consideration when sued on promissory notes given for the price, or to urge misrepresentation concerning the character or kind of the goods inducing the purchase, when relied on, is not limited because the transaction took the form of a written contract. *Lee v. Buie* (Civ. App.) 212 S. W. 230.

A contract for sale of land may be varied by showing the real consideration agreed on. *Speer v. Hansen* (Civ. App.) 213 S. W. 324.

RULE 25. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN INSTRUMENT IS VOID FOR ILLEGALITY, WANT OR FAILURE OF CONSIDERATION, OR ON ACCOUNT OF FRAUD OR MISTAKE

Grounds for admission of extrinsic evidence.—All oral agreements prior to the execution of a written contract are presumed to have been embodied in such contract, but such presumption is not conclusive, and may be rebutted by showing that the agreement by reason of mutual mistake, fraud, or accident failed to embody all the terms of the contract actually made. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

Where plaintiff at time of execution of written instruments knew that oral contract was not embodied in the writing, he would, to bring himself within the exception to general rule that parol testimony cannot be received to vary valid written instrument, be required to allege and prove that omission was due to accident, mistake, or fraud of defendants; a mere charge that omission was fraudulent being insufficient. *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767.

Parties to written instruments cannot vary their terms without allegation or evidence of fraud, accident, or mistake. *Von Hatzfeld v. Haubert* (Civ. App.) 224 S. W. 220.

A strained technical adherence to the rule that an instrument must not be varied or contradicted by parol should not be indulged so as to foster parol practices abhorrent to the statutes and public policy; and, even if a main contract of sale was lawful in its terms, but through letters and circulars one of the parties modified or enlarged the effect or provisions of the original instrument so as to make its purposes unlawful under the anti-trust statute, and the other party acquiesced in or was coerced into an acceptance of these changes and both parties construed and acted upon the contract as so modified, such parol evidence rule will not prevent introduction in evidence of such circulars and letters to uncover the unlawful acts rendering the contract invalid. *Caddell v. J. R. Watkins Medical Co.* (Civ. App.) 227 S. W. 226.

The parol evidence rule does not apply when facts are alleged showing the existence of fraud, accident, or mistake, or that the contract was entered into for the furtherance of objects forbidden by law, whether by statute or by an express rule of the common law or by the general policy of the law. *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

In action to cancel an oil and gas lease, it would not be varying the instrument by parol testimony to permit lessor to testify that lessee prepared the lease to run for a period of six months, and after the delivery of the lease struck out the words "six months" and inserted the words "ten years." *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

Matters affecting validity in general.—The parol evidence rule does not apply when facts are alleged showing the existence of fraud, accident, or mistake, or that the contract was entered into for the furtherance of objects forbidden by law, whether by statute or by an express rule of the common law or by the general policy of the law. *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

Illegality.—Parol evidence is admissible to show that a contract for the sale of cotton, regular on its face, is in reality a contract to deal in cotton futures, and therefore illegal and unenforceable. *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302; *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

In buyer's action for damages for seller's failure to deliver cotton contracted for, evidence of conversation between the parties at the time of making the contract as

to its being settled by payment of difference between contract price and market price held admissible on the issue whether the contract was a "future contract." *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

Though a contract for sales of goods to one purchasing for resale provided that it constituted the sole agreement, and that booklets, bulletins, and literature sent to the buyer should be considered as educational and advisory, and not as altering the contract, evidence of subsequent communications held admissible to show that the seller restricted the buyer's territory, fixed the resale prices, and required the buyer to give his entire time to the business, and these facts, when established, render the contract violative of the Anti-Trust Law. *W. T. Rawleigh Co. v. Smith* (Civ. App.) 231 S. W. 799.

Mistake.—Where consignee sued for loss of goods, and the carrier produced a receipt, the consignee was properly allowed to show that the receipt was inadvertently given when the goods were not delivered. *Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co.* (Civ. App.) 207 S. W. 167.

The Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), requiring the issuance of a bill of lading, does not exclude parol evidence of a mutual mistake in the bill of lading. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

Fraud.—It is permissible under the issue of fraud to offer parol evidence in avoidance of a deed. *Walker v. Ames* (Civ. App.) 229 S. W. 365.

— **In contracts in general.**—Where terms and conditions of a contract have by mutual mistake been omitted, it is competent to show such fact and supply omission by parol. *Estes v. Ferguson* (Civ. App.) 203 S. W. 941.

Where fraud exists, a written contract can be proved by parol, though it adds to such writing. *Martin v. Iroquois Mfg. Co.* (Civ. App.) 207 S. W. 569.

The rule that parol evidence is inadmissible to vary the terms of a written contract does not prevent the use of extrinsic evidence to attack its validity by showing fraud in its inception, notwithstanding the written contract provides that "no conditions, representations, or agreements other than these" contained therein could be considered. *Bankers' Trust Co. v. Calhoun* (Civ. App.) 209 S. W. 826; *Same v. James* (Civ. App.) 209 S. W. 830.

— **In contracts of sale.**—In action to rescind a contract of sale because of seller's misrepresentations, evidence bearing upon alleged fraudulent statements was not inadmissible on ground that it varied terms of the written contract. *Calloway v. Booe & Collier* (Civ. App.) 195 S. W. 1174.

Stipulation of contract of sale of lots by number, that no agent can bind the vendors by any act or statement not set forth in the contract, does not prevent purchaser from showing false representations by selling agent as to size of lots. *Landfried v. Milam* (Civ. App.) 214 S. W. 847.

Where flour mill scales sale contract provided that it contained all agreements and that "no representation made by an agent or other person, not included herein, shall be binding," the parol evidence rule did not render inadmissible evidence that the seller's agent represented that its scales were accurate and peculiarly fitted for weighing flour in the buyer's mill, whereas the scales as purchased were inaccurate; such evidence showing a false representation inducing the buyer to purchase. *Detroit Automatic Scale Co. v. G. B. R. Smith Milling Co.* (Civ. App.) 217 S. W. 198.

The value of a legal work being largely dependent on its early completion and delivery, an oral representation by an agent of the seller that the work was already in plate and ready for the press was a representation of an existing material fact, the proof of which would not infringe upon the rule which forbids the introduction of parol to vary or contradict the terms of written instruments, and a clause that "No representation or agreement has been made by salesman not herein stated," does not render such representation inadmissible. *American Law Book Co. v. Fulwiler* (Civ. App.) 219 S. W. 831.

In purchaser's action to recover purchase money paid and to cancel purchase notes on the ground that he was induced to buy the land by fraudulent representations by vendors' agents, stipulation in contract that the agents had no authority to bind vendors by any act or statement not set forth therein did not estop purchaser from proving that he was induced to enter into the contract by agent's fraudulent misrepresentations; such testimony not varying the terms of the written agreement, but merely showing that no valid contract was ever entered into. *Massirer v. Milam* (Civ. App.) 223 S. W. 304.

In an action on a sale contract, an objection to evidence of representations as furnishing guaranties and warranties not in the written agreement is not well taken, where the answer pleaded fraud inducing defendants to contract, making such evidence admissible. *Browning Engineering Co. v. Willett* (Com. App.) 228 S. W. 151.

— **In bills and notes or indorsement thereof.**—In broker's action on commission notes and to foreclose lien reserved in deed, parol evidence that notes had not been delivered, that transaction had been induced by fraud, and had been rescinded because of such fraud, held admissible; such evidence not seeking to alter written contracts, but merely attacking their efficacy as binding because of fraud and authorized rescission. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

RULE 26. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A TRUST OR TO SHOW THAT A WRITTEN INSTRUMENT WAS INTENDED AS A MORTGAGE, TRUST OR CONDITIONAL SALE

Mortgage or conditional sale.—An instrument in form a deed may be shown by parol to be in fact a mortgage as between the parties. *Mercer v. McMurry* (Civ. App.) 229 S. W. 699; *Young v. Blain* (Civ. App.) 231 S. W. 851.

The real consideration of a deed absolute on its face may always be shown by parol to be mere security for debt. *Morrow v. Gorter* (Civ. App.) 217 S. W. 164.

Trust.—As an abstract proposition it is no longer the rule that a parol trust cannot be established by the testimony of one witness. *Graves v. Graves* (Civ. App.) 232 S. W. 543; *Hall v. Hall* (Civ. App.) 198 S. W. 636.

An agreement to pay part of the purchase price of lots, title to be taken jointly, made prior to delivery of deed to defendant's husband alone as grantee, may be shown by parol. *McBride v. Briggs* (Civ. App.) 199 S. W. 341.

An express trust may be ingrafted on a deed conveying the absolute title by parol testimony. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

A parol trust may be ingrafted on a deed absolute on its face by the testimony of one witness, without proof of corroborating circumstances. *Allen v. Williams* (Civ. App.) 218 S. W. 135.

Parol evidence is admissible to show that the oil lease in controversy was delivered in trust. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Where plaintiff was induced to convey an interest in land to defendant in reliance on defendant's oral promise to devise her entire interest to plaintiff, and after the conveyance defendant repudiated the oral agreement, the title is subject to a trust in plaintiff's favor which may be established by parol. *Faville v. Robinson* (Sup.) 227 S. W. 938.

Proof of a trust agreement in reference to a conveyance is not objectionable as varying or contradicting the deed; such proof not proceeding upon the idea that the deed is not the conveyance it purports to be. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

RULE 28. A WRITTEN INSTRUMENT, FAILING THROUGH FRAUD, ACCIDENT OR MISTAKE, EITHER OF MATTER OF LAW OR OF FACT, TO REPRESENT THE TRUE AGREEMENT, OR CONTAINING TERMS CONTRARY TO THE COMMON INTENTION, WILL BE CORRECTED OR REFORMED IN EQUITY

Fraud, accident or mistake in general.—A mistake of law is no ground for relief, as ignorance is not mistake, and equity will not grant relief upon the mere supposition that the party was ignorant of the legal effect of his act or of his omission to act. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

A mistake by a scrivener in drawing an instrument which would warrant a reformation applies to mistakes of law as well as mistakes of fact, and a contract can be reformed where a scrivener uses a word in a mistaken sense. *Benson v. Ashford* (Civ. App.) 216 S. W. 283.

In Texas, where law and equity are administered in the same proceeding, if a mutual mistake has been made in reducing a contract, as a note, to writing, plaintiff may in the same proceeding obtain a judgment reforming the instrument and enforcing it according to its terms after it has been reformed. *Harkey v. Graves* (Civ. App.) 230 S. W. 750.

Contracts in general.—In suit to reform and specifically enforce contract for sale and exchange of lands in which plaintiff based her right of action on the fact property was signed up under a government irrigation project, and that contract by mistake failed to make defendant take subject to such project, evidence held sufficient to show that the land was signed up under the project. *Sorenson v. Broadus* (Civ. App.) 202 S. W. 1008.

If a guaranty was executed and accepted under a mistaken belief as to its amount, equity will reform the instrument. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

All oral agreements prior to the execution of a written contract are presumed to have been embodied in such contract, but such presumption is not conclusive, and may be rebutted by showing that the agreement by reason of mutual mistake, fraud, or accident, failed to embody all the terms of the contract actually made, and reformation of such an instrument may be had where there was a mistake on the part of one of the parties and fraud on the part of the other. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

RULE 29. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A SEPARATE ORAL AGREEMENT CONSTITUTING A CONDITION PRECEDENT TO AN OBLIGATION CLAIMED TO ARISE ON A WRITTEN AGREEMENT

Contracts in general.—Evidence that written agreement for partition of property, made by attorneys of parties to divorce suit, was not to become binding upon either of parties unless judgment for divorce was rendered was not inadmissible, on motion to enforce agreement after judgment refusing divorce, as parol testimony varying or contradicting writing. *Skeen v. Skeen* (Civ. App.) 204 S. W. 379.

In suit to cancel an oil lease, wherein plaintiffs contended the lease never became operative on their respective interests because at the time of execution and delivery to

a defendant it was understood that it was not to become effective and the consideration not to be paid until executed by all other heirs, testimony of two plaintiffs, mother and son, to such effect, held admissible. *Watson v. Cloud* (Civ. App.) 225 S. W. 807.

Parol evidence is admissible to show that a contract was delivered conditionally. *Barnes v. Early-Foster Co.* (Civ. App.) 228 S. W. 248.

Where the defendant's plea in reconvention was based on a written contract set out therein which was unconditional, a defense in the supplemental petition, based on a condition claimed to have been within the contemplation of the parties at the time of making the contract, the happening of which relieved the plaintiff's obligation, was subject to exception. *Texarkana Pipe Works v. Caddo Oil & Refining Co. of Louisiana* (Civ. App.) 228 S. W. 586.

Parol evidence is inadmissible to show that an oil and gas lease complete on its face which recited payment of a cash consideration was delivered to the grantee without payment with the understanding that it should not become effective until payment. *Parker v. Sorell* (Civ. App.) 230 S. W. 819.

Contracts of sale and deeds.—If deed contains no restriction rendering it operative only on grantor's death, no such clause can be added by parol. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

In action to foreclose a lien reserved in a deed to secure broker's fees, grantors could not show existence of conditions upon which instrument was delivered. *Speer v. Dalrymple* (Civ. App.) 196 S. W. 911.

Parol evidence is admissible to show whether grantors in bill of sale by delivery intended bill to become operative. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

It may be shown by parol testimony that an ordinary written instrument was executed under agreement that it should not become effective except on certain conditions, but the principle is not applicable to a deed delivered to the grantees and not to a third person. *Cooper v. Hinman* (Civ. App.) 212 S. W. 972.

In action for breach of covenant against incumbrances, consisting of retention of possession of the premises by a tenant of the vendor for several months after the conveyance, parol evidence was inadmissible to show that the grantees bought the land subject to the occupancy of the tenant, and undertook to arrange for themselves with the tenant to get possession. *Morriss v. Hesse* (Com. App.) 231 S. W. 317.

Bills and notes or indorsement thereof.—In action by purchaser of bank stock for misrepresentations as to value of assets, parol evidence was admissible to show that indorsement on note among such assets was qualified indorsement. *Adams v. Kelly* (Civ. App.) 196 S. W. 576.

In action on promissory notes, defendants' allegations that parties orally agreed notes should not become effective, unless plaintiff advanced certain credit to one of defendants, and that plaintiff failed to do so, presents good defense, since it does not seek to vary written notes, but only to postpone their effective date. *Baines v. Kohler & Campbell* (Civ. App.) 201 S. W. 735.

Where promissory note was delivered in payment of stock in an involved corporation with agreement that it should become binding upon the corporation's creditors accepting a compromise settlement, which was not done, the note was not enforceable, and the fact that it was contingent could be shown by parol. *Miller v. Murphy* (Civ. App.) 206 S. W. 968.

RULE 30. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN AGREEMENT HAS BEEN RESCINDED, MODIFIED, EXTENDED OR WAIVED BY A SUBSEQUENT VALID AGREEMENT

In general.—Where a written contract has been modified by parol agreement with agent authorized to make such modification, the whole transaction as to the modification may be shown in evidence. *Ware v. Fairbanks-Morse Co. of Texas* (Civ. App.) 217 S. W. 211.

Where there was a definite provision covering compensation of a ranch foreman in the original contract pleaded by him in his action for salary and advances, in the absence of specific allegations of change of such provision by an oral agreement made subsequently, there was no basis in the pleadings for introduction in evidence by plaintiff of an alleged oral agreement changing the written contract as to compensation. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

Facts are admissible to show subsequent agreement adding to, subtracting from, or explaining the doubtful meaning of the contract. *Barnes v. Early-Foster Co.* (Civ. App.) 228 S. W. 248.

Bills and notes.—In suit for specific performance of an oral contract by payee, since deceased, to cancel notes in consideration of legal services, evidence held sufficiently clear, strong, cogent, satisfactory, and convincing to support the jury's finding that such a contract was made. *Briscoe v. Bright's Adm'r* (Com. App.) 231 S. W. 1082.

Sales.—In action for price of an engine, held, that defendant could show that pursuant to contemporaneous parol agreement seller had taken back engine in satisfaction of unpaid notes for the price. *Barcus v. J. I. Case Threshing Mach. Co.* (Civ. App.) 197 S. W. 478.

In absence of allegation of fraud by the seller of cattle in procuring the written contract at a specified price by representation that his influence with the Mexican government would enable the cattle to escape export duty, plea of the buyers, setting up a verbal modification of the contract for the deduction from the price per head of the export duty exacted by the Mexican government, held not available to them as a palpa-

ble attempt to ingraft on a written contract a parol agreement directly antagonistic to it. *Barreda v. Craig, Thompson & Jeffries* (Com. App.) 222 S. W. 177, reversing judgment (Civ. App.) *Craig, Thompson & Jeffries v. Barreda*, 200 S. W. 868.

The rule that a party may be precluded by a sale contract provision from invoking a parol warranty not contained therein has no application to a subsequent oral agreement upon a new consideration concerning the same subject-matter, made while the contract was still executory and modifying the written agreement. *Bell v. Self* (Civ. App.) 210 S. W. 304.

Where seller of a lighting plant guaranteed that an electric engine not installed at time of sale would develop a stated power, evidence that defendant at time of test of machine agreed that a portion of the price would be held back until the guaranty was made good was competent, though contract was in writing. *Ware v. Fairbanks-Morse Co. of Texas* (Civ. App.) 217 S. W. 211.

RULE 32. A RECITAL IN A DEED BINDS THE PARTIES AND THEIR PRIVIES IN SUITS FOUNDED UPON SUCH INSTRUMENT OR GROWING OUT OF THE TRANSACTION IN WHICH IT IS GIVEN

I. Creation and Operation of Estoppel in General

4. Instruments operating as estoppel—Defective, inoperative or invalid instruments and transactions.—Where a deed described land by metes and bounds chain of title, and reference to prior deeds, and by a name which was erroneous, since it was not calculated to deceive, the grantor was not estopped to deny title of persons who purchased on execution sale under levy against the grantee, upon the land described by name, and not in fact conveyed. *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

Though order of court for making deed by administrator is void for lack of jurisdiction, recitals therein and in deed pursuant thereto that deceased held title in trust are admissible as circumstances to prove the trust and acknowledgment thereof by lost instrument. *Sandmeyer v. Doljisi* (Civ. App.) 203 S. W. 113.

A purchaser of land constituting part of a homestead is not estopped to deny the validity of a prior deed of trust thereon which was invalid under Const. art. 16, § 50. *First Nat. Bank of McGregor v. Rice-Stix Dry Goods Co.* (Civ. App.) 213 S. W. 344.

A married woman is not estopped by the certificate of a notary to deny her want of knowledge of the terms of a lease which she was led to believe by the grantee and notary was different from the one actually signed and different from the one she had agreed to make. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

5. Recitals in deeds, mortgages, and mechanic's liens as grounds of estoppel.—Where a son accepted from his father and stepmother deed reciting that it was in consideration of his relinquishment of all claim which he might have at any time in the future to their estate, such son was estopped by the recital to assert title in himself to any part of the land of the father not conveyed to him. *Martin v. Martin* (Civ. App.) 222 S. W. 291.

7. Persons estopped in general.—Where a timber deed was not accepted by the grantee, and, although filed in the county clerk's office, was not filed by him, and he did not authorize any one to file it, he was not estopped, as against persons who saw such deed on file, to deny that he was holding under such deed. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

9. Grantees or mortgagees.—If defendant, substitute purchaser of public school lands, had filed in general land office his transfer, together with statutory affidavit negating collusion, question of collusion could not be raised by plaintiff, subsequent purchaser, for purpose of invalidating defendant's title. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

11. Persons acting in particular character or capacity.—An executor or administrator by his acts or omissions may raise an estoppel against the estate. *Baber v. Houston Nat. Exch. Bank* (Civ. App.) 218 S. W. 156.

II. Estates and Rights Subsequently Acquired

14. Instruments operating on title subsequently acquired.—Where plaintiffs' mother executed an oil and gas lease on a parcel of land in which plaintiffs owned undivided interests, the instrument using the terms "let" and "lease" and giving the lessee full and exclusive authority to enter on the premises, and plaintiffs thereafter conveyed their interest to their mother, such after-acquired title on principles of estoppel passed to the oil and gas lessee. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

As a lease is a valuable property right and an option contract to acquire it can be specifically enforced, title acquired by a landowner after the execution of a so-called oil and gas lease will pass to the lessee on principles of estoppel, though the instrument be construed as a mere contract for an option to acquire a lease by complying at the lessee's election with the stipulations therein. *Id.*

15. — Conveyances with covenants.—If a daughter did not own as much of her parents' land as she attempted to convey, owning merely her mother's and not her father's interest, her after-acquired interest from her father on his death passed by estoppel under her warranty deed. *Hopkins v. Walters* (Civ. App.) 224 S. W. 516.

Where a grantor by warranty deed subsequently acquired legal title to the land, it inured to the benefit of his grantee by virtue of his warranty. *Green v. West Texas Coal Mining & Development Co.* (Civ. App.) 225 S. W. 548.

Title acquired by a vendor after he has conveyed a defective title, but with a covenant of warranty, passes, eo instanti to the prior vendee upon theory of estoppel, which

applies not only to the vendor, but to his privies in estate. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

16. — **Conveyances without covenants.**—Though a conveyance contained no warranty of title, yet, where its terms implied a claim of ownership of the fee-simple title by the grantor, the rule of estoppel whereby an after-acquired title will pass, eo instanti, to a prior grantee applies; the estoppel depending, not on a covenant of warranty, but on good faith and fair dealing. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

20. **Grantors or mortgagors and privies.**—Ordinarily purchaser of mortgaged property who assumes, or purchases subject to, the mortgage is estopped to deny its validity; but if he has not assumed mortgage, and has purchased without reduction on account thereof, he may dispute its validity. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

The rule of estoppel whereby after-acquired title of a vendor will pass to a prior vendee, etc., applies to a title acquired by mortgagor after execution of the incumbrance and inures to the benefit of prior mortgagee. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

23. **Estates or rights affected—Title acquired in different right.**—The grantor of minerals in land purchased by him from the state, and on which he owed the state a balance, did not, by paying the balance of the purchase money to the state, obtain a different and superior title to that which he had conveyed away, but only the same title freed from the claims of his vendor, the state. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

Where sons of the grantor in a deed excepting mineral rights conveyed the land by warranty deeds, which, being without limitation, conveyed full fee-simple title, under art. 1106, on the death of the grantor, they and those in privity with them by inheritance or by purchase were estopped from claiming as against their grantees their share inherited from the grantor in the mineral rights so excepted. *Donnell v. Otts* (Civ. App.) 230 S. W. 864.

RULE 33. THE ADMISSIONS OF A PARTY OR HIS AGENT ARE ADMISSIBLE IN EVIDENCE WHEN OFFERED BY THE ADVERSE PARTY

I. Nature, Form and Incidents in General

10. **Judicial admissions in general.**—Claimant of attached property, who alleged ownership, did not, by admitting for purpose of opening and closing that plaintiffs had good cause of action as set forth, under District and County Court Rule 31 (142 S. W. xx), admit that he was not owner of property. *Frost v. Smith* (Civ. App.) 207 S. W. 392.

Written confessions are inadmissible in subsequent proceedings after the conviction for felony of the authors of the confessions, since the conviction rendered the authors incompetent as witnesses. *In re McLaren's Estate* (Civ. App.) 221 S. W. 1045.

11. **Pleadings—Admissibility in same proceedings.**—An admission or statement made under one allegation in a pleading is not admissible in evidence as an admission where inconsistent defenses are pleaded. *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

The elevator which defendant had installed in plaintiff's hotel having proved defective, plaintiff sued defendant for damages, and defendant moved to enter judgment on the theory that plaintiff was chargeable with \$3,000 for the rental of the elevator, in which case judgment would have been in defendant's favor for a substantial amount instead of in favor of plaintiff on the theory that plaintiff was entitled to recover the difference between the agreed price and the actual value, held, that the fact that defendant in its motion allowed plaintiff the amount expended for repairing the elevator is no ground for allowing such amount where the case was disposed of on the theory of the sale. *Otis Elevator Co. v. Cook* (Civ. App.) 219 S. W. 546.

Where the answer of a carrier sued for the burning of goods contains a general denial, the statement therein that they arrived in good condition, in the part claiming that any liability was that of warehouseman, and not of carrier, is not admissible as an admission. *Hines v. Warden* (Civ. App.) 229 S. W. 957.

16. — **Pleadings superseded, withdrawn or abandoned.**—Plaintiff may introduce in evidence an answer not denying an averment of the petition, it being abandoned by amendment. *Red River, T. & S. Ry. Co. v. Davis* (Civ. App.) 195 S. W. 1160.

In action against railroad for arrest of two boys by conductor, statements or admissions in original answer filed by railroad were admissible, though answer had been abandoned. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 200 S. W. 263.

An abandoned supplemental petition, filed by plaintiff, is admissible in evidence against him, notwithstanding it contained legal conclusions, for the averments in the petition were admissions of the plaintiff. *Stowers v. H. L. Stevens & Co.* (Civ. App.) 208 S. W. 365.

An admission made by a party against his interest is admissible in evidence whether made in court or out, and whether by the pleading on which he goes to trial or an abandoned pleading. *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

In the purchasers' action for damages from misrepresentations inducing the sale of a thrasher, the original answer of the purchasers in the seller's suit to recover on the notes given it, held not admissible as tending to show the purchasers were not entitled to recover for certain items. *Id.*

20. **Offers of compromise or settlement.**—Plaintiff's testimony with reference to offer of defendant railway company to make settlement for damages due to fire alleged

to have been caused by its engine held inadmissible. *Quanah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606.

In a purchaser's action for payment upon vendor's failure to deliver deed and sink well by agreed date, any testimony tending to show vendor's willingness to comply with the contract within reasonable time after such date is admissible, but counterpropositions, or offers in the nature of a compromise, should not be admitted. *McDonald v. Whaley* (Civ. App.) 207 S. W. 609.

In personal injury action, testimony with reference to a compromise held properly excluded. *Northern Texas Traction Co. v. Smith* (Civ. App.) 223 S. W. 1013.

In a real estate broker's action for \$750 compensation earned on the exchange of land, evidence that after the deal was consummated defendant agreed to pay plaintiff the amount sued for, but later declined to do so, and of admissions by defendant that he offered plaintiff \$300, and later \$375, held admissible, in so far as it tended to show that defendant recognized the importance and value of plaintiff's services. *Barnes v. Beakley* (Civ. App.) 224 S. W. 531.

The law favors compromise settlements and the long established policy is that declarations and admissions made in an effort to settle out of court cannot be received as evidence. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

21. — **What constitutes offer.**—Plaintiff's letter to agent of defendant railroad presenting claim for damages from injuries, stating that plaintiff "alleges his damages to be the sum of \$500, which is offered as a compromise," and asking agent to take up matter with defendant railroad that it might have opportunity to settle without suit if desired, held inadmissible in plaintiff's action as offer of compromise. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 110 Tex. 360, 220 S. W. 769, reversing judgment (Civ. App.) *Missouri, K. & T. Ry. Co. v. Sullivan*, 157 S. W. 193.

In a suit to recover the purchase price paid for land on vendor's default in sinking a well before a given date, a letter from vendors proposing to execute a deed to be deposited subject to a new contract held properly excluded as being self-serving and offer to compromise. *McDonald v. Whaley* (Civ. App.) 228 S. W. 313.

In an action for breach of contract for the purchase of land, which provided for forfeiture of cash payment in event of purchaser's default, testimony by vendor's husband that the purchaser stated he wanted to take the property, but was not able, and did not want to pay the damages, together with a further statement that, if a 60-day option was made, he would take the property, was admissible to show a practical construction by the parties of the provision for liquidated damages, and breach, and was not objectionable as being evidence of a proposition to compromise. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

24. **Statements in writing.**—Defendant may introduce letters written by plaintiff after the making of their ambiguous contract, they tending to show that plaintiff then construed it as defendant claims it should be construed. *Marlin Lumber Co. v. Samuel Hastings Co.* (Civ. App.) 198 S. W. 1076.

27. **Oral statements.**—Evidence in trespass to try title by a widow and minor children to recover community lands conveyed by widow during lifetime of her deceased husband, but without his joinder that she stated she had been abandoned, etc., held admissible on issue of estoppel against her claiming any interest in land. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

The testimony of one of garnishor's officers, to the effect that he talked with the garnishee owner before the garnishment was served about the owner's agreement with the garnishment debtor, contractor, and that the owner said he had agreed upon terms of settlement, held admissible. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

In mortgage foreclosure action where defendant interposed plea of homestead rights in a 156-acre tract covered by mortgage, testimony of attorney for mortgagee as to declarations of mortgagor at time of execution of mortgage as to his ownership of 1,200 acres of land and as to the uses he had been making thereof held admissible. *Moore v. Monnig Dry Goods Co.* (Civ. App.) 217 S. W. 760.

28. **Acts or conduct.**—Where K. took possession of S.'s land under some sort of a trade, the absence of S., who asserted no right in opposition to K., might be considered, in a proper case, by the jury as tending to show payment of the purchase money. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

31. **Acquiescence or silence.**—Declarations of the agent of plaintiff, in trial of right of property to sequestered cotton, that there was a shortage of cotton in plaintiff's warehouse, and that it had been delivered to claimant, having been communicated by plaintiff's representative to defendant's representative, who admitted he had the cotton, was with that admission admissible. *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.

32. — **Failure to deny or object to statements in general.**—The fact that a person was present in court when a written confession by the defendants on trial was read in which the person was charged with instigating the murder of her husband, and that she did not then deny the charge, cannot be considered as an admission by her of its truth, since she was not then called upon to answer the charge, and to have done so would have interrupted the orderly proceedings of the court. In re *McLaren's Estate* (Civ. App.) 221 S. W. 1045.

II. By Parties or Others Interested in Event

34. **Parties of record.**—An admission made by a party against his interest is admissible in evidence whether made in court or out. *Hart-Parr Co. v. Krizani & Maler* (Civ. App.) 212 S. W. 835.

In an action by a wife to cancel a deed executed by her and her defendant husband, the latter negotiating the sale for her, and the other defendants filing a cross-action to quiet title against the husband and wife, statements and letters of the husband were admissible, at least against him, where they tended to show that certain land notes were delivered in payment of the land in question, and not in payment of other land, as contended by plaintiff. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

An ex parte statement under oath by a defendant, brought in by the original defendant under an order obtained by the original defendant, is inadmissible in behalf of plaintiff against the original defendant. *Theuber v. Marek* (Civ. App.) 222 S. W. 293.

In action for partition by a widowed daughter-in-law and sister-in-law against her mother-in-law and brother-in-law, testimony that the brother-in-law had told the witness that certain of the personal property involved belonged in equal parts to him and his brother, plaintiff's husband, held admissible as between plaintiff and the brother-in-law. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

III. By Grantors, Former Owners or Privies

38. **Privies and former owners in general.**—In trespass to try title by the heirs of the original patentee against those in possession, an original affidavit by one of defendant's predecessors in title that the patentee had sold his headright certificate to affiant's grantee was an ex parte statement, not admissible against the heirs of patentee. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

40. **Grantors, vendors or mortgagors of real property.**—Before conveyance or transfer of possession.—In determining questions of boundaries, it is competent to show that a third person, who was dead at time of trial, and from whom one of the parties obtained title, while in actual possession, made statements that he did not assert a claim to the boundary subsequently asserted by his grantee. *Rose v. Hays Inv. Co.* (Civ. App.) 205 S. W. 140.

41. — **After conveyance or transfer of title in general.**—The objection to the testimony of witnesses, stockholders of a corporation, which took from a partnership an assignment of a contract to construct an irrigation plant, assigned to a trustee preliminary to obtaining the corporate charter, who held it for the corporation, made on the ground that declaration of grantor after execution and delivery of deed is not admissible to impeach vendee's title, cannot be sustained, where the rights of the parties are based upon a common source, and where the testimony does not impeach intervener's title, but establishes his right subject to prior garnishment, since garnishor, not a party to the transfers, could show in whom was lodged the right to the debt. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

42. — **Showing nature of conveyance.**—Statements of grantor in absence of grantee that a conveyance of land and personalty was intended as a will was not admissible in an action involving the rights of creditors. *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

47. **Sellers or mortgagors of chattels.**—After transfer or delivery of possession.—Testimony as to an admission by mortgagor of automobile, subsequent to execution of mortgage and in absence of bona fide mortgagee, that mortgagor had stolen the automobile, held inadmissible against the mortgagee. *Howard v. Franklin Ins. Co.* (Civ. App.) 226 S. W. 447.

53. **Testators and intestates.**—In suit to recover half interest in land by one claiming as heir by adoption, statements by the adopting parent on demand by her second husband that she deed to him all her land that she owned but half interest in land in controversy and deeds by which she conveyed only a half interest were admissible as showing she recognized plaintiff owned other half. *Lane v. Sanders* (Civ. App.) 201 S. W. 1018.

In an action to recover certain land, brought by the children of deceased by his first wife against his children by his second and third wives, certain notes executed by deceased after the death of the first wife were properly admitted, being competent as an admission by the husband of a community debt in a proceeding seeking to charge community property with that debt. *Roberson v. Hughes* (Com. App.) 231 S. W. 734.

IV. By Agents or Other Representatives

54. **Authority in general.**—In trespass to try title, acts, admissions, or statements of plaintiff's son pending suit could not be used against her. *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

In action against automobile owner for injuries caused by driver's negligence, where agency of driver was established by the evidence, declarations made by driver at time of accident were legitimate and proper. *Parmele v. Abdo* (Civ. App.) 215 S. W. 369.

The statement of an agent of limited authority not a part of the res gestæ is hearsay and, if objected to, should not be admitted. *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402.

57. **Agents or employés in general.**—On the issue of title to a strip between lots of plaintiff and defendant, where defendants claimed under the statute of limitations, evidence of a conversation or agreement between one of the plaintiff's and the manager of the lessee of defendants' lot concerning the strip in controversy, though made outside the presence of defendants, was admissible, where it was not conclusively shown that defendants had possession of all the property in controversy prior to that time. *Cass v. Green* (Civ. App.) 227 S. W. 238.

59. — **Scope and extent of agency or employment.**—Where written oil and gas lease contained no stipulation that the lessor would drill a well in six months, and purported to contain all of the agreements between the parties, going into detail with great particularity, a statement made by a local landowner, who was assisting the lessee in procuring leases, out of hearing of the lessee or his agent, that a well would be drilled in six months is not binding on the lessee. *Lone Star Gas Co. v. McCullough* (Civ. App.) 220 S. W. 1114.

Though agency cannot be shown by extrajudicial declarations of agent, the testimony of an agent in court is competent to prove a parol agency, and to establish the nature and scope of the agent's authority. *Hines v. Rush* (Civ. App.) 229 S. W. 973.

60. — **Admissions before or after transaction or event.**—In action by the addressee for failure to seasonably deliver a message, replies to service messages sent by the receiving office to the point of delivery inquiring as to delivery were admissible in evidence. *Western Union Telegraph Co. v. McCormick* (Civ. App.) 219 S. W. 270.

Declarations by newspaper reporter after the publication of the alleged defamatory article are no wise binding on the publisher and are properly excluded. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

The roadmaster's opinion or conclusion as to the cause of derailment of a car, drawn from an examination subsequent to the accident, and favorable to one injured thereby, was not binding on the operator of the road, and so could not be shown in an action for the injury. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

61. — **Showing agency, authority or employment.**—The declarations of the agent are not admissible against his principal for the purpose of establishing or enlarging his authority. *Dawson & Young v. Nunn & Latham* (Civ. App.) 200 S. W. 603; *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421; *City Nat. Bank of Eastland v. Conley* (Civ. App.) 228 S. W. 972; *Dunlap v. English* (Civ. App.) 230 S. W. 829.

In action by shipper of live stock for damages in transit, it was error to permit him to testify that he met a man who said he was the yardmaster, and who on request refused to give assistance in taking care of cattle, in the absence of proof that such person was in fact the carrier's yardmaster. —*Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

In action against automobile owner for injuries caused by driver's negligence, evidence of declarations made by driver at time of accident is incompetent, for purpose of showing that driver was engaged in owner's business at time of accident. *Parmele v. Abdo* (Civ. App.) 215 S. W. 369.

The testimony of an agent in court is competent to prove a parol agency. *Hines v. Rush* (Civ. App.) 229 S. W. 973.

In action against a railroad for loss of goods involving an issue of whether the goods had been delivered to a transfer company, shown by undisputed evidence to have been employed by plaintiff to receive the goods, testimony by transfer company's employee, who received the goods from the railroad, that he signed delivery freight receipt as the transfer company's agent, held admissible. *Id.*

The authority of an agent to bind his principal must be shown to establish the principal's liability, since the law indulges in no presumption that an agency exists, and it cannot be shown by the agent's own representations or his assuming to act by mere rumor or general reputation, but must be shown by some act or omission of the principal. *Rhodes v. Smith* (Civ. App.) 230 S. W. 227.

62. **Corporate officers, agents and employes.**—In an action by the American foreman of a Mexican ranch for salary and advancements, affidavit of the foreman's assistant, attached to a claim against the Mexican government, prepared by the foreman at the suggestion of stockholders in the ranch company, for compensation for loss of cattle taken by various military commanders and raiders, held inadmissible, stockholders not having been shown to have had personal knowledge of truth or falsity of its statements. —*Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

63. — **Officers, agents and employees of insurance companies.**—In action on fire insurance policy, testimony of assured's wife and attorney as to material statements made by agents of insurer which had ratified the acts of such agents was admissible. *St. Paul Fire & Marine Ins. Co. v. Clark* (Civ. App.) 200 S. W. 229.

In action on fire insurance policy, letter of insurer's attorneys tending to prove that the insured's premium note was deducted from adjustment of prior loss on same policy was admissible. *Id.*

The statements of an agent, construing a fire policy after loss, are not admissible against the insurer to show the property included. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

In an action on a contractor's bond, where the defense of alterations in the plans was interposed, evidence by the architect that the general agent of defendant surety company told them defendant had received additional pay because of the alterations in the plans held admissible, since defendant was a corporation and could only speak through its agents. *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402.

64. — **Officers, agents or employes of carriers.**—In action against railroad for loss of cattle, a letter from claim agent of defendant stating that at a certain town on defendant's line animals were in such bad condition that four of them were removed from the car dead was admissible as an admission by claim agent that four animals died in defendant's possession. *Galveston, H. & S. A. Ry. Co. v. Booth* (Civ. App.) 209 S. W. 198.

In an action against a terminal carrier for injuries to goods in shipment, evidence that the carrier's agent, who was not authorized to bind the carrier to pay for loss or injury, advised plaintiff to take the goods, and stated that the carrier would do the right thing about them, is immaterial. *St. Louis Southwestern Ry. Co. v. Cox* (Civ. App.) 221 S. W. 1043.

65. **Public officers or agents.**—Assistant city engineer's testimony tending to show that city had not accepted triangular portion of street held not binding upon city, and only entitled to such weight as trial court might give to his opinion. *Newton v. City of Dallas* (Civ. App.) 201 S. W. 703.

66. **Attorneys.**—In an action on fire policy covering cotton on railroad platform, where, under the terms of the policy, there could be no recovery if insured was not the owner, exclusion of written statements prepared by plaintiff's counsel from information furnished by plaintiff and sent to defendant, tending to show that there had been a sale of the cotton as it stood on the platform, was error. *Hartford Fire Ins. Co. v. Triplett* (Civ. App.) 223 S. W. 305.

68. **Husband or wife.**—Instrument signed by husband alone, acknowledging tenancy in respect to community property claimed to have been held adversely, is admissible to go before jury in trespass to try title against husband and wife for what it is worth on issue of limitations. *Davis v. Cisneros* (Civ. App.) 220 S. W. 298.

Statement by husband, after an execution sale, to the effect that he and his wife had abandoned their homestead claim to the property sold, was not admissible against his wife's claim of homestead. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

In an action by a wife to cancel a deed executed by her and her husband, if the husband was agent for the wife in negotiating the sale, his letters and statements in negotiating the sale were admissible to show that certain land notes delivered were exchanged for the land in question; plaintiff claiming that the agreement was for cash, and that the land notes were given in payment for other property. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

No statement of a husband, verbal or written, in derogation of title of his wife to part of the notes received by him on sale of their community land claimed as a homestead, made after the transfer to the buyer, could affect the rights of the wife in the notes received by her. *Earhart v. Agnew* (Com. App.) 222 S. W. 188, reversing judgment (Civ. App.) 190 S. W. 1140.

69. **Partners.**—Where one member of a partnership, in response to plaintiff's telegram, directed her sister to write plaintiff, and plaintiff in an action for breach of contract of employment relied thereon, such letter, it appearing that plaintiff received it and handed it to the other partner, is admissible in evidence as an admission, despite objections that it contained unauthorized terms and that its contents were unknown to partner who directed it to be written. *Mindes Millinery Co. v. Wellborn* (Civ. App.) 201 S. W. 1059.

In suit by a company against a firm on a series of notes and on open account for goods purchased, written statement signed by the firm in its firm name by a member held not inadmissible on the ground, that the individual defendants other than the member who signed it were not parties to the statement. *Dee v. Taylor-Hanna-James Co.* (Civ. App.) 227 S. W. 361.

72. **Insured or beneficiary.**—In action on life policies, defended on ground that insured committed suicide, a statement as to the cause of insured's death presented to the insurance company by the beneficiary as proofs of death showing that insured committed suicide, held competent evidence against beneficiary as an admission. *Thornell v. Missouri State Life Ins. Co.* (Civ. App.) 229 S. W. 653.

In action on life policies defended on ground that insured had committed suicide, the fact that coroner's inquest was not in compliance with terms and forms of law, did not affect the admissibility of the certificate of the justice of the peace, acting as coroner, offered as an admission of the beneficiary that insured committed suicide. *Id.*

73. **Conspirators and persons acting together.**—Acts or declarations of conspirator, made before completion of conspiracy, in respect to its execution, or in furtherance of common design, is admissible against his co-conspirators, regardless of when they entered into the conspiracy. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

Acts and declarations of conspirators pending the conspiracy and in furtherance of the common design are admissible against a coconspirator, though done and said in his absence; consequently, where a mother and daughter conspired to extort money from defendant, and, when the mother was unable to make good her assertion that she was defendant's common-law wife, the daughter sued for breach of marriage promise, etc., evidence of acts and declarations by the mother in absence of the daughter and a letter written by the mother were admissible. *Wells v. Scales* (Civ. App.) 223 S. W. 303.

V. Proof and Effect

75. **Preliminary evidence.**—Existence and extent of agency or authority.—In an action for damages to an automobile in a collision, statement of defendant's secretary that he would settle for the damages to plaintiff's automobile and would put it in as good shape as it was before the accident should not have been admitted, in the absence of evidence as to secretary's authority to make such a statement or promise. *Wall & Stabe Co. v. Berger* (Civ. App.) 212 S. W. 975.

That statements of a broker, through whom defendants were procured to enter into a contract with plaintiff, may be admissible as an admission of plaintiff that it from the first understood the contract to be a gambling transaction, such statements being

made when the broker tried to induce defendants to make additional payments to keep the contract in force, authority of the broker to thus bind plaintiff must be shown. *Clark v. Merriam & Millard Co.* (Civ. App.) 223 S. W. 869.

In an action to recover cattle alleged to have been sold without authority, the bill of sale of the alleged unauthorized agent, although not admissible as establishing the agency, was admissible in connection with other proof of agency to identify the cattle and to sustain the defendant's title provided there was sufficient evidence of agency. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

In suit by a company against a firm on a series of notes and on open account for goods purchased, written statement, signed by the firm in its firm name by a member held not inadmissible on the ground that the individual defendants other than the member who signed it were not parties to the statement, and it was immaterial that statement was admitted prior to the introduction of other evidence establishing the connection of each individual member of the firm with it. *Dee v. Taylor-Hanna-James Co.* (Civ. App.) 227 S. W. 361.

The question whether the party writing letters offered in evidence against defendant was its agent was one of fact to be established by evidence. *Denby Motor Truck Co. v. Mears* (Civ. App.) 229 S. W. 994.

In an action for nondelivery of a carload of hay, evidence as to words and acts of the "commercial agent" of the defendant railroad, without any evidence as to the authority or duties of the person so designated, is incompetent to charge the carrier with the acts of the agent. *Rhodes v. Smith* (Civ. App.) 230 S. W. 227.

76. — **Existence of conspiracy or common purpose.**—A prima facie case of conspiracy must be proved, before act or declaration of one is admissible against others as co-conspirators and the trial court is judge of whether such prima facie case of conspiracy has been proved. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

81. **Conclusiveness and effect.**—Where mutual mistake was alleged in that certain fine print in a contract of guaranty was overlooked, and there were admissions of officer of plaintiff showing that he had overlooked such fine print, and copy of an original petition for amount guarantor contended contract covered, an explanation by plaintiff that they were made under an erroneous impression was not so conclusive as to exclude evidence, and render it any the less an admission against interest. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

82. — **As to particular facts in general.**—Even if the solvency of plaintiff, a joint-stock company, was pertinent to any issue, defendant's testimony to its "solvency" was precluded by his admission that the individuals composing the company were solvent. *Smith v. Railroad Employés Development Co.* (Civ. App.) 195 S. W. 220.

Defendant's admission, that plaintiff was entitled to recover, unless defeated by some of special defenses pleaded, was admission that plaintiff's deed and deeds through which he deraigned title conveyed legal title to strip in controversy. *Decker v. Rucker* (Civ. App.) 202 S. W. 1001.

In action on life policies defended on the ground that insured committed suicide, where proofs of death showing that insured had committed suicide had been admitted as an admission by beneficiary, the beneficiary was entitled to show that the necessary data for the proofs had been gathered by others, and that statements showing that insured committed suicide were untrue. *Thornell v. Missouri State Life Ins. Co.* (Civ. App.) 229 S. W. 653.

84. — **As to title or possession.**—In trespass to try title, defendant's admission that plaintiff's ancestor was the common source of title did not constitute an admission that the title was in such ancestor at time of his death, but merely that both parties were deraigning title from him or through him, entitling either to show that his title from such common source was the superior title. *Davis v. Cox* (Civ. App.) 229 S. W. 987.

In trespass to try title, defendants, having admitted ownership of property by one of the plaintiffs by virtue of a trustee's deed, could not complain that other plaintiff, alleged to have had a one-fifth interest, was not shown to have deraigned title separate from coplaintiff, but that such ownership was shown by testimony that coplaintiff in purchase of property at trustee's sale purchased four-fifths for himself and one-fifth for such other plaintiff. *Robertson v. Lee* (Civ. App.) 230 S. W. 730.

86. — **Judicial admissions.**—Where defendant in open court admitted all the allegations of plaintiff's petition except in so far as they might be avoided by his plea of partial failure of consideration to obtain the benefit of the opening and closing of the testimony, the plaintiff's admission reaches to the entire cause of action pleaded, and he cannot thereafter question plaintiff's failure to offer evidence on any material allegation. *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

RULE 34. DECLARATIONS ARE GENERALLY INADMISSIBLE, BUT MAY BE SHOWN AS A PART OF THE RES GESTÆ WHERE MADE BY A PARTY OR BY THIRD PERSONS AT THE TIME WHEN AN ACT IS PERFORMED AND AS PART OF THE TRANSACTION

I. Declarations in General

1. **Nature and grounds for admission in general.**—In a servant's action for injuries, his sworn evidence, adduced in open court on trial, that he was the joint agent of both defendant railroads, was not prohibited by the rule making inadmissible the declarations of an agent outside of court to establish a claimed agency. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

3. Statements showing physical or mental condition.—Testimony as to the making of a statement, by witnesses who heard statement made, held not objectionable as hearsay. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

In an action on a fraternal benefit certificate issued to plaintiff's wife whereon liability was denied on the ground of misrepresentations as to insured's health, a declaration by insured's husband that at the time he married insured she was in poor health, and that he "doctored her up" for the purpose of securing insurance held inadmissible as being too general and too remote to have any bearing on the alleged misrepresentations. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

4. Statements showing intent, motive or nature of act.—In real estate broker's action for commission, where it was claimed that broker procured purchaser ready, willing, and able to perform contract, but that owner declined to consummate transaction after having ratified the contract made with purchaser by broker, testimony as to statement by purchaser to owner's attorney that purchaser was ready and willing to carry out the contract held admissible. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

8. Self-serving declarations in general.—Question whether plaintiff did not tell her attorney that the mule was struck just as she had told jury held to call for self-serving declaration. *Baker v. Thomas* (Civ. App.) 201 S. W. 215.

In a purchaser's action to recover payment made upon vendor's failure to deliver deed and sink well by agreed date, any testimony tending to show vendor's willingness to comply with the contract within reasonable time after such date is admissible; but self-serving declarations, counter propositions, or offers in the nature of a compromise, should not be admitted. *McDonald v. Whaley* (Civ. App.) 207 S. W. 609.

In suit against operator of jitney and surety on his bond for injuries sustained by plaintiff while a passenger, when jitney collided with a street car, held that court did not err in refusing to strike out testimony of plaintiff's daughter that her father was complaining on the ground that it was self-serving. *Parker v. Harrell* (Civ. App.) 212 S. W. 542.

Testimony by plaintiff, in a personal injury action, that she did not have a cent, and that if she had known the extent of her injuries she would not have signed a release, was not inadmissible as involving a conclusion or as being self-serving. *Shaff v. Hollin* (Civ. App.) 213 S. W. 279.

11. — Statements as to intent, motive or nature of act.—In trespass to try title, a conversation between defendant and plaintiff's attorney in which defendant stated she intended to convey one half of a store to plaintiff and give him the other half held properly admitted over objection that it was self-serving. *Vaello v. Rodriguez* (Civ. App.) 218 S. W. 1082.

In action on a policy conditioned on delivery during applicant's good health, a letter from the general agent of the company to its local agent, directing him to ascertain whether the applicant was in good health, and, if not, to report the fact to the company before delivering the policy, was competent upon the issue of the delivery of the policy and the intention of the company in that respect, in view of plaintiff's contention that delivery of the policy to the local agent was delivery to the insured. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 436.

13. — Statements as to title.—Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant continued to claim the land after the execution of the deed held not self-serving, but admissible to show defendant's intention. *Delta Land & Timber Co. v. Spiller* (Civ. App.) 216 S. W. 414.

14. — Time of making statement in general.—Where physician examined injured person after suit was brought to qualify as expert, the injured person's statements to him held inadmissible as self-serving. *Texas & N. O. R. Co. v. Stephens* (Civ. App.) 198 S. W. 396.

16. — Statements by agents.—In action for slander, telegram from plaintiff's agent to plaintiff, stating that third party had notified agent that defendant had made alleged defamatory remarks, was inadmissible, being hearsay, self-serving, and not binding upon defendant. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

Testimony by a witness who was attorney for an alleged insolvent that he stated to the indorser of the note sued on that the maker had acquired land in another county since his bankruptcy is not evidence that the maker had acquired such land, and is not admissible to show the maker's solvency. *Cochran v. Sellers* (Civ. App.) 221 S. W. 351.

18. — Statements by grantors, assignors or former owners.—Witness could not testify that plaintiff told him that plaintiff's grantor gave him deed to keep, that being self-serving. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

In suit upon issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, testimony as to declarations of defendant grantor to the effect that he was the owner, made when plaintiff was not present, claimed to be self-serving, was inadmissible. *Ellis v. Haynes* (Civ. App.) 216 S. W. 249.

19. — Statements by persons since deceased, in general.—In suit on an accident policy, statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, held self-serving. *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S. W. 630.

20. — Statements by persons since deceased as to title or possession.—In trespass to try title by purchaser from decedent against purchaser from decedent's heirs, testimony of decedent's daughter, to prove by his declarations that deed he had made

to plaintiff was only a mortgage, being in decedent's interest, was inadmissible. *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571.

21. — Written statements in general.—In trespass to try title, where there was an issue whether plaintiff's grantor had been married, admitting recitals in deeds given by her that she was widow and wife of a certain person is erroneous; they being self-serving. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

As evidence of claim of ownership, recitals in ancient archives are admissible over the objection that they are self-serving. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

In an action to recover balance due on note for \$2,500, plaintiff was properly permitted to introduce in evidence an instrument signed by plaintiff, and not defendant, whereby plaintiff agreed to reconvey land when an older note was reduced to \$2,500, as against an objection that it was in the nature of a self-serving declaration, plaintiff having the right to demand possession of such instrument after reconveying the property to defendant in whose hands the instrument had been originally placed. *Peacock v. Aug. A. Busch & Co.* (Civ. App.) 231 S. W. 447.

22. — Letters.—In an action for breach of contract to convey land, letters written by defendant containing self-serving declarations are not admissible. *McMahon v. Gunter* (Civ. App.) 219 S. W. 284.

Where plaintiff's attorney as a witness was asked by defendant his reason for changing the nature of plaintiff's suit from one for rescission to one for damages, and he answered that it was because plaintiff was unable financially to pay mortgages becoming due on the property, it was error to further permit plaintiff's attorney to introduce in evidence a letter written by him to defendant's counsel, explaining the reason for the change and self-serving declarations. *Klein v. Stahl* (Civ. App.) 219 S. W. 523.

Correspondence between a defendant and a third party, after the controversy with plaintiff had arisen, held inadmissible as a self-serving declaration of defendant. *Negociacion Agricola y Canadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

In an action to recover cattle alleged to have been sold without authority, letters written by the alleged agent which were in a nature of self-serving declarations were inadmissible. *Peterson v. Clay* (Civ. App.) 225 S. W. 1112.

A letter written by a defendant to plaintiff after the litigation arose, in its nature self-serving, should have been excluded. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

In a suit to recover the purchase price paid for land on vendor's default in sinking a well before a given date, a letter from vendors proposing to execute a deed to be deposited subject to a new contract held properly excluded as being self-serving. *McDonald v. Whaley* (Civ. App.) 228 S. W. 313.

In insurance agent's action against insurance company for renewal commissions in which the company denied the existence of the contract entitling agent thereto, letters written by the agent abounding in argumentative statements held inadmissible, without qualification. *Hartford Life Ins. Co. v. Patterson* (Civ. App.) 231 S. W. 814.

23. — Pleadings.—A petition in a prior action to which defendants were not parties and which was unverified is in the nature of a self-serving declaration and is inadmissible to prove plaintiff's heirship. *House v. Stephens* (Civ. App.) 198 S. W. 384.

25. Declarations against interest in general.—Evidence that plaintiff, suing for personal injury, stated soon after injury that it was his fault, and he blamed no one therefor, was admissible as a declaration against interest. *Farrand v. Houston & T. C. R. Co.* (Civ. App.) 205 S. W. 845.

Statements of donor of land made to third persons in the absence of the donee after an alleged gift had been made were admissible in support of the gift as against an attacking creditor, where at the time they were made donor had no possible motive to fabricate, as declarations against interest. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

In an action to recover an automobile, declaration of defendant that he did not own the automobile, being against interest, would ordinarily be admissible for what it was worth. *Wiggins v. Tiller* (Civ. App.) 230 S. W. 253.

26. Declarations of person in possession or control as to title or possession.—In suit to establish parol trust upon land, that grantor retained possession and absolute control of premises did not make her declarations after conveyance in disparagement of grantor's title admissible. *Hambleton v. Dignowity* (Civ. App.) 196 S. W. 864.

Declarations, made while in possession, to others than the owner, are admissible in trespass to try title to determine whether such possession was adverse to the owner. *Bishop v. Paul* (Civ. App.) 217 S. W. 435.

To ascertain whether a holding of land from its inception was continuously adverse and hostile, it is permissible to show in proper way any relevant fact tending to establish want of continuous possession and claim; declaration of possessor being material. *Davis v. Cisneros* (Civ. App.) 220 S. W. 293.

In action involving boundary dispute, declarations by defendant's remote grantor, since deceased, made at the time he was in possession of the land, that the boundary line was as claimed by plaintiff, held admissible, being statements against his interest. *Barlow v. Greer* (Civ. App.) 222 S. W. 301.

In an action to have land of daughter applied on debt of father, where daughter claimed parol gift from father and under the statute of limitations, declarations of father that land belonged to daughter were admissible as tending to explain the character of possession of the land by the father and the daughter's husband as partners in

the cattle business. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

29. **Decedent against interest.**—In an action against a bank for attorney's fees included in a judgment against a deceased third person, evidence by plaintiff that the third person had told him to enter judgment for the full amount of attorney's fees was admissible, in view of an instruction by the bank for the inclusion of such fees. *People's Sav. Bank v. Marrs* (Civ. App.) 206 S. W. 847.

35. **Conclusiveness and effect.**—Letters written by plaintiff to defendant and introduced in evidence by plaintiff did not establish the truth of the statements of fact therein made, but only the fact that they were written and that such statements were made. *Bishop Mfg. Co. v. Sealy Oil Mill & Mfg. Co.* (Civ. App.) 220 S. W. 203.

II. *Res Gestæ*

36. **Nature of doctrine in general.**—Admission of statements of plaintiff shortly after regaining consciousness, after his injury, is largely within the discretion of the trial judge. *Missouri, K. & T. Ry. Co. v. Anderson* (Civ. App.) 198 S. W. 795.

Rule against hearsay testimony does not include *res gestæ* of transaction, such as declarations evoked by transaction itself, without premeditation, voluntary, and spontaneous. *Jurado v. Holmes* (Civ. App.) 200 S. W. 859.

The tendency of the courts is to extend rather than narrow the scope of the rule admitting otherwise hearsay matter as *res gestæ*. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

37. **Facts forming part of same transaction.**—In an action for wrongful death caused by a collision between defendant's street car and deceased's automobile, evidence that after the street car was stopped, in attempting to free the street car from the automobile, the latter was caused to fall upon the body of deceased before death, was admissible, not as proving a new separate and distinct ground of negligence, but as *res gestæ*, parts of the one continuous accident. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

In an action for personal injuries occasioned by plaintiff's team becoming frightened by defendant's train while traveling on a road parallel to the railroad track, evidence that a certain named road was on the opposite side of the railroad from that on which plaintiff was traveling was admissible as part of the *res gestæ* as to whether the road was much traveled; it appearing that the road on which plaintiff was traveling crossed the track and entered such road near where the injury occurred. *Baker v. Galbreath* (Civ. App.) 211 S. W. 626.

38. **Acts and statements accompanying or connected with transaction or event.**—Declarations or exclamations uttered by parties to a transaction contemporaneous with and accompanying it are admissible as *res gestæ*. *Wall & Stabe Co. v. Berger* (Civ. App.) 212 S. W. 975.

Declarations made by the original surveyor of land at the time of the survey might be admissible in a boundary suit as *res gestæ*, even if the surveyor were living. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

To be admissible as *res gestæ*, declarations must either be a part or continuance of the transaction, or made under such circumstances as to raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or arising out of the transaction itself, and, if they are not in their nature part of the transaction, they are inadmissible. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

39. — **By agents or employés.**—It is the authority of the agent to make a statement that renders it admissible against the principal's interests, and to receive such a statement as evidence of that authority as *res gestæ* is improper. *Dawson & Young v. Nunn & Latham* (Civ. App.) 200 S. W. 603.

In an action by an employé for damages for discharge occasioned by defendant falsely and maliciously notifying the employer that plaintiff owed her a debt, and that she had an assignment of his wages, plaintiff could testify that the employer's agents notified him at the time of his discharge that he was discharged because a loan company had given notice that it held an assignment of his wages, being a part of the *res gestæ* incidental to and explanatory of plaintiff's claim that the railroad company discharged him because of the giving of the false notice. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

40. — **Writings.**—In an action to restrain recovery on a life insurance policy, where the insurance company claimed the bank to which payment of renewal premium was made was not authorized by it to accept such payment, a collection slip sent by it to another bank with the receipts required by the policies authorizing the other bank to collect the premium in question, though self-serving in its nature, was admissible as part of the *res gestæ* of the effort to collect the premium and the authority to collect. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

In a suit to restrain defendant from operating a millinery business in her own name in violation of agreement claimed by plaintiff to be one of employment, but by defendant to be one of partnership, under absolute conveyances intended, in fact, to be mortgages, a letter which was an *ex parte* statement of defendant uncommunicated to plaintiff as to delivery of the deed to plaintiff upon payment of a certain amount held inadmissible, as *res gestæ*. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

41. — **Motive and intent in general.**—Statement of insured, while on his death-bed, that he did not intend to let his insurance lapse, and that he intended to pay a note given for a premium, was not admissible under the rule of *res gestæ*, nothing being done which his statement tended to explain; issue involved being whether insurer had

misled the insured to believe that insured would be given an extension of time to pay the note. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

43. — **Existence or nature of contract and relation of parties.**—Agreements between plaintiff and defendant and between defendant and others having given rise to notes sued on, what was said and done during both conversations is admissible as part of *res gestæ*. *Brooks v. Long* (Civ. App.) 199 S. W. 510.

Where plaintiff bought cattle in Mexico, and defendant claimed them as administrator of estate, testimony of one who accompanied plaintiff's vendor, when he paid money to persons on whose behalf defendant claimed the cattle, that the plaintiff's vendor said at the time that he was buying certain interests from the estate, is not admissible as *res gestæ*. *Jurado v. Holmes* (Civ. App.) 200 S. W. 859.

44. — **Sale or conveyance.**—Witness could not testify that plaintiff told him that plaintiff's grantor gave him deed to keep, that not being *res gestæ*. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

In real estate broker's action for commission on owner's refusal to consummate transaction with purchaser procured by broker, testimony as to what was said and done when written notice of such refusal was served on purchaser by owner's attorney held admissible as part of *res gestæ*. *Cooper v. Newsom* (Civ. App.) 224 S. W. 568.

46. — **Personal injuries.**—In automobile collision case, testimony constituting mere conclusions on the part of the witness as to what was said at the time of the accident held inadmissible, being hearsay and not a part of *res gestæ*. *W. F. Norman & Sons v. Clark* (Civ. App.) 221 S. W. 235.

While the admission of declarations as *res gestæ* rests largely in the discretion of the trial court, the facts must be sufficient to justify the reasonable conclusion that the declarations were made under such circumstances that reason and reflection were not dominant; hence, in an action against a railroad company for destruction of a motorcar and injuries received by the motorist, whose vehicle was struck by a train, evidence of the declarations made by passengers and others after the train had stopped that the whistle was not sounded, coupled with details of a fight between one of the spectators and the engineer, who asserted he sounded the whistle, were inadmissible as part of the *res gestæ*, such declarations having regard to the railroad company's liability. *Panhandle & S. F. Ry. Co. v. Laird* (Civ. App.) 224 S. W. 305.

47. — **Injury to, or loss of property.**—Statement as to manner in which accident happened, made by deceased about two minutes after the accident, to one coming in response to his shout, held admissible as part of the *res gestæ*. *Southwestern Portland Cement Co. v. Graves* (Civ. App.) 208 S. W. 979.

In an action against a carrier for damages to shipment of live stock, a witness' testimony that he asked conductor to see if he could get the engineer to handle the cars with more care and was told that anything the train crew said to the engineer seemed to make matters worse instead of better was admissible as part of the *res gestæ*. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

50. **Acts and statements after transaction or event.**—Narrative declaration is not *res gestæ*. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

Testimony of witness who went to scene of wreck immediately after it happened, that it was about 20 minutes before members of train crew who went away returned, and that deceased was not removed from wreckage until they got back, was part of *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778.

Not only are declarations or exclamations uttered by parties to a transaction contemporaneous with and accompanying it admissible as *res gestæ*, but also such as are made under such circumstances as will raise a reasonable presumption that they were the spontaneous utterances of thoughts created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption of premeditation or design. *Wall & Stabe Co. v. Berger* (Civ. App.) 212 S. W. 975.

In an action for damages arising from a collision of automobiles, a declaration relative to the accident made 15 minutes thereafter by employé who was driving defendant's automobile was not admissible as part of the *res gestæ*. *Id.*

Testimony that the insurance agent, who contracted by parol to furnish plaintiff insurance, without designating any of the companies designated by him, on the day after the fire, told plaintiff that if he had written a policy on the day of the agreement, he would have written it in defendant company, held hearsay, not a part of the *res gestæ*, and having reference to a past transaction. *Grimes v. Virginia Fire & Marine Ins. Co.* (Civ. App.) 218 S. W. 810.

In action for injury to automobile in automobile collision, testimony as to statements made by driver of defendant's automobile made shortly after the collision was not *res gestæ* nor admissible as original evidence. *Main Street Garage v. Eganhouse Optical Co.* (Civ. App.) 223 S. W. 316.

In an action for divorce on the grounds of the wife's adultery, declarations by the alleged correspondent, denying guilt, made to a witness immediately after the husband had found his wife and the correspondent together in a room, are admissible as parts of the *res gestæ*. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

52. **Acts and statements of person sick or injured.**—Statements as to cause of injury.—Where plaintiff's decedent was killed by a falling elevator, statements by him to another person about an hour after the injury as to how it happened was objectionable as not being part of the *res gestæ*. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

In a suit under the Workmen's Compensation Act, where witness came upon deceased, who had blood on his face, was spitting blood, and in great pain, and a large can of paint was at his feet, a statement of the deceased that he had "busted something lift-

ing that can of paint" was admissible as part of the *res gestæ*. *Southwestern Surety Ins. Co. v. Owens* (Civ. App.) 198 S. W. 662.

Statements of plaintiff as to cause of injuries, when he first regained consciousness after falling from a train, though 11 hours after the accident, were admissible as *res gestæ*. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 198 S. W. 795.

Declarations made by one who has suffered injuries, as to how the accident happened, are admissible as *res gestæ* when made under stress of nervous excitement which stills the reflective faculties, and the time between the accident and declaration is so brief that it must be assumed a consideration of self-interest could not have been brought fully to bear by seasoned reflection, and the question, whether the circumstances show such spontaneity as to render a declaration of an injured person as to how the accident happened admissible as part of the *res gestæ*, rests largely in the discretion of the trial court; but the facts and evidence should be sufficient to justify the reasonable conclusion that the declaration was made under such conditions as that it might be said the reflective faculties were not dominant. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 207 S. W. 329.

A declaration made by deceased to his father about 1½ hours after the occurrence of the fatal accident, as to how it occurred, in which decedent explained that one of the standards holding his load of lumber broke in crossing railroad tracks and caused his team to run away, held not admissible as part of the *res gestæ*. *Id.*

In suits on an accident policy, testimony as to statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, held inadmissible as hearsay, while the statements were self-serving and no part of the *res gestæ*. *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S. W. 630.

Where railroad employé was injured by trunk thrown from train and got back to depot in about three minutes after injury, statement then made by him to a third person as to how the injury occurred was admissible as *res gestæ* in an action for damages. *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364.

53. — **Statements as to and expressions of personal injury or suffering.**—In section hand's suit for injuries, his exclamations of pain and suffering, which were explanatory of his condition, and made to show pain and suffering at very time, held admissible. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

In personal injury action, expressions of person injured concerning bodily pain or illness, when shown to have followed injury, are competent. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

Where mental feelings are the subject of injury, the usual natural sign and expression of such feeling made at the time are competent evidence of such feelings. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

Where a railroad employé proved his injury, and defendant proved by a number of witnesses that at the time plaintiff did not stop work, that he made no complaint, etc., testimony of a witness offered by plaintiff in rebuttal to show his complaints at the time was admissible. *Hines v. Blackman* (Civ. App.) 226 S. W. 142.

54. — **Statements to physicians.**—In personal injury action, it was error to reject testimony of plaintiff's attending physician that, during time of treatment, plaintiff repeatedly complained of severe pain in his neck, shoulder, back, and side. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 200 S. W. 1120.

RULE 35. HEARSAY IS GENERALLY INADMISSIBLE, BUT IT IS COMPETENT EVIDENCE TO PROVE PEDIGREE, RELATIONSHIP, MARRIAGE, DEATH, AGE AND BOUNDARIES

I. Admissibility of Hearsay Evidence in General

1. **Nature of hearsay evidence and admissibility in general.**—Testimony of a witness, "I was not present when the note was transferred from D.'s attorney to Mrs. W. through G.," held not objectionable as hearsay, as it could not reasonably be thought that the trial court gave such testimony any other probative force than that "witness was not present" at the alleged occurrence. *Dalby v. Wall* (Civ. App.) 218 S. W. 46.

Where plaintiff, who was concealed on defendant's premises at night and was shot by defendant, was permitted to state his reason for being there, evidence as to what he had heard from third persons concerning the conduct of members of defendant's family when retiring was properly excluded as hearsay. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

Testimony of one who did not see the accident, as to how a shaft caused the death of one engaged in reaming out a cylinder, is hearsay. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

Testimony of witness that an applicant for compensation under the Workmen's Compensation Act (arts. 5246—1 to 5246—91) had a wife and several children, and that they lived together, and, although witness had never visited applicant, he knew about his financial condition, etc., held not subject to the objection that it was hearsay. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

2. **Hearsay evidence of opinions in general.**—Even if a roadmaster's opinion as to what caused a derailment of a car were admissible, to allow another to testify to what that opinion was would be hearsay. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

3. **Oral statements by persons other than parties or witnesses.**—In trespass to try title by purchaser from decedent against purchaser from decedent's heirs, declarations

of decedent's widow as to what plaintiff said to her, when repeated by decedent's daughter as a witness to prove admissions by plaintiff, were properly excluded as hearsay. *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571.

In an action by a minor son against a telegraph company for damages due to failure to deliver a telegram telling of the death of his father, testimony as to statement of a third person that the plaintiff and his mother would have attended the funeral if the message had been promptly delivered, was hearsay and should not have been admitted. *Western Union Telegraph Co. v. Fulton* (Civ. App.) 211 S. W. 285.

In an employe's action for unpaid wages, evidence regarding a conversation between other parties, when plaintiff was not present nor shown to have been connected with it, held inadmissible. *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225.

Declarations made by the original surveyor of land at the time of the survey might be admissible in a boundary suit as *res gestæ*, even if the surveyor were living, but such declarations subsequently made are hearsay, and to be admissible must be brought within some recognized exception to the hearsay rule. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

In automobile collision case, testimony constituting mere conclusions on the part of the witness as to what was said at the time of the accident held inadmissible, being hearsay. *W. F. Norman & Sons v. Clark* (Civ. App.) 221 S. W. 235.

4. — Bodily and mental conditions.—Where physician examined injured person after suit was brought to qualify as expert, the injured person's statements to him held inadmissible as hearsay. *Texas & N. O. R. Co. v. Stephens* (Civ. App.) 198 S. W. 396.

In suit against operator of jitney and surety on his bond for injuries sustained by plaintiff while a passenger, when jitney collided with a street car, held that court did not err in refusing to strike out testimony of plaintiff's daughter that her father was complaining, on the ground that it was hearsay and self-serving, and not admissible for any purpose. *Parker v. Harrell* (Civ. App.) 212 S. W. 542.

5. — Writings, contracts, agreements and transactions.—Witness could not testify that plaintiff told him that plaintiff's grantor gave him deed to keep. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

Where plaintiff bought cattle in Mexico, and they were claimed by defendant as administrator, witness should not have been allowed to testify that he accompanied plaintiff's vendor when he paid money to persons on whose behalf defendant claimed cattle, and that plaintiff's vendor then stated that he was buying certain interests of the estate; such testimony being hearsay. *Jurado v. Holmes* (Civ. App.) 200 S. W. 859.

In trespass to try title, depending upon whether a deed was forged, where it appeared that the deed was destroyed, and the parties, witnesses, and notary had died, declaration by a witness that an attesting witness said he had seen the grantor sign the deed, in corroboration of other testimony, was not inadmissible as hearsay. *Rodgers v. Bell* (Civ. App.) 207 S. W. 630.

In trespass to try title by the buyer of land against a tenant of the seller, since the tenant's claim of right of possession was predicated in part on his prior rental contract with the seller, of which the buyer had notice before he purchased, testimony to prove the fact was admissible over the buyer's objection that he was not present when the contract was made, so that the testimony was hearsay as to him. *Rupert v. Swindle* (Civ. App.) 212 S. W. 671.

In a bank's suit on a note given to cover overdrafts, defendant claiming that the cashier of the bank had fraudulently filled in the amount of the note, which had been left blank, testimony of a witness, not from personal knowledge, but as to what the books of the bank purported to show, as to forgeries and false entries in respect to the accounts of third persons made by the cashier, held inadmissible as hearsay. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

Testimony that the insurance agent who contracted by parol to furnish plaintiff insurance without designating any of the companies designated by him, on the day after the fire, told plaintiff that, if he had written a policy on the day of the agreement he would have written it in defendant company, held hearsay. *Grimes v. Virginia Fire & Marine Ins. Co.* (Civ. App.) 218 S. W. 310.

In an action for defendant's breach of contract to sell plaintiff cattle, plaintiff's testimony that he told defendant's son over the phone he would give a certain price, and requested that defendant be told, that there was a break in the conversation, and that the son said he had reported the offer to his father, defendant, who had accepted, was inadmissible as hearsay. *Klein v. Brightwell* (Civ. App.) 219 S. W. 298.

6. — Ownership and possession.—In a garnishment proceeding where the judgment debtor had deposited money in the name of his wife, the bank will not be permitted to prove that it did not owe the judgment debtor by introducing in evidence hearsay statements of the judgment debtor and his wife concerning the ownership of the money. *Hulshizer v. First State Bank of Robstown* (Civ. App.) 207 S. W. 584.

In an action against a sheriff and others for conversion, it was proper to permit defendants to testify that prior to levy upon the cotton in question they were informed by plaintiff's brothers that the cotton belonged to plaintiff's father and were informed by the owner of the land on which cotton was raised that the land was rented to plaintiff's father. *Douglass v. Wallace* (Civ. App.) 211 S. W. 530.

7. — Value and price.—In damage action against building contractors, plaintiff owner's testimony that other contractors had advised him it would cost certain amounts to remedy alleged defects is inadmissible because hearsay. *Echols Bros. v. Stevens* (Civ. App.) 196 S. W. 365.

In an action to recover a balance on the purchase price of cotton, sold under a contract to pay such price if cotton advanced to that point, evidence that plaintiff had been

offered, on the day he sold the cotton to defendant, more than defendant offered him, was not hearsay. *Smith v. McBroom* (Civ. App.) 203 S. W. 1130.

9. — **Cause.**—In suit on an accident policy, testimony as to statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, held inadmissible as hearsay. *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S. W. 630.

11. — **Condition or sufficiency of things.**—In action for goods sold and delivered under defense of payment, where the reply alleged that the money was counterfeit, evidence that the collector of customs declared the money counterfeit, confiscated it and refused to return it, was inadmissible to show that the money was counterfeit. *Ravel v. Haymon Krupp & Co.* (Civ. App.) 206 S. W. 211.

13. — **Representative character and relationship.**—On hearing on motion to enter judgment nunc pro tunc denying a divorce to plaintiff, where plaintiff was served only through her attorney of record, the declaration by the attorney, made some time before the motion, that he no longer represented plaintiff was properly excluded as hearsay. *Hamilton v. Hamilton* (Civ. App.) 225 S. W. 69.

In an action to recover from defendant a debt contracted by another, testimony by plaintiff that he understood defendant and another were partners, and that such other had told him they were partners, is incompetent as hearsay. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

15. — **Residence.**—In view of law fixing place where voter is entitled to vote as being where wife resides, statements by wife of voter at election for commissioners of drainage district, tending to show where she resided, were admissible, in suit contesting election, on question of voter's residence. *Cantwell v. Suttles* (Civ. App.) 196 S. W. 656.

16. — **Statements of persons available as witnesses.**—In personal injury suit evidence of declarations by physician, who testified as a witness to plaintiff's son, as to cause of injury, was hearsay and inadmissible in the absence of testimony by physician inconsistent with such declarations. *Corpus Christi Ry. & Light Co. v. Baxter* (Civ. App.) 217 S. W. 187.

17. — **Statements by persons since deceased.**—Injured servant's report of injury to foreman having been verbal, in parents' action for death against the Employers' Insurance Association under Employers' Liability Act of 1913 (arts. 5246h-5246zzzz), it was proper to hear testimony of foreman and another to establish report was made, and contents. *Texas Employers' Ins. Ass'n v. Mummey* (Civ. App.) 200 S. W. 251.

18. **Writings.**—Since the shipper is not a party to the waybill made out for the convenience of connecting carrier he is not bound by it, and it is not admissible in evidence against him to show the destination of the goods. *Quannah, A. & P. Ry. Co. v. Warren* (Civ. App.) 198 S. W. 814, 816.

In trespass to try title, where defendants claimed under an alleged forged deed executed by an attorney in fact, recitals of execution of such deed in notes purporting to be for the purchase money, given 30 years before the trial, were incompetent as hearsay. *Lancaster v. Snider* (Civ. App.) 207 S. W. 560.

In action for breach of warranty in deed, testimony of one who had been county surveyor and deputy county surveyor, who knew the location of the land, that land described in judgment against plaintiff and its grantor, failure of title to which was alleged, included the land described in the deed, held, that the fact that witness himself did not make original map which he sketched to testify from did not render his testimony and sketch inadmissible. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

A city directory was inadmissible to prove that a certain person was the agent of another; the contents thereof being but the declaration of an unknown person. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Despite provision of deeds of trust that any recitals of certain character in any deeds made by any trustee should be prima facie evidence, recitals of deeds executed by substitute trustee that beneficiary or holder of notes secured had requested trustee to sell the land, which request was necessary to authorize the trustee to sell, held unauthorized by the deeds, and no evidence of the fact of request, being mere hearsay as to the beneficiaries. *Bowman v. Oakley* (Civ. App.) 212 S. W. 549.

Where plaintiff, who purchased Minnesota flour contracted to resell the same, evidence that the waybill and expense bill covering the shipment contained the notation that 52 bags were caked at Duluth was inadmissible on behalf of defendant, who, the seller claimed, wrongfully refused to accept delivery, being simply hearsay declarations of third parties, not under oath. *El Paso Grain & Milling Co. v. Lawrence* (Civ. App.) 214 S. W. 512.

In an action against a carrier for damages resulting from delay in shipment of live stock, the account sales was inadmissible as hearsay; the entries and declarations therein being those of living third parties, and not of witness, and there being no testimony to their being made in professional, official, or other duty. *Schaff v. Holmes* (Civ. App.) 215 S. W. 864.

A copy of account sales was not objectionable as hearsay, where witness testified from his own knowledge that the copy was correct. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Civ. App.) 215 S. W. 866.

Copies of written confessions by petitioner's son and another that they killed petitioner's husband at her instigation are inadmissible, in proceedings for the appointment of petitioner as guardian of the estates of her minor children, to show that she is not

qualified to act as guardian, since they are purely hearsay. *In re McLaren's Estate* (Civ. App.) 221 S. W. 1045.

In an action involving the validity of oral leases, court erred in admitting in evidence deposit slips and checks relating to payments under a lease, without proof of the execution of the deposit slips, and without proof by any one who personally knew that the deposit had in fact been made, the slips and checks being purely hearsay as to the opposite party, who had nothing to do with them, the parties claiming the land under different leases. *Browning v. Hinerman* (Civ. App.) 224 S. W. 236.

19. — **Letters and telegrams.**—In suit on promissory note and to foreclose vendor's lien, court properly excluded as hearsay letter from plaintiff's grantor, not a party, to defendant, plaintiff's grantee, offered in evidence by defendant to show he had written notice from plaintiff's grantor that grantor was claiming interest in land. *Baldwin v. Drew* (Civ. App.) 195 S. W. 636.

In trespass to try title, letters written by Mexican officials to other officials relative to original grant of land in question were not inadmissible as hearsay where writers were dead and there was circumstantial guaranty of genuineness. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

In action for slander, telegram from plaintiff's agent to plaintiff, stating that third party had notified agent that defendant had made alleged defamatory remarks, was inadmissible, being hearsay. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

A statement in a surveyor's letter or report as to statements made by another, claiming to have assisted in the first survey as to boundary lines, is inadmissible in trespass to try title, being the unsworn conclusions concerning another person's statement, and not affording opportunity for cross-examination to ascertain what such statements were. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

Where plaintiff sold property to D., reserving title, and D. sold to defendant, a letter from D.'s wife to plaintiff, stating that defendant had agreed to pay plaintiff the balance due it, was hearsay, and inadmissible in plaintiff's suit for possession. *Ten-Pennett Co. v. James* (Civ. App.) 227 S. W. 528.

20. — **Records.**—As evidence of claim of ownership, recitals in ancient archives are admissible over the objection that they are hearsay or self-serving. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1113.

22. — **Books and other publications.**—In seller's action for balance of price, involving dispute as to quantity sold, books of seller, into which bookkeeper had entered weights of quantity sold from expense bills furnished buyer by railroad, and sent to seller by buyer, without any evidence as to their correctness, held hearsay and inadmissible, where there was no testimony that weights were correct, and where it appeared that some of the weights were only estimates of railway employé. *Freund v. Hanson's Sons* (Civ. App.) 215 S. W. 151.

23. — **Certificates and affidavits.**—In trespass to try title, affidavit of deceased county surveyor being sworn report to commissioner of land office as to what he did and found in making survey, was not inadmissible as hearsay. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

In landlord's action for rent and to foreclose lien, ex parte affidavit of tenant that he bought furniture and fixtures, and took possession, and operated rented restaurant until certain date on his own account, was inadmissible as hearsay. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

In trespass to try title, where defendants claimed under an alleged forged deed executed by an attorney in fact, the record of affidavits as to genuineness of the signature of the attorney in fact was inadmissible as hearsay. *Lancaster v. Snider* (Civ. App.) 207 S. W. 560.

On an application for appointment as guardian of petitioner's minor children, a complaint before a justice of the peace charging petitioner on information and belief of affiant with the murder of her husband and a judgment of the justice binding her over to the district court to answer the charge of murder are inadmissible against the petitioner. *In re McLaren's Estate* (Civ. App.) 221 S. W. 1045.

25. — **Recitals in instruments.**—Recitals in ancient instruments, petition to court and deed of a person holding land in trust, held in action involving title, not objectionable as self-serving, hearsay, and immaterial. *Sandmeyer v. Dolijsi* (Civ. App.) 203 S. W. 113.

26. **Evidence founded on hearsay.**—In action to rescind personal property sale because seller misrepresented amount of indebtedness which buyer assumed as part of purchase price, the buyer's testimony regarding amount of such indebtedness, based on conversations with seller's creditors, held inadmissible because hearsay. *Richardson v. Cantrell* (Civ. App.) 201 S. W. 702.

In action for delay in delivery of cattle shipment, testimony predicated upon correctness of records of sales of the cattle kept by person making sales and records of weight by person doing weighing was not objectionable as hearsay. *Ft. Worth & R. G. Ry. Co. v. Jones* (Civ. App.) 212 S. W. 552.

In action for failure to promptly deliver a telegram informing plaintiff that sender would sell his interest in a partnership, failure to deliver resulting in sale not being consummated, testimony as to reasonable value of business by witnesses who stated that they knew the fair and reasonable market value of the business was not subject to objection that it was incompetent, irrelevant, immaterial, hearsay, and mere opinion. *Western Union Telegraph Co. v. Dorough* (Civ. App.) 213 S. W. 282.

27. — **Reputation as to persons.**—Plaintiff could not prove legal adoption by general reputation of adoption. *Lane v. Sanders* (Civ. App.) 201 S. W. 1018.

28. — **Market value shown by sales or market quotations.**—In action for delayed delivery of live stock, witnesses who accompanied shipment could, over objection that their knowledge was based on hearsay, testify that the market was lower on the afternoon of day on which destination was reached than during morning of same day prior to their arrival, where they were experienced cattlemen, had shipped a great many cattle, and had received market reports regularly. *Chicago, R. I. & G. Ry. Co. v. Manby* (Civ. App.) 207 S. W. 157.

29. — **Repute as to facts in general.**—In action to cancel deed to brother for fraud, admission of statement of the mother of plaintiff and defendant that the family thought that defendant had robbed plaintiff held error. *Baugh v. Baugh* (Civ. App.) 224 S. W. 796.

In slander action, testimony of witnesses that they heard rumors of plaintiff stealing chickens from defendants was hearsay, where defendants were not connected with the rumors. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

30. — **Ownership.**—Evidence that after the purported execution of a deed the land was assessed against the grantee is hearsay. *Kellogg v. Chapman* (Civ. App.) 201 S. W. 1096.

In an action involving a controversy over land, testimony that there was a general belief in the family of the witness that the property had been deeded to her father for legal services held inadmissible. *Id.*

II. *Pedigree, Relationship, Marriage, Death, Age and Boundaries*

35. **Declarations by members of family.**—In a suit on a life insurance policy, hearsay testimony of plaintiff as to a brother of the assured having died was too uncertain to justify forfeiture of the policy on the ground of misrepresentations as to family history. *Sovereign Camp, W. O. W., v. Hubbard* (Civ. App.) 231 S. W. 828.

37. — **Necessity that declarant be dead.**—Statements by living third person concerning himself and family connections are hearsay. *Smelser v. Henry* (Civ. App.) 199 S. W. 1151.

38. — **Relationship to family.**—A second cousin to the husband of a granddaughter of a person whose heirship is to be proved is not a member of the family whose declarations as to heirship or pedigree are admissible; declarations of general reputation among persons other than members of the family as to heirship or pedigree connected with that family being inadmissible. *Mackechney v. Temple Lumber Co.* (Civ. App.) 197 S. W. 744.

41. — **Mode and form of declaration.**—A petition in a prior action between other parties which did not involve the same questions or land in controversy is inadmissible to prove plaintiff's heirship. *House v. Stephens* (Civ. App.) 198 S. W. 384.

Rule admitting declarations of deceased persons to prove family history will not be extended to include declarations made in declarant's interest. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

49. **Declarations as to boundaries—General reputation.**—The recitals of a deed could be admissible, in an action of trespass to try title, only on the theory that a grantor is presumed to know the boundaries of his own land, but it cannot be presumed that he knew whether the land owned by another extended to his east line, where grantor's survey was located 25 years before grantees, and grantor's recital that the lines of two grants were coincident would not establish a general reputation to that effect. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

In trespass to try title, evidence of general reputation that two grants were called the B. grants was admissible, the circumstances tending to show that the original surveyor calling for the B. pasture lands probably intended to call for the grants instead of a larger body of land similarly designated. *Id.*

RULE 36. ON QUESTIONS OF SCIENCE OR SKILL OR TRADE, PERSONS OF SKILL OR POSSESSING PECULIAR KNOWLEDGE IN THOSE DEPARTMENTS ARE ALLOWED TO GIVE THEIR OPINIONS IN EVIDENCE

I. *Mere Conclusions Generally not Admissible*

1. **In general.**—The conclusions of a witness should be excluded. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 201 S. W. 233; *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

A question, what would have been the cash market value of cattle if carried "with reasonable dispatch and without rough handling," answered, "6.15 per hundred," was not erroneous as an opinion on a mixed question of law and fact, where the question of reasonable time was not in issue. *Texas & P. Ry. Co. v. Max Hahn Packing Co.* (Civ. App.) 197 S. W. 1146.

Conclusion, inference, of judgment of witness is admissible when it relates to a fact which is collateral or relatively unimportant, and rejected when fact is either in issue or so material as to involve substantial rights. *Federal Ins. Co. v. Munden* (Civ. App.) 203 S. W. 917.

In suit by insurer of automobile against theft to recover car as car for loss of which it had paid insured, statement by insured as witness for insurer that his car "was stolen," particularly in view of statutory definition of theft in Pen. Code, art. 1329, was inadmissible as conclusion. *Id.*

Testimony of treasurer of insurer that loss was paid because of "theft" was properly rejected as conclusion, not being admissible on any theory that it was admissible as circumstance tending to show theft. *Id.*

In a personal injury action due to an explosion of gasoline sold as coal oil, exclusion of evidence whether the retailer, who was a codefendant, had induced plaintiff to bring suit against defendant, held a conclusion. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

Testimony by plaintiff in a personal injury action that she did not have a cent, and that if she had known the extent of her injuries she would not have signed a release, was not inadmissible as involving a conclusion. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

As a general rule opinions and conclusions of nonexpert witnesses are not admissible; but they should state the facts, and the conclusions to be drawn therefrom should be left to the jury, but there is an exception to the rule against nonexperts giving their opinions or conclusions where the situation cannot be made palpable to the jury by a mere statement of the facts. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

In an action by an employee claiming to have been wrongfully discharged, refusal to permit a witness to state as a conclusion that plaintiff's services were unsatisfactory to him held not erroneous. *Golden Rod Mills v. Green* (Civ. App.) 230 S. W. 1089.

In an action for salary by the secretary of an association, testimony of plaintiff that during the time the salary sued for was accruing he performed all the duties of secretary he was called upon to perform was not inadmissible as a conclusion. *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

2. Conversations in general.—In action for death of employé involving question of whether employé comprehended danger of work, foreman's testimony that employé's "wages were never raised, because Mr. B. thought he did not have enough experience to justify it," was the statement of a fact, and not objectionable as a conclusion. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

8. Personal identity or characteristics.—Testimony of one who was tarred and feathered by a group of citizens that a certain citizen "was the man that was presiding during the trial" was not objectionable as being a conclusion. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

Testimony of witness that she was heir of a certain person to whom land in controversy was granted was clearly a conclusion on her part, where she never saw such person, never had in her possession any of his papers, and was never on the land. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 569.

9. Bodily appearance or condition.—In section hand's suit for injuries, his statements to effect that injury caused suffering and pain, etc., held inadmissible. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

Testimony of insured's wife that he was in perfect health when she left home on the occasion of an illness, held inadmissible as her conclusion. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616.

Where it was undisputed plaintiff was injured in a certain wreck, and that muscles were torn loose from spinal column, admission of testimony by a witness that on plaintiff's arrival after wreck he was suffering from an injury to his back, which he claimed to have received that evening in a railroad accident, and that he was suffering to such an extent that he did not walk about, etc., was not reversible error. *Texas-Mexican Ry. Co. v. Creekmore* (Civ. App.) 204 S. W. 682.

An objection that testimony that plaintiff, as result of his injuries, could not rise from a sitting posture and walk as well as he could before was a conclusion of the witnesses is without merit. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

9½. Mental condition or capacity.—In a servant's action for injuries, plaintiff may testify that he got awfully blue at times because he could not do the work which he had formerly done. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614.

In contest of probate of a will of deceased wife of proponent involving issue of undue influence exerted by proponent, testimony of daughter that her father dominated her mother was a conclusion, and inadmissible. *Jennings v. Jennings* (Civ. App.) 212 S. W. 772.

A witness may testify that people he talked to were mad, but when he undertakes to tell what made them mad he enters the realm of opinion evidence. *Walker v. Kellar* (Civ. App.) 218 S. W. 792.

11. Due care and proper conduct.—A fellow servant could not testify that the motorman who injured plaintiff was careless, since that represented his own conclusion. *Strawn Coal Co. v. Trojan* (Civ. App.) 195 S. W. 256.

In section hand's suit for injuries received when hand car upon which he was riding collided with a cow, evidence that conduct of foreman was reckless, etc., held inadmissible. *St. Louis Southwestern Ry. Co. of Texas v. Roberts* (Civ. App.) 196 S. W. 1004.

In an action for injuries to an employee engaged in unloading timber from a car, testimony by the injured employee that, while he was loosening the last stake holding the timbers on the car, he saw the stake go upward in the hands of his fellow employee, who had been cautioned not to remove the stake while the other was working under it, held not to state a mere conclusion, but to be sufficient to sustain a finding by the jury that the fellow employee was negligent. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 232 S. W. 290.

13. **Nature, condition and relation of objects.**—Evidence that hogs would have taken first premium at exhibition states a conclusion. *Kansas City, M. & O. Ry. Co. v. Bell* (Civ. App.) 197 S. W. 322.

It was proper to testify where lines under surveys were actually run upon the ground and where improvements were located with reference to such lines. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

In suit between two districts to fix their boundary line, evidence as to the correct location of such line held improperly excluded. *Trustees of Dover Common School Dist. No. 66 v. Dawson Independent School Dist.* (Civ. App.) 223 S. W. 556.

Testimony of witness that an applicant for compensation under the Workmen's Compensation Act (Acts 35th Leg. [1917] c. 103, arts. 5246—1 to 5246—911) had a wife and several children, and that they lived together, and, although witness had never visited applicant, he knew about his financial condition, etc., held not subject to the objection that it was hearsay and a conclusion of the witness. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

The statement of a witness that a fence was "very sorry," and "what I mean by real sorry, it was old and rotten," was not the expression of opinion, but the statement of a fact, like a statement that a thing was wet, or a fire was hot, or a horse was lame. *Corn v. McNutt* (Civ. App.) 230 S. W. 1052.

14. **Value.**—In action for failure to promptly deliver a telegram informing plaintiff that sender would sell his interest in a partnership, failure to deliver resulting in sale not being consummated, testimony as to reasonable value of business by witnesses, who stated that they knew the fair and reasonable market value of the business was not subject to objection that it was incompetent, irrelevant, immaterial, hearsay, and mere opinion. *Western Union Telegraph Co. v. Dorrough* (Civ. App.) 213 S. W. 282.

In an action involving book accounts as evidence of the value of a business transferred, plaintiff's testimony that the business was worth "around \$14,000" held not subject to exclusion on objection that it was the conclusion of the witness. *Cochran v. Hamblen* (Civ. App.) 215 S. W. 374.

17. **Cause and effect.**—Testimony of witnesses, not shown to be experts, that in their opinion maize, claimed to have been injured in cars, was ruined by being rained on while in the field on the ground, is nothing more than a guess, and inadmissible. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Question as to what might have happened if something had been done, which witness testified had not been done, called for a conjectural conclusion. *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

In live stock shipper's action against railroad to recover charge for extra feed necessitated by delay in transportation, statement by witness that necessity for extra feed was caused by the stock standing in the cars at point of delay held a mere conclusion. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Civ. App.) 216 S. W. 682.

In sister's action for failure to deliver message requesting brother to postpone burial of father, brother's testimony that he would have postponed burial until sister had arrived, held admissible against contention that it was a mere expression of opinion. *Western Union Telegraph Co. v. Kilgore* (Civ. App.) 220 S. W. 593.

Even if statement of nonexpert that he knew of nothing else that could have caused the derailment except the tools falling in front of the car may be considered a statement of fact and admissible, his further statement, that this was the only thing that he could figure out that did it, was clearly a conclusion and opinion, and inadmissible. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

18. **Title and ownership.**—Claimant of attached property, who has not seen property, should be limited in testifying to stating the facts and should leave it to the court and jury to determine whether or not such facts show ownership without himself expressing an opinion thereon. *Frost v. Smith* (Civ. App.) 207 S. W. 392.

In suit on vendor's lien note which had been property of an estate, plaintiff's burden of showing, as a condition to his right of action, an order of court under art. 3480, authorizing foreign administrator's sale or assignment thereof to him, was not sustained by his mere statement that he was the owner of the note, which was a bare conclusion or opinion, without basis of fact, and, though not objected to, it had no probative force. *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Testimony that a witness knew his father acquired the interest of another in land, that he was present when the purchase was made, and knew of the transaction, cannot be excluded as a conclusion. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

The fact that recitals in ancient archives were in the form of conclusions does not render them inadmissible as evidence of claim of ownership, especially where an affidavit not stating conclusions would not have complied with the statute. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

A statement that a person is the owner of a duplicate land certificate is incompetent as a conclusion, since one may become an owner in a variety of ways, so that such statement does not necessarily involve any certain facts. *Id.*

20. **Construction and effect of contracts or instruments.**—In action on contract for purchase of assets of a bank by individual testimony of one of individual defendants who signed contract, which consisted merely of conclusions and opinions of that witness with respect to what plaintiff understood by written contract in controversy, held properly excluded. *Langford v. Power* (Civ. App.) 196 S. W. 662.

In action of trespass to try title, construction of office survey of his homestead by

common source of title was properly ignored by court. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

In an action to cancel an oil lease, which gave the lessee the option to sink an oil well before a certain time, the court properly refused to permit plaintiff to testify that the consideration recited of \$10 for the option was not considered by either of the parties as any consideration supporting the contract and was only nominal, and was not paid as an inducement for the execution of the lease contract, and that the sole inducement was a hope entertained by the lessor that he would secure the sinking of a test well near the land and royalties, etc., on objection that such evidence was a conclusion. *Nolan v. Young* (Civ. App.) 220 S. W. 154.

A statement that witness sold a duplicate certificate to a purchaser, received its value, and delivered the certificate, is not inadmissible as a conclusion, since a sale, on a consideration received, of a land certificate consists of only two elements, the agreement to pass title for the stipulated consideration and the delivery of the property. *Mace v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

In an action against a fire insurer of a stock of lumber located on the switch of a railroad, the defense being that insured had not complied with the record warranty clause of the policy, testimony of plaintiff insured as to whether the inventory before him at the time was the kind of inventory defendant insurer's agents instructed him to make held admissible, to show what kind of inventory was contemplated or necessary, as against the objection that it called for the conclusion of the witness. *Camden Fire Ins. Ass'n v. Yarborough* (Civ. App.) 229 S. W. 336.

Testimony of a witness that "the instrument clearly expresses the intention, which was to settle all controversies of every character which they had against that estate," was objectionable as being a mere conclusion of the witness. *Nesbit v. Richardson* (Civ. App.) 229 S. W. 595.

21. Agency in general.—Testimony that a witness was collecting money and tickets for a named railroad company stated facts and not the conclusions of the witness. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In action to recover mules, etc., which defendant claimed were sold him by one R. as plaintiff's agent, defendant's statement that plaintiff "gave Mr. R. authority to sell these mules, etc., to me," was not admissible; it appearing from defendant's testimony to have been merely his conclusion. *Vaughn v. Charplot* (Civ. App.) 213 S. W. 950.

In an action under a lease for rent, where defense was that defendant had surrendered building and plaintiff had accepted the same from one N., it was not error to admit the testimony of N. to the effect that he was agent for the defendant and not the plaintiff. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

25. Indebtedness.—It was not reversible error to permit a witness to give his conclusions as to a tax collector's proportionate share of taxes collected; such amount being a mere matter of computation. *Powell v. Archer County* (Civ. App.) 198 S. W. 1037.

26. Damages.—In an action against fire insurance companies for conspiring to prevent plaintiff from obtaining insurance, plaintiff's statement that he had been damaged held inadmissible as being a conclusion. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

It was error to overrule an objection, where plaintiff was asked by his counsel to state "how much he had been damaged by reason of the fact that he had been deprived of the place in controversy in this suit for the use to which he was putting it"; such question calling for a conclusion of the witness.—*Williams v. Gardner* (Civ. App.) 215 S. W. 981.

A witness, testifying that rough handling of live stock by a carrier "depreciated the entire shipment I should say, from \$1.50 to \$3 per head. I say this because I remained with the cattle after they reached their destination and saw them get fat and resold, and know from the way they recuperated there they were damaged to the extent I have stated. I make this statement knowing that cattle shipped the distance from Marathon to Blackland would depreciate to some extent in condition with ordinary and usual handling, but the amounts of depreciation I have stated are in excess of what the depreciation would be if they had been handled in the ordinary and usual manner, without delays or rough treatment!"—stated facts and an opinion tending to establish a true measure of damages, and did not involve a question of law. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

Special damages can be recovered only on proof that special circumstances existed that defendant had knowledge of the special circumstances, and that the contract was made with reference thereto; hence, in an action for a balance due on a shipment of hay and on an oat contract, the buyer's cross-bill, setting up by way of special damages the seller's failure to deliver during the month of July on the ground that the subsequent delivery caused greater expense in hauling, is open to exception, there being nothing to show that the contract was made with reference to the special circumstances, and testimony that the buyer was damaged a certain sum per bushel from such cause, without more, is objectionable. *Myrick v. Tolivar* (Civ. App.) 227 S. W. 555.

II. Subject of Opinions of Nonexperts

29. Subjects in general.—In action for amount due plaintiff by defendant, who, with funds furnished by plaintiff, had performed road construction contract sublet to plaintiff by original contractor, evidence of a settlement of accounts entered into between defendant and plaintiff's agent held admissible over objection it was a matter of calculation. *McFarland v. Ray McDonald Co.* (Civ. App.) 213 S. W. 946.

Testimony regarding the usual and customary time for a cattle shipment to be in transit between specified points held admissible against the objection that it was an opinion on a mixed question of law and fact. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

30. **Matters directly in issue.**—Answer of witness, "Jones was the person who caused me and Mr. Huddleston to buy the steers," being a conclusion as to the very fact in issue to be determined by the jury, objection should have been sustained. *Lumsden v. Jones* (Civ. App.) 205 S. W. 375.

Opinion testimony of qualified witnesses on questions of fact is admissible, but opinions partaking of the nature both of fact and law are not admissible. *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

An opinion of an attorney that an abstract of title showed a good title was not competent evidence; the question of whether an abstract shows a good title being one of law, to be determined by the court. *Wakeland v. Robertson* (Civ. App.) 219 S. W. 342.

In an action by the American foreman of a Mexican ranch to recover salary, advancements, etc., testimony as to the meaning of a letter from a stockholder in the Mexican corporation owning the ranch to plaintiff foreman held inadmissible to show knowledge and approval by the company of the foreman's borrowing money from an individual to buy cattle, as the various letters and telegrams should have been introduced in evidence, and the jury left to determine what was meant by a reference in the letter. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

Opinions of witnesses to the effect "that cattle of the class in question going from this section of the country at that time of the year to pasture in Oklahoma should not, in their opinion, lose over a certain per cent., assuming that the cattle were handled in the ordinary and usual way," when given by qualified witnesses, presented purely a question of fact and in no way involved a question of law. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

In action involving issue as to ownership of property, it was incompetent for witness to state his opinion as to ownership thereof. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

31. — **Damages.**—In action against railroad for injuries to passenger in derailment, testimony of plaintiff's father that, since he (plaintiff) went to California, he had not been able to work in his office, profession, business, or occupation, and had been delicate, was inadmissible, as the conclusion of one not an expert, and invaded the province of the jury. *Texas & P. Ry. Co. v. Stivers* (Civ. App.) 211 S. W. 319.

Testimony in action for negligent injury of a shipment of cattle that they were depreciated by reason of such injury and on account of delay in shipment and rough handling and failure to receive needed food and water, at least \$5 per head, is inadmissible, as involving a mixed question of law and fact. *Hines v. Edwards* (Civ. App.) 228 S. W. 1117.

33. — **Due care and proper conduct.**—In an action for loss of barges, testimony of a witness, who had been in charge of another party's barge at the time of the flood which caused the loss, that he considered it reasonable care and ordinary prudence on his part to have five men on his barge to protect it from the flood, held inadmissible as opinion involving a mixed question of law and fact. *Freeport Town-Site Co. v. S. H. Hudgins & Sons* (Civ. App.) 212 S. W. 287.

In action for injury to automobile struck by street car at crossing, it was not error to refuse to permit a witness to testify that he thought at the time plaintiff and the motorman discovered each other "they were too close together for either one to stop," nor to exclude the testimony (by deposition) of the motorman that the instant he saw the automobile he did everything he could have done to stop the car, there being testimony showing what the motorman could have done, and he having testified as to what he did do, as it was for the jury and not the witness to say whether he did all he could have done to stop or check the speed of the car. *Southwestern Gas & Electric Co. v. Grant* (Civ. App.) 223 S. W. 544.

34. — **Mental condition or capacity.**—While a nonexpert witness may, in connection with facts and circumstances, upon which her opinion is based, give an opinion as to mental condition, she cannot testify to a legal conclusion from facts given, either by herself or by others, which embodies the very point in issue. *Daley v. Whitacre* (Civ. App.) 207 S. W. 350.

35. — **Nature, condition and relation of objects.**—In suit to recover for taking of cattle claimed by one defendant as having been stolen from him, and having passed to plaintiff, defendant's positive statement that cattle in controversy belonged to him, being a conclusion on a mixed question of law and fact, was incompetent to prove title, and furnished no proper basis for judgment in defendants' favor. *Stovall v. Martin* (Civ. App.) 210 S. W. 321.

In an action for personal injuries sustained when plaintiff's team was frightened by defendant's railroad train, while traveling on a public road, an answer that witness did not remember how long the road had been used by the public, "but a long time," was not inadmissible as a conclusion. *Baker v. Galbreath* (Civ. App.) 211 S. W. 626.

36. — **Value.**—In action against a railroad for damages to horses from rough handling in shipment, testimony by qualified witnesses as to what the reasonable market value of the horses at destination would have been if they had been handled with ordinary care and delivered in good condition held admissible as against the contention that it invaded the province of the jury by stating conclusions on the issue to be determined by the jury. *Texas & P. Ry. Co. v. Prunty* (Sup.) 230 S. W. 396.

In suit against a railroad for damages through negligent delay in a shipment of cattle, testimony of qualified witnesses as to the difference between the market value of the cattle in the condition in which they arrived at destination and that in which they would have arrived but for defendant railroad's negligence was admissible. *Gatewood v. Fort Worth & D. C. Ry. Co.* (Sup.) 232 S. W. 493.

38. Inferences or impressions from collective facts.—Testimony that from what witness heard he had formed impression that another was wanting to select an umpire to arbitrate loss under insurance policy is mere opinion evidence. *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365.

An inference which necessarily involves certain facts, that is, which is the mere shorthand rendering of the facts, is admissible over the objection that it is a conclusion, but an inference which may be sustained upon either of several phases of fact is inadmissible. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

One who was injured in attempted rescue of her child on the railroad track in imminent danger through failure of train operatives to keep a proper lookout could testify that when she started to get the child off she thought she could do so without injury; as it would be hard for her, by a mere statement of the surrounding facts, to portray the situation so that the jury might see it as it appeared to her at the time. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

Opinions of witnesses are rejected where it is apparent that the facts can be fully presented to the jury, and the circumstances are such that it may fairly be assumed that persons of ordinary information and intelligence are competent to draw the correct inferences from such facts. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

39. Special knowledge as to subject-matter.—In action for breach of contract to deliver timber, witness' conclusion that there was no other timber of kind contracted for available held admissible. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Where a witness by his own admissions on the stand shows that he is not informed as to a matter concerning which he gave opinion testimony, such testimony should be stricken. *Southern Pac. Co. v. Stephens* (Civ. App.) 201 S. W. 1076.

41. — Bodily condition.—Testimony of witnesses, who knew plaintiff and saw him just before and just after his injury, being their personal observations of outward manifestations of condition, open to all who came in contact with him after his injury, held competent, as showing his condition at the time, and not open to objection of being speculative and the opinion of a nonexpert. *Galveston, H. & S. A. Ry. Co. v. White* (Civ. App.) 216 S. W. 265.

42. — Mental condition or capacity.—While a nonexpert witness may, in connection with facts and circumstances upon which her opinion is based, give an opinion as to mental condition, she cannot testify to a legal conclusion from facts given either by herself or by others, which embodies the very point in issue. *Daley v. Whitacre* (Civ. App.) 207 S. W. 350.

A lay witness who had observed the testator and had been associated with him in business might, in a will contest, where the testator's capacity was attacked, testify that the testator lost his temper, became violently angry, so that he was not responsible for his actions or speech. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

A nonexpert may state that since her injury her mind is so confused that she is not able to teach school as before. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

45. — Railroad.—In suit for shrinkage of cattle shipped, from delay, testimony was admissible of usual time for such shipments, although given by witness who had accompanied only shipment in suit; it appearing he had accompanied shipments between such points over another route, and that the agent routed the shipment in suit upon application for most direct route. *Baker v. Holman* (Civ. App.) 196 S. W. 723.

46. — Speed.—Evidence of a witness that defendant's train was moving at about 15 miles per hour was admissible, without showing witness' qualification to judge of its speed. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

A person in a box car when the same was being "kicked" by a switch engine was competent to testify as to the speed of the box car. *Schaff v. Moss* (Civ. App.) 219 S. W. 548.

As the rate of speed of moving vehicles can usually be determined only by the opinions of witnesses, testimony by plaintiff, who was struck by an automobile, as to the rate of speed at which it was moving is competent; for a person of ordinary intelligence may testify as to the speed of vehicles observed by him. *Merchants' Transfer Co. v. Wilkinson* (Civ. App.) 219 S. W. 891.

In an action against a railroad company for the death of its servant in a derailment wreck, testimony of a witness living near the track that he frequently saw the train pass and observed its speed, and that it was running faster than usual, was properly admitted. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

47. — Distance.—Testimony by plaintiff that the street cars at the speed they were traveling could have stopped within a distance of 20 feet was admissible, over the objection that witness had not qualified as an expert. *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632.

49. — Cause and effect.—Where defendant railroad claimed child's death was due to improper attention, and not to its poorly heated cars, testimony that child was

not properly nursed was correctly excluded where witness saw it only three or four times, and did not know how its mother treated it. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

In an action against a railroad company for flooding plaintiff's land by backwater caused by the construction of the road, it was not error to permit nonexpert witnesses, who had observed the flood and occupied land in the vicinity, to testify that from their knowledge of conditions plaintiff's farm would have been covered by the floodwaters if the railroad track had not been there. *Johnson v. San Antonio & A. P. Ry. Co.* (Civ. App.) 220 S. W. 388.

52. — **Nature, condition and relation of objects.**—In trespass to try title, where one claimant testified that he had previously seen a certain map, and that a road shown thereon had been pointed out to him, his statement that the map looked all right to him was admissible as upon sufficient qualification. *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

In trespass to try title, there was no error in permitting witnesses to testify as to the appearance of cuts and marks on trees and the age thereof; such being matters of common knowledge. *Id.*

In action for breach of warranty in deed, testimony of one who had been county surveyor and deputy county surveyor, who knew the location of the land, that land described in judgment against plaintiff and its grantor, failure of title to which was alleged, included the land described in the deed, held not inadmissible on ground witness was not qualified, and the fact that witness himself did not make original map which he sketched to testify from did not render his testimony and sketch inadmissible. *Wigham v. Wilson* (Civ. App.) 211 S. W. 469.

53. — **Value in general.**—In action by owner on warranty of heating system, to recover the cost of correcting the defects in the plant to make it answer the warranty, where he had testified that he was not himself qualified to say what was necessary to be done to remedy the defects, but was qualified to testify as to the reasonable cost of the work that was actually done, his testimony that it was necessary to expend a named sum for that purpose was inadmissible, as it was shown that he was not qualified to give his opinion on what was necessary to make the heating plant do the work. *Nunn v. Brillhart* (Civ. App.) 230 S. W. 862.

55. — **Value of real property.**—In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify in his own behalf that the fair market value of the land taken prior to its taking was \$100 an acre. *Gulf & Interstate Ry. Co. of Texas v. Stephenson* (Civ. App.) 212 S. W. 215.

In an action for the burning of grass on leased land, an objection to testimony of plaintiff and his son as to reasonable value of the grass, when they were not shown to be qualified to testify as to its market value, was not well taken, and the testimony was admissible to show that the leased premises were used by plaintiff exclusively for pasture and their reasonable value therefor. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.

In contest of will, where reliable testimony as to value of community property of testatrix could readily be obtained from other sources, the court did not err in refusing to permit contestant daughter, who did not show herself sufficiently qualified to testify as to value of community property belonging to testatrix, to testify to value. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

Cattlemen of many years' experience in buying and selling grass and grass land were qualified to testify as to the damage done to a pasture and grass by a fire, and the fact that they stated they were using their private opinions would only affect their credibility. *Wichita Valley Ry. Co. v. Martin & Walker* (Civ. App.) 219 S. W. 559.

56. — **Value of personal property.**—A witness is qualified to testify to market value of maize at a certain place, there being no denial of his testimony that he had shipped much maize there and was acquainted with market value there. *Patterson & Roberts v. Quanah, A. & P. Ry. Co.* (Civ. App.) 195 S. W. 1163.

Where witness testified that no market existed for cattle as injured by carrier's negligence, his opinion as to their market value was inadmissible. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

In cases of conversion of personal property, witness must show he was acquainted with market value of the property at such time and place. *Waldrop v. Goltzman* (Civ. App.) 202 S. W. 335.

In action for damages to shipment of cattle, witness, who testified that cattle had market value at destination, naming it, was qualified to testify as to market value without stating that he had known same number of cattle as were in shipment to be sold at such point. *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

In an action for failure to deliver a carload of hay to a buyer who had sought to have it diverted from its original destination, the buyer was incompetent to state the value of the hay at the place of its original destination, which was more than 100 miles from his residence, and the admission of such evidence was error, especially where the value as stated exceeded the amount claimed in his petition, and in view of the fact that the measure of damages was the value at the place to which he had the shipment diverted. *Rhodes v. Smith* (Civ. App.) 230 S. W. 227.

57. — **Damages.**—A witness who accompanied a shipment of cattle and remained with them after they reached their destination, and saw them get fat and resold, was qualified to give his opinion as to the damage caused by rough treatment and delays while in the hands of the carrier. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

62. **Personal identity and characteristics.**—When it becomes permissible to offer evidence as to good character, the individual opinion of witnesses is not admissible. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

64. **Bodily appearance or condition.**—In suit against operator of jitney for injuries sustained by plaintiff passenger in jitney when jitney collided with a street car, defense being that plaintiff's injuries were the result of prior accident, there was no error in permitting plaintiff's wife to testify that her husband had recovered from a former accident some two years before the accident in question. *Parker v. Harrell* (Civ. App.) 212 S. W. 542.

66. **Mental condition or capacity.**—Permitting a fourteen year old girl, not a party to contest, or an interested witness, to give opinion that testatrix was sane at or about the time she made will, held not error. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

69. **Nature, condition and relation of objects.**—In an action against a carrier for damages to a shipment of cattle resulting from rough handling in spotting cars, the testimony of witness that they were not spotted in the usual and customary manner was competent, where the witness testified that he had about 30 years' experience in raising, buying, selling, and shipping cattle, and had on numerous occasions observed shipments of cattle to the point in question as well as other points. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Civ. App.) 211 S. W. 255.

A witness, though he did not see the fall of tools from a car claimed to have caused its derailment, could testify how the car could have been built to prevent tools carried thereon from falling. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

71. **Value.**—A qualified witness may give his opinion on a question of value, since value is a mere matter of opinion. *Texas & P. Ry. Co. v. Prunty* (Sup.) 230 S. W. 396.

73. — **Real property.**—Witnesses, shown to have lived in the county 19 and 27 years, respectively, could testify upon issue of value of grass burned by fire alleged to have been set by defendant railway company's engine. *Quannah, A. & P. Ry. Co. v. Lancaster* (Civ. App.) 207 S. W. 606.

In suit against railway for damages by fire to grass and land, where no market value is shown, the opinion of witnesses, qualified as practical and experienced men, as to its actual value, is admissible. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

In a railroad's condemnation proceedings, an owner of the land, who had lived in the neighborhood for 31 years, and on his then farm for 25 years, having been deputy tax assessor in the neighborhood for several years, and well informed as to the nature of lands in the vicinity, held qualified to testify as to market value. *Gulf & Interstate Ry. Co. of Texas v. Stephenson* (Civ. App.) 212 S. W. 215.

In an action for damages to a pasture by fire, a witness may give his opinion as to the value of the property before and after the fire. *Houston & T. C. R. Co. v. Ellis* (Sup.) 224 S. W. 471, affirming judgment (Civ. App.) 160 S. W. 606.

74. — **Personal property.**—Witness' opinion as to value of cattle had they been delivered by carrier free from injury was not objectionable. *Ft. Worth & R. G. Ry. Co. v. Bryson & Burns* (Civ. App.) 195 S. W. 1165.

In buyer's action for breach of contract by nondelivery, the question of market price of goods is usually a matter of opinion, the question of qualification of a witness to testify in relation thereto is largely a discretionary matter, reviewable only in case of clear abuse of discretion and admission of testimony of a witness, whose knowledge was limited to daily market quotations received at another city in the same state and from other dealers in different places throughout the state, was not such an abuse of discretion. *Early-Foster Co. v. Gottlieb* (Civ. App.) 214 S. W. 520.

A farmer who had been raising, buying, and selling corn for 15 years, and, during year when it was claimed that a crop was destroyed, bought 200 bushels, and read crop reports and market quotations constantly and kept himself advised as to the condition of the corn market and the value of the same, and knew the market value of corn such as would have been raised where the crop was destroyed, was qualified to testify as to what would have been the reasonable value of the crop had it fully matured, and not been destroyed. *San Jacinto Rice Co. v. Ulrich* (Civ. App.) 214 S. W. 777.

In an action against a carrier for damages for delay in shipment of cattle, where the issue was as to market value on the day of arrival and day when they should have arrived, and witness stated he knew he could state the difference. *Schaff v. Holmes* (Civ. App.) 215 S. W. 864.

Plaintiff mortgagor suing defendant mortgagee for wrongful withholding of the mortgaged road-grading outfit, whose only knowledge concerning the value of the use of such property was based on what was paid per month by persons who had rented a pair of mules, wagon, and harness, held not qualified to make an estimate of the rental value of the property for the period for which he sued. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

In a suit for damages based on the destruction of crops by cattle, court did not err in permitting witness to testify when asked about the comparative value of stacked hay and sorghum, "it ran about the same as in any other year" and "I think sorghum feed stuff stacked up like that was, ran about the same as prairie hay." *Corn v. McNutt* (Civ. App.) 230 S. W. 1052.

76. **Time.**—A witness' testimony, based on experience as to time usually consumed in shipping cattle, did not violate rule making incompetent any opinion on a mixed question of law and fact. *Chicago, R. I. & G. Ry. Co. v. Hensley* (Civ. App.) 196 S. W. 974.

A witness' testimony that he annually shipped 30 to 100 carloads of cattle between certain points and had accompanied several horse shipments between such points qualified him to state the usual, customary running time between the points involved. *Hines v. Davis* (Civ. App.) 225 S. W. 862.

78. **Cause and effect.**—In action for injuries to live stock it was competent for an experienced witness to testify as to effect upon cattle of carrier's delays and rough handling shown by testimony. *Chicago, R. I. & G. Ry. Co. v. Hensley* (Civ. App.) 196 S. W. 974.

80. **Damages—Injuries to property.**—In action by shipper against a carrier for injuries to horses and expense for extra feed, testimony of shipper that he would not have been at any expense for feed because he would have sold them to a certain person had they been uninjured was shipper's opinion merely, and therefore without probative force. *Lancaster v. Whittle* (Civ. App.) 210 S. W. 334.

In an action against a railroad company for damages to plaintiff's pasture by fire from a passing engine, where a witness was asked, "What would be the damage, the difference between the value of the pasture before the fire and after the fire?" an answer that, "If you are going to rent a pasture for stock, and one had been burned and one was not burned, I would make 50 cents an acre difference; yes, sir, that would be a fair difference in the value," was not objectionable as allowing the witness to state the damage to the land in a given amount. *Houston & T. C. R. Co. v. Ellis* (Sup.) 224 S. W. 471, affirming judgment (Civ. App.) 160 S. W. 606.

III. Subjects of Expert Testimony

82. **Matters of opinion or facts.**—The testimony of a farmer who qualifies as an expert, testifying from his common experience with, and result of his observations made at the time as to the usual and common appearance or facts and condition of things, which cannot be reproduced to the jury, is admissible under an exception to the general rule excluding the conclusions of a witness. *Bowman & Blatz v. Raley* (Civ. App.) 210 S. W. 723.

A district surveyor's mere conclusions, contained in his report or letter that a monument marked a certain corner, was inadmissible on question of boundaries in trespass to try title. *Land v. Dunn* (Civ. App.) 226 S. W. 801.

83. **Matters directly in issue.**—As it is a question for the jury whether the place at which a servant was injured was safely maintained, testimony of experts that the place was in safe condition was properly excluded. *Missouri, K. & T. Ry. Co. of Texas v. Grimes* (Civ. App.) 196 S. W. 691.

Qualified witnesses may, in action against carrier for injury to shipment of sheep from negligent bedding of cars, testify they were properly bedded; this not being an invasion of province of jury. *Kansas City, M. & O. Ry. Co. of Texas v. Weatherby* (Civ. App.) 203 S. W. 793.

Testimony of a medical expert on insanity that defendant from about 1912 to the date of trial would not have been conscious of the effect of his acts on himself or surrounding circumstances was not subject to the objection that the witness was stating a legal conclusion rather than a point of fact. *Beasley v. Faust* (Civ. App.) 217 S. W. 179.

In suit for a conversion of crops grounded on duress upon plaintiff inducing him to assign his lease contract, though it was competent for plaintiff's son, a physician, to testify as to plaintiff's medical condition as bearing on the question of his being easily intimidated or influenced by threats, he could not give his conclusion on the issue to be determined, whether plaintiff was incapable to transact business, etc. *Grice v. Herrick Hardware Co.* (Civ. App.) 224 S. W. 533.

In an action for injuries to an elevator passenger, whose leg was caught in the door and held while the elevator descended, in determining whether or not plaintiff's leg was or was not held in the door, as claimed by him, it was pertinent to show how easy it was to open or close the door, and the kind of door, whether easy or difficult to work, but it was for the jury, and not for experts, to form the ultimate conclusion as to whether plaintiff's leg could be or was caught and held by the door. *American Nat. Ins. Co. v. Nussbaum* (Civ. App.) 230 S. W. 1102.

86. **Bodily condition.**—In an action on a fraternal benefit certificate issued to plaintiff's wife liability whereon was denied because of alleged misrepresentations by insured as to her health, it was not error to refuse to permit a medical witness to testify that insured was conscious that she had consumption prior to her application for insurance. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

87. **Mental condition or capacity.**—Medical testimony to effect that testatrix was masochist, based on unnatural sexual relations between her and proponent, and the effect of such condition on the mind, held admissible, where will was attacked for undue influence. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

In suit for conversion of crops grounded on duress upon plaintiff inducing him to assign his lease contract, though it was competent for plaintiff's son, a physician, to testify as to plaintiff's medical condition as bearing on the question of his being easily intimidated or influenced by threats, he could not give his conclusion on the issue to

be determined, whether plaintiff was incapable to transact business, etc. *Grice v. Her-
rick Hardware Co.* (Civ. App.) 224 S. W. 533.

90. **Construction and repair of structures, machinery and appliances.**—The yard-
master of defendant railroad could say whether it would have been safer to have tracks
further apart, since he was a duly qualified expert upon the subject. *Houston Belt &
Terminal Ry. Co. v. Stephens*, 109 Tex. 185, 203 S. W. 41.

91. **Management and operation of vehicles, machinery and appliances.**—There is no
error in allowing witnesses of experience to give their testimony as to the distance
in which a locomotive may be stopped. *El Paso & S. W. Ry. Co. v. Havens* (Civ. App.)
216 S. W. 444.

92. **Conduct of business.**—Expert testimony is admissible in case of disagreement
as to meaning of technical words to explain sense in which such technical terms are
generally understood in business to which they relate. *Frost v. Martin* (Civ. App.) 203
S. W. 72.

93. **Laws of other states or countries.**—The unwritten, common, or case law of
another state, the sources in which it may be found and mode of its application, may
be established by expert testimony of lawyer engaged in practice in such state. *Illinois
Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642.

94. **Construction of written instruments.**—In suit to forfeit an oil and gas lease
for failing to prosecute drilling of well until completion, it was error to refuse to
admit testimony of an expert that the well was "completed" within the terms of the
lease when driven to the depth of 2,103 feet without finding oil or gas. *Frost v. Martin*
(Civ. App.) 203 S. W. 72.

In suit for breach of contract relating to merchantable cattle, where a witness had
qualified as an expert, there was no error in permitting him to testify what was meant
by "merchantable cattle." *Carothers v. Finley* (Civ. App.) 209 S. W. 801.

Where a written agreement was unambiguous, testimony of expert witnesses to
explain it was properly excluded. *Polk v. Inman* (Civ. App.) 211 S. W. 261.

95. **Nature, condition and relation of objects.**—On an issue whether an electric engine
would develop the power guaranteed by the seller, testimony as to its lack of power
by a fully qualified expert who had shown himself capable of making a proper test
of the engine was improperly excluded. *Ware v. Fairbanks-Morse Co. of Texas* (Civ.
App.) 217 S. W. 211.

97. **Value.**—In action for damages to shipment of horses, it was proper for expert
witness to testify to market value of horses at point of destination if they had been
transported in the usual manner and time; such testimony being in respect to a fact.
Galveston, H. & S. A. Ry. Co. v. Gibbons (Civ. App.) 202 S. W. 352.

Witnesses who qualify themselves as experts may give opinion evidence as to the
profits to be derived from the drilling of an oil well. *Osage Oil & Refining Co. v. Lee
Farm Oil Co.* (Civ. App.) 230 S. W. 518.

99. **Cause and effect—Injuries to the person.**—The physician in charge of case, who
had known plaintiff prior to the injury, was properly permitted to testify, "I found him
complaining of some pain and inability to do his work without tiring him," and "con-
finement was due solely to the injury to his back." *Texas-Mexican Ry. Co. v. Creekmore*
(Civ. App.) 204 S. W. 682.

In an action for injuries to a passenger in an elevator when his leg was caught
in the door and held as the elevator descended, exclusion of defendant's offered ex-
pert testimony as to whether it would have been possible for a man's leg to be caught
and held, as claimed by plaintiff, held proper, the jury being competent to draw the
proper inferences from the facts involved. *American Nat. Ins. Co. v. Nussbaum* (Civ.
App.) 230 S. W. 1102.

100. — **Injuries to property.**—In action for damage to live stock shipment, tes-
timony of witnesses who were shown to have had experience in shipping cattle as to
effect on cattle of long distance transportation held admissible. *Panhandle & S. F.
Ry. Co. v. Sanderson* (Civ. App.) 218 S. W. 540.

IV. Competency of Experts

102. **Necessity of qualification.**—In an action by mine employé for personal injuries,
based on ground that mine was not properly lighted, testimony of witness that the mine
was "poorly lighted" at that point of accident should not be admitted, unless the wit-
ness qualifies as an expert. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S.
W. 758.

103. **Knowledge, experience and skill in general.**—As farmers testifying as experts
can only testify as to things they have the necessary special knowledge about, great
care must be used in qualifying such a witness as to his knowledge, observation, and
experience in respect to the matters about which he may be called to testify. *Bowman
& Blatz v. Raley* (Civ. App.) 210 S. W. 723.

104. **Bodily and mental condition.**—Testimony of expert who examined injured
person to qualify as an expert, held inadmissible when based in part at least on her
statements as to the cause of the injury and the manner in which she was affected
thereby. *Texas & N. O. R. Co. v. Stephens* (Civ. App.) 198 S. W. 396.

Medical witness held competent to testify as an expert that defendant, sued on a
note and for foreclosure of the deed of trust securing it, was insane at a time when

he had not observed him, when the instruments in question were executed; his opportunities for observing and conversing with the defendant before and after such time having justified him in forming the opinion of insanity expressed. *Beasley v. Faust* (Civ. App.) 217 S. W. 179.

Medical witness, not a specialist on mental diseases, but who had treated many insane persons and had read text-books on insanity, held competent to testify as an expert that defendant, sued on a note and for foreclosure of the deed of trust securing it, was insane at a time when he had not observed him, when the instruments in question were executed; his opportunities for observing and conversing with the defendant before and after such time having justified him in forming the opinion of insanity expressed. *Id.*

107. **Construction and operation of railroads.**—A witness who testified that he had been engaged in railroading a number of years, and civil engineering and maintenance of way work and measuring the speed of trains, was fully qualified to estimate the speed of a train by the scene of a wreck from derailment, so that his testimony that the wreck indicated that the speed was about 45 miles an hour and that the prescribed speed was 40 miles, and as to the proper altitude for the curve where the wreck occurred, was properly admitted. *Hines v. Kelley* (Civ. App.) 236 S. W. 493.

109. **Physical facts.**—Where the witness had been a freight conductor for more than 15 years, and had handled shipments of probably 5,000 head of cattle, it was improper in an action for injuries to a shipment of cattle to refuse to allow the witness to give opinion evidence as to whether they were in condition to stand the trip. *Ft. Worth & R. G. Ry. Co. v. Ellis* (Civ. App.) 225 S. W. 409.

110. **Value.**—Farmer living mile and a half from property, not pretending to be real estate expert, who had not bought or sold land in the neighborhood except on one occasion, held not qualified to express opinion as to damages from condemnation. *Galveston, H. & S. A. Ry. Co. v. Schelling* (Civ. App.) 198 S. W. 1018.

In action for damages to automobile truck, that dealer, who had authority to sell such trucks at place in which accident took place, and who testified to being familiar with the market value of such trucks at such place, had actually sold only one truck of that kind at such place, did not affect the admissibility of his evidence, but merely its weight. *Kansas City, M. & O. Ry. Co. of Texas v. O'Connell* (Civ. App.) 210 S. W. 757.

A dealer in personal property at any given place is generally accepted as an expert witness upon its market value. *Id.*

In an action against a railroad for the destruction by fire of cotton in transit, a member of plaintiff firm, long experienced in handling, buying, and selling cotton, held qualified to give an opinion as to quality of the cotton. *Sugarland Ry. C. v. Dew Bros.* (Civ. App.) 212 S. W. 190.

111. **Damages.**—In condemnation suit, proprietor of beer joint and amusement park held not competent to express opinion as to damages to land not taken. *Galveston, H. & S. A. Ry. Co. v. Schelling* (Civ. App.) 198 S. W. 1018.

Dealer in particular make, of automobile truck at certain place, who was familiar with their market value at such place upon day of damage to a truck of that particular make, and who had examined truck minutely after accident to ascertain extent of damage, was competent to testify. *Kansas City, M. & O. Ry. Co. of Texas v. O'Connell* (Civ. App.) 210 S. W. 757.

112. **Cause and effect.**—In suit on accident policy, medical witness held to have had sufficient knowledge of facts on which to pass expert opinion as to the effect of gunshot wounds. *Georgia Casualty Co. v. Shaw* (Civ. App.) 197 S. W. 316.

V. Examination of Nonexperts

113. **Determination of question of competency.**—Action of court in permitting witness to testify as to market value will not be held error on appeal on ground that qualification of witness was not shown, in absence of a showing of abuse of discretion. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 217 S. W. 737; *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969; *Early-Foster Co. v. Gottlieb* (Civ. App.) 214 S. W. 520; *Panhandle & S. F. Ry. Co. v. Sanderson* (Civ. App.) 213 S. W. 540.

Testimony, in a suit for conversion of cotton linters, as to how witness knew the market value of the linters at the time stated by him, was admissible. *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224.

In buyer's action for breach of contract by nondelivery, the question of market price of goods is usually a matter of opinion, the question of qualification of a witness to testify in relation thereto is largely a discretionary matter, reviewable only in case of clear abuse of discretion and admission of testimony of a witness whose knowledge was limited to daily market quotations received at another city in the same state and from other dealers in different places throughout the state, was not such an abuse of discretion. *Early-Foster Co. v. Gottlieb* (Civ. App.) 214 S. W. 520.

114. **Examination in general.**—In action against carrier for injuries occasioned by fall in aisle of a moving car, testimony of conductor that a woman walking to rear of a car in motion might become overbalanced while attempting to stop to wait while one obstructing the aisle should let her pass, was a mere opinion on a hypothetical case, and incompetent. *Gulf, C. & S. F. Ry. Co. v. Steed* (Civ. App.) 209 S. W. 772.

115. — **Facts forming basis of opinion.**—In a suit to restrain the operation of a cotton gin as a nuisance, evidence of a medical expert that in his opinion the operation of the gin would affect the value of the surrounding property and be a detriment to

the neighborhood for residence purposes was not inadmissible as opinion evidence, where the facts upon which such opinion was based were also given. *Moore v. Coleman* (Civ. App.) 195 S. W. 212.

A witness, testifying as to the value of an oil lease at a certain time, was properly allowed to state facts concerning transactions in the same locality at the time, on which he based his opinion. *Peden Iron & Steel Co. v. Jenkins* (Civ. App.) 203 S. W. 180.

While a nonexpert witness may, in connection with facts and circumstances upon which her opinion is based, give an opinion as to mental condition, she cannot testify to a legal conclusion from facts given, either by herself or by others, which embodies the very point in issue. *Daley v. Whitacre* (Civ. App.) 207 S. W. 350.

In suit against railway for damages by fire to grass and land, one who shows that he has been dealing with grass pastures and land and observed the price paid and the sales for years may be able to give an opinion as to market value of grass at the time of the injury, although no sales are shown at or about that time. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

In an action involving whether or not a bank had received a letter on or before a certain date, where an officer of the bank, who did not see the letter until eight days after such date, testified that his best judgment was that the letter arrived prior to such date, it was error to sustain an objection to a question, "State to the jury your reasons upon which you base your judgment" that the letter arrived prior to such date. *Texas Co. v. Wimberly* (Civ. App.) 213 S. W. 286.

In an action for damage by water to a stock of shoes, the trial court's failure over defendant's objection, to require witnesses as to damages to show they were basing their testimony on market value at the place of damage rendered the testimony incapable to meet the legal requirement. *Ara v. Rutland* (Com. App.) 215 S. W. 445.

In a personal injury action, testimony that plaintiff at time of trial had only 75 per cent. use of his legs and arms, held inadmissible as against objection that it was opinion testimony and that facts upon which opinion was based had not been stated by witness. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

A witness may give his opinion of any obvious fact of which he has knowledge from personal observation, and a person, not an engineer, could state that in his opinion irrigation machinery and a canal would not furnish water, where he stated the facts as he saw them, and knew that the canal and the plant did not furnish water. *Wortman v. Young* (Civ. App.) 221 S. W. 660.

In an action for personal injuries, a sister of plaintiff can state that plaintiff had been sick since she came from the hospital, where the witness had lived with plaintiff and detailed the facts upon which the opinion was based. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113.

Testimony of lay witnesses that grantor was mentally incapable of conveying, basing conclusion generally on business transacted by her, but not disclosing to judge the facts on which the opinion was based, was improperly admitted. *Duckels v. Dougherty* (Civ. App.) 226 S. W. 720.

In trespass to try title, testimony of a witness that he and another, together with a plaintiff and a defendant, figured out the matters in controversy between such plaintiff and defendant, and that by their figures defendant owed plaintiff \$700 on sale and purchase of a hardware company, held admissible, as a nonexpert who states the facts on which he bases his opinion and thereby shows himself capable of having an opinion in many instances may state it. *Johnson v. Frost* (Civ. App.) 229 S. W. 558.

Testimony that a fence was "pretty poor" was not erroneous as an expression of opinion, when accompanied by the explanation that "some of the wires were broken, and the posts were down, and it was an old fence and the wire was old." *Corn v. McNutt* (Civ. App.) 230 S. W. 1052.

116. — **Cross-examination and re-examination.**—It is a sufficient predicate for the admission of opinion evidence as to market value that the witness is willing to testify that he knows it; and cross-examination showing insufficient knowledge goes only to the weight of the testimony or the credibility of the witness. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

VI. Examination of Experts

118. **Determination of question of competency.**—Action of trial court in passing on the credibility of a witness testifying as an expert will not be reviewed, unless gross abuse of discretion is shown. *Wichita Valley Ry. Co. v. Martin & Walker* (Civ. App.) 219 S. W. 559; *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781; *Hines v. Davis* (Civ. App.) 225 S. W. 862.

119. **Mode of examination in general.**—The usual way to ascertain market value of real estate is by permitting expert witnesses to state their several methods in ascertaining it, the comparison of value of contiguous property by relation, and the particular uses of the property and those to which it may be put. *Richey v. City of San Antonio* (Civ. App.) 217 S. W. 214.

123. **Hypothetical questions and answers.**—Physician's opinion regarding cause of child's illness, based upon facts stated in hypothetical question, is admissible. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

Where there was testimony as to testatrix's habitual use of chloral, morphine, and aspirin, hypothetical questions as to effect of such drug habits on her mind were proper. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

124. — **Form and sufficiency of questions.**—Expert testimony as to permanency of injuries to passenger, predicated upon hypothetical facts, presence of all of which was not shown by record, was inadmissible. *Texas & P. Ry. Co. v. Mercer* (Civ. App.) 195 S. W. 263.

Hypothetical question assuming fact not in evidence is properly excluded, but it is not a valid objection that the hypothetical question may have omitted parts of evidence, since omitted elements may be incorporated upon cross-examination. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

In action against city for damages from city's septic sewer tank, held proper to exclude answer of plaintiff's expert to question not stating conditions, but merely asking whether the malodors, etc., resulting therefrom, would sicken plaintiff's family. *Brewster v. City of Forney* (Civ. App.) 196 S. W. 636.

In will contest case, hypothetical questions to medical witnesses as to whether testatrix was afflicted with masochism, based on evidence of relations between her and proponent, etc., held proper. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

In an action by passenger who claimed that, as a result of waiting for a train in a cold station, he contracted la grippe which resulted in pneumonia and tuberculosis, hypothetical question to a medical expert held not objectionable as assuming facts not proven and not corresponding to the facts shown and calling for speculative or conjectural answer. *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

125. — **Scope and sufficiency of answers.**—In an action for personal injuries, an answer by a physician to a hypothetical question assuming plaintiff had certain diseases, that the injury could have been aggravated or brought about the diseased condition, is not objectionable as relating to possibilities not probabilities or as speculative. *El Paso Electric Ry. Co. v. Jennings* (Civ. App.) 224 S. W. 1113.

126. **Facts forming basis of opinion.**—The age, experience, and average monthly earnings of brokers' representative are not facts to be considered in determining reasonable value of brokers' services for work done largely by such representative, and a hypothetical question based thereon was properly excluded. *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170.

In action for damages for injuries sustained by minor while attempting to board defendant's street car, statement by medical expert that displacement of womb would likely cause accelerated or irregular menstruation was reversible error, in absence of evidence of such injury. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

In an action on a fraternal benefit certificate issued to plaintiff's wife liability whereon was denied because of alleged misrepresentations by insured as to her health, it was not error to refuse to permit a medical witness to testify that insured was conscious that she had consumption prior to her application for insurance, although an expert can give his opinion as to the probable duration of a malady based on its progress at the time. *Knights and Ladies of Security v. Shepherd* (Civ. App.) 221 S. W. 696.

Expert opinion evidence as to the probable profits from drilling an oil well is admissible, though based on the general topography of the country and the known depth of underlying rock strata, even though it was possible that oil might have been discovered without drilling to the agreed depth; that fact not rendering the testimony misleading. *Osage Oil & Reaming Co. v. Lee Farm Oil Co.* (Civ. App.) 230 S. W. 218.

129. **Cross-examination and re-examination.**—While defendant railroad might show plaintiff's expert medical witness was to receive more than statutory fee if judgment was recovered in pending action, it cannot cross-examine witness regarding contingent fees for testifying in other damage suits. *Missouri, K. & T. Ry. Co. of Texas v. Hart* (Civ. App.) 196 S. W. 960.

In a prosecution for manslaughter through killing of defendant's paramour, neither the order of the court directing that the body of the deceased woman be exhumed and examined nor the application therefor was admissible to impeach the testimony of two physicians who examined the body as to the disputed question whether they did or did not examine for bruises, where the physicians had never seen the order or application. *Mobley v. State* (Cr. App.) 232 S. W. 531.

VII. Comparison of Handwriting

132, 133. **Standard of comparison.**—Extrinsic documents not filed in the case or relevant to any issue are inadmissible as standards of comparison of handwriting. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

134. **Examination of expert.**—Where a depositor asserted that checks paid by a bank were forgeries, and bank officials testified to the genuineness of the signature, checks, proven genuine, were not admissible on cross-examination to test the knowledge and good faith of the witnesses by giving basis for comparison. *Texas State Bank of Ft. Worth v. Scott* (Civ. App.) 225 S. W. 571.

VIII. Effect of Opinion Evidence

135. **Opinions of witnesses in general.**—Conclusion by property owner that defendant waterworks company or its predecessors in interest were bound to install service or cut-off boxes in such pipes, unsupported by contract or ordinance requiring such installation, is of no probative weight. *San Antonio Water Supply Co. v. Castle* (Civ. App.) 199 S. W. 300.

Admission in evidence of conclusion of witness as to duties of waterworks company, which in itself was of no probative effect, gains no value by reason of its admission. *Id.*

Estimate by plaintiff, who sued carrier for delay in delivering shipment to connecting carrier, as to loss due to lack of proper material on brickwork, held not binding, so charge restricting jury to that amount was properly refused as on weight of evidence. *Quannah, A. & P. Ry. Co. v. Bone* (Civ. App.) 208 S. W. 709.

It is a sufficient predicate for the admission of opinion evidence as to market value that the witness is willing to testify that he knows it; and cross-examination showing insufficient knowledge goes only to the weight of the testimony or the credibility of the witness. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 210 S. W. 969.

Where testimony of plaintiff in an action to recover on a quantum meruit, was that he put in 89 days' work and that he had been accustomed theretofore to charge \$3.50 per day for such labor and had previously worked for the defendant and charged her at this rate, jury was not bound to adopt such estimate of the value of plaintiff's services, although uncontradicted. *Buchanan v. Bowles* (Civ. App.) 218 S. W. 652.

In an action against a railway for damages to a shipment of live stock from delay in transit and rough handling, the weights of the cattle should have been shown, if possible, by more certain evidence than the opinion of a plaintiff, one of the shippers, as to what shrinkage would occur on a usual run, and what on delay, though such opinion testimony sustained verdict for plaintiffs. *Panhandle & S. F. Ry. Co. v. Arnett* (Civ. App.) 219 S. W. 232.

Testimony of a physician concerning the value of nursing by a trained or practical nurse furnished no basis for fixing the value of services performed by a woman who was neither a practical nor trained nurse. *Kuhlmann's Estate v. Poss* (Civ. App.) 220 S. W. 564.

An estimate by a witness as to the amount plaintiff's garden was damaged by a trench for a gas main, without a statement of the facts on which the estimate was based, is insufficient to sustain a judgment for plaintiff. *Beaumont Gaslight Co. v. Rutherford* (Civ. App.) 223 S. W. 245.

Where plaintiff testified to the circumstances under which she and her husband were riding in an automobile of another, which collided with a railroad train, her statement that they and the driver were engaged in a joint undertaking was a conclusion which did not establish that fact, where the circumstances showed the contrary. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

In a suit to set aside a conveyance made by decedent in consideration of support during the rest of his life, the jury are not bound to accept defendants' statements as to the value of the support furnished; it being the mere opinion of interested parties, but may apply their general knowledge as to the matter. *Kibby v. Kessler* (Civ. App.) 225 S. W. 277.

Where a fact is sought to be established by opinion evidence not amounting to the certainty of positive proof, although not disputed by other evidence, the jury are free to give such weight to the same as in their judgment it may be entitled to. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 225 S. W. 773.

Plaintiff's uncontradicted testimony as to the value of a hand bag and its contents, based on his actual experience and investigations made at the time of loss, was sufficient to authorize finding for him and fixing the value in his action against an innkeeper. *Dallas Hotel Co. v. Neely* (Civ. App.) 227 S. W. 695.

In an action for deceit the jury are not bound to accept the opinion of an interested witness as to the actual value of the property sold, though no other witness expressed an opinion as to such value. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

In an action for deceit in the sale of an oil lease, the jury are not bound as to the value of the lease by the opinion of the only witness who testified to such value, where the facts on which the opinion was based were disputed. *Id.*

136. **Testimony of experts.**—The testimony of expert witnesses that the signature on a note was that of defendant held too weak and uncertain to support a judgment for plaintiff as against the positive and direct testimony of defendant and others. *Joffre v. Mynatt* (Civ. App.) 206 S. W. 951.

In action for damage to automobile truck, that dealer, who had authority to sell such trucks, at place in which accident took place, and who testified to being familiar with market value of such trucks at such place, had actually sold only one truck of that kind at such place, did not affect the admissibility of his evidence, but merely its weight. *Kansas City, M. & O. Ry. Co. of Texas v. O'Connell* (Civ. App.) 210 S. W. 757.

In action for injuries to woman passenger by falling in aisle while waiting for conductor to let her pass, testimony of the conductor that a woman walking to the rear of a car in motion might become overbalanced while attempting to stop to wait until one obstructing the aisle should let her pass was without probative value, being a mere opinion on a hypothetical case, and, in any event, had reference to a permanent blocking of the aisle, and not to a temporary blocking of the aisle, which was the character of the blocking disclosed by the evidence in the case at bar. *Steed v. Gulf, C. & S. F. Ry. Co.* (Com. App.) 231 S. W. 714.

RULE 37. A PARTY IS ESTOPPED FROM DENYING A FACT WHICH HE HAS DIRECTLY AND WILLFULLY, BY HIS WORDS OR CONDUCT, INDUCED ANOTHER TO BELIEVE, AND TO ACT ON THE BELIEF SO AS TO ALTER HIS OWN PREVIOUS CONDITION, AND WHO WOULD BE PREJUDICED IF THE ADMISSION OF THE FACT WAS RETRACTED.

I. Nature and Essentials of Equitable Estoppel in General

1. Nature and elements of estoppel in pais.—The terms “waiver” and “estoppel,” though often inaccurately used as synonyms, are not synonymous; a “waiver” being the relinquishment of some right by word or conduct, and an “estoppel” arising from the perpetration of a wrong or a fraud which has misled another to his hurt or injury and from which justice and equity will prevent him from receiving profit or benefit. *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291; *Sovereign Camp, Woodmen of the World, v. Putnam* (Civ. App.) 206 S. W. 970.

Where one by his acts, declarations, or silence, where it is his duty to speak, has induced another, in reliance on such acts, declarations, or silence, to enter into transaction, he shall not later, to hurt of person misled, impeach transaction, being estopped. *Barclay v. Dismuke* (Civ. App.) 202 S. W. 364.

A “waiver” is the intentional relinquishment of a valuable right, and is the result of an agreement between two or more parties sufficient to constitute an estoppel. *Weeks v. First State Bank of De Kalb* (Civ. App.) 207 S. W. 973.

Estoppel is a doctrine to protect those misled by that which on its face was fair and whose character, as represented, parties to the description will not in the interest of justice be permitted to deny. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

The ground on which estoppel proceeds is active or constructive fraud on the part of the person sought to be estopped. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

To constitute an estoppel by conduct there must be a false representation to or a concealment of material facts from a party ignorant of the matter with the intention that such party should act thereon, and such party must be induced thereby to act. *Id.*

“Waiver” is an intentional abandonment of a known right, and there can be no waiver unless it is so intended by one party and so understood by the other or one party has so acted as to mislead the other and is estopped thereby. *Hines v. Jordan* (Civ. App.) 228 S. W. 633.

“Equitable estoppel” is a bar which prevents the party against whom it is pleaded from denying the truth of a fact because the party asserting estoppel has changed his position and has parted with some right by reason of the representation of conduct constituting the estoppel. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

3. Knowledge of facts.—See *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

A shipper is not estopped by carrier's customary dealing with his previous shipments, of which he did not know and by exercise of ordinary diligence could not have known. *International & Great Northern Ry. Co. v. Kansas City Produce Co.* (Civ. App.) 200 S. W. 254.

Waiver by borrower of loan broker's departure from terms of loan authorized by him is operative only where borrower has knowledge, actual or constructive, of the facts. *Hutchings v. Binford* (Civ. App.) 206 S. W. 557.

Though the insurer in an action on an accident policy agreed on trial that plaintiff was the wife of the insured, the insurer is not estopped from setting up the true facts when discovered, where it was induced to so agree through fraud or ignorance. *National Life & Accident Ins. Co. v. De Lopez* (Civ. App.) 207 S. W. 160.

Where a “Boosters' Club” procured a bank to guaranty subscriptions for a bonus to a factory without informing the bank that one subscription was payable in gas, a surplus collected by the bank over the bonus to be paid to the club, its members were estopped to claim that payment in gas was not valid as to them. *Henrietta Oil & Gas Co. v. W. B. Worsham & Co.* (Civ. App.) 210 S. W. 819.

Where actual authority does not exist, apparent authority or estoppel cannot be established except by facts known to the party dealing with the agent and relied upon by him in such dealings. *Guaranty Bank & Trust Co. v. Beaumont Cadillac Co.* (Civ. App.) 218 S. W. 638.

To constitute an estoppel in pais, it must be shown that the matters claimed to constitute an estoppel in some material respect have influenced the conduct of the party invoking the estoppel. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Where a note executed by a railroad company secured by stock subscription notes secured by deeds of trust was void under art. 6717 et seq., as a transaction had without the consent of the Railroad Commission, and the stock subscriber paid his note to the bank holding it for collection on the advice of his attorney without knowledge of the illegal character of the indebtedness it was transferred to secure, and on the mistaken belief it was in the hands of an innocent holder for value, the stock subscriber is not estopped to demand return of the money paid on discovery the note was transferred as collateral to secure an indebtedness created in contravention of the statutes. *Lumpkin v. Brown* (Com. App.) 229 S. W. 498.

5. Acts done or omitted, and change of position.—Where a bank has accepted a mortgage of partnership property to secure a partner's individual debt, a statement by his copartner to the bank that his failure to promptly notify it of his rights in the property deprived him of his right of action, did not require submission of the issue of waiver in the absence of evidence of consideration or estoppel. *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544.

Assuming that city officers could be estopped to perform official duties by ante-election promises, allegations by members of a labor union that city commissioners made ante-election promises that they would not discharge firemen belonging to a union, and that they were threatening to do so, and that the promises caused the members to remain in the union, did not show that the members of the union were misled to their harm, since they can still withdraw from the union if they so desire. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

Where makers agreed to transfer a specified interest in a mine or organize a corporation with specified amount of corporate stock, and issue payee stock therein in payment of balance due on note, payee's acceptance of stock and participation in the affairs of the corporation, as an officer and stockholder, did not estop him from claiming that makers had not complied with their agreement in that they had organized a different corporation, with much greater amount of authorized capital stock than that contemplated by the agreement, where such acts by payee did not cause makers to do anything they would not have done if he had not so acted. *Wrather v. Parks* (Civ. App.) 227 S. W. 513.

6. **Benefit to person against whom estoppel is asserted.**—Where divorced wife, in anticipation of remarriage to former husband, conveyed a half interest in land to husband in consideration for an agreement to discharge lien on land, but executed deed reciting different consideration on husband's promise to do right, her delay in bringing suit to cancel deed on his failure to discharge lien did not estop her from canceling deed, where she received no benefits different from those any other wife receives from a husband from their joint or separate property, and where husband continued to promise that he would do the right thing, and she did not discover his fraud, and that he did not intend to discharge lien until shortly before suit was commenced, the cause of action not accruing until husband openly repudiated obligation. *Moore v. Moore* (Civ. App.) 225 S. W. 78.

7. **Prejudice to person setting up estoppel.**—An agent for sale of town-site lots is not estopped to claim ownership by purchase of a certain lot, by statements that such lot was public property, where no one was induced to purchase lots thereby. *School Dist. No. 7 v. Frazier* (Civ. App.) 199 S. W. 846.

One of the necessary elements of an equitable estoppel is that the person claiming it must have been induced to alter his position in such manner that he will be injured if the estoppel is not declared. *Llano Granite & Marble Co. v. Hollinger* (Com. App.) 212 S. W. 151.

Where the purchaser of an oil lease under oral contract from an equitable owner acquired the lease by direct conveyance from the legal holder at his vendor's suggestion, the giving by him of a check for part of the purchase price, which was certified by his bank, and thereby the amount was withdrawn from his account, was sufficient injury to support estoppel against the vendor to attack his title. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

8. **Default or wrongful act of person setting up estoppel.**—In an action for an accounting brought by two members of a partnership against a third to recover salaries paid under duress, consisting of threats by defendant to dispose of the partnership property and to dissolve the firm, under the terms of the contract, plaintiffs held not estopped where the conditions whereby defendant was enabled to coerce them by the threatened sale of the property continued until after the payments were made. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

10. **Estoppel against public, government or public officers.**—See *Cawthorn v. City of Houston* (Com. App.) 231 S. W. 701.

If conduct of gasoline filling station is determined, in suit between oil company and city, to be menace to pedestrians or nuisance to street traffic, city cannot be estopped to abate it by having permitted construction. *Oriental Oil Co. v. City of San Antonio* (Civ. App.) 208 S. W. 177.

A city, even if having no power to pass an ordinance offering a reward for an arrest and conviction of arson, would not be estopped from asserting its invalidity because ordinance had enabled it to secure a reduction in the rate of insurance applicable to the city and had induced plaintiff to act in pursuance of ordinance. *Choice v. City of Dallas* (Civ. App.) 210 S. W. 753.

Where a county made an invalid contract for conveyance of a valuable interest in school lands which it held in trust and permitted grantees to incur large expenditures upon such land, the county is not estopped thereby to allege the invalidity of the contract. *Thomason v. Upshur County* (Civ. App.) 211 S. W. 325.

The state cannot be estopped by the unauthorized act of its officers. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 725.

City officials cannot be estopped to perform their official duties by any ante-election promises or representations. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

The board of trustees of independent school district of Ft. Worth were not estopped to sue the city for penalty moneys collected on school taxes in the city of Ft. Worth during the period from January 1, 1909, to November 30, 1917. *American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth* (Civ. App.) 224 S. W. 292; *City of Ft. Worth v. Same* (Civ. App.) 224 S. W. 294.

II. Grounds of Estoppel

11. **Inconsistency of conduct and claims in general.**—In an action for a balance due for materials for the construction of a school building, evidence held to show that plain-

tiff, by refusing to present his bill to the trustees, was estopped to claim liability on their part. *Rimmer v. Bay Lumber Co.* (Civ. App.) 195 S. W. 296.

In suit to foreclose deed of trust liens, by excepting to court's order separating land and nursery stock thereon, and ordering separate sales of each, and preserving its right to assert its claim to nursery stock in independent action, held, that plaintiff agreed that title to nursery stock should not pass by sale of land. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 196 S. W. 626.

Vendors who surrendered possession on request of one making a loan on mortgage from their vendees without asserting any claim, held estopped to say that they would have made claim if told that a loan was to be made. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

That sender and sendee of telegram arbitrated a loss caused by error in a message before a board, which agreed that they should share in loss equally, did not estop the sendee from suing the telegraph company. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

Statement of attorney for administratrix that he thought she would pay claim when she got the money held not to bind her or estop her from pleading limitations against the claim. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Where purchaser secretly agreed with vendor's agent that agent should become partner in purchase and that contract should be signed by which security of vendor would be greatly impaired, purchaser was estopped to assert misrepresentations of agent being charged with knowledge that agent must not become a partner. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Where corporation bought cotton oil subject to rules of association which required notice of date when to ship to be given by the purchaser, and on failure to deliver authorized purchase through broker of like quantities, and trustee in bankruptcy of purchaser authorized broker to buy like quantities but broker failed to do so, employment of the broker was not an election of remedies. *Planters' Oil Co. v. Gresham* (Civ. App.) 202 S. W. 145.

The right of a purchaser from one tenant in common to a specific tract conveyed to him does not depend upon the nonjoining tenants' assent to or recognition of the sale, nor is it created through estoppel, but is conditioned solely upon whether its enforcement would prejudice the other owners. *Lasater v. Ramirez* (Com. App.) 212 S. W. 935.

The right to an actual and a formal tender of money due is waived, when the debtor offers to pay, and is ready, willing, and able to do so, but is prevented from so doing, as where the party to whom the money is due expressly declares that he will not accept the tender, if made, or repudiates the contract. *White v. Dennis* (Civ. App.) 220 S. W. 161.

Where a landowner who had listed his property with a broker for sale declined to carry out broker's contract for sale made after discovery of oil on adjoining property, the fact that landowner assigned, as one reason for refusing to carry out the contract, that another broker had previously contracted to sell the premises and that he had procured a release, will not estop him from defending a suit for specific performance on the ground that the purchaser colluded to defraud him, and judgment for the landowner will not be reversed on the ground that, having stated in a deposition that the prior sale was one ground for refusing to carry out the agreement, the landowner cannot rely on others. *Brown v. Musgrave* (Civ. App.) 222 S. W. 606.

The grantor to a town of an easement for the construction of a septic tank is not estopped, by his refusal to permit the town to bury the contents of the tank when it was cleaned on the premises, to claim damages for the nuisance created by leaving the contents on the surface of the ground, since the grant gave no right to use the premises to bury the contents. *Town of Gilmer v. Pickett* (Civ. App.) 223 S. W. 347.

14. **Possession or acts of ownership under title or claim.**—One who takes possession of property in subordination of another's title is ordinarily estopped as against that other to deny that title, but defendant's possession of tract allotted to him under agreement to partition land held in common which agreement he recognized to the extent of going into possession does not put in motion for him the doctrine of equitable estoppel against the plaintiff, whose lands he so seized. *Lasater v. Premont* (Civ. App.) 209 S. W. 753.

15. **Claim or position in judicial proceedings.**—Party will not be allowed to maintain inconsistent position in judicial proceedings, a rule not one strictly of estoppel, but resting more on considerations of orderliness, regularity, and expedition of litigation. *Chicago, R. I. & P. Ry. Co. v. Lopez* (Civ. App.) 209 S. W. 192.

Right of mortgagee must be determined by facts as they existed at time of execution of mortgage, and if there was then no other valid lien existing, nothing thereafter done by mortgagor could create a prior and valid mortgage or superior lien, not even a pleading admitting validity of a prior mortgage. *Texas Moline Plow Co. v. Klapproth* (Com. App.) 209 S. W. 392.

Where defendant offered some of the evidence of one of plaintiff's witnesses given in a suit in another court as to a certain matter, plaintiff was not estopped from asserting the truth of the testimony of such witness on the trial because his counsel insisted on the introduction of the whole transcript in the former proceeding, bringing to light the inconsistent testimony; such testimony having been practically placed before the jury by defendant's witness. *Weil v. Miller* (Civ. App.) 215 S. W. 142.

Plaintiff was not estopped to deny the truth of testimony of one of his witnesses by reason of the introduction by him of a transcript of the testimony of such witness in another suit apparently inconsistent therewith, where such former testimony contained

expressions that would authorize the jury to find that the facts contended for by plaintiff were true. *Id.*

Where, in a suit on vendor's lien notes, the vendee filed a cross-action for cancellation of the notes for fraudulent representations and the parties adjusted their differences by making a new contract but the vendee brought a new action to cancel the notes under the new contract and for damages, he was not precluded from setting up and proving the fraud pleaded in the earlier action in connection with the alleged fraud inducing the second contract. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

In a suit to set aside an oil and gas lease as a cloud on title, where plaintiffs offered the lease in evidence, they waived any question of its execution and delivery. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

16. — **Claim inconsistent with previous claim or position in general.**—To establish defense of estoppel by election, it must be made to appear that plaintiff had two valid and available and inconsistent remedies, and that he undertook to pursue one. *National Life Ins. Co. of United States v. Eggleston* (Civ. App.) 195 S. W. 942.

That intervener in receivership proceedings failed to set up by amendment claim under art. 6625, in addition to his claim of priority under doctrine of equity, held not to estop him, on doctrine of election of remedies, from setting up his statutory claim in subsequent suit. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

A vendor who obtained a judgment of foreclosure in an action against purchasers of the vendee who had assumed incumbrances, foreclosure being for interest paid on a mortgage to protect the vendor's lien note and for interest on the note, and purchased the property at an extremely low price at the sheriff's sale, and thereafter sold it for a large sum, was not estopped in equity to subsequently sue the vendee for the face of the vendor's lien note, although the vendee had no knowledge of the foreclosure proceeding. *Rector v. Brown* (Civ. App.) 208 S. W. 702.

Defendant appellee, in suit to set aside judgment for delinquent taxes, having agreed in statement of facts that proceedings referred to constituted record in tax suit, there being no intimation they were even objected to when offered in evidence, is not in position to say they did not in fact comprehend the whole record. *Rousset v. Settegast* (Civ. App.) 210 S. W. 219.

Where plaintiff, not knowing that an automobile had been transferred to third persons, recovered a judgment for title and possession, which was unsatisfied, he may thereafter maintain an action against such third persons and the original parties for conversion of the automobile, for as the first judgment was not satisfied and the remedy sought was unavailing, there was no election of remedies which would estop him from seeking relief by way of an action of conversion. *Palmer v. Bizzell* (Civ. App.) 229 S. W. 971.

In a suit to enjoin defendant from conducting a millinery business sold to plaintiff, wherein defendant claimed that the conveyance constituted but a mortgage, that plaintiff, in answer to a writ of garnishment issued out of a suit against defendant, answered under oath that he did not owe her anything, held not to stop plaintiff from claiming that the instruments under which he held were absolute conveyances, no element of injury to defendant appearing. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

17. — **Claim inconsistent with contract or title previously asserted.**—Bringing action on canceled life policy held not to estop recovery on reduced policy in consideration of issuance of which larger had been canceled. *National Life Ins. Co. of United States v. Eggleston* (Civ. App.) 195 S. W. 942.

18. — **Defense or objection inconsistent with previous claim or position in general.**—Where defendant excepted specifically to petition as containing a misjoinder of causes of action, and the plaintiff amended so as to obviate the objection, and later filed a separate suit on cause of action eliminated by amendment, defendant is estopped to set up that the judgment in favor of plaintiff in the second suit is a bar to the first. *Ablene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

Where wife of bankrupt admitted in bankruptcy proceeding under oath that certain land belonged to the estate of her husband, and swore that a deed to her was a mortgage, and not intended as a conveyance of title, and the federal court set aside the deed on said admission, and she accepted a compromise of her claim, and accepted money of the estate on the compromise, and other benefits, she is estopped from thereafter setting up any claim to the land on the ground that transfers made under order of the federal court were void. *Koger v. Clark* (Civ. App.) 216 S. W. 434.

Heirs who, being of age, agreed among themselves and with the administrator that, in order to secure a final settlement and distribution of estate, land should be sold to certain of the heirs at specified price, and who participated in the distribution of the proceeds of such sale, are estopped from denying validity of sale, since, having assumed that administrator had the right to make sale, they are estopped from denying existence of such fact. *Allen v. Berkmier* (Civ. App.) 216 S. W. 647.

A mortgagor, who in his suit against the mortgagee, who has taken possession for foreclosure, asserts the mortgagee no longer had any right of foreclosure, or of possession, cannot in the same litigation complain of the mortgagee's failure to foreclose immediately on taking possession. *Lipper v. McClain* (Civ. App.) 223 S. W. 349.

20. — **By levy of attachment or execution.**—If chattel mortgagee had lien on proceeds of insurance policy by virtue of stipulations in contract and mortgage, and also remedy by garnishment, doctrine of election of remedies did not apply, and remedy be-

cause of stipulations was not waived when mortgagee sued out writ of garnishment against insurance company. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Creditors whose debtor fraudulently conveyed land to his mother, by availing themselves of an appropriate means of enforcing their right against the land in suing out attachment against the son as if the conveyance had not been made, attachment being in a sense an execution in advance, did not estop themselves to deny that debtor had such title, subsequent to his conveyance as would support his claim of homestead. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

23. Failure to assert title or right.—Where claimant against the surety of a jitney bus driver knew others injured in the same accident were asserting their claims, and failed to act diligently, leaving the surety to act in the belief that he had abandoned his claim, and pay other claims exhausting the bond, he was estopped from holding the surety. *Darrah v. Lion Bonding & Surety Co.* (Civ. App.) 200 S. W. 1101.

Where owner of property, or one having right to possession, permits another, who has no right to it, to take it, he does not, by mere silence, lose his right to property. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 203 S. W. 68.

Where a bank guaranteed subscriptions to a bonus which the bank paid when due, a subscriber who failed to inform the bank that his subscription was payable in gas, was estopped, in a suit by the guarantor to recover his subscription, from claiming payment so made; the subscriber being chargeable with notice that the guarantor was bound to pay over the bonus. *Henrietta Oil & Gas Co. v. W. B. Worsham & Co.* (Civ. App.) 210 S. W. 819.

Where right to demand arbitration had not arisen under fire policy, there being no disagreement as to loss, that insured did enter into arbitration which resulted in arbitrators' failing to appoint an umpire would not defeat right to sue on policy, such collateral agreement being no part of policy, in view of Const. art. 1, § 13, providing that no right is waived unless in plain terms. *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365.

A widow may waive her privilege to control the place and manner of burial by abandoning her duties in that respect, and where the jury, on sufficient evidence, found that she was indifferent to the disposition of her husband's remains and left them to be buried by his father, she cannot recover damages from the father. *Foster v. Foster* (Civ. App.) 220 S. W. 215.

Where A., having an unrecorded deed to land, sold the timber, and persons claiming under the timber deed acquired a deed to the land from one having a subsequent conveyance from A.'s grantor, the failure of A. to pay taxes and their payment by the persons claiming under the timber deed raised no issue of estoppel against him. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

24½. Clothing another with apparent title or authority.—If loss must fall on materialman, owner, or contractor, by reason of the default of one chosen by the contractor to perform his obligation and of one whose acts are or ought to be directly under the contractor's supervision, the loss ought to fall on contractor. *Wilson v. Sherwin-Williams Paint Co.*, 110 Tex. 156, 217 S. W. 372.

Defendant's letter stating his opinion that plaintiff was a person completely honorable and able to perform any contract he might make, etc., not being an admission of a matter of fact, held inadmissible in plaintiff's action, not being inconsistent with a subsequent assertion by defendant of plaintiff's dishonesty in a specific subsequent transaction. *Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love* (Civ. App.) 220 S. W. 224.

25. — Agency.—One claiming a principal's estoppel to deny agent's apparent authority must base such authority upon facts, be actually misled, and must have exercised due diligence to ascertain truth. *J. I. Case Threshing Mach. Co. v. Morgan* (Civ. App.) 195 S. W. 922.

The theory of apparent scope of authority in the law of agency is based upon the rule of estoppel, to the effect that, where a principal has led the other to believe that the agent had authority to act, such principal cannot later say that such agent was without authority, and such rule is based upon equity. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

Purchaser of a motortruck was entitled to rely upon representation of salesman that his principal, whom he telephoned, had given its approval of an exchange, instead of cash sale, and principal was estopped to deny that the salesman had authority to make the exchange, it being the custom to permit salesmen of motortrucks to make exchanges. *Federal Supply Co. v. Wichita Sales & Supply Co.* (Civ. App.) 232 S. W. 879.

26. — Real property.—Where legal title to community property is in the surviving husband, his conveyance to an innocent purchaser, although not for purpose of paying community debts, will pass title on the theory of estoppel. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

An erroneous survey of a valid Spanish grant by a county surveyor, the field notes of which included less than the original grant, did not create an estoppel in favor of the state so as to make the excluded land vacant, where such survey was not made by authority of the owners of the original grant. *McLellan v. Brown* (Civ. App.) 209 S. W. 177.

Where a grantee of land reconveyed and his grantor lost the deed and thereafter had the grantee convey the property to a third person, who assumed to pay vendor's lien notes, the original vendor was estopped from setting up the lost deed in an action by the last grantee to try title; the lost deed having been treated by the parties as never having existed. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

27. — **Personal property.**—In action to foreclose mortgage on cattle, evidence held to sustain finding that a third person to whom cattle belonged had done nothing which would lead an ordinarily prudent person to believe that they belonged to mortgagor, and that mortgagor had a right to mortgage them. *First Nat. Bank of Canadian v. Jones* (Civ. App.) 209 S. W. 468.

It is settled policy of Texas that enforcement against innocent purchasers for value of secret undisclosed liens upon and reservation of titles to personalty, possession of which has been voluntarily surrendered and the possessor clothed with an apparent full and unincumbered title, shall not be had. *Chambers v. Consolidated Garage Co.* (Civ. App.) 210 S. W. 565.

Where plaintiff drew a bill of sale of a car from H. to B. without reference to a company, except that its name appeared thereon above H.'s signature, and plaintiff took a mortgage upon the car from B., plaintiff may not claim that the company is estopped by the bill of sale, or that he is an innocent purchaser as against the company. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

The purchaser of a mortgage and note from bank under representations that another indorsed note secured by another mortgage had been paid, such other note being in the hands of the bank which delivered it to purchaser together with a release thereof, was protected against such other note, where it belonged to a third person who had permitted it to come into the hands of the bank. *Dellinger v. Gulf Production Co.* (Civ. App.) 215 S. W. 360.

Owner who leased barber shop fixtures by parol for the purpose of being used in the lessee's shop was not estopped from claiming ownership of fixtures as against innocent mortgagee who loaned lessee money on the faith that the fixtures belonged to lessee. *Dorsey v. Kemble* (Civ. App.) 224 S. W. 217.

28. — **Relying and acting on apparent title or authority.**—A father who placed his son, who was in fact his agent for some purposes, in a position to deceive defendants, would be estopped to deny agency, defendants having in fact been deceived. *De la O v. Consolidated Kansas City Smelting & Refining Co.* (Civ. App.) 202 S. W. 1027.

29. **Dealing with person asserting title or exercising authority.**—Evidence held insufficient to destroy the title of an heir by estoppel. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

30. **Contracts.**—That buyer of machinery, when he procured insurance, did not know of a stipulation for insurance in favor of the sellers in a chattel mortgage given by buyer for the purchase money, cannot be urged by a third lienholder, claiming proceeds of policy, as a reason why ordinary rule as to estoppel by contract should not apply. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Where defendant had agreed as to amount of damages in a shipment of apples, he is estopped to rely on noncompliance with condition as method of arriving at the same. *Neely v. Dublin Fruit Co.* (Civ. App.) 199 S. W. 827.

Where debtor, J., gave note to D., secured by chattel mortgage and to meet unsecured obligation due L., all parties agreed to a renewal note signed by L. and J., as principals and release of mortgage, and a subsequent agreement was made, on extending the renewal note, whereby D. was to let J. work off debt on a farm, which agreement was superseded, because of inability of J. to get supplies, by contract to work farm. D. to furnish supplies and to be reimbursed therefor, D. held not estopped by original contract from suing L., where the bill for supplies exceeded the amount of work J. did. *Lee v. Durham* (Civ. App.) 204 S. W. 1171.

If plaintiff assignor of his lease contract agreed to a particular distribution of the rents under the fear and compulsion of threats previously made against him by defendant assignee, and did so still acting under duress, he is not estopped thereby from claiming that defendant realized the benefits of an illegal transaction and was liable therefor. *Grice v. Herrick Hardware Co.* (Civ. App.) 224 S. W. 533.

Buyer under contract could not cancel certain items of his order and then sue for damages for failure to deliver such items. *Solomon v. Schwartz Bros. & Co.* (Civ. App.) 231 S. W. 174.

31. — **Recognition of rights.**—Sellers and buyers would be estopped from claiming that sale was in violation of Bulk Sales Law, arts. 3971-3973, to defeat just debts, which both had agreed to pay and made provision to pay out of the consideration for sale. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

When a contract is made and the parties thereto as a basis therefor assume a certain state of facts to be true, they are thereafter estopped from denying the existence of such facts so made the basis of the contract. *Allen v. Berkmier* (Civ. App.) 216 S. W. 647.

In an action against a carrier for ejection from a passenger train while attempting to ride on an interstate journey on a mileage book not good for such a journey, that after having been ejected defendant's agent sold plaintiff a ticket for scrip from such book held not to estop defendant from contending that plaintiff was an interstate passenger. *Chicago, R. I. & G. Ry. Co. v. Edwards* (Civ. App.) 232 S. W. 356.

32. — **Contracts relating to real estate.**—An equitable owner of oil lease under contract to purchase it, who orally agreed to sell the lease, and induced the purchaser to take written contract from legal owner of the lease, is estopped to attack the contract with the purchaser, either under the statute of frauds, or as made only with an agent when the principal was disclosed. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Where the legal owner of an oil lease has deposited in escrow a contract to transfer it, he holds the title as trustee for the purchaser, and a direction by the purchaser

to convey to another is a waiver of right under the escrow, which estops the purchaser from attacking title conveyed. *Id.*

Where the equitable owner of an oil lease under contract from a corporation sold his interest to a purchaser, whom he induced to accept a conveyance from the corporation executed by its president, and thereafter secured a conveyance to himself from the corporation, executed by the vice president and secretary, the lack of the president's authority to execute the conveyance to the purchaser does not defeat purchaser's right to the lease by estoppel of the equitable owner. *Id.*

33. — **Relying or acting on contract.**—Where bank held assignment of balance due plaintiff as subcontractor for materials as a mere pledge to secure certain indebtedness due it by plaintiff, defendant debtor could not claim that plaintiff was estopped to deny the bank's authority to accept less than the amount due in full satisfaction of defendant's liability; defendant having paid only admitted liability and protected his rights under contract. *Llano Granite & Marble Co. v. Hollinger* (Com. App.) 212 S. W. 151.

Payment on contract held not to preclude garnishment of money so paid on rescission of contract. *Commercial Nat. Bank v. Heid Bros.* (Civ. App.) 226 S. W. 806.

35. **Requests.**—Where the legal owner of an oil lease has deposited in escrow a contract to transfer it, he holds the title as trustee for the purchaser, and a direction by the purchaser to convey to another is a waiver of right under the escrow, which estops the purchaser from attacking title conveyed. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

36. **Representations.**—Where peanut threshers were sold under misrepresentations, and, after machines in hands of buyer's customers did not work satisfactorily, seller's agents told buyer that it was on account of wet season, rank vines, and inexperienced operators, seller cannot insist, when sued for damages from the original fraud, that buyer was guilty of negligence in being deceived by subsequent fraudulent representations. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

If a man by his statements or behavior leads another to do something which he would not have done but for the expression of that language, or the exhibition of such behavior, such first man will not be allowed to deny his utterance or act to the loss, injury, or damage of the other one. *F. L. Shaw Co. v. Dalton Adding Mach. Co.* (Civ. App.) 211 S. W. 833.

37. — **Ownership of property.**—Under agreement that defendant was to receive, smelt, and pay for ore coming from plaintiff's mines, only, plaintiff, who, through his agent, delivered as his own, to defendant, ore coming from mine of another company, would be estopped to set up that such company was deprived of title by confiscation of Mexican government. *De la O v. Consolidated Kansas City Smelting & Refining Co.* (Civ. App.) 202 S. W. 1027.

38. — **Existence and extent of liens or claims.**—Wife, having induced third person to purchase notes by representations as to validity of vendor's lien securing the notes, will be estopped to assert invalidity of lien by reason of husband's failure to join in execution of notes. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

40. — **Validity of bills or notes.**—Evidence held sufficient to show that maker requested indorsee to purchase note or promised or led him to believe that she would pay. *Commonwealth Trust Co. v. Hardee* (Civ. App.) 200 S. W. 201.

41. — **Relying and acting on representations.**—Title by estoppel cannot be based on representations not acted on. *Wilson v. Robertson* (Civ. App.) 223 S. W. 285.

42. — **Admissions and receipts.**—A written request by purchaser, under an earnest money contract, that the "deal be delayed for our convenience for thirty days," amounted to a waiver of an alleged failure to furnish an abstract and the admission of readiness of the vendor to then perform the contract. *Fuersteneck v. Clark* (Civ. App.) 195 S. W. 294.

A mere effort to reach a compromise is not an estoppel to the assertion of one's rights in court. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

43. **Assent to or ratification of acts of others in general.**—In holder's action on a note, it was proper to exclude evidence of written permission from holder to payee to sell property for which notes were given, subject to notes. *Rowe v. Daugherty* (Civ. App.) 196 S. W. 240.

Where purchaser was in possession and could have known of falsity of all representations, but made no claim for damages or to rescission for more than five years, he waived any claim arising from misrepresentations. *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Where a husband, with knowledge of the terms of a conveyance, caused it to be executed to his wife, making the lot conveyed her separate property, and it was delivered to her with his consent and his knowledge that title to lot was in her, and where there was no understanding between them as to any trust, he was estopped to ingraft an implied trust on the deed or title. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

County held not entitled to an equitable lien, based on the doctrine of estoppel, as against the seller of materials to its bridge contractor, though after the property was delivered to the contractor the county paid it 60 per cent. of the contract price of the work, and after its delivery and the making of the payment the seller caused the property to be seized. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

A property owner is not estopped from recovering from defendant city damages suffered by him by reason of the city's negligence in making a paving improvement whereby surface water was collected in front of the owner's lot because he petitioned the city with others for the improvement; the petition not being construable as a re-

quest to make the improvement without reference to consequences to plaintiff resulting from negligence. *City of Greenville v. McAfee* (Civ. App.) 230 S. W. 752.

In an action by the owner of money placed in the hands of the defendant receiver with instructions as to its application, held, that the action was for a misappropriation of funds, and that the plaintiff could not recover for the reason that the money had been paid as directed by him in releasing liens upon his land, so that he was estopped by equity and good conscience from recovering more than the damages actually suffered, namely, the unexpended balance left after discharging the liens. *Stonewall v. McGown* (Civ. App.) 231 S. W. 850.

44. — **Contracts.**—In action for price of goods sold defendant's wife while living apart from him and after notice not to sell on his credit, evidence as to his conduct held to make question for jury on issue of equitable estoppel. *Sanger Bros. v. Trammell* (Civ. App.) 198 S. W. 1175.

47. **Assent to or participation in judicial proceedings—Partition proceedings.**—Partition having been made between the widow and children of testator, and for years acquiesced in, on the theory of the will not attempting to dispose of her community interest, the children are estopped to claim against her mortgagees on the opposite theory. *Floyd v. Seay* (Civ. App.) 196 S. W. 237.

48. **Acceptance of benefits.**—Even if national bank's contract of indemnity against materialmen's liens given to secure payment to it of money due its debtor on building contract was ultra vires, yet the bank, having received the money, would be estopped to deny its liability on that ground. *Eddleman v. Wofford* (Civ. App.) 217 S. W. 221.

In the absence of supporting evidence, mere acceptance by oil lessors of rentals paid by the lessee because of not having drilled a well did not estop the lessors from pleading and proving want of original consideration for execution of the lease; the payment of the rentals amounting only to consideration from the lessee for a right or option to delay performance of the contract, by drilling during the period covered by the payment. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Transferee of note for labor and materials furnished for improvements on land held estopped by the acceptance of insurance money from asserting any claim over the makers and owners of the premises against her immediate transferor, who had taken from the payee, the owners being estopped from questioning the lien by having secured the note by vendor's lien, so that the liability of plaintiff's transferor on the original mechanic's lien was immaterial. *Reese v. Hamlett* (Civ. App.) 223 S. W. 346.

49. — **Contracts.**—The principal will not be permitted to receive money belonging to another and keep it under the plea that the agent was not authorized to make the representations he did to secure the contract with plaintiff which the principal breached. *Trammell v. San Antonio Life Ins. Co.* (Civ. App.) 209 S. W. 786.

If plaintiff's acceptance and cashing of checks constituted an accord and satisfaction, he is estopped from thereafter suing on the claim for which the checks were given in payment. *Lone Star Shipbuilding Co. v. Daniels* (Civ. App.) 217 S. W. 225.

Lessor under oil lease was estopped to set up fraud of lessee in obtaining the lease by telling him that it was for six months instead of ten years, where he accepted rentals after the expiration of the six months knowing that the lease had been assigned, and such was true even though the lease was altered after execution and delivery, changing the term. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

50. — **Sale and conveyance or mortgage of property.**—Railway company accepting and registering deed containing covenant to maintain depot on land held estopped to deny that it was bound thereby, where purchasers were thereby induced to buy contiguous lands of the grantor. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621.

Defendant in undisputed possession of tract received from plaintiff on agreement for exchange of lands cannot deny existence of the agreement and retain the benefit therefrom and hold both his own and plaintiff's tracts. *Lasater v. Premont* (Civ. App.) 209 S. W. 753.

Supply creditors of receiver, who accepted part payment of their claims from receiver out of proceeds of sale of the property, were bound by the terms of the order of sale, directing a sale free from the claims of such creditors, and were estopped to assert a claim or lien on such property as against purchaser and his assignee. *Mayotown Lumber Co. v. Nacogdoches Grocery Co.* (Civ. App.) 221 S. W. 644.

If receiver's supply creditors urged receiver to sell the property, and accepted 70 per cent. of their claims out of the proceeds, they would not be estopped to prosecute suit against bondholders, since bondholders should have seen to it that the property brought a sufficient sum to pay off all claims superior to theirs. *Id.*

Where defendant bought interest in business, giving note therefor, and a partnership was formed and the two partners executed notes to a third person, the note given for the interest in the business being placed as collateral, and the seller of the partnership interest was adjudicated a bankrupt, and the defendant sold the real estate of the firm to the third person in consideration of a discharge of the note against the partnership and a release of defendant from liability on his note to the bankrupt, the agreement of the third person to release defendant from liability on his note was a binding obligation upon the third person, and it could not recover thereon where the note subsequently came into his hands. *H. C. Denny & Co. v. Lee* (Com. App.) 221 S. W. 947, affirming judgment (Civ. App.) 188 S. W. 294.

Subscriber to stock in insurance company, party to transaction whereby his note was accepted in payment for stock, and whereby he received stock, being estopped to deny legality of note in suit of creditors of company, held bound to its receiver for portion of note representing subscription to surplus, not within constitutional inhibition of

issuance of stock for notes, particularly in view of fact burden was on him to show invalidity of note. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Where a mother with the consent of her children deeded lands to them, excepting one who was a minor, saving certain land for him, and later their father was discovered to be the real owner, and he consented to the deeds and made deeds to them granting same property, taking notes from the children, they to be reimbursed by his will for amounts paid on the notes, held, that the grantee heirs subsequent to the father's death were estopped to claim title to the lots set apart, but not deeded to such minor, they having been reimbursed. *Uloth v. Moodyman* (Civ. App.) 227 S. W. 326.

53. Permitting improvement or expenditures—Improvements and expenditures by purchasers of land.—Where property owners have platted their land and faced lots upon certain streets and improved them, and other persons have purchased property on such streets in reliance upon the recorded plat, the city and the property owners are estopped to change the plat. *Halsell v. Ferguson*, 109 Tex. 144, 202 S. W. 317.

55. Permitting sale or mortgage of property.—The filing of a chattel mortgage in county records does not estop one who had no knowledge of its contents and was not a party to it from claiming the property as his own. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

In a suit to foreclose a mortgage lien, where part of the property was claimed by another, evidence by the claimant that he did not know his property was included in the mortgage, when it was executed in his presence, held sufficient to sustain a finding that he did not consent to the mortgage so as to be estopped to claim the property. *Id.*

57. Silence.—Wife by occupying with her husband a house not constructed according to a contract for its erection made by them jointly with a third person is not estopped to deny performance of contract on account of acts by husband, by reason of mere silence, except where such silence deceives an innocent person, and she intends that it shall do so. *Harrop v. National Loan & Investment Co. of Detroit, Mich.* (Civ. App.) 204 S. W. 878.

Estoppel was not available against the title to oil and minerals under a grant passing the legal title under which drilling had been stopped, where nothing was said or done by plaintiffs, the present owner of the grant, or any predecessor in title, amounting to a disclaimer or denial of the title, and nothing said or done was intended or would reasonably have been expected to have been acted upon by defendants or any predecessor in title in buying or developing the land; and defendants and those in privity with them knew of plaintiffs' title and made no inquiry in regard thereto, and in buying or developing the land did not rely on anything said or done by plaintiffs or any predecessor in title on which they had a right to rely, but on their own independent judgment and where, in the development, more than enough money had been received to fully reimburse all outlay, since, as respects land, the plea cannot be based upon mere silence or inaction, nonclaim or neglect, or want of use or possession, but only on affirmative words or acts, amounting to actual or constructive fraud. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

Mere silence by the party entitled to possession of a mining claim does not defeat his right to ore taken therefrom by a trespasser and sold to an innocent purchaser, though of course the owner's consent to such taking would defeat his right. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

58. Negligence.—Negligence of defendant corporation in failing to properly audit the books of its branch, no matter how obvious, must have misled plaintiff to its injury in order to be the basis of an estoppel. *Guaranty Bank & Trust Co. v. Beaumont Cadillac Co.* (Civ. App.) 218 S. W. 638.

58½. Particular matters.—One could not, by reason of the wrong of trustees, in which he participated, making him a trustee, acquire the property free from the equitable title, as he would be estopped from setting up the invalidity of a contract to which the beneficiaries were not parties. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

III. Persons Affected

59. Persons to whom estoppel is available.—Subscribers to the stock of a banking corporation organized under a prior special act subsequent to the adoption of Const. 1876, art. 16, § 16, prohibiting the organization of such corporations, are not estopped, as against creditors, represented by a receiver, to deny the validity and binding force of their subscriptions; the creditors being charged with notice the corporation was illegal. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

In trespass to try title, defendants not being parties to a suit of plaintiffs against purchaser, plaintiffs are in no manner estopped to assert another and contrary theory, from that upon which they recovered from the purchaser, upon which to base a recovery against defendants. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

60. Persons estopped.—Where partner in drug firm, in inducing sister to purchase vendor's lien notes, acted for benefit of firm, his partner was estopped to say that so far as he was concerned sister did not acquire vendor's lien against land of partnership. *Bolding v. Bolding* (Civ. App.) 200 S. W. 537.

Where the legal holder of an oil lease, the equitable owner thereof under contract to purchase, and one who had introduced a subsequent purchaser, all acted together in completing the sale to subsequent purchaser, it is immaterial to the issue of the

equitable owner's estoppel to attack sale what were the exact relations between the three persons, so co-operating. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

In action involving ownership of land as between plaintiff, who claimed to have purchased land in good faith at a trustee's sale, and defendant, who alleged a conspiracy between plaintiff and a defendant's partner who had agreed to purchase land to be held by the copartnership, the fact that partner did not reveal to defendant that the land had been sold to plaintiff did not tend to estop plaintiff from asserting his claim. *Mason v. Gantz* (Civ. App.) 226 S. W. 435.

61. — **Purchasers from person creating estoppel.**—That a purchaser of property subject to a lien takes with knowledge of vendor's recognition of the validity of the lien estops him to deny its validity, notwithstanding any unrevealed intention on the part of the purchaser subsequently to contest its validity on the ground that the property constituted a homestead. *Rice-Stix Dry Goods Co. v. First Nat. Bank* (Com. App.) 231 S. W. 386.

IV. Matters Precluded

64. **Rights and liabilities under contracts.**—One entitled to forfeiture and re-entry may waive such right, or be estopped by conduct from asserting it. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

One who had made an oral contract for the sale of an oil lease under circumstances which estopped him from attacking the purchaser's title, because of payment of part of the price and acceptance of the obligation to pay the balance, cannot, after the lease has become valuable, rescind his contract to the prejudice of the purchaser. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Art. 3688. [2300] [2246] Color or interest does not disqualify.

Cited, *Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283; *Leahy v. Timon*, 110 Tex. 73, 215 S. W. 951.

In general.—In view of this article, held that under art. 3690 as to testimony relating to transaction with a decedent, a devisee under a will, probate of which was contested for want of capacity by the heirs, may testify as to conversations and transactions with the testator. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

Parties of record.—As *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3688, has removed the common-law disability against testimony by a party in interest, although art. 3690 contains exceptions and forbids testimony by party in interest where the opposite party is dead, etc., the daughter of an alleged vendor of land, notwithstanding that she was a prospective heir, may testify as to an arrangement for abandonment of the contract made with the purchaser who had since died. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

Interest of party or other person.—The father of a beneficiary of a will is not an "interested party," so as to be incompetent to testify to the execution of a will. *Stephenson v. Stephenson*, 6 Civ. App. 529, 25 S. W. 649.

Where an executor renounced his position as such, he was competent, despite art. 3690, to testify as to conversations showing the testator's capacity, etc., for no judgment could be rendered against him in his representative capacity. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

Art. 3689. [2301] [2247] Husband or wife not disqualified, except, etc.

See, also, notes to Code Crim. Proc. art. 794.

Confidential communications.—Declarations of husband made to wife in presence of third persons are not privileged and such third persons are competent to state them; but declarations made in presence of wife alone are privileged. *Wiggins v. Tiller* (Civ. App.) 230 S. W. 253.

Termination of marriage.—Neither death nor divorce destroys the privilege that a spouse has under the rule of evidence that prohibits either one of them against the will of the other to lift the screen of privacy to public gaze and disclose the statements made in private to each other in any conversation between them during their marriage relation. *Wiggins v. Tiller* (Civ. App.) 230 S. W. 253.

Art. 3690. [2302] [2248] In actions by or against executors, etc., certain testimony not allowed.

See *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848; *Leverett v. Wherry* (App.) 15 S. W. 121; *Gray v. Shelby*, 83 Tex. 405, 18 S. W. 809; *Stephenson v. Stephenson*, 6 Civ. App. 529, 25 S. W. 649; *Todd v. Hand* (Civ. App.) 225 S. W. 770.

Cited, *Perdue v. Perdue*, 110 Tex. 209, 220 S. W. 322.

1. **Construction of act.**—This article changes the common-law rule, and should be strictly construed, and the words taken in their ordinary meaning and according to their usual signification. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

The terms of this article will not be so extended by judicial construction as to exclude testimony not expressly excluded by its provisions. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

2. Actions in which testimony is excluded.—In creditor's suit after the grantor's death to set aside conveyance as fraudulent, representations made by grantor to plaintiff's agent were admissible. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

In action against assignees of oil and gas lease to cancel lease, plaintiff lessor was not prohibited by this article, from testifying as to fraudulent declarations by lessee, since deceased, and against whom the suit had been dismissed, made at the time of the execution of the lease in reference to the term for which the lease was taken and as to the amount of rentals agreed to be paid; the lessee having prepared the lease. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

3. — Representative capacity or title or interest of party.—In action against testamentary trustee by alleged beneficiaries, in which devisees intervened as defendants held that none of the defendants were legal representatives, within this article, though the trustee was also named as executor, where will was not probated in Texas, so that plaintiff's testimony as to conversation with testator was competent. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

4. — Possibility of judgment for or against party in particular capacity or right.—Where an executor renounced his position as such, held, in view of art. 3688, that he was competent, despite this article, to testify as to conversations showing the testator's capacity, etc., for no judgment could be rendered against him in his representative capacity. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

In trespass to try title, where defendants relied on a lost deed, testimony that witness saw and read the deed which conveyed the premises to his father, and from whom he inherited an interest, which he conveyed to defendant is admissible. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

5. — Probate or contest of will.—In a will contest, testimony by a contestant concerning statements by or transactions with the testator are not admissible. *Leahy v. Timon* (Civ. App.) 204 S. W. 1029.

This article does not apply to contestant in a will contest. *Grelle v. Grelle* (Civ. App.) 206 S. W. 114.

A contested application to probate a will is a "suit" within this article. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Testatrix's heirs suing devisees, including executor, to contest validity of will, were incompetent to testify as to statements of testatrix, such action being one "arising out of any transaction with such decedent." *Leahy v. Timon*, 110 Tex. 73, 215 S. W. 951.

This article applies to contest by daughters of testatrix joined by their husbands of application by testatrix's son and sole devisee for probate. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

8. Parties whose testimony is excluded.—In an action by the guardian of the minor children of a deceased heir against the other heirs for partition, one of the defendants, though called by his codefendants, cannot testify as to declarations made to him by the deceased heir. *Ellis v. Stewart* (Civ. App.) 24 S. W. 585.

In action by heirs of testatrix against devisees to contest validity of will, husband of one of the heirs, who was joined as party plaintiff, was incompetent to testify as to statement by testatrix since husband, being a party, comes within prohibition. *Leahy v. Timon*, 110 Tex. 73, 215 S. W. 951.

10. — Legatee, devisee, heir or distributee.—In suit by heirs of grantor to cancel deed, held what grantor said in conversation with reference to execution could not be proved by heirs. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

Petition, showing plaintiff sues as heir as well as sole legatee, this article applies. *Houston Transfer & Carriage Co. v. Williams* (Civ. App.) 201 S. W. 712.

An heir is an "interested party, although he did not actively participate in the will contest by joining in the pleadings. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

In view of art. 3688, declaring that no person shall be incompetent to testify on account of interest, held that under this article, a devisee under a will, probate of which was contested for want of capacity by the heirs, may testify as to conversations and transactions with the testator. *Byrnes v. Curtin* (Civ. App.) 208 S. W. 405.

In trespass to try title by purchaser from decedent against purchaser from decedent's heirs, heirs, who have not been called upon to defend title, and are not apparently in a situation to be concluded by any judgment rendered, are not "parties," within meaning of this article, though term should not in every case be limited to those named in pleadings. *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571.

In an action by an administrator, an heir of deceased is essentially a party, though not nominally a party, and she is therefore incompetent to testify to a transaction with deceased. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

In a proceeding to contest the probate of a will, evidence by a daughter and heir of testatrix that, from observation of her acts, conduct, and mental and physical condition, she was of opinion that testatrix was insane at time of making the will, held properly excluded, the witness being a party to the proceedings. *Holland v. Nimitz* (Com. App.) 232 S. W. 298.

11. — Surviving spouse.—Testatrix's husband, a legatee under the will, cannot testify in his own behalf as to declarations made by his wife bearing on the validity of the will. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

14. Interest in subject-matter as disqualifying witness.—The guardian of the minor children of a deceased heir, in an action by him against the other heirs for partition, is incompetent to testify as to declarations made to him by the heirs' intestate. *Ellis v. Stewart* (Civ. App.) 24 S. W. 585.

15. — **Relationship of witness to party or person interested.**—As art. 3688, has removed the common-law disability against testimony by a party in interest, although this article contains exceptions, the daughter of an alleged vendor of land, notwithstanding that she was a prospective heir, may testify as to an arrangement for abandonment of the contract made with the purchaser who had since died. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

16. — **Agent of party interested.**—This article does not apply to agents of corporation with whom decedent had business relations. *Williams v. Farmers' Nat. Bank of Stephenville* (Civ. App.) 201 S. W. 1083.

20. — **Termination or extinguishment of interest.**—Testimony of a defendant is not rendered admissible by a conveyance of the interest of the witness for the sole purpose of rendering him competent. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

21. **Parties as against whom testimony is excluded.**—Where plaintiff sues as the representative in part of her husband's estate, it is not error to reject evidence as to transactions between her deceased husband and one of defendants. *Harrell v. Houston*, 66 Tex. 278, 17 S. W. 731.

In trespass to try title by the heirs of the owner against the widow's devisees, plaintiff's testimony as to conversations with widow were not inadmissible; her executors not being necessary parties to the suit, and the inhibition of the statute merely applying to personal representatives or heirs. *Stiles v. Hawkins* (Civ. App.) 207 S. W. 89.

This article does not apply to purchaser from decedent, suing purchaser from decedent's heirs in trespass to try title. *Ferguson v. Coleman* (Civ. App.) 208 S. W. 571.

Where one of several plaintiffs died after suit commenced, and his heirs were substituted as plaintiffs, defendant could not testify as to a conversation had with him. *McKelvy v. Gugenheim* (Civ. App.) 208 S. W. 757.

In an action by a legatee on a note bequeathed, defendants cannot be precluded from testifying to statements by or transactions with the deceased during his lifetime concerning the subject-matter of the suit, legatees not being mentioned in the statute. *Houston Transfer & Carriage Co. v. Williams* (Com. App.) 221 S. W. 1081, reversing judgment (Civ. App.) 201 S. W. 712.

23. — **Party as to whom person deceased acted in representative or fiduciary relation.**—This article, does not apply to corporations, so as to exclude testimony as to contracts made with their officers and agents who have since died. *Bexar Bldg. & Loan Ass'n v. Newman* (Civ. App.) 25 S. W. 461.

25. **Subject-matter of testimony—What constitutes transaction in general.**—In an action against the heirs of a deceased grantor, to prove for record an unacknowledged instrument, it is error to allow plaintiff to testify as to his reception of the instrument through the post-office, with a certain post-mark, for the purpose of proving delivery thereof by the deceased grantor, since such delivery is a "transaction" with deceased. *Howard v. Zimpelman* (Sup.) 14 S. W. 59.

Rev. St. 1879, art. 2248, does not prevent a party suing executors from testifying that he had lost a note owned by him, and purporting to be executed by the deceased. *Choate v. Huff* (App.) 18 S. W. 87.

In suit to set aside deed for nonpayment of price, where defendant died, testimony of his wife held not violation of this article, relating to transaction with or statement by deceased. *Russell v. Beckert* (Civ. App.) 195 S. W. 607.

In will contest involving question of whether testator revoked will, testimony of an heir that testator directed witness to get will, and after having so done testator tore will in two and told witness to light match, and then held papers over flame in the hands of witness until they were consumed, was incompetent, being as to a transaction with deceased. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Testimony by proponent and defendant in a will contest proceeding that she stayed with her mother, the testatrix, during a period of time in which she accompanied her mother to gospel missions, and on return found the house burglarized, etc., does not fall within the prohibition of this article, relating to testimony as to transactions with persons since deceased. *Marshall v. Campbell* (Civ. App.) 212 S. W. 723.

Testimony by husband as to his intent in having land deeded to his wife, since deceased, does not relate to transaction with her so as to be incompetent. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In trespass to try title, where defendants relied on a lost deed, testimony by one of the defendants that he saw and read the deed which conveyed the premises to his father and from whom he inherited an interest is admissible. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Testimony of proponent that he never said anything to testatrix, his mother, with reference to making of will being contested, was not testimony to "any transaction with or statement by the testator." *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

One suing as heir of grantor of land to recover a triangular piece of land could not testify as to the place where deceased and the grantee, with the assistance of witness, had fixed the beginning corner on the ground. *Tomlinson v. Noel* (Civ. App.) 223 S. W. 1038.

This article is not to be extended beyond its spirit, and should not be held to apply to facts within the knowledge of the witness not dependent upon what was said or done by the deceased. *Id.*

26. — **Occupancy of land and delivery of property.**—This article held to apply to testimony showing deceased had failed to deliver goods for which the note sued on was given. *Houston Transfer & Carriage Co. v. Williams* (Civ. App.) 201 S. W. 712.

In action by mother's administrator against decedent's sons to recover property converted by them, their testimony that mother had given them such property was incompetent as testimony of transaction with deceased. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

In an action against a widow to recover an undivided fourth interest in land claimed by her to have been community property of herself and her deceased husband, admission of testimony of defendant widow that it was the intention of herself and husband to acquire the place for a home held not erroneous. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903.

27. — **Contracts.**—Testimony by husband as to his intent in having land deeded to his wife, since deceased, does not relate to transaction with her so as to be incompetent, though testimony as to her agreement to hold it in trust for him is incompetent. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

In action on fraternal certificate involving dispute as to right to proceeds between insured's father, named as beneficiary at time of insured's death, and insured's surviving wife, who had previously been designated as beneficiary, and who contested the change of beneficiary upon ground of undue influence and fraud, testimony by wife as to statements by insured as to his reasons for changing beneficiary held inadmissible. *Griggs v. Griggs* (Civ. App.) 220 S. W. 363.

In an action for the specific performance of a contract for the purchase and sale of land, where pending trial plaintiff, the purchaser, died, and his wife, as survivor of the community estate, was substituted as plaintiff and prosecuted the action for benefit of herself and children of the marriage, the vendor is incompetent to testify that, after the execution of a deed and payment of part of the purchase money, etc., it was arranged between herself and the decedent, purchaser, that the transaction should be abandoned. *Watson v. Watson* (Civ. App.) 229 S. W. 899.

30. — **Payment or transmission of money.**—In suit against heirs to rescind contract for purchase of land, permitting plaintiff to testify over objection that balance of purchase price had never been paid, was reversible error; note introduced in evidence being more than 30 years past due. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

In an action by an administrator to recover funds entrusted by deceased to defendant, testimony by defendant that he made payments to others to procure conveyances of property to deceased is competent, since such payments did not amount to a transaction with deceased. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

31. — **Physical condition and mental capacity.**—In contest by daughters of testatrix, joined by their husbands, of application by testatrix's son and sole devisee for probate, contestants could testify that, independently of any statements made by testatrix or any transactions had with her, that in their opinions, testatrix was insane or sane at the time of execution of will and could testify as to testatrix's physical condition during her last illness, including matters of involuntary expressions of pain and suffering, and acts and conduct tending to show mental trouble. *Nimitz v. Holland* (Civ. App.) 217 S. W. 244.

32. — **Transactions between persons other than witnesses and persons subsequently deceased or incompetent.**—In trespass to try title by grantee against his grantor's executor, witness could not testify that plaintiff told him that plaintiff's grantor gave him deed to keep. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

Children of the first marriage of their father, suing his children by later marriages for land left by him, are incompetent witnesses to the fact of it having been paid for with the property of their mother, although such transaction was between the deceased parents and a third party; all their knowledge being derived from their deceased parents. *Hughes v. Robinson* (Civ. App.) 214 S. W. 946.

Testimony by an heir of deceased in an action by the administrator as to a conversation she heard between the deceased and defendant is incompetent. *Dodson v. Watson* (Civ. App.) 225 S. W. 586.

In a proceeding to contest the probate of a will, a daughter and heir of decedent, though a party to the proceeding, held competent to testify that, when decedent was brought to a certain town during her last illness, no preparations had been made to take care of her at defendant's house, and that defendant's wife was unkind to her, and neglected her. *Holland v. Nimitz* (Com. App.) 232 S. W. 298.

34. — **Admissions or other statements by person subsequently deceased.**—Rev. St. 1879, art. 2248, did not preclude defendants in an action by the widow of a decedent, in behalf of herself and children, for damages for his alleged wrongful killing, from testifying as to conduct and statements of decedent at the time of his killing, in a personal difficulty with defendants. *Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283.

In replevin for chattels claimed by the defendant under an administrator, the plaintiff, who denies the title of the intestate, is a competent witness to prove his admissions. *Bush v. Barron*, 78 Tex. 5, 14 S. W. 238.

35. — **Communications or instruments in writing.**—Testimony that decedent was person who signed note in suit is not testimony as to transaction with the decedent. *Williams v. Farmers' Nat. Bank of Stephenville* (Civ. App.) 201 S. W. 1083.

In partition, where plaintiffs' title was derived by inheritance from their father and from a trust resulting from application of their interest in a 40-acre tract conveyed by their father in payment of part of purchase price of the 100-acre tract in controversy, and wherein defendants claimed by descent from their mother as community property of their father and of defendants' mother, who was plaintiffs' step-mother, evidence by plaintiffs that they were to receive an interest in the 100-acre tract as a consideration for conveying the 40-acre tract, but had received nothing, held

not inadmissible as relating to a transaction with the decedent contrary to Rev. St. 1911, art. 3690, since, as to the interest sought to be established by the testimony, the title was neither claimed nor resisted on the ground of heirship. *Pynes v. Pynes* (Civ. App.) 225 S. W. 777.

37. **Nature and effect of testimony.**—In a will contest, admission of testimony by defendant, the proponent of the will showing her intimacy with the testatrix and opportunity to exercise undue influence, held harmless, though such testimony was inadmissible. *Marshall v. Campbell* (Civ. App.) 212 S. W. 723.

38. **Effect of admission of evidence on behalf of adverse party.**—In an action involving a contract whereby the parties were to divide the profits arising from the purchase and sale of land, the action being by a bank against one of the parties, and the other intervening, the intervener's explanation of an item appearing on a memorandum introduced in evidence by the administratrix of the other party should have been admitted. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

39. **Rebuttal of evidence on behalf of adverse party.**—Where contestants introduced evidence of statements of testatrix as to proponent's cruelty to, demands upon, and threats communicated to testatrix, proponent may, notwithstanding this article, deny the evidence introduced. *Marshall v. Campbell* (Civ. App.) 212 S. W. 723.

40. **Effect of calling or examination as witness by adverse party.**—On his cross-examination as a witness, defendant is not precluded from testifying as to services rendered and money advanced by him to decedent during her life, where defendant was called as a witness by plaintiff, and questioned as to the money collected by him belonging to the estate, and another witness testifies concerning the services and advances. *Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032.

Proponent having called heir as witness in county court to testify as to transaction with deceased, the testimony reduced to writing under arts. 3273-3275 was competent in district court. *Perdue v. Perdue* (Civ. App.) 208 S. W. 353.

Where a nephew, suing his uncle's executor to recover a deposit with the uncle as trustee, had his ex parte deposition taken by the executor, but it was not offered in evidence, the nephew was "called to testify" by the adverse party within the meaning of the statute, and became competent to give evidence in his own behalf in relation to his transaction with his uncle, deceased. *Allen v. Pollard*, 109 Tex. 536, 212 S. W. 463.

In an administrator's action, the administrator, by cross-examining defendant as to transactions with intestate, waived the incompetency of such testimony. *Reynolds v. Reynolds* (Civ. App.) 224 S. W. 382.

Art. 3692. [2304] [2250] Printed statutes evidence, when.

See *Harvey v. Cummings*, 68 Tex. 599, 5 S. W. 513.

Application in general.—A book purporting to be a reprint of the Penal Code of the state of Coahuila, Mexico, when duly proven to be such by a competent witness, is admissible in evidence to prove the laws of such state, under Rev. St. 1879, art. 2250. *Fernandez v. State*, 25 Tex. App. 533, 8 S. W. 667.

The statutory law of another state can be proved only by introducing in evidence the authorized printed statutes. *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642.

Printed statutes of other states are the best evidence of the statutes, and parol evidence is not admissible to establish them, though such evidence is admissible to establish the unwritten law of another state. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Art. 3693. [2305] [2251] Certified copies of acts, etc., evidence.

Certificate.—A copy of a statute of Alabama, with the certificate of its secretary of state that it was taken from the official published acts in his office, was properly admitted. *Harvey v. Cummings*, 68 Tex. 599, 5 S. W. 513.

Art. 3694. [2306] [2252] Copies of records of public officers and courts to be prima facie evidence.

See *Traylor v. Lide* (Sup.) 7 S. W. 58; *Texas Mex. Ry. Co. v. Jarvis*, 69 Tex. 527, 7 S. W. 210; *Meyer v. Hale* (Civ. App.) 23 S. W. 990.

Cited, *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300; *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 23 Am. St. Rep. 922.

In general.—A certificate of a county clerk that no claims had been filed against an estate is inadmissible in evidence. *Myers v. Jones*, 4 Civ. App. 330, 23 S. W. 562.

Letters from Mexican officials to other officials in Mexico, certified by their official custodian, are not admissible as certified copies. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

Where original conveyance was not produced or accounted for, a certified copy of such deed as appeared in records is not admissible, particularly where book containing deed was shown to have contained copies of other instruments confessedly and admittedly forged. *Kellogg v. Chapman* (Civ. App.) 201 S. W. 1096.

In suit to enjoin a county inspector from requiring cattle to be dipped pursuant to the Tick Eradication Statute (Vernon's Ann. Civ. St. Supp. 1918, art. 7314 et seq.), certified copy of the rules and regulations of the Live Stock Sanitary Commission, not

certified by any member of the Commission, but by the acting Secretary of State, held admissible. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

Records of land office.—The first leaf or page of a certified translated copy of the Spanish grant, under which plaintiff in trespass to try title claimed, showed the following words and figures: "200. Title in favor of Rafael de Aquirre [the grantor] for 11 leagues of land,—ten of which are situated." etc., "[describing it,]—issued by L. Lessosier, alcalde of San Filipe, October 22, 1829;" then written in pencil, "This is the genuine title to Rafael de Aquirre, the name 'Perfecto Valdez' inserted through mistake. J. P. B.;" also in pencil, "see Mr. Borden's letters, pile 3, 636. Refer to title to Rafael de Aquirre." "Note 1. The above is a true copy of the memoranda attached to the title." One of the issues was as to the validity of the Spanish grant, the defense being set up that it was a forgery. Held, that said first leaf was not admissible, it being in the nature of hearsay. *Gaither v. Hanrick*, 69 Tex. 92, 6 S. W. 619.

Art. 3696. [2308] [2253] Copies and certificates from certain officers are evidence.

Cited, *Texas Mex. Ry. Co. v. Jarvis*, 69 Tex. 527, 7 S. W. 210; *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Decisions under prior acts.—See *Lott v. King*, 79 Tex. 292, 15 S. W. 231.

Secretary of state.—In shipper's action against railroad, certificate of Secretary of State as to forfeiture of shipper's right to do business in Texas, consisting of certified copy of records, containing entry on margin showing forfeiture of franchise for failure to pay franchise tax, was admissible, although such marginal entry was not signed by Secretary of State. *Texas Packing Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 204 S. W. 120.

Commissioner of land office.—The number of the certificate by which the land in controversy was patented, where that fact does not appear in the patent, is properly proved by the certificate of the commissioner of the general land-office. *Talbert v. Dull*, 70 Tex. 675, 8 S. W. 530.

Commissioner of insurance and banking.—In suit on a fraternal order's beneficial certificate, if only a copy of the contract of merger between defendant order and another, decedent's original insurer, was filed with the commissioner of insurance, a copy of such copy would not be admissible in evidence. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

Art. 3700. [2312] [2257] Recorded instruments admitted in evidence without proof, when.

See *Frelberg v. Brunswick-Balke-Collender Co.* (App.) 16 S. W. 784; *Jester v. Steiner*, 86 Tex. 415, 25 S. W. 411.

Application of article in general.—On a trial for the theft of an animal, the execution by defendant of an attested bill of sale for the animal, which has not been filed in the case, cannot be proved by secondary evidence, without accounting for the non-production of the subscribing witness; a bill of sale being required by law to be recorded. *Morrow's Case*, 2 S. W. Rep. 624, followed. *Graves v. State*, 28 Tex. App. 354, 13 S. W. 149.

Letters from Mexican officials to other officials in Mexico, certified by their official custodian, are not admissible as certified copies. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

Filing before trial and notice.—A petition averring that defendant had the original deed, notifying him to produce it, or that secondary evidence of its contents would be introduced, together with a certified copy thereof, filed with such petition six months or more prior to the trial, is sufficient to render the certified copy admissible. *Pennington v. Schwartz*, 70 Tex. 211, 8 S. W. 32.

Just before a cause was called for trial the attorneys agreed that certain deeds might be read in evidence from the records as originals; but on the trial defendant objected to their admission, for the reason that the originals or copies thereof had not been filed three days before trial, as required, which objection was sustained. Plaintiff then asked to withdraw his announcement of readiness for trial, which was refused, and he thereupon took a nonsuit. Held that, where the cause of action had in the mean time become barred by limitation, plaintiff was entitled to a reinstatement, as such agreement authorized him to infer that defendant waived his objection to the filing of the deeds. *Cotton v. Lyter*, 81 Tex. 10, 16 S. W. 553.

No further notice to the opposite party is required, where the instrument was made part of the petition, which is filed more than three days before trial. *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 788.

A deed is not inadmissible because it was not filed three days before the trial, and no notice was given, when it is an original, and its execution and delivery are proved by witnesses on the trial. *McGehee v. Minter* (Civ. App.) 25 S. W. 718.

Where one party gave the notice required, and filed copies of deeds, held, opposite party, though he failed to give notice or file copies, may introduce same in evidence. *Luatke v. Murray* (Civ. App.) 199 S. W. 321.

The method prescribed by this article, of introducing written instruments in evidence without proving their execution as at common law, by filing affidavit before trial, does not make such a prerequisite to proving the execution of lost deed by sub-

scribing and other competent witnesses. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

In a prosecution for adultery, where the identity of a defendant's marriage license was proven by the clerk, but its execution was not proven by any one else, it was inadmissible in evidence, because not filed among the papers for three days and notice given by the prosecution to defendant. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

A copy of an instrument was properly admitted in evidence, although the notice required, was not given, and the original was not filed among the papers, where plaintiff alleged that such instrument had been recorded and was in the possession of defendant, and called upon defendant to produce the same in court upon the trial. *El Paso Townsite Co. v. Watts* (Civ. App.) 227 S. W. 709.

Affidavit of loss, mutilation or inability to procure.—Rev. St. 1879, art. 2257, requires the filing of an affidavit of loss only when it is proposed to introduce in evidence a certified copy; and therefore, when the loss or destruction of an unrecorded deed is proved as at common law, a sufficient predicate for the proof of such lost deed is laid by the evidence produced at the trial. *Blanton v. Ray*, 66 Tex. 61, 17 S. W. 264.

Affidavit of forgery.—The rule that a duly-recorded instrument may be put in evidence without proof of execution, unless attacked as a forgery, does not require proof of an instrument executed by virtue of a power, merely because the power is attacked, but only where the instrument itself is attacked. *Moses v. Dibrell*, 2 Civ. App. 457, 21 S. W. 414.

When a deed was attacked by an affidavit of forgery, the burden then rested on the party depending on the deed to show that it was a genuine instrument. *Alamo Trust Co. v. Cunningham* (Civ. App.) 203 S. W. 413.

In trespass to try title, where defendants claimed under a deed by an alleged attorney in fact, and plaintiffs filed affidavit that the deed was forged, the burden was on defendant to establish their defense by a preponderance of the testimony; plaintiffs having shown title to the land and being entitled to recover, unless they had parted with title. *Lancaster v. Snider* (Civ. App.) 207 S. W. 560.

Ancient documents.—A vendor's contract to furnish authentic abstract showing good merchantable title held complied with; where a defectively acknowledged deed had been of record more than ten years and had also been cured by subsequent deeds. *Moser v. Tucker* (Civ. App.) 195 S. W. 259.

The record of an ancient deed, not acknowledged or proven for record, held admissible, without proof of execution of deed, where there was no adverse claim within ten years after record, though there is affidavit of forgery. *Conrad v. Hughes* (Civ. App.) 195 S. W. 1181.

An ancient deed against which a plea of non est factum is interposed is not, without proof of execution, admissible in evidence; it having been found among the papers in the county clerk's office, and no rights having been claimed thereunder until many years after its execution. *Kellogg v. Chapman* (Civ. App.) 201 S. W. 1096.

Art. 3706. [2314] [2258] Certified copy of instrument sued on is evidence, when.

See *Kutch v. Holley*, 77 Tex. 220, 14 S. W. 32.

Art. 3707a. Certified copies of documents in custody of University of Texas.—That the librarian of the University of Texas and the archivist of the Department of History of the said University are hereby authorized to make certified copies of all public records in the custody of the University of Texas and said certified copies shall be valid in law and shall have the same force and effect for all purposes as if certified to by the county clerk or other custodian as now provided for by law. In making the certificate to the said certified copies either by the librarian or the archivist of the Department of History the said officer shall certify that the foregoing is a true and correct copy of said document, and after signing the said certificate shall swear to the same before a notary public or any other officer authorized to take oaths under the laws of the State of Texas. [Acts 1921, 37th Leg., ch. 43, § 1.]

Explanatory.—Sec. 2 of the act relates to the placing in the custody of the University of Texas public records of historical value, and is set forth, ante, as art. 90a. The act took effect 90 days after March 12, 1921, date of adjournment.

Art. 3710. [2318] [2262] Execution of notes and other instruments presumed, unless, etc.

See *Webb v. Reynolds* (Com. App.) 207 S. W. 914.

Foundation of action or defense.—Controverting affidavit to plea of privilege is a "pleading," within this article, where pleading is founded on such an instrument

charged to have been executed by the other party, and the other party does not file affidavit denying execution. *Borschow v. Waples-Platter Grocer Co.* (Civ. App.) 223 S. W. 872.

Necessity of plea of non est factum and verification thereof.—A petition alleged that the drafts sued on, which were drawn on and accepted by "J. P. Nelson, Agent," were accepted by defendant's authority, and neither the execution of the acceptances nor the authority of the agent was denied on oath. Held, that they were admissible without proof of those facts, and were a sufficient basis for a judgment. *San Antonio & A. P. Ry. Co. v. Harrison*, 72 Tex. 478, 10 S. W. 556.

In an action by a broker for commissions for procuring a purchaser, held, that the petition, though alleging that its vendor, through the plaintiff, executed the contract of sale, must be deemed to have asserted that the contract of sale was executed pursuant to the enlistment contract; hence where evidence showed that terms of sale were contrary to the enlistment contract, and the broker introduced oral statements authorizing a sale on different terms, it was error to refuse to allow the vendor to offer evidence in contradiction thereof, on the theory that, since he did not deny under oath the broker's authority to execute the contract, he should not, under this article, on trial offer proof in denial. *Peebles v. Griffith* (Civ. App.) 214 S. W. 561.

Effect of plea of non est factum.—The interposition, in an action on a note, of a sworn plea denying consideration, does not throw the burden of proving consideration on plaintiff. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157.

Under a plea of non est factum, where defendant claims that the note has been materially altered since execution, after plaintiff has made a prima facie showing as to execution, the burden of proof shifts to defendant. *Iowa City State Bank v. Milford* (Civ. App.) 200 S. W. 883.

A verified plea of non-execution of a note is not evidentiary, but merely robs the instrument of its own probative effect to establish its execution. *Id.*

Where a plea of non est factum is interposed as against a deed, the burden of establishing the execution as at common law is cast on the party relying on the deed; and execution of such deed is not established by proof that after date of its alleged execution taxes were assessed against grantee named. *Kellogg v. Chapman* (Civ. App.) 201 S. W. 1096.

The burden of proof of execution of a note, on which the answer, in action on a life policy, was in part based, was on defendant, execution being denied under oath. *Kansas City Life Ins. Co. v. Jinkens* (Civ. App.) 202 S. W. 772.

Plea of non est factum places the burden upon plaintiff of establishing defendant's execution of note. *Joffre v. Mynatt* (Civ. App.) 206 S. W. 951.

In a bank's suit on a note admittedly signed in blank by defendant maker, claiming that the cashier of the bank had fraudulently filled in an improper amount, the burden was on defendant, who pleaded non est factum, admitting the signature of the note, but seeking to avoid it, to show how he had been injured. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

When the want of consideration of a note is denied under oath, the burden to prove the note is on plaintiff payee. *Id.*

Instruments the execution of which must be denied.—Rev. St. 1879, art. 2262, does not dispense with proof of execution of an instrument alleged to have been executed by the grantor of the other party. *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278.

Defendant in suit for taxes held bound to deny under oath that rendition of property was made by it, to be entitled to deny that it made rendition. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

Signed invoices, providing where all bills are payable, are "contracts," within this article. *Borschow v. Waples-Platter Grocer Co.* (Civ. App.) 223 S. W. 872.

In an action on a beneficiary certificate issued by one fraternal order and assumed by defendant order, plaintiff declaring on the contract of assumption, charging defendant order with liability thereunder, and defendant order not denying under oath execution of the assumption instrument so charged, defendant order could not show that its officers which had executed the assumption instrument had no authority to do so. *Independent Order of Puritana v. Brown* (Civ. App.) 229 S. W. 939.

Art. 3712. [2323] [2266] Suit on sworn account.

See *Hensley v. Degener* (Civ. App.) 25 S. W. 1130.

Cited, *Hinkle v. Higgins*, 83 Tex. 615, 19 S. W. 147; *Lytle v. Custead*, 4 Civ. App. 490, 23 S. W. 451.

Construction of statute.—This article merely creates a rule of evidence to be applied solely to proving open accounts under certain given conditions, and does not preclude the verification of any pleading in suit on such an account. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

What constitutes open account.—Mere fact that account sued on consisted of single transaction did not show that it was not open account. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 200 S. W. 899.

This article applies only to transactions between persons in which by sale and purchase the title to personal property is passed from one to another and the relation of debtor and creditor is created by general course of dealing, and does not mean one or more isolated transactions resting upon a special contract. *Bixler v. Dolieve* (Civ. App.) 220 S. W. 148.

Account pleaded by plaintiff against defendant held an open account verified under this article, so as to be admissible in evidence. *Miller v. L. Wolff Mfg. Co. of Texas* (Civ. App.) 225 S. W. 212.

Accounts not within article.—In a suit by attachment on accounts not due, they cannot be verified at the institution of the suit so as to make them admissible in evidence. *Sims v. Howell Bros. Shoe Co.* (App.) 15 S. W. 120.

Where suit against principal and the guardian of an insane surety was based upon contract, and an account was merely pleaded to show the amount and value of property purchased, it was not necessary to verify the account. *Webber v. Swift & Co.* (Civ. App.) 226 S. W. 509.

Sufficiency of affidavit to account.—Where the account sued on is verified immediately before the trial, it is not prima facie evidence, though no counter-affidavit is filed, and the defendant is not precluded from denying the account. *Blakeley v. Wimberly* (App.) 15 S. W. 119.

An account is properly verified by affidavit of plaintiff, assignee thereof, and need not be verified by affidavit of plaintiff's assignor. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

Effect of affidavit to account.—Where the account filed by plaintiff was not verified, defendant is not required to verify his answer. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

Sufficiency and effect of counter affidavit.—In an action on open account a verified answer containing a general denial, a special denial of each item of the account, and a denial of indebtedness was not a compliance with this article, and did not overcome the prima facie case made by plaintiff's sworn account. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 200 S. W. 899.

Where by answer under oath defendant denied an account verified in accordance herewith, the probative effect of the verified account is destroyed, and it is insufficient to establish prima facie proof of debt, which otherwise could be established thereby. *Gulf Refining Co. v. Nelson* (Civ. App.) 227 S. W. 549.

Failure to file counter-affidavit and effect thereof.—The rule that the justness of the account cannot be impeached unless a counter affidavit is filed does not mean that ownership of the debt is conceded by failing to file an affidavit. *Intertype Corporation v. Sentinel Pub. Co.* (Civ. App.) 206 S. W. 548.

In suit on verified open account to recover a balance alleged to be due for merchandise sold and delivered to defendant, where defendant properly pleaded payment, the trial court did not err in receiving evidence in support of such plea, though there was no counter affidavit that the account was not just or true. *Selz, Schwab & Co. v. Shipman* (Civ. App.) 230 S. W. 842.

Objections to affidavits.—Assignments of error, objecting to affidavit in suit on open account, in that it merely alleged that all lawful offsets had been allowed, while this article requires that the affidavit shall allege that all "just and lawful offsets" have been allowed, is not reviewable, in absence of objection to admission of account in evidence. *Peterson v. Graham-Brown Shoe Co.* (Civ. App.) 200 S. W. 899.

Art. 3713. [677] [601] Records of corporation are evidence.

See *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

Best evidence.—The best evidence of an assessment made by authority of an order of the board of directors of a corporation is the record of the order or resolution of the board, which must be produced in an action by the corporation to collect the assessment, unless some sufficient reason is shown why it cannot be produced. *Guadalupe & San Antonio Rivers Stock Ass'n v. West*, 76 Tex. 461, 13 S. W. 307.

TITLE 54

EXECUTION

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Article 3714. [2324] [2267] Execution on judgment of district and county court, issued when.

Divorce judgment.—Alimony is not in the nature of a "debt" for the collection of which execution may issue. *Beeler v. Beeler* (Civ. App.) 218 S. W. 553.

Workmen's compensation.—Workmen's compensation award enforced by execution. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

Art. 3717. [2326a] When judgment shall become dormant.

When judgment shall become dormant.—A dormant judgment is one which has remained so long unexecuted that execution cannot be issued upon it without first reviving the judgment. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

A judgment, decreeing undivided interest in the minerals and the surface estate, held not dormant by reason of the fact that no writ of possession was ever issued, where the judgment did not award writ of possession. *Henderson v. Chesley* (Civ. App.) 229 S. W. 573.

Judgment a cause of action.—A dormant judgment will support a writ of garnishment. *Tripplett v. Hendricks* (Civ. App.) 212 S. W. 754.

That judgment becomes dormant after garnishment of fund does not discharge garnishment. *Childs v. Gearhart* (Civ. App.) 229 S. W. 702.

Validity of execution on dormant judgment.—An execution on a dormant judgment must be obeyed by the officer. *Cleveland v. Tittle*, 3 Civ. App. 191, 22 S. W. 8.

Revival of judgment.—Judgments on claims against estates of decedents are not enforceable by execution, and cannot become dormant and be revived by scire facias. *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358.

On showing that judgment obtained by him against a defendant and sureties on defendant's bond on appeal from a justice court was on its face valid, and at most only voidable for errors, plaintiff was entitled to an order reviving his judgment against all defendants in the original judgment as the same appeared of record. *C. J. Gerlach & Bro. v. Du Bose* (Civ. App.) 210 S. W. 742.

Collateral attack on judgment.—A dormant judgment is not void, but only voidable, and for that reason it cannot be attacked in a collateral proceeding. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

As a general rule, no one has such an interest in a dormant judgment which is merely voidable that he can attack the same, except the parties thereto or their privies. *Id.*

Art. 3723. [2332] [2275] On death of defendant, no execution for money.

Collateral attack.—A sale on execution is inoperative and may be attacked, directly or collaterally, when the judgment shows on its face that it was against one who was dead at the time of its rendition, or when it is shown that he died after the judgment was rendered. (Distinguishing *Taylor v. Snow*, 47 Tex. 464.) *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98.

Dissolved corporation.—Statute has no application to dissolved corporations. *Richardson v. Allison* (Com. App.) 213 S. W. 252.

Art. 3727. [2336] [2279] Execution for property shall issue.

Situs of property.—Clerk of a county district court without authority to issue an order of sale, requiring the sheriff of another county to sell lands lying still in another county. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

Sheriff of a named county held entitled to make sale of tracts of land, part of which only were within the county after readjustment of the county lines subsequent to the execution of mortgage, but was not authorized to sell lands lying wholly in the new county. *Id.*

Art. 3729. [2338] [2281] Requisites of an execution.

See *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

Description of judgment.—An execution, which names only one plaintiff, although there are several plaintiffs, names one as the only defendant, and misstates the date on which it is issued, is defective, and for such defects, coupled with the inadequacy of the price, the sale will be set aside. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

Execution describing judgment held not void on account of form. *Simmons v. Arnim*, 110 Tex. 309, 229 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

Statement of amount.—Execution based in part on a valid judgment, is not wholly void, though in part based on another void judgment, rendering it excessive and voidable, or subject to correction. *Simmons v. Arnim*, 110 Tex. 309, 229 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

Where a judgment was a valid lien to the extent of the portion not assigned by the judgment creditor, an alias execution for the sale of land was not invalid because for the full amount of the judgment. *Ives v. Culton* (Com. App.) 229 S. W. 321.

Defect in an execution in including excessive charges for costs renders it merely irregular, but not void. *Brown v. Bonoughi* (Sup.) 232 S. W. 490.

Mortgage foreclosure.—Subdivision 3 of this article contemplates mortgage foreclosure sale. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

Art. 3730. [2339] [2282] Returnable, when.

Cited, *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

Return day.—The clerk cannot, by an indorsement "returnable in sixty days," make the writ returnable after the expiration of the statutory limit. *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

Sale after return day.—A sale of land under execution made after time for return is void. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

Art. 3733. [2342] [2285] On death, etc., of officer, enforced by successor.

See *Wolf v. Taylor*, 68 Tex. 660, 5 S. W. 855.

Art. 3735. [2344] [2287] Levy of execution.

Amount of levy.—See *Moore-De Grazier Co. v. Hawley* (Civ. App.) 230 S. W. 1069.

Art. 3736. [2345] [2288] Failure of defendant to designate property.

Property subject to execution.—Stock in possession of corporation. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

Property not subject to execution.—Property is in custodia legis. *Illinois Cent. R. Co. v. Ryan* (Civ. App.) 214 S. W. 642.

No part of a spendthrift trust estate in the hands of the trustee could be taken on execution by any creditors of the cestui que trust. *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

Order of sale.—Execution sale of cultivated lands will not be enjoined, unless debtor establishes that he owned personalty or uncultivated lands within county at date of application for writ sufficient to satisfy judgment. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

Cultivated lands may be levied upon after sheriff has exercised due diligence to have judgment debtor point out uncultivated lands, etc., to satisfy levy. *Id.*

Art. 3739. [2348] [2291] Levy on real estate.

Indorsement on execution.—Lien attaches as of the time of indorsement on writ and is not affected by the act of the officer in going upon the land. *Riordan v. Britton*, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

Art. 3740. [2349] [2292] On personal property.

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Marsh v. Thomason*, 6 Civ. App. 379, 25 S. W. 43.

Cited, *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Hamburg v. Wood & Co.*, 66 Tex. 168, 18 S. W. 623.

Third party entitled to possession.—As to claimant's right to question levy, see *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

Art. 3741. [2350] [2293] On stock running at large.

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155.

Cited, *Holloway v. Cabell*, 3 Civ. App. 320, 22 S. W. 531.

Art. 3742. [2351] [2294] Levy on shares of stock.

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155.

Art. 3743. [2352] [2295] Interest of partner.

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Marsh v. Thomason*, 6 Civ. App. 379, 25 S. W. 43; *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544.

Sufficiency of levy.—Manner of levy on partnership property cannot be questioned by claimant, who is not a party to the partnership. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

Levy of attachment.—Attachment debtor giving replevy bond cannot claim attachment was invalid, because not made as prescribed by this article. *Wells v. Cloud* (Civ. App.) 202 S. W. 331.

Art. 3744. [2353] [2296] Goods pledged or mortgaged.

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Burns v. True*, 5 Civ. App. 74, 24 S. W. 338.

Cited, *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

Rights and remedies of mortgagee or pledgee.—While the pledgee cannot be deprived of possession, he cannot complain of or resist a levy where his right of possession had not been interfered with. *Briggs v. Briggs* (Civ. App.) 227 S. W. 511.

Art. 3745. [2354] [2297] Shares of stock may be sold.

Cited, *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113.

Art. 3746. [2355] [2298] Duty of officer as to property in his hands.

See *Frelberg v. Johnson*, 71 Tex. 558, 9 S. W. 455.

Validity of execution.—The fact that the judgment was dormant by failure to have execution issued within a year does not make the execution, subsequently issued, void, and it is the duty of the officer to obey it. *Cleveland v. Tittle*, 3 Civ. App. 191, 22 S. W. 8.

Art. 3748. [2357] [2300] Defendant may give delivery bond and keep property.

Cited, *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66.

Art. 3751. [2360] [2303] Real property sold, how.

Sale after return day.—A sale after time for return is void. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

Hour of sale.—An execution sale may be made at any time between 11 and 12 o'clock under a notice that it will be made at 11 o'clock. *Wagner v. Hudler* (Civ. App.) 215 S. W. 100.

Art. 3753. [2362] [2305] Lots in a city, how sold.

Cited, *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

Art. 3754. [2363] [2306] Lands not in a city, etc., sold in lots.

Cited, *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

Subdivision and sale in parcels.—Since debtor can protect himself by requiring sales in 50-acre lots, execution sale will not be enjoined because value of land grossly exceeds judgment. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

Mortgage foreclosure.—In mortgage foreclosure sale, owners may divide land and have it sold in lots, under this article. *Chandler v. Riley* (Civ. App.) 210 S. W. 716. But see *Chandler v. Young* (Civ. App.) 216 S. W. 484.

Art. 3755. [2364] [2307] Sale of lots shall cease, when.

Cited, *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

Art. 3756. [2365] [2308] Expenses of selling lots, how paid.

Cited, *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

Mortgage foreclosure.—See note under art. 3754.

Art. 3757. [2366] [2309] Notice of sale of real estate.

See 1918 Supp., arts. 6016½-6016½c, as to publication in newspaper instead of posting.

Notice to defendant—Necessity and sufficiency.—Omission from sheriff's return to an order of sale of name defendant's attorneys on whom order was served renders return defective. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

Costs.—As to objection to allowance of item for advertising notice of sale under deeds of trust, see *Adams v. Kelly* (Civ. App.) 196 S. W. 576.

Art. 3758. [2368] [2310] "Court house door" defined.

Cited, *Wheeler v. Wheeler*, 76 Tex. 489, 13 S. W. 305.

Art. 3759. [2369] [2310a] Sales of real estate under powers conferred by deed of trust or other contract lien; land situated in more than one county; notice; sales how made; land in unorganized county.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

2. Trust deeds which may be foreclosed.—A sale made under a deed of trust for a sum larger than the amount with which the property is properly chargeable is not void, and a power of sale in such deed can be exercised if any part of the debt is due and owing. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

4. Power as authority for sale in general.—Where a trustee under deeds of trust or his substitute was authorized by the deeds to sell the property only at the request of the beneficiary or other holder of the notes secured, the request provided for was essential to passing of title by the substitute trustee. *Bowman v. Oakley* (Civ. App.) 212 S. W. 549.

5. Commencement, suspension or termination of power.—While an independent estate is open and pending, no valid sale can be made of the mortgaged estate by a trustee in a deed of trust, since the death of the grantor revokes the power, and since the court in certain contingencies may take charge of the estate and appoint an administrator, precluding creditor from exercising the power of sale. *Fernandez v. Holland-Texas Hypotheek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

6. Right to foreclose.—Where surety has procured his principal to execute deed of trust to secure note upon which surety is liable, and has paid such note, he will be subrogated to rights of payee, and is entitled to foreclose lien by procuring sale by trustee under trust deed. *Eustis v. Frey* (Civ. App.) 204 S. W. 118.

8. Authority to execute power and execution of power in general.—Interest in the debt secured does not disqualify one from acting as trustee in a trust deed, and the mortgagee may himself act as trustee. *Thornton v. Goodman* (Com. App.) 216 S. W. 147.

The effort of a trustee in a trust deed, as attorney of beneficiary, to collect the note secured thereby is not incompatible with his duty as trustee to make a sale in the event of its nonpayment. *Id.*

In such case the court will scrutinize very closely every act of the trustee in the execution of the trust, but no presumption of fraud can arise from the mere relation. *Id.*

10. Time for exercise of power.—Where the holder of a note secured by deed of trust was authorized by the note on default of payment of installment to declare the whole obligation due, the trustee's sale of the land on election by the holder of the note to declare it due after default in payment of an installment was not premature. *Shear Co. v. Hall* (Civ. App.) 215 S. W. 567.

12. Place of sale.—A sale of property under deed of trust executed prior to enactment of act was not required to be made in county in which property was situated, although time for payment had been extended after act had taken effect. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

14. Notice of sale.—A sale of land without notice by a trustee under trust deed is void, and the deed can be set aside as a cloud upon the title of the owner. *Willie v. Hays* (Civ. App.) 207 S. W. 427.

18. Persons who may purchase.—A mortgagee may himself act as trustee in a trust deed, and become the purchaser at a sale of the property. *Thornton v. Goodman* (Com. App.) 216 S. W. 147.

19. Setting aside sale.—Where principal has deeded land under a trust deed to secure a surety who has taken possession thereof upon sale of such land under trust deed, sale will not be set aside because credit has not been given to principal for rentals due

from surety, in absence of tender by principal of amount due under deed. *Eustis v. Frey* (Civ. App.) 204 S. W. 118.

Sale under trust deed given for benefit of surety will not be set aside for mere inadequacy of price for which surety bought in the property, where sale was not irregular and principal was a bankrupt, and value of property was less than surety's indebtedness. *Id.*

Where sale of land under trust deed was set aside on the ground that appointment of substitute trustee was unauthorized, there was no election of remedies. *Lewis v. Powell* (Civ. App.) 205 S. W. 737.

A sale under a trust deed cannot be avoided merely because of inadequacy of price and an offer on the part of the grantors in the trust deed to pay the debt and expenses incident to the sale, even though beneficiary under the trust deed was the purchaser and has not disposed of the property. *Thornton v. Goodman* (Com. App.) 216 S. W. 147.

Payment by purchaser held a voluntary one, not recoverable, when the sale was set aside as invalid. *Hayner v. Chittim* (Civ. App.) 228 S. W. 279.

21. Title and rights of purchaser.—Purchaser at trustee's sale under power in deed of trust, second lien, held to acquire superior title to purchaser under prior foreclosure of first lien, vendor's lien, to which second lienholder was not party, but subject and subordinate to vendor's lien. *Houston v. Johnson* (Civ. App.) 197 S. W. 1121.

Purchaser, at trustee sale, under deed of trust, is not entitled to crops growing and unmaturing at time of sale as against assignees of crop-sharing rental contract. *Sanger Bros. v. Hunsucker* (Civ. App.) 212 S. W. 514.

Where land is rented under crop-sharing rental contract, and, while crops are growing, is sold under deed of trust, and, after sale, a portion of the land is replanted by tenant under agreement with purchaser, assignees of rental contract are entitled to the rent crop share of the replanted crops as against purchaser. *Id.*

Rental contract, entered into by purchaser under deed of trust with tenant in possession, with knowledge of tenant's rental contract with former owner, and assignment of rents thereunder, is of no effect as against assignees. *Id.*

Where the purchasers of land from a substitute trustee under deeds of trust by his deed were not relieved from necessity of inquiring into and ascertaining whether the trustee had been empowered to sell by having been requested so to do by the beneficiary or holder of the notes secured, having made no inquiry, the purchasers assumed the trustee had power at their peril, and where he was without power his sale was void. *Bowman v. Oakley* (Civ. App.) 212 S. W. 549.

Where the substitute trustee under deeds of trust sold the land without authority because not on request of the beneficiary or holder of the notes secured, the purchasers are not protected as bona fide purchasers. *Id.*

An instrument executed without consideration by a payee in vendor's lien notes releasing all claims in the land to a purchaser at a sale under a trust deed would not support a plea of innocent purchaser, as against a lien note which the payee had previously assigned to a third person. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

A purchaser at a sale of land under a trust deed acquires no more than the deed of trust gives him. *Id.*

When there is a foreclosure under power of sale in a deed of trust, the owner is not an actor in the transaction, and cannot sever the crops or rents by reserving them at the time of sale. *Roberts v. Armstrong* (Com. App.) 231 S. W. 371.

23. Proceeds.—A payment from the proceeds of mortgaged property must be applied in payment of the mortgage debt. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

And see *Hayner v. Chittim* (Civ. App.) 228 S. W. 279.

24. Fees and costs.—As to objection to allowance of item for advertising notice of sale, see *Adams v. Kelly* (Civ. App.) 196 S. W. 576.

25. Operation and effect.—One having a lien under a deed of trust has no title to wood cut and removed prior to foreclosure. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

Where principal has conveyed land under trust deed to secure his surety and also conveyed the same land to another in order to create lien in favor of such other subject to main indebtedness for which conveyance was made under the trust deed, upon foreclosure of deed of trust by exercise of power of sale, principal held to be in no position to set up that foreclosure was void because second mortgagee was not a party. *Eustis v. Frey* (Civ. App.) 204 S. W. 118.

Art. 3759c. Judicial sales of property of soldier or sailor prohibited for one year.—All sales under execution, Deed of Trust, Mortgage or lien of property belonging to soldiers or sailors now in the service of the United States during the present war or who have been in such service and honorably discharged is hereby prohibited for twelve months after the discharge of any such soldier or sailor, and any sale made in violation of this law shall convey to the purchaser no right or title. Provided, however, such soldier or sailor may waive the benefits of this Act by doing so in writing duly acknowledged before some person authorized by law to take acknowledgments. Provided further that all statutes

of limitation shall be suspended during the twelve months after such discharge as to any debt, right, or cause of action against such soldier or sailor. And provided further that the provisions of this Act shall apply only to such soldier and sailor defendants as are, in the discretion of the trial court, necessary parties defendant to the pending litigation, and then only to such debts as were contracted by such soldier or sailor prior to his enlistment or draft into the army or navy of the United States. [Acts 1919, 36th Leg., ch. 63, § 1.]

Took effect March 13, 1919.

Art. 3761. [2371] [2312] Notice of sale of personal property.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

Art. 3762. [2372] [2313] Personal property present at sale, except.

Cited, *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Hamburg v. Wood & Co.*, 66 Tex. 168, 18 S. W. 623.

Art. 3763. [2373] [2314] Sale of stock running in range.

See *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.
Cited, *Holloway v. Cabell*, 3 Civ. App. 320, 22 S. W. 531.

Art. 3765. [2375] [2316] Conveyance to purchaser.

Cited, *Holloway v. Cabell*, 3 Civ. App. 320, 22 S. W. 531.

Recitals.—Recital in sheriff's deed that it was made under alias execution on a judgment, after proper levy and advertisement, is not, long after date of such deed, conclusive, but merely some evidence such execution was issued and levied. *Menefee v. Colley* (Civ. App.) 200 S. W. 182.

A sheriff's deed reciting that it was made by virtue of an execution issued on a judgment is insufficient to support title without evidence of the judgment or execution. *Atkinson v. Citizens' State Bank of Giddings* (Civ. App.) 221 S. W. 998.

Title acquired by purchaser.—Only the right, title, and interest of the judgment debtor is sold to the purchaser on execution. *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 991; *Houston v. Shear* (Civ. App.) 210 S. W. 976; *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

As to redemption from liens by purchaser at sale, see *Houston v. Shear* (Civ. App.) 210 S. W. 976.

Rights of purchaser at mortgage foreclosure sale are subject only to liens acquired previous to sale. *Bömar v. Smith* (Civ. App.) 195 S. W. 964.

A subsequent purchaser of land subject to a vendor's lien who assumed the payment of the note secured by the lien and whose interest was sold under execution is not liable to the purchaser at the execution sale on the assumption of the lien for the amount bid for the land, since the execution sale covered only the judgment debtor's interest in the land, which was his right thereto subject to the lien. *Bidwell v. Taylor* (Civ. App.) 224 S. W. 941.

Possession of purchaser.—Purchaser at execution sale who paid off liens, held entitled to recover possession. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

Art. 3768. [2378] [2318] Purchaser deemed innocent.

Cited, *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

Notice.—Actual possession of land by grantees by deed on condition subsequent put purchaser at execution under judgment defendant grantor on inquiry as to rights under which grantees claimed. *Arnold v. Scharff* (Civ. App.) 210 S. W. 326.

Art. 3769. [2379] [2319] Penalty for making sale otherwise than as authorized by law.

See *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649, 8 Am. St. Rep. 570.

Art. 3770. [2380] [2320] Officer or deputy shall not purchase.

Tax sale.—A conveyance of title purchased under a tax sale, to a deputy of the sheriff is voidable, under this article. *Davis v. Howe* (Com. App.) 213 S. W. 609.

Art. 3771. [2381] [2321] Purchaser failing to comply.

Construction of "twenty per cent."—This article does not apply if nothing is really sold, as where property of execution defendant passed into custody of bankruptcy court before sheriff attempted to sell. *Archenhold Co. v. Schaefer* (Civ. App.) 205 S. W. 135.

Art. 3774. [2384] [2324] Money to be paid over.

Money of debtor in hands of sheriff.—A sheriff into whose hands money comes by virtue of an execution in favor of one person may apply it in satisfaction of an execution, in his hands at the time of the collection, against such person. *Branscum v. Reese* (Civ. App.) 219 S. W. 871.

Art. 3775. [2385] [2325] Failure to pay over money.

See *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; *Branscum v. Reese* (Civ. App.) 219 S. W. 871.

Art. 3776. [2386] [2326] Failure to levy or sell, penalty for.

Form of proceeding.—Plaintiff's "petition" against sheriff and sureties on bond for misdelivery, etc., of property sold on execution held to entitle him to relief, though it was not denominated a "motion." *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Art. 3777. [2387] [2327] Failure to return execution.

See *Buckholts State Bank v. Thallman* (Civ. App.) 196 S. W. 687.

Art. 3779. [2389] [2329] Return of execution.

Sufficiency of return.—Omission from sheriff's return to an order of sale of the name of defendant's attorneys on whom the order was served, as required by art. 3757, renders the return defective. *Turner v. Maury* (Civ. App.) 224 S. W. 255.

Art. 3780. [2390] [2330] Death of defendant operates as superseas, when.

Cited, *Jenkins v. Cain*, 72 Tex. 88, 10 S. W. 391.

Art. 3782. [2392] [2332] Execution docket.

Cited, *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

DECISIONS RELATING TO SUBJECT OF TITLE IN GENERAL

3. **Suppression of competition at bidding.**—Where purpose of release of one of judgment debtors was his elimination from bidding at execution sale, transaction was fraudulent at law. *Ives v. Culton* (Civ. App.) 197 S. W. 619.

Mortgage foreclosure sale held subject to be set aside, it appearing that by reason of an agreement for redemption competition was stifled. *Chandler v. Young* (Civ. App.) 216 S. W. 484.

7. **Grounds for setting aside sale—Inadequacy of price.**—The sheriff in selling property under execution is merely the agent of the creditor and debtor, and it is his duty to secure the best results for both. *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

Mere inadequacy of price will not avoid a sale of land upon execution. *Graves v. Griffin* (Com. App.) 228 S. W. 913. See, also, *Houston v. Shear* (Civ. App.) 210 S. W. 976.

8. — **Inadequacy of price combined with other objections.**—Mere irregularity in connection with gross inadequacy of consideration is insufficient to vacate a sale, unless the irregularity in some way conduced to that inadequacy; although, when the price is enormously inadequate, slight irregularities will be sufficient to justify setting aside the sale. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

As to effect of inadequate price combined with defects and irregularities, see *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

9. **Estoppel to set aside sale.**—Husband's negligence held not imputable to wife, and did not prevent the setting aside of the sale of homestead. *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

13. **Actions to set aside sale—Tender.**—In action to cancel sheriff's deed on ground that purchaser promised owner to reconvey on owner's payment of price paid for land by purchaser, it was not necessary for owner to actually tender the money admitted to be due and owing to purchaser into court; an offer to do equity and to perform such decree as the court may enter being sufficient. *Chandler v. Riley* (Civ. App.) 210 S. W. 716.

16½. — **Payment into registry.**—In a suit to set aside an execution sale, the court could have required the sheriff to pay the money collected by him under execution into the registry of the court. *Wagner v. Hudler* (Civ. App.) 218 S. W. 100.

18. **Collateral attack on sale.**—That plaintiff's title rested on purchase at execution sale for inadequate consideration did not make the sale an absolute nullity, which could be urged in a collateral proceeding in trespass to try title, brought by such purchaser. *Hopkins v. King* (Civ. App.) 204 S. W. 360.

Unless a sale of real estate under execution is absolutely void, it cannot be attacked collaterally in trespass to try title. *Graves v. Griffin* (Com. App.) 228 S. W. 913.

24. **Wrongful execution.**—When real or personal property had been levied on by a writ of execution, to which the claimant or owner is not a party, he may resort to his

common-law remedy for the damages inflicted by seizure thereunder. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

31. — **Exemplary damages.**—Exemplary damages may not be recovered unless actual damages are alleged and proven. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948. That defendants acted in good faith and without malice, and upon probable cause, may be shown where exemplary damages are sought. *Douglass v. Wallace* (Civ. App.) 211 S. W. 530.

38. — **Sufficiency of evidence.**—Evidence held sufficient to show claim of ownership was merely colorable and that cotton levied was owned by debtor. *Douglass v. Wallace* (Civ. App.) 211 S. W. 530.



TITLE 55

EXEMPTIONS

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| <p>Chap.
1. Property exempt from forced sale.</p> | <p>Chap.
2. Excess over homestead, etc., how set apart and subjected to execution.</p> |
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CHAPTER ONE

PROPERTY EXEMPT FROM FORCED SALE

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| <p>Art.
3785. Property exempt from, to every family.
3786. "Homestead" defined.
3787. Proceeds of sale of homestead exempt for six months.</p> | <p>Art.
3788. Property exempt to others than families.
3792. Homestead exemption does not apply, when.
3793. Other exemptions not applying.</p> |
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Article 3785. [2395] [2335] Property exempt from, to every family.

See *Moton v. Hull*, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722. Cited, *Terry v. State*, 25 Tex. App. 714, 8 S. W. 934; *Parr v. Newby*, 73 Tex. 468, 11 S. W. 490; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481; *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485.

5. **Family.**—Under the Texas law, a surviving widow, when the head of a family, may acquire a homestead estate. *Woodward v. Sanger Bros.*, 246 Fed. 777, 159 C. C. A. 79.

7. — **Unmarried persons.**—Six unmarried brothers living in the same house with their four unmarried sisters and with their aged, widowed father, who was unable to perform labor of any kind, constituted "family" within exemption laws. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

While the wife and adult unmarried daughter of deceased could hold his homestead, the wife could not acquire a new homestead where no obligation rested upon her to support the adult daughter. *Quintana v. Giraud* (Civ. App.) 209 S. W. 770.

Where an unmarried woman, living with her parents and two sisters purchased a house and lot adjoining the family homestead, and after the death of the mother and the destruction of the family home by fire the father and daughters moved into such house, and they were not dependent on any one member of the family as the head of the family, the daughters being self-supporting, and the father, if dependent on any, being dependent on all, the premises did not constitute a homestead. *Hutchenrider v. Smith* (Civ. App.) 228 S. W. 989.

8. — **Persons divorced or living apart.**—In view of Const. art. 16, §§ 49-51, a divorced father, who had not been legally deprived of the custody of his son or daughter, with whom the son was living, except for temporary absences, and who contributed to the daughter's support, though she was living with her mother, held the "head of the family," entitling him to exemption of his automobile. *John E. Morrison & Co. v. Murff* (Civ. App.) 212 S. W. 212.

11. **Household furniture.**—Widow with child occupying a house of seven or eight rooms, held entitled to hold exempt the furniture in the rooms occupied by boarders. *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

13. **Tools and apparatus belonging to trade or profession.**—Machinery may not be set aside as tools or apparatus of trade, where run by other power than hand. *Peyton v. Farmers' Nat. Bank of Hillsboro*, Tex. (C. C. A.) 261 Fed. 326.

19. **Milch cows.**—Animal sucking a cow that is being milked would be a "calf" within the liberal construction of the exemption statute, and "bull yearlings," if over

a year old and if their mothers were dry or not useful for milk purposes, were subject to forced sale, otherwise not. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

21. Carriage.—Carriage set aside to bankrupt as exempt. *Peyton v. Farmers' Nat. Bank of Hillsboro, Tex.* (C. C. A.) 261 Fed. 326.

22. Provisions and forage.—Under Const. Tex. 1876, art. 16, § 49, the provision of the statute which exempts from forced sale "all provisions and forage on hand for home consumption," does not contemplate that gathered crops, merely because they have grown upon the homestead, should be exempt from seizure. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

23. Wages.—The amount due a person for services under a contract by which he agrees to nurse another during an attack of sickness, and by which the latter agrees to pay him well, is "current wages for personal services," within the law, though neither the compensation to be paid nor the time of payment is fixed. *Dempsey v. McKennell*, 2 Civ. App. 284, 23 S. W. 525.

An employer sued for wages cannot set off a debt due from the employé to a third person, and assigned to him. *Id.*

24. Evidence.—Evidence held sufficient to sustain finding that judgment debtor with two granddaughters constituted a family. *Tunnell v. Johnson* (Civ. App.) 209 S. W. 451.

25. Waiver of exemptions of personal property.—Insurer of piano, having paid amount of loss on piano to insured after his notice to it to pay part to seller of piano, who retained mortgage on piano, and after garnishment by seller, could not avail itself of plea of exemption of such insurance proceeds, it having been waived by such debtor's notice. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

26. Wrongful levy on exempt property.—Where defendants, in suit on note with attachment and levy, brought cross-action for conversion of exempt property, they thereby abandoned it to plaintiff and it became his property. *Kiggins v. Henne & Meyer Co.* (Civ. App.) 199 S. W. 494.

Art. 3786. [2396] [2336] "Homestead" defined.

1. But one homestead allowed.—One person cannot have an urban and a rural homestead at the same time. *First National Bank v. Porter* (Civ. App.) 204 S. W. 463.

There can be but one homestead. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

3. Estate or interest sustaining homestead right.—That mortgagor had not acquired good title to a tract upon which he actually resided did not affect his residence, for the purpose of establishing homestead. *First National Bank v. Porter* (Civ. App.) 204 S. W. 463.

A son after his fraudulent conveyance to his mother had no title or interest in the land to which a homestead exemption could attach in his favor. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

Divorced wife held entitled to a writ of possession for her separate property as against husband claiming homestead right therein. *Landers v. Landers* (Civ. App.) 220 S. W. 359.

Property held in trust by a son for his mother cannot be impressed with homestead rights for the son's wife. *Witt v. Witt* (Civ. App.) 223 S. W. 277.

A homestead right attaches to separate as well as community property. *Bishop v. Williams* (Civ. App.) 223 S. W. 512. See, also, *Whitaker v. McCarty* (Com. App.) 221 S. W. 572.

A son, living with his widowed mother upon land which she claimed as her homestead, was precluded from asserting a homestead interest in the same land which she claimed as a homestead, for one claiming merely an interest in remainder is without any right to possession necessary to found a claim of homestead. *Massillon Engine & Thresher Co. v. Barrow* (Com. App.) 231 S. W. 368.

5. — Leasehold.—A mere cropper has no such title to a crop as will support a plea of homestead. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

8. — Tenants in common.—Where tenants in common live upon a large tract of land, each occupying different parts as their respective homesteads, the homestead interest of each extends through the entire tract, and upon partition each of the cotenants is entitled to a homestead containing not exceeding 200 acres. *Massillon Engine & Thresher Co. v. Barrow* (Civ. App.) 203 S. W. 933.

Where several cotenants live upon a common piece of land as their homestead, a subsequent partition does not disturb the respective homesteads which the cotenants had originally acquired. *Id.*

Where surviving widow and children, upon death of the husband and father, became tenants in common of a tract of community land of the mother and deceased, and one son lived upon the tract, and had inclosed and was using not more than 20 acres of it, and another son was living upon contiguous land which he had purchased and built a house on, and his inclosure extended onto the tract and within its compass, and upon such tract were the barn, some fruit trees, and a plot of ground not exceeding 10 acres which he was farming, the sons subjected the land to homestead purposes. *Massillon Engine & Thresher Co. v. Barrow* (Com. App.) 231 S. W. 368.

Tenants in common may impress the tract owned in common with the character of a homestead, provided such use does not prejudice the rights of other cotenants. *Massillon Engine & Thresher Co. v. Barrow* (Com. App.) 231 S. W. 368. See, also, *Leach v. Leach* (Civ. App.) 223 S. W. 287.

10. Intent to acquire homestead.—While actual occupancy of the land is not, under all circumstances, indispensable, there must be something more than mere intention

where there has been no actual occupancy as a homestead, such as an existing bona fide intention to dedicate it as a homestead, evidenced by some unmistakable acts showing an intention to carry out such design. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

Purchaser of land for the purpose of acquiring a homestead as the head of a family for use and occupation for such purposes acquires a homestead right, protected to his family by the Constitution. *Hayner v. Chittim* (Civ. App.) 228 S. W. 279.

11. Use and occupation as homestead necessary.—Bankrupt held not entitled to a house, as a living homestead, never having occupied it, nor taken preparatory steps, nor declared his intention to occupy it as a home. *Peyton v. Farmers' Nat. Bank of Hillsboro, Tex.* (C. C. A.) 261 Fed. 326.

Appellee held not to have a homestead in land, having only made declaration of intention, unaccompanied by acts showing the land was set apart solely for homestead purposes. *Garcia v. Uveda* (Civ. App.) 198 S. W. 167.

To constitute a homestead, there must be actual occupancy and use as such, or an intention to do so, coupled with some acts indicating the intention. *Evans v. Fortner* (Civ. App.) 198 S. W. 626.

The mere fact that the husband, when he married, had the intention at some time to occupy as a homestead the land involved in a subsequent trust deed, did not impress it with the character of homestead, where in fact such intention was never consummated. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

To impress farm with homestead character, under Const. art. 16, § 51, the land must have been used for the purposes of a home. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

To constitute a homestead, actual occupancy of the land is not, under all circumstances, indispensable. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

Where owners of rural homestead purchased adjoining land with intention of making it part of homestead, and where the two tracts comprised less than 200 acres, the land so purchased became a part of the homestead at time of purchase, though owners at such time were not living upon homestead. *Barbee v. Lundy* (Civ. App.) 212 S. W. 257.

Owners' designation of land as their homestead, combited with user of rents therefrom, was not sufficient to impress the land as a homestead, where the residence actually occupied by them as a home was four miles distant therefrom, since land, to constitute a homestead, must be impressed with the incidents of a home. *Lasseter v. Blackwell* (Com. App.) 227 S. W. 944.

12. — Character and mode of use or occupancy.—Defendants, by remaining on homestead as tenants at sufferance after sale and until they could obtain possession of newly acquired homestead, held not to have made new designation of the property sold as their homestead. *Jones v. Lanning* (Civ. App.) 201 S. W. 443.

Since it is the principal use which must be looked to, to determine whether land is a homestead, the mere use on rural homestead of grubbed-out stumps taken from a detached tract did not show use of such tract as a homestead; the principal purpose of removing them being to clear the land for cultivation. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

Where husband is a soldier, land may be impressed in the character of a homestead, although the husband and wife never lived together on the land. *Markley v. Barlow* (Civ. App.) 204 S. W. 1013.

The homestead interest of tenants in common is not confined to the land actually inclosed by them, but is coextensive with their undivided interest in the entire tract, and, so long as it is unpartitioned, it is not within their power to designate their homestead by metes and bounds. *Massillon Engine & Thresher Co. v. Barrow* (Com. App.) 231 S. W. 368.

As to tenants in common who had inclosed part of the tract, and were living thereon as their homestead, their homestead right extended to their undivided interest in the whole tract. *Id.*

13. Purpose of occupancy and use.—The right attaches to land purchased for a home in March by one who, before a levy in November following, begins to prepare it for occupation by such acts as clearly show an intention to live on it with his family within a reasonable time. *White v. Wadlington*, 73 Tex. 159, 14 S. W. 296.

In determining whether, under the Texas laws, an aged and infirm person had a homestead estate in land, the condition of such person should be considered in determining whether the property was devoted to homestead purposes. *Woodward v. Sanger Bros.*, 246 Fed. 777, 159 C. C. A. 79.

The fact that a 160-acre tract of land was devoted to bringing in an income used for the support of the family living on another tract did not alone constitute a user of the 160-acre tract for the purpose of a home. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

15. — Business homestead.—Bankrupt's mill being on leased land, he is not entitled to have set aside, as part of his business homestead, machinery in it, though constituting fixtures, nor appurtenances on the lot, outside the building. *Peyton v. Farmers' Nat. Bank of Hillsboro, Tex.* (C. C. A.) 261 Fed. 326.

In order to impress the character of a business homestead on property, the claimant must have been actually employed in a business there. *Hutchenrider v. Smith* (Civ. App.) 228 S. W. 989.

Where an unmarried daughter bought a house and lot adjoining her parents' homestead, took charge of it, rented the rooms in it, returned it for taxation and exercised all the rights of ownership over it, it was not the father's business homestead. *Id.*

16. **Character of homestead as urban or rural.**—In determining whether a homestead is rural or urban, within the meaning of the Constitution, it is not necessary that it be located within an incorporated city or town. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

The platting of a homestead and laying it out into lots and blocks and streets and filing the plat with the county clerk does not constitute it urban property, unless in fact it is situated within a town or village. *Id.*

18. — **Extension of corporate limits.**—When a rural homestead is taken in by a city and the city grows out to the property and the owners thereof voluntarily cut the same up into lots and blocks and dedicate the streets and alleys to the public, it loses its homestead character. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

20. **Separate tracts or lots.**—Land in controversy, being detached from the tract upon which the home is located, cannot become a part of the homestead by anything less than would be necessary to designate the homestead originally. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

Intention of the parties to make a farm their homestead is insufficient to impress a tract of land with a homestead character, when such land is detached from the premises on which the rural home of the parties is situated. *Id.*

The mortgagor is entitled to claim three detached rural tracts as a homestead, if their total acreage was less than 200 acres. *First National Bank v. Porter* (Civ. App.) 204 S. W. 463.

Under Const. art. 16, § 51, the right of homestead in disconnected tracts of land depends on the actual use made of the land, and in determining the homestead character the intent of the owner as evinced by his declarations negating homestead quality are not to be considered. *First Nat. Bank of McGregor v. Rice-Stix Dry Goods Co.* (Civ. App.) 213 S. W. 344.

Under Const. art. 16, § 51, a block of land not improved, but inclosed by fence, and used occasionally, by the owner, who resided on property across the street, as a pasture and for agriculture, the whole property not exceeding the value named, constituted a part of the owner's homestead. *Id.*

Where 156-acre tract of land was situated about a mile from 15-acre tract on which owner lived and was not a part of the tract owner had designated as his homestead in executing a mortgage, and where owner divided his attention between mercantile business and farming doing most of the farming by hired help, he had no homestead rights in the 156-acre tract. *Moore v. Monnig Dry Goods Co.* (Civ. App.) 217 S. W. 760.

A piece of land separated from the tract on which the dwelling is situated may be so used as to make it a part of the homestead. *Johnson v. Russell* (Civ. App.) 220 S. W. 352.

Tearing down fences between the homestead of a family and adjoining property owned by an unmarried daughter and putting an automobile belonging to one or both places in a garage on one of the lots did not make the daughter's property a part of the homestead. *Hutchenrider v. Smith* (Civ. App.) 228 S. W. 989.

21. **Part of building.**—An apartment over a store in a building which was the separate property of the wife, which was fitted up as a dwelling and occupied by the wife and her son and by her husband whenever his business permitted him to be in town, was the homestead of the husband and wife, in the absence of any evidence that the husband claimed a home elsewhere. *Kelly v. Nowlin* (Civ. App.) 227 S. W. 373.

The homestead, as constitutionally defined, is not restricted to the rooms actually occupied as such, but includes the lot on which the building stands, if that is owned by the owner of the dwelling. *Id.*

24. **Evidence of homestead right.**—Evidence held insufficient to establish homestead character of detached tract, income from which was used for support of the family. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

Evidence held not to support finding that owners of rural homestead who purchased adjoining land did not intend to make purchased land a part of the homestead. *Barbee v. Lundy* (Civ. App.) 212 S. W. 257.

Evidence held to sustain a finding that mortgagor had acquired another homestead at the time the mortgage was given. *Bayless v. Guthrie* (Civ. App.) 218 S. W. 131.

27. **Abandonment of homestead.**—The husband, has the right to abandon homestead rights on either separate or community property, while acting in good faith. *Bishop v. Williams* (Civ. App.) 223 S. W. 512; *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586; *Kelly v. Nowlin* (Civ. App.) 227 S. W. 373.

Husband cannot, under any and all cases, divest property of homestead character, which has once attached, so as to defeat wife's right in same as homestead, by merely declaring intention of abandoning property as homestead. *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

When a homestead has been acquired it remains such until it has been abandoned or another homestead acquired. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415.

Where a rural homestead consists of two or more tracts of land, the homestead claim to one or more of them may be abandoned. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

The husband cannot perpetrate a fraud on the wife causing the abandonment of one homestead and the loss of another intended homestead. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

28. — **Consent of wife.**—Husband's right to abandon homestead without wife's consent, when in so doing he acts in good faith, is not dependent on wife voluntarily

leaving the property and ceasing to use it as her home. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

29. — **Absence from homestead and other acts.**—Where husband in good faith, without intention to defraud wife, abandons property as homestead, and removes without intention to occupy as homestead, and is followed by wife, homestead is abandoned by both spouses. *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

Instruction that if the land was the separate property of the husband, and his wife was not living with him at the time of the execution of the deed of trust, the land was not a homestead, held properly refused. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

Continuous absence from homestead is not controlling fact as to abandonment, but simply an evidentiary fact, so that, where no other homestead has been acquired, it must be clear that there has been total abandonment with intention not to return. *Alderete v. Mosley* (Civ. App.) 200 S. W. 261.

That for several years defendant and her family did not reside upon lot in question, and that during part of that time she and her husband resided in another state, does not necessarily disclose an abandonment of defendant's homestead rights in lot. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415.

To show abandonment of homestead by wife who had not been living with husband, it was incumbent upon defendants not only to establish a separation, but to show that wife left husband and home without good cause and without his consent. *Markley v. Barlow* (Civ. App.) 204 S. W. 1013.

The permanent appropriation of a part of the homestead tract to an inconsistent use is an abandonment thereof. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

Cultivation of land does not disprove previous abandonment of the land as a homestead, and owner may, without intending to make it his home again, cultivate, rent, or otherwise utilize the property after removal. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

Where the homestead is the separate property of the wife, her declaration, on leaving it for a health resort, that she never expected to live there again, without any statement denying the right of her son and husband to continue to occupy it as a home, was not an abandonment of the homestead, if such an abandonment by the wife would be conclusive against the husband, where the homestead was her separate property. *Kelly v. Nowlin* (Civ. App.) 227 S. W. 373.

30. — **Intent to return to homestead.**—To constitute abandonment it must be shown that discontinuance was accompanied by an intention never to resume use of property as a homestead. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415.

Where only dwelling shown to have been upon homestead was removed, and there was no evidence of any intention to return building or build a new one, and the husband had purchased, occupied, and used homesteads in other places for long periods of time, intention to return will be held to have been abandoned. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

Upon the owner's having a bona fide intention not to return, property becomes subject to the payment of his debts. *Henderson v. Texas Moline Flow Co.*, 109 Tex. 466, 211 S. W. 973.

Husband may abandon homestead rights in his separate property by removal, without wife having notice of his intention to so do. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

31. — **Acquiring other residence or homestead.**—Mere acquisition and occupancy of a home in another state is not conclusive proof of abandonment of a homestead. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415.

The acquisition of a new homestead is not a condition precedent to the exercise of the power or right of abandonment of the whole homestead. *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

When wife voluntarily leaves homestead, and goes with husband elsewhere, and the husband believing that he is doing what is best for himself and family, without any intention to defraud his wife, forms the intention in his own mind never to return and use the property as a homestead, the property ceases to be a homestead as soon as such removal and intention concur, though no other homestead has been acquired. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

Where a husband and wife moved from their former homestead to a rented place because of disagreements between the wife and children by a former marriage, and intent to remain there only temporarily and then to move on a tract of 400 acres on which they intended to make their home, and the wife continuously claimed the former homestead as such until they moved on the 400-acre tract, there was no abandonment of the former homestead until the new homestead was designated as such. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

There can be but one homestead, and until a new homestead is acquired there can be no abandonment of the old one by the act of the husband alone. *Id.*

Where a wife was induced by the husband to move on a tract of land owned by him for the purpose of aiding him in holding off his creditors until he could sell the land, by persuasion and influence and promises that they would move upon another tract as their homestead, the wife acquired no homestead rights therein and did not abandon the right in the former homestead which she continued to claim until they moved on the tract intended as a new homestead. *Id.*

A husband, acting in good faith, may select the homestead of the family, and when he has acquired a new home, and his wife has removed with him to the newly acquired

homestead, a prior deed made by him without her concurrence to the former homestead becomes as to the husband operative as an estoppel against his right to recover the property, and the wife's right, being that of homestead only, ceases when a new homestead has been acquired and she removes thereto. *Fisher v. Gulf Production Co.* (Civ. App.) 231 S. W. 450.

32. — Conveyance or sale.—Abandonment of homestead on sale and conveyance held question of fact, though defendants remained in possession until they could obtain possession of a newly acquired homestead. *Jones v. Lanning* (Civ. App.) 201 S. W. 443.

Where husband and wife, having homestead on three lots, conveyed one lot to wife's sister to have house built on it to rent, other part of lots being sufficient for homestead and occupied by husband and wife as such, lot on which house was built was segregated as part of homestead, and lost character, and mechanic's lien attached. *Ferguson v. Smith* (Civ. App.) 206 S. W. 966.

An executory contract to sell a homestead does not as a matter of law deprive it of its homestead character; but the contract is a circumstance to be considered by the jury in determining the issue of abandonment. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

An offer to sell homestead property is not necessarily inconsistent with an intention to return and reoccupy the property as a home if not sold. *Dunlap v. English* (Civ. App.) 230 S. W. 829.

33. — Renting or leasing.—Portion of homestead separated from the remainder by a fence on which was a small house rented at times, held not segregated and abandoned as a part of the homestead. *Whitley v. Alexander* (Civ. App.) 198 S. W. 173.

Whether homestead was rented temporarily only is to be determined by physical facts and circumstances as well as owner's testimony. *Thornton v. Wear* (Civ. App.) 202 S. W. 1038.

Findings that tenant houses were built on homestead property as a sole means of support for the family, and were never intended to be sold, but were to be kept for the use of their children, are consistent with a finding that premises had been abandoned as a homestead, notwithstanding Const. art. 16, § 51. *Id.*

The constitutional proviso as to temporary renting of homestead does not apply until after the homestead character is once established. *Blackwell v. Lasseter* (Civ. App.) 203 S. W. 619.

Where one leased his homestead for six years and moved to another state, then intending to return and live upon the homestead, which intention he had not abandoned at the time of its sale on execution, the sale was void. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

The erection of a building upon a portion of the homestead tract with no view of making it a part of the homestead, but with the intention of renting it, is an abandonment of such portion of the tract. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

A mere temporary absence and renting does not constitute an abandonment of a homestead. *Dunlap v. English* (Civ. App.) 230 S. W. 829.

34. — Waiver.—The mere filing, by a widower, of suit to partition homestead, which was not prosecuted but abandoned and suit changed to one of trespass to try title claiming all the land, did not constitute a waiver or abandonment of homestead rights set up in reply to the answer of defendants claiming title to part of the land. *Berry v. Godwin* (Com. App.) 222 S. W. 191, reversing order (Civ. App.) 188 S. W. 30.

Where a husband and wife borrowed money from intervener to purchase lot and erect building, agreeing to give a lien thereon before moving therein, they acquired no homestead rights in the property prior to the execution of such lien; and, where in the lien they agreed that no homestead claim of either could defeat the lien, neither could do so, so long as the indebtedness was enforceable against either of them. *Benavides v. Houston Ice & Brewing Ass'n* (Civ. App.) 224 S. W. 385.

35. — Evidence.—An abandonment of an old homestead before the acquisition of a new one must be shown by the most clear, conclusive, and undeniable evidence. *Bell v. Franklin* (Civ. App.) 230 S. W. 181; *Dunlap v. English* (Civ. App.) 230 S. W. 829.

In suit to cancel deed of trust, evidence held to warrant findings that premises had been abandoned as homestead by plaintiffs, and that they were not their homestead on execution of deed of trust, so that latter was valid lien. *Hart v. Hulsey* (Civ. App.) 196 S. W. 302.

On issue whether renting of homestead property was temporary only, physical facts and circumstances may be of such probative force as to control against owner's testimony. *Thornton v. Wear* (Civ. App.) 202 S. W. 1038.

Evidence held insufficient to show that defendant wife had abandoned her homestead right in property in controversy. *Robinson v. McGuire* (Civ. App.) 203 S. W. 415.

In action for specific performance of a contract for conveyance of land, facts, including defendant's contract of sale with another, held to show conclusively that the defendant had abandoned the tract of land as a homestead, so that he could transfer it without the consent of his wife. *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

Under Const. art. 16, § 52, the fact that plaintiff's children were not living with him when suit was filed was not conclusive that he had abandoned his homestead; nor would it follow, from that fact alone, that he was not entitled to assert a homestead right in the land. *Berry v. Godwin* (Com. App.) 222 S. W. 191, reversing order (Civ. App.) 188 S. W. 30.

Evidence held to show that removal of grantor and his family from the property was with the intention on his part never to return and use it again as a homestead, and that in so removing with such intention he was not actuated by any purpose to defraud his wife. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

That husband, after abandonment of homestead, deeded it to his mother without any pecuniary consideration, does not necessarily show that his prior abandonment of the property was for the purpose of defrauding his wife. *Id.*

Evidence in a suit for specific performance of a contract to convey merely showing that the defendants removed from the property, rented it and expressed a willingness to sell held not to show abandonment of homestead rights. *Dunlap v. English* (Civ. App.) 230 S. W. 829.

36. Estoppel to claim homestead.—See *Fisher v. Gulf Production Co.* (Civ. App.) 231 S. W. 450.

In a suit wherein defendant children, as tenants in common, claimed homestead rights as against foreclosure of a lien, evidence held not to sustain allegation that they had designated such homestead, so as to estop them from claiming homestead rights in a larger tract. *Massillon Engine & Thresher Co. v. Barrow* (Civ. App.) 203 S. W. 933.

37. Conveyance or incumbrance of homestead.—See notes under arts. 1115, 4621.

38. Conveyance or incumbrance of homestead—How made.—Where it was always stipulated that title was to pass only through mutual deeds, the title to homestead property did not pass until delivery of deeds. *Henderson v. Texas Moline Plow Co.*, 109 Tex. 466, 211 S. W. 973.

42. — Mortgage.—Mortgage lien held superior to the homestead exemption rights of the widow and children in land. *Investors' Mortgage Security Co. v. Newton*, 109 Tex. 478, 211 S. W. 971.

44. — Effect of abandonment or termination of homestead right.—If, when the husband executes a deed of trust on his land, his wife is living separate and apart from him, and in abandonment of him, with no intention of ever living with him again, or on the property as a homestead, the land is not a homestead in contemplation of law. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

Under Const. 1876, art. 16, § 50, an attempted mortgage of a business homestead by the husband joined by his wife was absolutely void, and conferred no right whatever and was incapable of validation by any act of the husband, such as its subsequent abandonment as a homestead. *Kearby v. Cox* (Com. App.) 211 S. W. 932.

Where mortgage of business homestead by husband joined by wife was absolutely void under Const. 1876, art. 16, § 50, the subsequent abandonment of property as a homestead did not give it any validity, and the mortgagee's conveyance to others by husband's direction in consideration of grantees' payment of husband's indebtedness to mortgagee passed no title to the grantee. *Id.*

Husband's deed to his separate property, constituting the homestead, without wife's signature, is inoperative as long as the property remains the homestead, but on subsequent abandonment of the homestead the deed becomes operative, and vests title in grantee. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

45. — Excess over homestead.—A deed from a man in which his wife did not join conveyed to the grantee all the community interest in the land except the homestead claim. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

47. — Estoppel to deny validity.—Where plaintiff, in reliance upon written and verbal statements of defendants, that lot No. 11 alone was their homestead, made a loan secured by a mortgage on lot No. 12, defendants cannot defeat loan by setting up that lot No. 12 was in fact their homestead. *Turrentine v. Doering* (Civ. App.) 203 S. W. 802.

A wife is not estopped from asserting her homestead rights by fraudulent acts of her husband in borrowing money on the homestead, where she did not join him in the fraudulent acts. *Markley v. Barlow* (Civ. App.) 204 S. W. 1013.

Husband and wife, who conveyed lot, part of homestead, to wife's sister to have house for rental purposes built, constituted wife's sister their agent to act in executing lien agreement with builder, and in fixing liens against lot, and as against mechanic's lienor and successors are estopped to assert lot was their homestead. *Ferguson v. Smith* (Civ. App.) 206 S. W. 966.

Judgment foreclosing mortgage is not res adjudicata against wife who was not made a party to the suit, and in no way affects her homestead right. *Barbee v. Lundy* (Civ. App.) 212 S. W. 257.

A purchaser of land constituting part of a homestead is not estopped to deny the validity of a prior deed of trust thereon, which was invalid under Const. art. 16, § 50. *First Nat. Bank of McGregor v. Rice-Stix Dry Goods Co.* (Civ. App.) 213 S. W. 344.

Trust deed grantor held estopped by representations from asserting homestead rights in the property. *Johnson v. Masterson Irr. Co.* (Civ. App.) 217 S. W. 407.

Insolvent owner of lots, who recognized conveyance made by his assignee, held estopped to claim a homestead right in an alley. *Boynton v. Milmo* (Civ. App.) 218 S. W. 510.

48. — Rights of purchasers and mortgages.—If a purchaser of land constituting a homestead agrees to pay a prior deed of trust thereon as a part of the consideration of the conveyance, he is liable to the mortgagee for the amount due on the deed of trust, though the lien created thereby is void under Const. art. 16, § 50. *First Nat. Bank of McGregor v. Rice-Stix Dry Goods Co.* (Civ. App.) 213 S. W. 344.

A purchaser may, as against one holding a prior deed of trust, assert that the land constituted a homestead, and that the deed of trust was invalid under Const. art. 16, § 50. *Id.*

While trust deed and vendor's lien note arising out of a simulated sale of a homestead are void as against one having actual or constructive notice as far as wife is concerned,

the husband should not be freed of liability as against purchaser of the note with constructive notice only. *Brooker v. Wright* (Civ. App.) 216 S. W. 196.

Purchaser under deed of trust with full notice of homestead rights in such land, and that owner had brought suit to have deed of trust declared void, because given on homestead, received no title. *Amicable Life Ins. Co. v. Slovak* (Civ. App.) 217 S. W. 200.

One receiving a fictitious deed of conveyance of a homestead had no power to convey the title to the wife as her separate estate, since no title was vested in him. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

49. — **Rights of bona fide purchasers.**—That a purchaser of property subject to a lien takes with knowledge of vendor's recognition of the validity of the lien estops him to deny its validity, notwithstanding any unrevealed intention on the part of the purchaser subsequently to contest its validity on the ground that the property constituted a homestead. *Rice-Stix Dry Goods Co. v. First Nat. Bank* (Com. App.) 231 S. W. 386.

52. **Judgment as lien against homestead.**—Divorced wife's homestead held not subject to husband's judgment lien for improvements paid for out of community funds. *Barber v. Barber* (Civ. App.) 223 S. W. 866.

A judgment lien does not come within the operation of Const. art. 16, § 50, which provides that no mortgage, trust deed, or other lien on a homestead shall ever be valid, etc. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

A judgment lien attached to all the property as soon as it was abandoned as a homestead. *Id.*

Art. 3787. Proceeds of sale of homestead exempt for six months.

Proceeds of exempt property.—Where proceeds from voluntary sale of homestead are transferred without consideration to third party and are not reinvested within six months from such sale, they can be garnished by seller's creditor. *Simmons-Newsome Co. v. Malin* (Civ. App.) 196 S. W. 281.

Proceeds of homestead sold for education and maintenance of minor heirs, without order for use or investment in a homestead, held not exempt from children's creditors for six months. *Ridling v. Murphy* (Com. App.) 228 S. W. 165.

— **Involuntary conversion.**—Proceeds from voluntary sale of homestead are subject to garnishment after six months from sale. *Simmons-Newsome Co. v. Malin* (Civ. App.) 196 S. W. 281.

— **Proceeds of insurance.**—Where machinery which had become part of realty constituting homestead was insured in favor of chattel mortgagee of machinery, proceeds of policy were not subject to garnishment by mortgagee during the six months following time when mortgagor had a right to demand it of insurance company. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Art. 3788. [2397] [2337] Property exempt to others than families.

Tools and apparatus belonging to trade or profession.—This exemption applies to property owned and held in partnership, as well as to property owned in severalty. *St. Louis Type Foundry v. International Live-Stock Printing & Publishing Co.*, 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870.

Art. 3792. [2401] [2341] Homestead exemption does not apply, when.

See *Ellerman v. Wurz* (Sup.) 14 S. W. 333.

Purchase money.—Where purchaser before maturity, etc., of notes given partly for purchase price of land, had knowledge by recitals therein that vendees, husband and wife, occupying premises as a homestead, gave deed to vendor, who in turn deeded to husband, held purchaser was entitled to judgment for full amount of notes, but only to lien on premises for amount owing on land at date notes were executed. *Thomas v. Ash* (Civ. App.) 199 S. W. 670.

While piano purchased on installments is exempt from execution for purchaser's general debts, it is not exempt from sale to satisfy the unpaid installments secured by a mortgage. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

Where the owner of a lot not fully paid for contracted for the building of a house thereon, and subsequently, being unable to meet his payments, rescinded the contract of purchase, destroyed his unrecorded deed, and had title taken in the name of the contractor, who in turn conveyed it back to the owner, retaining a vendor's lien, the homestead right of the owner attached before the transfer was made, the lot having been dedicated for that purpose, and the dedication having been completed when the improvements were begun, so that as to parties with notice no valid lien could be created to secure the antecedent debt. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

Makers of vendors' lien notes could not defeat foreclosure of lien by claiming land as homestead, where makers had joined mother in executing mortgage on land to vendors at time when the property was mother's exclusively, and where mortgage was unpaid at time of conveyance of land to vendors and reconveyance to makers. *Jones v. Ping* (Civ. App.) 209 S. W. 777.

Purchasers could not defeat foreclosure of vendors' lien on ground that land was a homestead because of having lived on land prior to execution of vendors' lien notes, where, prior to the execution of such notes, the purchasers had, by a conveyance made in good faith and fully consummated, conveyed land to vendors, notwithstanding Const. art. 16, § 50. *Id.*

— **Loans and advances for purchase money.**—Surviving wife, tenant in common of homestead with her children to save it from threatened foreclosure of vendor's lien, had the right to extend time of payment of purchase-money note by making new note to third party who took over purchase-money notes from vendor, and to execute deed in trust binding her interest and that of the children in the homestead to secure such note. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

Where time of payment of purchase money for homestead was extended by execution of deed in trust of homestead to secure note to third party who took over purchase-money notes from vendor, a sale under the deed in trust was valid, notwithstanding that note to third party was in excess of the amount of indebtedness secured by vendor's lien. *Id.*

Surviving wife had the right to bind her interest in homestead by deed of trust for purpose of extending time for payment of purchase price, under Rev. St. 1879, art. 2854, in force at such time, though she had remarried at time of execution of deed in trust; the transaction being to preserve her separate estate and being merely a change in the form of the indebtedness, and not the creation of a debt. *Id.*

Under Const. art. 16, § 50, deed of trust of homestead was illegal and void as to portion of loan not representing purchase money. *Amicable Life Ins. Co. v. Slovak* (Civ. App.) 217 S. W. 200.

Where part of debt secured by deed of trust on homestead represented purchase price, and where prior to sale under deed of trust owner had commenced action to have deed of trust declared void, because not constituting a valid lien on homestead, and had offered to pay lender that portion of loan representing purchase price, and where court in its judgment required owner to pay such portion of indebtedness to lender, and ordered sale of land to enforce payment upon owner's default, sale under such deed of trust conveyed no title to lender. *Id.*

— **Taxes.**—Since the homestead is protected under the Constitution, failure of homestead owners to appear and contest special assessments for public improvements does not estop them from interposing a plea of homestead. *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703.

Under Const. art. 16, § 50, a lien declared by a city under an ordinance against a homestead to secure payment for material and labor furnished by a paving company, held a nullity. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Improvements.—A lien in a contract for street improvement to secure payment to contractor covering homestead and given by widow, if construed as mortgage, is invalid, under Const. art. 16, § 50. *Schutze v. Dabney* (Civ. App.) 204 S. W. 342.

A lien, voluntarily created by an instrument executed by a husband and wife against homestead property in favor of a paving contractor, is subordinate to a prior mortgage. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Divorced wife's homestead held not subject to husband's judgment lien for improvements paid for out of community funds. *Barber v. Barber* (Civ. App.) 223 S. W. 866.

The provisions of Const. art. 16, § 50, and art. 5631, do not prescribe that a contract for improvement of the homestead of husband and wife, to subject it to forced sale, shall insure value received for the moneys expended. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

Lien on homestead of husband and wife for improvements held fixed by a contract in writing complying with Const. art. 16, § 50, and art. 5631. *Id.*

Where contract for the improvement of the homestead of husband and wife erecting a building complied with Const. art. 16, § 50, and art. 5631, the resulting lien is enforceable against the homestead, though the building as finished cost more than the contract called for, where the wife knew of such changes and increase in cost. *Id.*

A widow's contract, granting paving contractor lien on homestead to secure her indebtedness to the contractor for pavement of the street, held valid, notwithstanding Const. art. 16, § 50, prohibiting partition of a homestead during the lifetime of the surviving wife. *Dabney v. Schutze* (Com. App.) 228 S. W. 176.

A note reserving a lien may be made payable to a third party by agreement. *Barber v. Herring* (Com. App.) 229 S. W. 472.

Loans and advances for improvements.—The fact that an advancement was a loan to husband and wife to improve their homestead did not avoid the effect in fixing lien for the money so borrowed, under the provisions of Const. art. 16, § 50, and art. 5631, where all of the loan was used for such purpose. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

The fact that money lent husband and wife to improve their homestead was turned over to the husband by the contractor to pay for material and labor does not vitiate the lien of the loan. *Id.*

Pre-existing liens.—Intent at time property was acquired after abandonment of former homestead to use the property so acquired as a homestead held a dedication rendering it exempt from the lien of existing judgment. *Jones v. Lanning* (Civ. App.) 201 S. W. 443.

A homestead could be acquired in community property purchased after an abstract of judgment had been filed, recorded, and indexed, so as to render it exempt from the judgment lien. *Id.*

Attorneys' fees.—Where note secured by deed of trust contained stipulation for attorney's fees in amount equal to 10 per cent. of the entire debt and vendor's lien note taken up by plaintiff provided for attorney's fees at same rate and being part of consideration for lot, their homestead plea is not available against collection of such attorney's fees. *Blackmon v. Texas Securities Co.* (Civ. App.) 196 S. W. 590.

A lien created by instrument executed by a husband and wife against a homestead,

in favor of a paving contractor is not security for a 10 per cent. attorney's fee provided for therein, although such fees are enforceable as a personal liability. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

Art. 3793. [2402] [2342] Exemptions not to override claim for rent, etc.

Repeal of statute.—Statute held not repealed by art. 6171j, applicable only to mortgages to loan brokers. *Mason v. Green* (Civ. App.) 226 S. W. 829.

Landlord's lien.—A landlord's lien is superior to the claim of a widow and her minor children to an allowance in lieu of property exempt from forced sale. *Stokes v. Burney*, 3 Civ. App. 219, 22 S. W. 126.

Lien on proceeds of insurance.—Under an agreement between mortgagee and mortgagor that the latter will insure the property for the benefit of the mortgagee, the latter has an equitable lien on the proceeds of the policy, even though the property itself was exempt from forced sale. *Mosley v. Stratton* (Civ. App.) 203 S. W. 397.

CHAPTER TWO

EXCESS OVER HOMESTEAD, ETC., HOW SET APART AND SUBJECT TO EXECUTION

Art.		Art.	
3794.	Voluntary designation of, and who may set aside homestead.	3797.	Excess subject to execution, etc.
3795.	Mode of setting it apart.	3817.	Provisions cumulative.

Article 3794. [2403] [2343] Voluntary designation of, and who may set aside, homestead in the country.

See *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

Designation of rural homestead out of part of larger tract.—Since defendant was not entitled to entire section as a homestead, court was not bound to recognize her plea of homestead, where she did not point out specific 200 acres that constituted her homestead. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

Designation of homestead in the manner provided by statute is not necessary to establish a homestead right, but is contemplated only where the head of a family has more than 200 acres, which have been impressed with the homestead character, and desires to withdraw the excess from homestead protection. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

Wife's consent to designation.—The husband, as the head of the family, has the right to designate the home. *Kelly v. Nowlin* (Civ. App.) 227 S. W. 373.

Art. 3795. [2404] [2344] Mode of setting it apart.

Necessity and sufficiency of designation.—Where written designation of homestead gave call of description as on bank of river, designation called for river wherever it was at time, and homesteader's grantee of remainder of homesteader's land obtained title only as to what remained after designation. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

Art. 3797. [2406] [2346] Excess over homestead subject to execution.

Execution sale of excess.—If it becomes necessary to sell the entire homestead for the purpose of segregating the value of the excess from that of the exempted portion, it may be done, such a procedure resulting in a forced sale of the exempted interest only for the purpose of partition. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

Art. 3817. [2426] [2366] Provisions of this chapter cumulative.

Marshaling assets.—Where mortgagors designated a homestead on a portion of the mortgaged premises, their homestead right became perfect, except as to the mortgage, and on foreclosure they are entitled to have the land outside the homestead first sold. *Chandler v. Young* (Civ. App.) 216 S. W. 484.

TITLE 56

EXPRESS COMPANIES

DECISIONS RELATING TO SUBJECT IN GENERAL

Negligence in general.—An express company is not liable for damages to goods due solely to an unprecedented storm, which could not have been foreseen or anticipated. *Wells Fargo & Co. v. Porter* (Civ. App.) 202 S. W. 987.

Limitation of liability.—A limitation of liability in an interstate contract of shipment to the declared value applies to a case of embezzlement by an employé of the carrier as distinguished from a conversion by the carrier itself. *Henderson v. Wells Fargo & Co. Express* (Civ. App.) 217 S. W. 962.

A limitation of liability to the declared value in an interstate contract of shipment applies to gross, wanton, and willful negligence, making the theft or embezzlement of the shipment by an employé of the carrier easy of accomplishment and difficult of detection. *Id.*

The owner of goods shipped in interstate commerce under a limited liability contract, and embezzled by the carrier's employé, cannot avoid the limitation of liability by proving that the shipment and assent to the limitation were without her consent, as to the carrier's liability arises only from the contract. *Id.*

Under the rule of the Interstate Commerce Commission and the official express classifications filed with that commission by the express companies of the United States, providing for a limitation of liability based on the declared value of the shipment, the liability for ordinary negligence is limited to the declared value, or, if no value is declared, to the sum of \$50. *Id.*

See, also, *Wells Fargo & Co. Express v. Bollin* (Civ. App.) 212 S. W. 283.

Express company as employer.—As to liability for negligence of joint employés, see *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085.

TITLE 57

FACTORS AND COMMISSION MERCHANTS

<p>Art. LIVE STOCK COMMISSION MERCHANTS</p> <p>3832c. Who are live stock commission merchants.</p> <p>3832d. Bond to be given.</p> <p>3832e. Conditions of bond; renewal of bond; amount.</p> <p>3832f. Approval of bond.</p>	<p>Art. 3832g. Registration of bond; certified copy; fee.</p> <p>3832gg. Adverse claimants to proceeds of live stock sold; deposit in bank.</p> <p>3832ggg. Suit on bond; new bond.</p> <p>3832h. Repeal.</p> <p>3832i. When act becomes effective; Act 1913 repealed; repeal.</p>
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LIVE STOCK COMMISSION MERCHANTS

Article 3832c. Who are live stock commission merchants.—Any person, firm or corporation who shall pursue the business of selling live stock, cattle, cows, calves, bulls, steers, hogs, sheep, goats, mules, horses, jacks, and jennets or any of them, upon consignment for a commission or other charges, or who shall solicit consignment of live stock as a commission merchant or agent, or who shall advertise or hold himself out to be such, shall be deemed and held to be a live stock commission merchant within the meaning of this Act and subject to all the provisions and penalties prescribed by this Act. [Acts 1913, p. 93, § 1; Acts 1921, 37th Leg., ch. 91, § 1.]

Art. 3832d. Bond to be given.—All live stock commission merchants before they shall engage in said business within this State, are hereby required to make bond in an amount hereinafter specified, signed by some responsible surety company regularly authorized to do business under the laws of this State and having a paid up capital of not less than Five Hundred Thousand (\$500,000.00) Dollars, which said bond shall be payable to the County Judge of the county in which such live stock commission merchant has his principal office or place of business, and to his successors in office, as trustee for all persons who may become entitled to the benefits of this Act, such bond to be filed in the office of the County Clerk of the county in which such commission merchant has his principal office or place of business, and in which county suits shall be instituted for any alleged breaches of said bond. [Acts 1913, p. 93, § 2; Acts 1921, 37th Leg., ch. 91, § 2.]

Art. 3832e. Conditions of bond; renewal of bond; amount.—Said bond shall be conditioned that such live stock commission merchant will faithfully obey and carry out all the terms and provisions of this Act, and will faithfully and truly perform all agreements entered into with all the consignors, owners or those holding valid liens on said live stock with respect to receiving, handling, selling and making remittances and payments of the net proceeds thereof to the said named parties, or to the person, firm or corporation to whom said consignors, owners or valid lien holders shall direct such payments to be made; and said bond shall further provide and shall be conditioned that such live stock commission merchant shall within forty-eight hours of the sale of live stock so consigned, excluding the day of sale, Sundays, and holidays, remit the net proceeds thereof to the parties rightfully entitled to receive the same, or to such person, firm or corporation to whom such parties shall direct the payment to be made, or shall within forty-eight hours of the sale of such live stock for said parties at interest deposit to the credit of such

parties their respective interests in the net proceeds thereof in some state or national bank in the city or town where such live stock commission merchant has his principal office or place of business, if requested by any or all of the said parties at interest to do so.

Said bond shall be made annually and shall expire on September 1st of each year.

The amount of such bond shall be fixed by the County Judge as follows: Double the amount of the average daily sales of the stock sold on commission for the preceding twelve months period (computed upon the number of business days) by the person, firm or corporation desiring to pursue the business of a live stock commission merchant, which facts shall be made to appear to the County Judge by the sworn statement of the individual, or member of the partnership, or by the president or secretary of the corporation, seeking the approval of said bond; and provided further that any person, firm or corporation who has not theretofore engaged in the business of a live stock commission merchant shall give bond in the sum of Twenty Thousand (\$20,000.00) Dollars, which shall be the minimum bond to be given under this Act. Provide, the period of forty-eight hours shall be computed, excluding the day of sale, Sundays and holidays. [Acts 1921, 37th Leg., ch. 91, § 3.]

Art. 3832f. Approval of bond.—It shall be the duty of the County Judge to carefully scrutinize said bond when tendered and if satisfied therewith to approve said bond, for which service he shall be entitled to charge and collect from the applicant a fee of One (\$1.00) Dollar, provided that no bond shall be approved by him which is not in the amount prescribed by the terms of this Act, and conditioned as required by this Act and executed by some surety company in good standing, and authorized to do business in this State, and having a paid up capital stock of not less than Five Hundred Thousand (\$500,000) Dollars, which facts shall be first duly certified to the said County Judge by the statement or certificate to that effect issued by the Commissioner of Insurance and Banking. [Id., § 4.]

Art. 3832g. Registration of bond; certified copy; fee.—Said bond, together with the sworn statement made to the County Judge by the applicant seeking the approval of the same and setting forth the average daily sales of such applicant for the twelve months period next prior thereto, shall, as soon as practicable after the approval of said bond by the County Judge, be filed for record in the County Clerk's office in the county where the principal business of said commission merchant is to be carried on, and shall be recorded at length and properly indexed in a well bound book kept for that purpose, to be labeled "Bonds of Live Stock Commission Merchants" and shall also file and securely retain in the archives of his office said original bond and sworn statement, and for this service said clerk shall be entitled to charge and collect a fee of One (\$1.00) Dollar.

Said clerk shall immediately upon the recording and indexing of the said bond and sworn statement furnish to the person, firm or corporation filing the same a correctly certified copy thereof, for which a fee of One (\$1.00) Dollar shall be charged and collected from said commission merchant, and it is also made the duty of said commission merchant to procure said certified copy from said clerk at the earliest practicable date after the filing and recording thereof. [Acts 1913, p. 93, § 5; Acts 1921, 37th Leg., ch. 91, § 5.]

Art. 3832gg. Adverse claimants to proceeds of live stock sold; deposit in bank.—If the proceeds of any live stock sold by said live stock commission shall become involved in a dispute between contending claimants or if the said live stock commission merchant is notified that other parties are asserting rights to said proceeds, or any part thereof, in opposition to the claim of those shipping said stock to said commission merchant, it shall in such cases be the duty of said live stock commission merchant to deposit the amount of said net proceeds involved in such contention in some state or national bank in the town or city where said live stock commission merchant has his principal place of business, and to promptly notify all interested parties of his said action in the premises; whereupon no further liability as to such funds so deposited shall accrue or continue as to said live stock commission merchant, either personally or on his bond. [Acts 1921, 37th Leg., ch. 91, § 6.]

Art. 3832ggg. Suit on bond; new bond.—The bond provided for by the preceding sections of this Act may be sued upon and recovery had thereon by any persons claiming to have been damaged by a breach of its conditions, provided that said bond shall not become void upon the first recovery thereon but may be sued upon until the amount thereof is exhausted, and provided further that upon a reduction of said bond by recoveries thereon to the extent of one-half thereof said live stock commission merchant shall be required forthwith to make and file a new bond conditioned as provided in Section 3 hereof [Art. 3832e] so as to restore said bond to the required amount.

If it shall come to the knowledge of the County Judge that the surety company making such bond has become insolvent or is not financially able to make the said bond ample and sufficient in the opinion of said judge, then it shall be the duty of said officer to notify said live stock commission merchant to execute a new bond as herein provided for; whereupon it shall be the duty of such live stock commission merchant to make a new bond the same as originally required by the provisions of Section 2 and 3 [Arts. 3832d, 3832e] of this Act. [Acts 1913, p. 93, §§ 3, 3a; Acts 1921, 37th Leg., ch. 91, § 7.]

Explanatory.—Sections 8, 9, 10, 11, and 12 of the act impose criminal penalties, and are set forth, post, as articles 317d, 99911 to 99914, Penal Code.

Art. 3832h. Repeal.—It is expressly declared that none of the provisions of Title 57 of the Revised Civil Statutes of 1911 are affected or in any wise modified or repealed by the provisions of this Act. [Acts 1913, p. 93, § 6; Acts 1921, 37th Leg., ch. 91, § 13.]

Art. 3832i. When act becomes effective; Act 1913 repealed; repeal.—This law shall become effective September 1st, 1921. The Act of the Thirty-third Legislature, Regular Session, Chapter 49, page 93, approved March 27th, 1913, is hereby repealed but all rights and liabilities accruing under said Act shall not be in any manner affected or interfered with by the passage of this law. All laws in conflict herewith are hereby repealed. [Acts 1921, 37th Leg., ch. 91, § 14.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Duty and liability in general.—Where cotton factors, who had made advances against cotton held subject to selling instructions from owner under owner's agreement, to send additional margin, sold certain amount for purpose of increasing margin after notice to owners and upon owner's failure to send additional margin, factors were not liable to owner for making such sale contrary to selling instructions. *Robinson v. William D. Cleveland & Sons* (Civ. App.) 217 S. W. 171.

Owner, who accepted proceeds of sale, held to have affirmed sale. Id.

Compensation.—Sales agent, appointed factor by its principal for a limited time, and simply empowered to sell such automobiles as might be consigned to it by its principal

during life of the contract, earned no commission on sale of machines ordered from its principal only two days before the contract expired, so that they could not arrive in time to sell before expiration of the contract. *Ford Motor Co. v. Cranford Auto Co.* (Civ. App.) 206 S. W. 108.

Dealings with third persons.—Where a factor mortgaged goods belonging to his principal without the knowledge of principal or act of estoppel on principal's part, the principal's right to the goods is superior to that of mortgagee. *Chase Hackley Piano Co. v. Clymer* (Civ. App.) 202 S. W. 214.

TITLE 58

FEES OF OFFICE

Chap.

1. Certain state officers.

2. Clerks of the supreme court and courts of civil appeals.

Chap.

3. County officers.

4. General provisions.

CHAPTER ONE

CERTAIN STATE OFFICERS

SECRETARY OF STATE

4. COMMISSIONER OF GENERAL LAND OFFICE

Art.

3837. Fees of state department.

3838. Minimum fees in certain cases.

3840. Fees paid in advance to secretary and by him to treasurer monthly.

Art.

3842. Fees of commissioner of general land office.

2. SECRETARY OF STATE

Article 3837. [2439] Fees of state department.—The Secretary of State, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the State the following fees:

For each and every charter, amendment or supplement thereto of a private corporation created for the purpose of operating or constructing a railroad, magnetic telegraph line or street railway or express company, authorized or required by law to be recorded in said department, a fee of two hundred dollars to be paid when said charter is filed; provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of fifty cents for each one thousand dollars authorized capital stock, or fractional part thereof, after the first one hundred thousand; and provided further that such fee shall not exceed the sum of twenty-five hundred dollars.

For each and every charter, amendment or supplement thereto, of a private corporation intended for the support of public worship, any benevolent, charitable, educational, missionary, literary or scientific undertaking, the maintenance of a library, the promotion of painting, music or other fine arts, the encouragements of agriculture or horticulture, the maintenance of public parks, the maintenance of a public cemetery not for profit, a fee of ten dollars to be paid when the charter is filed.

For each and every charter, amendment or supplement thereto, of a private corporation created for any other purposes intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed, provided that if the authorized capital stock of said corporation shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first, and

provided further that such fee shall not exceed the sum of twenty-five hundred dollars.

For each commission to every officer elected or appointed in this State, a fee of one dollar; and each and every State, district county and precinct officer elected or appointed in this State is required to apply for and receive his commission; provided, that the Secretary of State shall not be required to forward copies of laws to nor attest the authority of any officer in this State who fails or refuses to take out his commission as required herein.

For each official certificate, a fee of one dollar.

For each warrant of requisition, a fee of two dollars.

For every remission of fine or forfeiture, one dollar.

For copies of any paper, document or record in his office, for each one hundred words, fifteen cents.

For each and every charter, amendment or supplement thereto taken out under Chapter 16, Title 25, Revised Statutes (channel and dock corporations), a fee of two hundred dollars shall be paid to the Secretary of State for the use and benefit of the State, which shall be paid when the charter, amendment or supplement thereto is filed for record; provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of fifty cents for each one thousand dollars of its authorized capital stock, or fractional part thereof, in excess of one hundred thousand dollars; and provided further that such fee shall not exceed the sum of twenty-five hundred dollars.

Each and every foreign corporation that files with the Secretary of State a certified copy of its articles of incorporation and any amendments thereto and obtains a permit to do business in this State, and each and every foreign corporation now holding a permit to do business in this State, or shall hereafter obtain a permit to do business in this State, that shall subsequently file with the Secretary of State, a certified copy of any amendment or supplement to its articles of incorporation, such corporation shall pay to the Secretary of State as filing fees the following: fifty dollars for the first ten thousand dollars of its capital stock actually subscribed, and ten dollars for each additional ten thousand dollars or fractional part thereof; provided that in no event shall such fee exceed the sum of twenty-five hundred dollars; provided that each and every foreign corporation having a permit to do business in this State, shall be required to immediately file with the Secretary of State, of Texas, a certified copy of any amendment or supplement to its original Articles of incorporation, when any such amendment or supplement to its original Articles of incorporation is filed in the State, Territory or Foreign Country, under whose laws such corporation is incorporated, after such permit is granted; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph line in this State, shall in no event exceed the sum of twenty-five hundred dollars. [Acts 1907, S. S. p. 500; Acts 1905, p. 135; Acts 1887, p. 93; Acts 1889, p. 93; Acts 1889, p. 87; Acts 1883, p. 72; Acts 1909, S. S. p. 267; Acts 1917, 35th Leg., ch. 85, § 1; Acts 1919, 36th Leg., ch. 45, § 1.]

Explanatory.—Sec. 2 of the act repeals all laws in conflict. The act took effect March 11, 1919.

See *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Constitutionality.—Franchise tax on foreign corporations held unconstitutional. *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, affirming judgment (D. C.) 218 Fed. 260.

Art. 3838. Minimum fees in certain cases.

See *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Art. 3840. Fees paid in advance to secretary and by him to treasurer monthly.

Deposit of funds.—Failure of the secretary of state to pay public moneys coming into his hands officially into state treasury is an offense. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

4. COMMISSIONER OF GENERAL LAND OFFICE

Art. 3842. [2441] [2376] Fees of commissioner of general land office.—The Commissioner of the General Land Office is authorized and required to charge for the use of the State the following fees, to wit:

Filing Fees.

Deed transferring one tract of land or a decree of Court relating to one tract of land.....	\$.50
Each additional tract in a deed or decree.....	.25
Affidavit of ownership.....	.50
Original field notes.....	1.00
Transfer of mineral claims, permits, relinquishments, leases[,] contracts, etc.	1.00
Certificates of facts covering one tract of land.....	1.00
Each additional tract.....	.50
Certificate of occupancy on the home section.....	1.00
Each additional tract shown in a certificate on the home tract.....	.50
Each other certificate not otherwise provided for.....	.50

Certified Copies.

Certificate of the class of Toby Scrip.....	2.50
All other land certificates.....	1.00
Application for survey.....	1.00
Field notes	1.00
Mineral application	1.00
Mineral permit or mineral lease.....	2.00
Purchase application and obligation.....	1.25
Purchase application.....	1.00
Obligation for deferred payment on land.....	.50
File wrapper.....	1.00
Proof of occupancy.....	1.50
Deed, Bond for title, power of attorney, decree of court or other similar instrument.....	1.50
Patent	1.25
Affidavit of settlement, non-settlement and rebuttal affidavits, each	1.00
Other affidavits	1.00
Lease application or contract not exceeding five tracts.....	.75
Each additional tract add.....	.25
Letters and impressions of letters, one page.....	.50
Letters and impressions of letters more than one page.....	1.00
Extract of muster roll, traveling land board reports, clerks' returns relating to land certificates, patent delivery books, school land sales, records, and books and other similar records, each.....	2.00

For copy of any record, document or papers in the English language not otherwise provided for herein 20 cents for each 100 words; provided that no charge shall be less than..... 1.00

Plain or certified copy of any other paper, document or record in any other language than the English, 40 cents for each 100 words; provided no charge shall be less than..... 1.00

Blue print, white print, or other cloth map of any county except lithograph 3.00

Lithograph map..... .50

Plain or certified copy of a portion of a map or sketch or plat made by print or hand, and for a working sketch the charge shall be determined by the amount of material used and time consumed at the rate of, per hour..... 1.00

For examination of any filed papers, for each survey..... .50

When an examination of the records of the General Land Office, other than maps or filed papers, is desired by one person or where search is necessary to compile information minimum fee to be charged of 50 cents, and if the examination is extended beyond thirty minutes an additional sum shall be charged at the rate of, per hour..... 1.00

Patent Fees.

Eighty acres or less..... 3.00

Each additional 80 acres or fractional part thereof contained in a patent..... 1.00

[Acts 1873, p. 176, P. D. 6844a; Acts 1907, p. 283; Acts 1919, 36th Leg., ch. 48, § 1.]

Explanatory.—The following note is appended to this article as it appears in Rev. Civ. St. 1911: "See Acts 1879, ch. 55, for penalty for not paying fees and taking out patents."
 The act took effect 90 days after March 19, 1919, date of adjournment.

CHAPTER TWO

CLERKS OF THE SUPREME COURT AND COURTS OF CIVIL APPEALS.

Art. 3847a. Salary of clerks of courts of civil appeals.	Art. 3847b. Payment of costs collected into treasury.
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Article 3847a. Salary of clerks of courts of civil appeals.—The Clerks of the Courts of Civil Appeals of Texas shall hereafter receive an annual salary of Three Thousand (\$3,000.00) Dollars, payable in equal monthly installments and the same shall be paid out of the general revenues of this State. [Acts 1919, 36th Leg., ch. 78, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 3847b. Payment of costs collected into treasury.—Said Clerks of said Courts of Civil Appeals shall collect and pay into the Treasury of the State of Texas all costs to be, and that are, collected by him, under such laws as now exist or may hereafter be enacted, under such further rules and regulations as may be prescribed by the Comptroller, subject to the approval of the Judges of said Courts. [Id., § 3.]

CHAPTER THREE
COUNTY OFFICERS

<p>2. CLERKS OF THE DISTRICT COURT</p> <p>Art. 3855. Fees of clerks of the district court.</p> <p>4. SHERIFFS</p> <p>3866. Compensation for ex officio services.</p> <p>7. COUNTY COMMISSIONERS</p> <p>3870. Per diem pay of county commissioners.</p> <p>3870a. Counties of certain population.</p> <p>8. ASSESSOR OF TAXES</p> <p>3871. Assessors' compensation.</p>	<p>9. COLLECTOR OF TAXES</p> <p>Art. 3872. Collectors' compensation.</p> <p>10. COUNTY TREASURER</p> <p>3873. County treasurers' commissions.</p> <p>3874. Commissions on school fund.</p> <p>3875. Commissions shall not exceed \$2,000 annually.</p> <p>11. DISTRICT AND COUNTY SURVEYORS</p> <p>3876. District and county surveyors' fees.</p>
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2. CLERKS OF THE DISTRICT COURT

Article 3855. [2453] [2389] Fees of clerks of the district courts.

Filing papers.—The provision giving clerks a fee for "filing each paper," refers only to papers forming part of record proper, and is inapplicable to letters introduced in evidence. *Texas Brewing Co. v. State* (Civ. App.) 195 S. W. 211.

Assessing damages.—A clerk of court is not entitled to a fee for "assessing damages," where judgments were entered upon agreement. *Texas Brewing Co. v. State* (Civ. App.) 195 S. W. 211.

4. SHERIFFS

Art. 3866. [2462] [2398] Compensation for ex officio services.—

For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads, and doing all other public business not otherwise provided for, the sheriffs may receive annually not exceeding one-thousand dollars, to be fixed by the commissioners court at the same time other ex-officio salaries are fixed, to be paid out of the general funds of the court on the order of the commissioners court. Provided, however, that no such ex-officio salary shall be allowed to any sheriff who had received the maximum salary allowed by law. [Acts 1905, p. 91; Acts 1920, 36th Leg., 3d C. S., ch. 43, § 1.]

Took effect 90 days after June 18, 1920, date of adjournment. See *Veltmann v. Slator* (Civ. App.) 219 S. W. 530.

Authority of commissioners' court.—Under art. 3893, and this article, an allowance to a sheriff of a county of about 4,000 inhabitants of \$1,600 for ex officio expenses is invalid as to all sums in excess of \$500. *Veltman v. Slator*, 110 Tex. 193, 217 S. W. 378.

7. COUNTY COMMISSIONERS

Art. 3870. [2466] [2402] Per diem pay of county commissioners.

Constitutionality of local act.—Under Const. art. 3, § 56, article 8, § 9, as amended, Bexar County Road Law, providing for annual salary for commissioners of county for acting in all capacities, is unconstitutional as an attempted regulation of county affairs by local and special act. *Altgelt v. Gutzeit*, 109 Tex. 123, 201 S. W. 400.

Maximum compensation.—The per diem allowed county judges by this article, is properly regarded as compensation or salary for ex officio services, and the county judge, having received the maximum compensation allowed him under the maximum fee bill, is not, under article 3893, entitled to retain such per diem as additional compensation. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Art. 3870a. Counties of certain population.—Hereafter each county commissioner in counties having a population of as much as twenty-three thousand three hundred and fifty and less than twenty-nine thousand according to the last United States census, may receive twelve hundred dollars per year, payable monthly, as compensation for all services ren-

dered of whatsoever nature, whether in connection with the roads of the county or in connection with other county business. [Acts 1921, 37th Leg., ch. 69, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

8. ASSESSOR OF TAXES

Art. 3871. Assessors' compensation.—Each assessor of taxes shall receive the following compensation for his services, which shall be estimated upon the total value of the property assessed as follows: For assessing the State and County taxes: on all sums for the first Two Million Dollars (\$2,000,000.00), or less, Five Cents (5c) for each One Hundred Dollars (\$100.00) of property assessed; and on all sums in excess of Two Million Dollars (\$2,000,000.00), and less than Five Million Dollars (\$5,000,000.00) Two and one-fourth cents ($2\frac{1}{4}c$) on each One Hundred Dollars (\$100.00) and on all sums in excess of Five Million Dollars (\$5,000,000.00), one and seven-tenths cents (1.7) on each One Hundred Dollars (\$100.00); one-half of the above fee shall be paid by the State, and one-half by the County; for assessing the taxes in all drainage districts, road districts, or other political subdivisions of the county, the assessor shall be paid one-half of one cent for each One Hundred Dollars of the assessed values of such districts or subdivisions; provided such compensation as is paid to the assessor to be prorated among the various drainage districts, road districts and other political subdivisions of the county according to the value of the property assessed in each district, or other political subdivision; and for assessing the poll tax, Five Cents (5c) for each poll which shall be paid by the State. The Commissioners' Court shall allow the assessor of taxes such sums of money to be paid monthly from the county treasury, as may be necessary to pay for clerical work, taking assessments and making out the tax rolls of the county, such sums so allowed to be deducted from the amount allowed to the assessor as compensation upon the completion of said tax rolls; provided, the amount allowed the assessor by the Commissioners' Court shall not exceed the compensation that may be due by county to him for assessing. [Acts 1897, S. S. p. 8, § 8; Acts 1919, 36th Leg., ch. 158, § 1; Acts 1919, 36th Leg., 2d C. S., ch. 57, § 1.]

Took effect July 28, 1919.

9. COLLECTOR OF TAXES

Art. 3872. Collectors' compensation.—There shall be paid for the collection of taxes as compensation for the services of the collector, beginning with the first day of September of each year, five per cent. (5%) on the first Ten Thousand Dollars (\$10,000.00) collected for the State, and four per cent. (4%) on the next Ten Thousand Dollars (\$10,000.00) so collected for the State, and one (1%) per cent. on all collected over that sum; for collecting the county taxes, five per cent. (5%) on the first Five Thousand Dollars (\$5,000.00) of such taxes collected and four per cent. (4%) on the next Five Thousand Dollars (\$5,000.00) collected, and one and one-fourth per cent. ($1\frac{1}{4}\%$) on all such taxes collected over that sum. For collecting the taxes in all drainage districts, road districts, or other political subdivisions of the county, the tax collector shall be paid one half of one per cent. (1%) on all such tax collected; provided that the amount to be paid the tax collector shall be paid by the various drainage districts, road districts, or other political subdivisions of the county on a pro rata basis in accordance with the

amount collected for such districts; and in counties owing subsidies to railroads, the collector shall receive only one per cent (1%) for collecting such railroad taxes, and in cases where property is levied upon and sold for taxes, he shall receive the same compensation as allowed by law to sheriffs or constables on making the levy and sale, in similar cases, but in no case to include commission on such sales; and on all occupation and license taxes collected five per cent. (5%). [Acts 1897, S. S., p. 8, § 9; Acts 1919, 36th Leg., ch. 158, § 2.]

Took effect 90 days after March 19, 1919, date of adjournment.

10. COUNTY TREASURER

Art. 3873. [2467] [2403] County treasurers' commissions.

Power to fix compensation.—See *Hunt County v. Greer* (Civ. App.) 214 S. W. 605.

The order of the commissioners fixing compensation of county treasurer at a stated salary is void. *Rusk County v. Hightower* (Civ. App.) 202 S. W. 302.

Rate.—An order of the commissioners' court, that the "county treasurer is allowed a commission on receipts and disbursements not to exceed \$1,200 a year for the next ensuing year," was not void for limiting the amount of the commission to \$1,200, nor because it did not fix the rate of the commission. *Wood County v. Leath* (Civ. App.) 204 S. W. 454.

Compensation as treasurer of drainage and navigation districts.—Additional compensation as treasurer of drainage and navigation districts allowable. *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

Commissions, if illegally retained, are not voluntarily paid by the county so as to bar their recovery. *Id.*

Art. 3874. [2468] Commissions on school fund.

See *Charlton v. Harris County* (Civ. App.) 228 S. W. 969; note under art. 3873.

Art. 3875. [2469] [2405] Commissions not to exceed \$2000 annually; proviso.—The commissions allowed to any county treasurer shall not exceed two thousand dollars annually, provided, however, that in all counties in which the assessed value of the property of such counties shall be one hundred million dollars, or more, as shown by the last preceding assessment roll, the treasurers thereof shall receive as their commissions a sum not exceeding two thousand seven hundred dollars annually. [Acts 1879, ch. 69, p. 79; Acts 1891, p. 147; Acts 1920, 36th Leg. 3d C. S., ch. 35, § 1, amending art. 3875, Rev. Civ. St.]

Took effect 90 days after June 18, 1920, date of adjournment.

See *Charlton v. Harris County* (Civ. App.) 228 S. W. 969; note under art. 3873.

Right to statutory compensation.—An order of the commissioners' court, that the "county treasurer is allowed a commission on receipts and disbursements not to exceed \$1,200 a year for the next ensuing year," held valid. *Wood County v. Leath* (Civ. App.) 204 S. W. 454.

Act of commissioners' court of county in fixing treasurer's salary at \$1,200 per annum, where the treasurer under the law was entitled to commissions to a maximum amount of \$2,000, held illegal, and not binding upon treasurer, but he waived his right by acceptance without protest. *Hunt County v. Greer* (Civ. App.) 214 S. W. 605.

11. DISTRICT AND COUNTY SURVEYORS

Art. 3876. [2470] [2406] District and county surveyor's fees.

Surveying land under water.—The statutory fees for surveying land held inapplicable, where the land was under water. *Redus v. Blucher* (Civ. App.) 207 S. W. 613.

CHAPTER FOUR

GENERAL PROVISIONS

<p>Art. 3880. Official failing to take out commission shall not receive fees or compensation.</p> <p>3881. Maximum amount of fees allowed.</p> <p>3882. Maximum fees in certain counties.</p> <p>3883. Maximum fees in certain counties.</p> <p>3884. County attorney, compensation in certain counties.</p> <p>3885. District attorney, compensation of.</p> <p>3886. County judge, compensation of.</p> <p>3888. Amounts allowed to be retained out of fees collected; state not responsible.</p> <p>3889. Fees, how disposed of; excess fees.</p> <p>3893. Compensation for ex-officio services, etc., may be allowed by commissioners' court, proviso.</p> <p>3894. Officials named in arts. 3881-3886 to keep accounts; duties of grand jury and district judge as to.</p>	<p>Art. 3895. Officers to make sworn statement, etc.</p> <p>3897. Monthly report; statement of expenses; audit, etc.</p> <p>3898. [Repealed.]</p> <p>3903. County commissioners may authorize appointment of deputies and assistants; assistants for district and county attorneys in certain counties; compensation; repeal; special deputy clerks in counties having several courts.</p> <p>3915. Penalty for demanding, etc., fees unlawfully.</p> <p>3921. Preceding articles, etc., do not apply to executors, etc.</p> <p>3924. Any other fees of office.</p> <p>3925. State's attorney fees in school land litigation.</p>
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Article 3880. Official failing to take out commission shall not receive fees or compensation.

See *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

Art. 3881. Maximum amount of fees allowed.

See *Veltmann v. Slator* (Civ. App.) 219 S. W. 530; *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

Amendment of statute.—Intention to alter or change provisions of this article, cannot be inferred from fact that it was in revision of statute placed under a title which contained a statute relating to a different matter. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Maximum compensation of county judge.—Where a county judge has retained fees up to the maximum allowed by the statute, he cannot retain commissions for making a sale of drainage bonds. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Maximum compensation of sheriff.—Amounts allowed a sheriff by commissioners' court, within limitations prescribed by statute, for safe-keeping, feeding, and care of prisoners, cannot be included in estimating maximum amount of fees a sheriff may retain. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445; *Harris County v. Hammond* (Civ. App.) 203 S. W. 451.

This article should not be construed so that maximum compensation of sheriff will be reduced by his having to pay out of his own pocket necessary expenses of conducting his office. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Sheriff required to account for fees earned in tax suits, art. 3924 not applying. *Id.*

Assessor's maximum compensation.—Amounts paid county assessor for assessing taxes, for drainage and school districts held "fees," within arts. 3881, 3883, 3889, and not compensation for "ex officio services," within art. 3893. *Nichols v. Galveston County* (Sup.) 228 S. W. 547.

Collector of taxes.—Under Acts 25th Leg. (Sp. Sess.) c. 5, approved June 15, 1897, as amended by Acts 25th Leg. (Sp. Sess.) c. 15, approved June 19, 1897, county collectors of taxes who were to receive only 10 cents for each poll tax receipt and certificate of exemption issued by them were those subject to all requirements of sections 11 and 16. *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

Tax collector held entitled to retain 10 cents for each poll tax receipt issued by him in addition to maximum fees allowed him by maximum fee law. *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

A county tax collector is not entitled to receive and retain as his own, in addition to amount allowed by the maximum fee law compensation provided by arts. 7687b, 7688a, for making up delinquent tax rolls and collecting delinquent taxes. *Id.*

Maximum compensation of district attorneys.—District attorneys held not relieved from operation of the law fixing maximum compensation. *Bexar County v. Linden*, 110 Tex. 339, 220 S. W. 761, reversing judgment (Civ. App.) 205 S. W. 478.

Art. 3882. Maximum fees in certain counties.

See *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727; note under art. 3881; *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

Art. 3883. Maximum fees in certain counties.—In counties containing a city of over twenty-five thousand inhabitants, or in such counties as shown by the United States census of 1910 shall contain as many as thirty-seven thousand inhabitants, the following amount of fees shall be allowed, viz: county judge, an amount not exceeding thirty-five hundred dollars per annum; sheriff, an amount not exceeding thirty-five hundred dollars per annum; clerk of the county court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; county attorney, an amount not exceeding thirty-five hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars inclusive of the five hundred dollars allowed by the Constitution and paid by the State; clerk of the district court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; collector of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; provided, the compensation fixed herein for sheriffs and their deputies shall be exclusive of any rewards received for the apprehension of criminals or fugitives from justice; provided further that all county clerks in such counties having a population in excess of thirty-seven thousand and a city not in excess of fifteen thousand, as shown by the United States census of 1910, and constituting a separate judicial district, shall be exempt from the Texas fee bill for the year 1920, and shall not be required to make an annual report for the said year of 1920. [Acts 1907, p. 501; Acts 1913, p. 246, § 1; Acts 1917, 35th Leg., ch. 130, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 40, § 1.]

Explanatory.—The act amends "Article 3883 of Chapter 130 of the General Laws of the State of Texas passed by the Thirty-fifth Legislature at its Regular Session."

Took effect 90 days after June 18, 1920, date of adjournment.

See Grayson County v. Cooper (Civ. App.) 211 S. W. 249; Bexar County v. Davis (Civ. App.) 223 S. W. 558; Nichols v. Galveston County (Sup.) 228 S. W. 547; note under art. 3881.

County clerk.—Compensation allowed county clerks in delinquent tax suits by art. 7691 must be reported, accounted for, and considered in reaching maximum compensation of such clerks. Jones v. Harris County (Civ. App.) 209 S. W. 207.

District attorney.—The word "fees," includes commissions on forfeited bail bonds. Bexar County v. Linden (Civ. App.) 205 S. W. 478.

Art. 3884. County attorney, compensation in certain counties.

See Bexar County v. Davis (Civ. App.) 223 S. W. 558.

Art. 3885. District attorney, compensation of.

See Bexar County v. Davis (Civ. App.) 223 S. W. 558.

Art. 3886. County judge, compensation of.

See Bexar County v. Davis (Civ. App.) 223 S. W. 558.

Art. 3888. Amounts allowed to be retained out of fees collected; state not responsible.

See Harris County v. Hammond (Civ. App.) 203 S. W. 445; note under art. 3881.

Art. 3889. Fees, how disposed of; excess fees.—Each officer named in this Chapter shall first, out of the fees of his office, pay or be paid the amount allowed him under [the] this provisions of this Chapter, together with the salaries of his assistants or deputies. If the fees of such office collected in any one year be more than the amount needed to pay the amount allowed such officer and his assistants and deputies, same shall be deemed excess fees and such excess fees such officer in counties having less than twenty-five thousand inhabitants shall retain one-fourth until such one-fourth amounts to the sum of Twelve Hundred Dollars;

and in counties having between twenty-five and thirty-eight thousand inhabitants such officer shall retain one-fourth of the excess fees until such one-fourth amounts to the sum of Twelve Hundred and Fifty Dollars; and in Counties having more than thirty-eight thousand inhabitants such officer shall retain one-fourth of the excess fees until such one-fourth amounts to the sum of Fifteen Hundred (\$1,500.00) Dollars. Such population to be based on the United Census next preceding any given year. All fees collected by officers named in Article 3881 to 3886 of the Revised Statutes of 1911 during any fiscal year in excess of the maximum amount allowed by law, and of the one-fourth of the excess of the maximum amount allowed for their services, and for the services of their deputies or assistants as herein provided for shall be paid into the county treasury of the county where the excess accrued; provided that in counties of less than twenty-five thousand inhabitants by such last preceding United States census, and which counties constitute a separate judicial district. "The chief deputy or first assistant of the officers named in this Chapter shall receive a sum not to exceed a rate of eighteen hundred dollars per annum, and the other deputies or assistants a sum not to exceed a rate of fifteen hundred dollars per annum, and the limitations as to the pay of deputies and assistants elsewhere, provided, in this Chapter shall not apply in such Counties." [Acts 1897, S. S. p. 9, § 11; Acts 1907, p. 50; Acts 1913, p. 246, § 1; Acts 1919, 36th Leg., ch. 158, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 20, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

See *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727; *Nichols v. Galveston County* (Sup.) 228 S. W. 547; note under art. 3881.

Cited, *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Constitutionality.—The provision requiring district attorneys to pay into the county treasury the excess fees of their office, held not violative of Const. art. 3, § 51, as amounting to grant of public money to counties of the state as municipal corporations. *Bexar County v. Linden*, 110 Tex. 339, 220 S. W. 761, reversing judgment (Civ. App.) 205 S. W. 478.

Art. 3893. Compensation for ex-officio services, when may be allowed by commissioners' court; proviso.

See *Veltman v. Slator*, 110 Tex. 198, 217 S. W. 378; note under art. 3866; *Veltmann v. Slator* (Civ. App.) 219 S. W. 530; *Nichols v. Galveston County*, 228 S. W. 547; note under art. 3881.

Constitutionality.—Acts 33d Leg. c. 121, amending this article, held valid, reference being sufficient, though Const. art. 3, § 36, requires the law as amended to be set out at length, the amendment, though changing the law, not amounting to a substitute. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Effect as repeal.—This provision repealed the provision of the act creating county court, which allowed the commissioners to fix ex officio compensation for the county judge. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

County judge.—The per diem allowed county judges by art. 3870, is properly regarded as compensation or salary for ex officio services, and the county judge, having received the maximum compensation allowed him under the maximum fee bill, is not entitled to retain such per diem as additional compensation. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

County attorney.—Allowance authorized as the word "fees," as used in the Constitution, is to be given its ordinary legal significance. *Veltman v. Slater*, 110 Tex. 198, 217 S. W. 378.

Art. 3894. Officials named in articles 3881 to 3886 to keep accounts; duty of grand jury and district judge as to.

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445; *Grayson County v. Cooper* (Civ. App.) 211 S. W. 249.

Collector of taxes.—As to poll tax, see *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

Art. 3895. Officers to make sworn statement, etc.

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445; *Grayson County v. Cooper* (Civ. App.) 211 S. W. 249.

Art. 3897. Monthly report; statement of expenses; audit, etc.

Expenses of sheriff.—Charges paid in civil cases in which county was not a party, sums advanced to indigent witnesses, expenses of conveying defendants in felony cases, and expense of obtaining requisition, are properly credited to sheriff. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Sheriff held not entitled to credit for amount expended for gasoline and repair of his automobile used in performing duties of office in determining maximum amount of his fees. *Id.*

District attorney.—See *Bexar County v. Linden*, 110 Tex. 339, 220 S. W. 761; reversing judgment (Civ. App.) 205 S. W. 478.

Art. 3898. [Amended by Acts 1913, p. 246. Repealed by Acts 1919, 36th Leg., ch. 158, § 4.]

Officers required to report.—See *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

Art. 3903. County commissioners may authorize appointment of deputies and assistants; assistants for district and county attorneys in certain counties; compensation; repeal; special deputy clerks in counties having several courts.—Whenever any officer named in Article 3881 to 3886 shall require the services of deputies or assistants in the performance of his duties, he may apply to the county commissioners court of his county to appoint such deputies or assistants and said court may make its order authorizing the appointment of such deputies and fix the compensation to be paid them and determine the number to be appointed, provided that in no case shall said commissioners court or any member thereof attempt to influence the appointment of any person as deputy or assistant in any office, and thereupon the officers applying for such deputies shall be authorized to appoint them as now provided by law, provided that said compensation shall not exceed the maximum amounts hereinafter set out. Provided that in counties having a population in excess of one hundred thousand inhabitants, the district attorney of the district or the county attorney of such county or counties where there is no district attorney is authorized, when empowered to so do by the commissioners court of said county, to appoint not to exceed two assistants in addition to his regular deputies or assistants, the number of said additional assistants not to exceed two for the entire district regardless of the number of counties it may contain, which two assistants shall not be required to possess the qualifications prescribed by law for district and county attorneys and who shall perform such duties as may be prescribed by such district or county attorney and each such assistant shall receive as compensation not to exceed one hundred and fifty dollars per month to be paid monthly out of the funds of the county for which appointment is made, by warrants drawn on such county funds; provided that nothing in this Act shall repeal or modify any salary or compensation fixed for either regular or special assistant district or county attorneys by any special Act which has been or which may be hereafter enacted; and provided further that in counties having a population in excess of one hundred thousand inhabitants, the district attorney in the county of his residence or the county attorney, where there is not a district attorney, shall be allowed by order of the commissioners court of the county where such official resides such amount as said court may deem necessary to pay for the proper administration of the duties of such office, not to exceed seventy five dollars per month; such amount to be allowed upon affidavit of said district or county attorney showing a necessity for such expenses and for all the amounts so incurred, said commissioners court may also require any other evidence as it may deem necessary to show the necessity of such expenditure and its judgment in allowing same shall be final.

The maximum compensation which may be allowed for deputies or assistants to the officers named in said Articles 3881 to 3886 for their services, shall be as follows, to-wit:

First assistant or chief deputy not to exceed eighteen hundred dollars per annum; other assistants or deputies not to exceed fifteen hundred dollars per annum each.

Provided that in counties having a population of from thirty-seven thousand five hundred to one hundred thousand inhabitants, the maximum compensation which may be allowed such deputies or assistants for their services shall be as follows, to-wit:

First assistant or chief deputy not to exceed twenty-one hundred dollars per annum; heads of such department not to exceed eighteen hundred dollars per annum each, other deputies or assistants not to exceed fifteen hundred dollars per annum each.

Provided that in counties having a population in excess of one hundred thousand inhabitants the maximum compensation that may be allowed such deputies or assistants for the services shall be as follows, to-wit:

First assistant or chief deputy not to exceed twenty-four hundred dollars per annum; heads of each department not to exceed twenty-one hundred dollars per annum each; other deputies or assistants not to exceed eighteen hundred dollars per annum each.

Provided that in counties having a population of from thirty-seven thousand five hundred to one hundred thousand, and containing a city of over twenty-five thousand, the maximum compensation that may be allowed such deputies or assistants for their services shall be as follows, to-wit:

First assistant or chief deputy not to exceed twenty-four hundred dollars per annum; heads of each department not to exceed twenty-one hundred dollars per annum each, other deputies or assistants not to exceed eighteen hundred dollars per annum each.

Provided further that in determining the number of inhabitants in each of the instances heretofore mentioned, the number of inhabitants as shown by the last United States census shall control.

The county commissioners court in each order granting authority to appoint deputies or assistants shall state the number of deputies or assistants authorized and the amount of compensation to be allowed each deputy or assistant, which compensation shall be paid out of the fees of the office to which such deputies or assistants may be appointed and assigned, and shall not be included in estimating the maximum fees of the officers prescribed in said Articles 3881 to 3886; such salaries to be paid out of the fees of the office in the following manner:

First, out of any current fees collected, and second, if such fees are not sufficient, then out of any delinquent fees collected which are due the county after all legal deductions are made and if there be any balance remaining after payment of the maximum fee, compensation and excess fees due such officer or officers and the compensation of such deputy or deputies, such balance shall be paid to the county treasurer.

Provided, however, that nothing in this Act shall be construed to repeal H. B. 196, passed by the Regular Session of the Thirty-sixth Legislature, same being known as Chapter 47, of the Acts of the Regular Session of the Thirty-sixth Legislature, page 83, [Arts. 340a-340g] relating to fixing salaries of district attorneys, their deputies, assistants and stenographers in counties having a population of more than one hundred thousand.

Provided that in counties of two hundred thousand inhabitants and over and containing a city with a population of over 160,000 inhabitants according to the last United States census, and in which counties there are more than one District Court, including criminal District Courts, the Clerk of the District Courts shall appoint a special deputy for each such Court when directed so to do by the Judge of any such court, except in instances where there is one now already provided for by law; provided further that any such special deputy shall be paid out of the general fund of the county, a salary not in excess of the maximum salary per annum provided for deputies now by law, payable monthly and such compensation shall not be paid out of the fees or compensation of the District Clerk, and shall not be taken into consideration in arriving at the maximum compensation and excess fees allowed the Clerk of the District Courts. [Acts 1897, S. S. p. 10, § 12; Acts 1913, pp. 246, 286, § 1; Acts 1917, 35th Leg., ch. 55, § 1; Acts 1920, 36 Leg. 3d C. S., ch. 32, § 1; Acts 1921, 37th Leg., ch. 96, § 1.]

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445; *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

Appointment of deputies and assistants by county judge.—County judge, held not empowered to appoint deputies or assistants for himself and compensate them out of fees collected by him. *Bexar County v. Davis* (Civ. App.) 223 S. W. 558.

Art. 3915. [2485] [2421] Penalty for demanding, etc., fees unlawfully.

Liability imposed by statute.—A suit to recover four times the amount of excessive fees charged by a county surveyor, is one for a penalty. *Redus v. Blucher* (Civ. App.) 207 S. W. 613.

Fee to surveyor.—To recover the statutory penalty it must appear that application for survey, was made to surveyor in proper county, and that land surveyed was situated in such county. *Redus v. Blucher* (Civ. App.) 207 S. W. 613.

Art. 3921. [2492] [2428] Preceding articles, etc., do not apply to executors, etc.

Guardian and ward.—This article applies only to an adjudication against estates of minors under guardianship in probate court, and not to one against "minors" or "estates of minors" having merely a guardian ad litem. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

A judgment creditor of a minor whose person or property is not under the jurisdiction of the probate court in a guardianship proceeding, need not institute proceeding for execution of his judgment. *Id.*

Art. 3924. [2495] Any other fees of office.

See *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

Application of statute.—See *Jones v. Harris County* (Civ. App.) 209 S. W. 207.

Since this article placed by codifiers in this title, did not, before amendment of provisions of such title fixing maximum fees of officers, affect same, it is not now applicable to said provisions. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Fees of sheriff.—Sheriff required to account for fees earned in tax suits. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Art. 3925. [2495a] State's attorney fees in school land litigation.

See *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

TITLE 59

FENCES

Article 3927. [2496] [2431] "Sufficient fence" defined.

Cited, *Clarendon Land, Investment & Agency Co. v. McClelland* (Civ. App.) 21 S. W. 170.

Contributory negligence.—Upon a finding that an owner has failed to surround his land with a fence sufficient to exclude stock of ordinary disposition, the law conclusively presumes him guilty of negligence precluding recovery for trespass. *Phillips v. Crow* (Civ. App.) 199 S. W. 851.

TITLE 61

FORCIBLE ENTRY AND DETAINER

Art.
3942. Other cases of forcible detainer.
3944. Citation.
3945. Requisites of the complaint.

Art.
3960. Damages may be proved, when.
3962. Judgment of county court final, etc.,
except, etc.

Article 3942. [2521] [2442] Other cases of forcible detainer.

Improvements.—In forcible detainer against tenant at will, refusing to pay increased rent, and also refusing to vacate, no issue as to tenant's right to reimbursement for value of improvements made, or tenant's right to remove same, is determined. *Arrietta v. Crosby* (Civ. App.) 213 S. W. 987.

Art. 3944. [2523] [2444] Citation.—When the party aggrieved, or his authorized agent, shall file his complaint in writing and under oath with such justice of the peace, it shall be his duty immediately to issue his citation to the sheriff or any constable of the county, commanding him to summon the person against whom complaint is made to appear before such justice of the peace at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of such citation; provided, that if the party aggrieved shall, at the time of filing his complaint under oath, execute a bond with two or more good and sufficient sureties, to be approved by the justice of the peace, in such an amount as may be fixed by the justice of the peace as the probable amount of the costs of suit and of the damages which may result to defendant in the event the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against him, —it shall be the duty of the officer serving such citation to place the aggrieved person in possession of the property sued for, unless the defendant shall, within six days from the service of the citation, execute and deliver to such officer a bond with two or more good and sufficient sureties in an amount double the amount of the bond given by the plaintiff, to be approved by the officer serving such citation and conditioned that the defendant, in case judgment is rendered against him, will pay all the costs of suit and the reasonable rental or value of the use of the property during the time he has withheld possession of the same from plaintiff to the time of making such bond and, in addition, will also pay the reasonable value or rental of such property while such suit is pending and until it is finally disposed of. [Acts 1876, p. 155, § 4; Acts 1917, 35th Leg., ch. 154, § 1; Acts 1918, 35th Leg., 4th C. S., ch. 83, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 3945. [2524] [2445] Requisites of complaint.

Requisites and sufficiency of complaint.—An allegation that defendant "has heretofore been a tenant at will of said real property, and that said complainant is entitled to the actual possession of the same," is insufficient to show the relation of landlord and tenant between the parties. *Gulledge v. White*, 73 Tex. 498, 11 S. W. 527.

Art. 3960. [2538] [2459] Damages may be proved, when.

Damages recoverable.—In a suit by a landlord for damages for breach of a rental contract, plaintiff held entitled to recover attorney's fees and other expenses in a forcible detainer suit appealed to county court. *Shotwell v. Crier* (Civ. App.) 216 S. W. 262.

Art. 3962. [2540] [2461] Judgment of county court, final, etc., except, etc.

When appeal will lie.—No appeal lies unless damages in excess of \$100 are awarded. *Tibbitts v. Lacy* (Civ. App.) 225 S. W. 190.

TITLE 62

FRAUDS AND FRAUDULENT CONVEYANCES

Art.	Art.
3965. Written memorandum required to maintain certain actions.	3971. Sales of merchandise and fixtures in bulk; notice to creditors; liability as receiver.
3966. Conveyance to defraud creditors, etc., void.	3973. Not applicable in what cases.
3967. Voluntary conveyances.	3973a. Actionable fraud.
3969. Loan of chattels.	3973b. Same; actual damages.
3970. Mortgage of chattels void, when.	3973c. Same; exemplary damages.

Article 3965. [2543] [2464] Written memorandum required to maintain certain actions.

1. **Promises to answer for the debt, default or miscarriage of another in general.**—In action to foreclose lien on shares of stock deposited by father to secure notes of son, held petition did not show that cause of action was based on oral promise to answer for debt of another; there being no verbal promise to pay debt. *Pattillo v. Citizens' Nat. Bank of Stamford* (Civ. App.) 197 S. W. 1054.

2. **Nature of debt or default.**—Where the debt was a partnership one the statute of frauds had no application. *Pennington v. Fleming* (Civ. App.) 212 S. W. 303.

3. **Promise to debtor to discharge debt.**—Where remote purchaser of stock and fixtures promised to pay original seller's debt, which promise was part consideration for transfer to remote purchaser by his immediate seller, the stock, under the Bulk Sales Law, being a trust fund for creditors, such remote purchaser's promise was not within the statute. *Hay v. Behrens Drug Co.* (Civ. App.) 214 S. W. 940.

Where a lumber company agreed with owner to pay bills for plumbing, houses to be sold after construction and bills paid and balance applied on owner's indebtedness to the company, such was not a mere naked "promise to answer for debt or default of another," but an express assumption of the plumber's bills for a valuable consideration. *Turnbow Lumber Co. v. Eastham* (Civ. App.) 221 S. W. 667.

4. **Promise to indemnify.**—Where broker who sold apples had an interest in the property, his pledge to save plaintiff from loss if plaintiff would pay draft and take apples was not within the statute and could be enforced, though oral. *Neely v. Dublin Fruit Co.* (Civ. App.) 199 S. W. 827.

5. **Original or collateral promise in general.**—An original promise to pay for articles secured for use of another, made before the sale, was not within the statute. *Carlisle v. Frost-Llewellyn Lumber Co.* (Civ. App.) 196 S. W. 733; *Bejil v. Blumberg* (Civ. App.) 215 S. W. 471.

Where defendant injured boy, and took him to plaintiff's hospital, and requested plaintiff to treat boy's broken leg, defendant's agreement to pay plaintiff for his services was original undertaking, not within statute. *Banfield v. Davidson* (Civ. App.) 201 S. W. 442.

Where a corporation, after its organization was completed, adopted a contract of its organizers under which services resulting to its benefit had been rendered, the contract becomes an original undertaking, not a promise to answer for the debt of another, and need not be in writing. *Hart-Toole Furniture Co. v. Shahan* (Civ. App.) 220 S. W. 181.

The statute is not available as against an oral contract by owner to pay subcontractor for extras. *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675.

Where the main purpose of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute. Thus a promise of members of an association made for their own benefit to pay secretary's salary is not within the statute. *Great Southern Oil & Refining Ass'n v. Cooper* (Civ. App.) 231 S. W. 157.

6. **Acceptance of bill of exchange.**—Acceptance of a draft may be verbal, and need not be in writing. *Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co.* (Civ. App.) 207 S. W. 400.

9. **Promise to pay from property of debtor.**—An agreement of seller of realty occupied by a tenant to continue to collect the rent to meet monthly payments, with interest falling due on a second lien note, held not within the statute, as a promise of the seller to answer to the buyers for the debt, default, or miscarriage of another person. *Gossett v. Hainline* (Civ. App.) 225 S. W. 415.

11. **Agreements not to be performed within one year—In general.**—Parol promise of vendor to have the land irrigated, which could not have been performed within one year, was in violation of the statute. *Lott Town & Improvement Co. v. Harper* (Civ. App.) 204 S. W. 452.

Parol agreement by insurer, made at time of renewing policy for three-year term, to renew policy upon expiration, was unenforceable under the statute. *Ætna Ins. Co. v. Richey* (Civ. App.) 206 S. W. 333.

A lease giving right to enter and remove oil and gas, whether considered a contract to lease for a term more than one year or a contract conveying an interest in the land, must be in writing. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

An agreement of seller of realty occupied by a tenant to continue to collect the rent to meet monthly payments, with interest falling due on a second lien note, held not within statute, as a lease of the land for a longer term than a year. *Gossett v. Hainline* (Civ. App.) 225 S. W. 415.

Where a lessee has an option for the extension of the term of the lease, he holds over, after giving notice of exercising his option under the original lease, and not under the notice, so that an oral agreement for an option to renew an oral lease for one year after its expiration is void under the statute. *Hill v. Brown* (Civ. App.) 225 S. W. 780.

An assignment of a lease for more than one year must be in writing. *Lewis Bros. v. Pendleton* (Civ. App.) 227 S. W. 502.

12. — Possibility of performance.—In suit by vendee to recover possession from one claiming under agreement with vendor, an answer which did not affirmatively call for possession for longer than one year, nor allege that agreement could not be performed and possession concluded within one year, held, on demurrer, not within the statute of frauds. *Bostick v. Haney* (Civ. App.) 209 S. W. 477.

An agreement by a surety company executing certain bonds to pay its agent annually while the bonds were in force a specified commission held without the statute of frauds, as one performable within one year. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 465.

Parol lease for the term of lessor's life held not void under the statute which is applicable only to leases which by their terms cannot be performed within the year. *Betts v. Betts* (Civ. App.) 220 S. W. 575.

15. Creation of estates or interests in general.—An easement is an estate or interest in the land which could only be created by deed or grant. *Shepard v. Galveston, H. & H. R. Co.*, 2 Civ. App. 535, 22 S. W. 267.

Where a colonization company was organized, but the survey showed an excess over the acreage of each shareholder, and the trustee orally gave the excess to the shareholders in common, they never acquired legal title to such excess under the statute. *Howell v. Duncanson* (Civ. App.) 195 S. W. 349.

Agreement between railroad company and owner of land that the landowners might use a pond partially situated on their lands to stock fish and rent boats for fishing is not necessarily required by law to be in writing in order to be effective between the parties. *Town of Jacksonville v. Ragsdale* (Civ. App.) 202 S. W. 774.

No lien can be created on land by lending money to a purchaser thereof on his oral promise to convey the land to the lender in default of payment, since a lien upon real estate will not be created by parol agreement. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

The ratification of an unauthorized mortgage must be evidenced by a written instrument. *Texas Moline Plow Co. v. Klapproth* (Com. App.) 209 S. W. 392.

A contract to assign interest vested by an oil lease for a term of more than one year must be in writing, the words "contract for the sale of land," in the statute, including every agreement by which one promises to alienate an existing interest in land upon a consideration. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Where lots within subdivisions were sold by deeds containing certain restrictions as to their use under an agreement that all other lots in subdivision when sold would be similarly restricted, the purchaser acquired an equity to require the restrictions in deeds to lots subsequently sold which was not an interest in lands and which can be proved by parol evidence. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

16. Creation of leases.—Parol evidence that written lease in terms of second floor, was intended to also cover third floor, is unavailing. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

A lease giving right to enter and remove oil and gas, whether considered a contract to lease for a term more than one year, or a contract conveying an interest in the land, must be in writing. *Priddy v. Green* (Civ. App.) 220 S. W. 243. See, also, *Texas Co. v. Tankersley* (Civ. App.) 229 S. W. 672.

17. Assignment, grant or surrender of existing estates, interests or terms.—A verbal assignment of an interest in an oil lease is unenforceable by reason of the statute. *Pantaze v. McDill* (Civ. App.) 228 S. W. 962.

19. — Establishment of boundary.—Parol agreement between owners of adjacent lands to fix their boundary line at place other than its known and established location is in contravention of statute of frauds, and therefore ineffectual to change true location of line. *Grawunder v. Gotoskey* (Civ. App.) 204 S. W. 705.

Parol agreement by adjacent landowners, establishing boundary line as located by surveyor, line never having been marked and fixed on ground, and there being nothing in deeds whereby its location could be fixed, other than calls for courses and distances, held valid and not within statute of frauds. *Id.*

Parol agreement fixing boundary line will not be set aside merely because it is subsequently discovered that agreed line is not true line. *Id.*

21. Contracts for sale of interests in land.—Since one may accept the obligations of an otherwise binding contract by acts as well as deed, the statute of frauds did not stand in the way of enforcement by specific performance of an earnest money contract for the purchase of land dependent on the owner's acceptance, where the owner executed and tendered a deed. *Fuersteneck v. Clark* (Civ. App.) 195 S. W. 294.

An agreement of seller of realty occupied by a tenant to continue to collect the rent to meet monthly payments, with interest falling due on a second lien note, held not within the statute, as a contract for the sale of land. *Gossett v. Hainline* (Civ. App.) 225 S. W. 415.

An agreement that the mortgagor should not bid at the foreclosure sale, and that the mortgagee would take the property bid in at the sale, in full satisfaction of the mortgage, is not required to be in writing. *Lobit v. Marcoulides* (Civ. App.) 225 S. W. 757.

Contract by plaintiff with defendants to file suit for cancellation of a former lease on which agreed rentals had not been paid and therefore had terminated, but which remained a cloud on title, as pleaded by plaintiff in his petition to recover money judgment or in the alternative to recover a leasehold interest in the realty, held enforceable as a parol agreement to acquire land together and to divide it according to the terms of the agreement. *Tunstill v. Grisham* (Civ. App.) 228 S. W. 272.

A parol agreement, whereby, in consideration of the father's surrender of the custody of plaintiff and the latter's living with defendant's intestate as a son, intestate agreed that his lands owned at his death should become plaintiff's property, is within the statute unless taken therefrom by part performance. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

The statute does not declare a parol contract for the sale of land to be illegal and void, but merely provides a means of successful resistance in case the statute is not complied with. *Simpson v. Green* (Com. App.) 231 S. W. 375.

22. — **Nature of property.**—Where land is conveyed by a warranty deed containing no reservations, a parol agreement reserving title to a house on such land is in effect a parol sale of an interest in land within the statute and cannot be enforced. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

23½. **Authority of agent to convey.**—The verbal authority of the owner of real estate to another to convey it confers no power to do so, because in clear violation of the statute of frauds. *Kearby v. Cox* (Com. App.) 211 S. W. 932.

25. **Sale of lumber or timber.**—Where standing timber is sold for purpose of prompt severance within reasonable or specified time, with mere license to enter and remove, contract need not be in writing. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

27. **Part performance—in general.**—Lease contract, performed by lessor and partially by lessee, under which lessee has received benefits for term, is not within statute of frauds, and is enforceable irrespective of validity when executed, and lessee cannot escape liability by asserting invalidity for insufficient description, etc. *Folmar v. Thomas* (Civ. App.) 196 S. W. 861.

The fact that the consideration for an oral contract for the transfer of land was the rendition of services by the transferee to the transferor as a son, and that such services had been rendered, held not to take the case out of the statute, where possession of the property had not been transferred. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

28. — **Possession.**—Transfer of possession is required before an oral contract of sale of land can be enforced in equity. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

30. — **Improvements.**—Shareholders in colonization company held not to have acquired equitable title to land under parol gift by constructing temporary improvements. *Howell v. Duncanson* (Civ. App.) 195 S. W. 349.

When a purchaser by parol has been fully compensated for his improvements, or has gained more by his possession than he has expended in improvements, they will not avail him as a ground for specific execution. *Martin v. Martin* (Civ. App.) 207 S. W. 188.

Where buyer of land by verbal contract took possession and made permanent improvements, consisting of a house or shed, a well, corrals, fencing, grubbing, and clearing land, of a total value of \$750, such improvements were sufficient to justify specific enforcement of the verbal contract of sale. *Williams v. Sweatt* (Civ. App.) 208 S. W. 230.

Where the value of improvements made by a purchaser of land by oral contract together with the amount of money paid by him amount to only \$56 more than the value of the use of the land while he had possession, he is not entitled to specific performance on any theory of part performance and making of improvements. *Jackson v. Carlock* (Civ. App.) 218 S. W. 578.

31. — **Possession and payment.**—Where by parol lease for more than year landlord places tenant in possession, and receives one or more installments of rent under the lease, there is part performance, taking contract out of the statute of frauds, and it may be enforced. *Adams v. Van Mourick* (Civ. App.) 206 S. W. 721.

Where defendants entered into possession under a turpentine lease or contract, and began to cut trees, and part of the rental was paid, defendants cannot defeat an action for recovery of rental thereafter becoming due, on the ground that the contract or lease was void because of ambiguity in the description of the property. *Spivey v. Hooks* (Civ. App.) 216 S. W. 486.

32. — **Possession and Improvements.**—Where the wrong lot was inserted in a mortgage and the mistake carried through to a sheriff's deed, the transaction was no more than a verbal transfer, and valuable improvements were necessary in addition to possession to acquire an equitable title to the lot intended to be mortgaged. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

Parol gift of land followed by actual possession and the making of valuable improvements held to give the grantee a good title without written conveyance. *Butler v. Lollar* (Civ. App.) 199 S. W. 1176.

A parol contract for the sale or gift of land is not enforceable unless followed by delivery of possession and the making by the vendee or donee of valuable and permanent improvements which materially enhance the value of the property. *Leonard v. Cleburne Roller Mills Co.* (Civ. App.) 229 S. W. 605.

33. — Payment and improvements.—It is essential to specifically enforce an oral contract for the sale of land that valuable improvements be made on the land, although the price has been paid and possession taken, and the value of the land cannot be recovered, but the price paid. *Wells v. Foreman* (Civ. App.) 199 S. W. 1174.

To relieve a parol sale of land from the operation of the statute three elements are essential: Payment of the consideration, possession by the vendee, and the making by the vendee of valuable and permanent improvements with the consent of the vendor, or, in absence of such improvements, such other facts as would make the transaction a fraud if it were not enforced. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

34. Contracts implied by law on part performance.—Where property has been transferred in consideration of an oral promise which the promisor refuses to perform, the law implies a promise on which an action will lie for the value of the property so transferred or, in equity, the land itself may be recovered. *Lasater v. Premont* (Civ. App.) 209 S. W. 753.

35. Contracts completely performed.—The statute does not apply to an oral contract which has been executed. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

37. Modification of contract.—An agreement for the surrender of a written lease for five years, which would have more than one year yet to run after the date of surrender is within the statute of frauds, and not enforceable if not in writing. *Gardner v. Sittig* (Com. App.) 222 S. W. 1090, affirming judgment (Civ. App.) 188 S. W. 731.

Where an assignment of a lease for more than one year as part of a sale of a business was in writing, and the written contract provided for making of the cash payment within 37 days, a parol agreement waiving or modifying the provision as to time for performance because of difficulty in obtaining the lessor's consent to the assignment was not invalid because not in writing. *Lewis Bros. v. Pendleton* (Civ. App.) 227 S. W. 502.

38. Equitable relief.—Since the exercise of equitable jurisdiction to enforce a parol contract for the sale of lands results, in any case, in practically setting the statute aside, the rule under which such contracts will be enforced in equity should be as definite and precise as the statute, and should not be extended to cases not within its terms. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

The only ground on which the jurisdiction of equity to enforce a parol contract for the transfer of land can be sustained is that the refusal to enforce the contract would perpetrate a fraud. *Id.*

The payment of the consideration for a parol contract for the sale of land alone does not make the enforcement of the statute the perpetration of a fraud, since the purchaser can recover such payment by an action at law. *Id.*

39. Persons to whom statute is available.—A person interfering with a contract of sale of real estate is liable in damages in a proper case, although the contract was obnoxious to the statute of frauds, but not if the contract breached be one which the party may or may not perform at his option. *Richardson v. Terry* (Civ. App.) 212 S. W. 523.

40. Writing subsequent to oral agreement.—When a sufficient memorandum of a prior oral contract has been made and signed and suit for enforcement is brought, it is the oral contract that is enforced, and not the memorandum by which such contract is proved. *Simpson v. Green* (Com. App.) 231 S. W. 375.

41. Waiver of bar of statute.—Where land is conveyed by a warranty deed containing no reservations, but grantor by parol reserves the right to remove a house sold to another prior to the conveyance, grantee is not estopped to assert the statute of frauds, where his promise to permit removal of house was not made with fraudulent intent. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

That contract to convey was in parol did not render deed executed pursuant thereto invalid under the statute. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

42. Trusts.—Agreement enforceable as parol trust. *Winfree v. Winfree* (Civ. App.) 195 S. W. 245; *Schultz v. Scott* (Civ. App.) 210 S. W. 830.

Under the Texas law, the fact that one having title to land holds it in trust for another need not be evidenced by writing. *City of Ft. Worth, Tex., v. National Park Bank of New York* (C. C. A.) 261 Fed. 817.

Oral agreement by which plaintiff suffered judgment in foreclosure suit to be entered against him when defendants agreed to reconvey land to him, if entered into, was not void under statute of frauds, since it created a trust. *Matthews v. Deason* (Civ. App.) 200 S. W. 855.

The statute does not apply to a parol express trust, and hence a judgment creditor, who promised to allow the debtor time to redeem and as result of the promise obtained the property without competitive bids, etc., cannot defeat the debtor's action on the ground that the agreement to allow redemption was not written. *Riley v. Chandler* (Civ. App.) 220 S. W. 361.

Where plaintiff was induced to convey an interest in land to defendant by defendant's oral agreement, subsequently repudiated, to devise her entire interest to plaintiff,

the statute of frauds does not prevent proof of the verbal promise for the purpose of establishing a trust. *Faville v. Robinson* (Sup.) 227 S. W. 938.

43. Requisites and sufficiency of writing.—After completing oral negotiations for an oil lease, the landowners deposited in escrow a lease, which recited payment of the consideration, it being agreed that if title proved satisfactory the lessee would execute the lease, and pay the consideration, but before the lessee had executed the lease and paid the consideration the landowners elected to repudiate contract, held that the contract was wholly executory until delivery of the lease, was within the statute of frauds and unenforceable, and the lease, which was a memorandum of the executed contract, was not sufficient to take the case out of the statute. *Blue v. Conner* (Civ. App.) 219 S. W. 533.

A written assignment of an oil lease placed in escrow, sufficient as a present conveyance, was a sufficient memorandum in writing to comply with the statute of frauds. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

Oil and gas lease signed by lessor, reciting agreed consideration and terms and conditions of lease, delivered to bank pursuant to parol escrow agreement, held a sufficient memorandum to comply with statute. *Pearson v. Kirkpatrick* (Civ. App.) 225 S. W. 407.

A deed deposited in escrow is not insufficient as a memorandum because in the form of an executed contract. *Simpson v. Green* (Com. App.) 231 S. W. 375.

45. — Description of land.—An assignment of an oil and gas lease, which referred to a certain lease made by a certain person to a certain other person, and stated that said lease was recorded in a certain county, sufficiently described the land, if by reference to the deed records and the lease offered the correct description could be secured. *Townsend v. Day* (Civ. App.) 224 S. W. 283.

Stipulation in note, that it was given as a forfeit on 331½ acres of land, in case the maker gave perfect title thereto in a reasonable time the note to be null and void, and as soon as he delivered deed to 331½ acres of land out of "J. Burns survey" to plaintiff, was insufficient to take the case out of the statute as to contracts for sale of lands. *Davis v. Dilbeck* (Civ. App.) 232 S. W. 927.

46. — Statement of price.—Where the vendor had executed an ordinary warranty deed and deposited it in escrow to be delivered on acceptance of title and payment of purchase money, the recital of the deed as a money consideration in a specified amount held sufficient to meet the requirements of the statute, though an auto was taken in part payment prior to its execution, and the balance in cash deposited where the deed was executed and deposited. *Simpson v. Green* (Com. App.) 231 S. W. 375, reversing (Civ. App.) 212 S. W. 263.

It is not necessary that the consideration of a contract for sale of lands should be expressed in the writing. *Id.*

47. — Signature.—Contract employing a broker to negotiate a sale of land, to merely entitle him to commissions, need not be in writing, under the general statute of frauds, though it must be for him to execute a binding contract of sale. *Vrablec v. Kocurek* (Civ. App.) 199 S. W. 876.

Where the vendor of an oil lease attacked the claim of his purchaser because the contract between them was not in writing, the purchaser could rely on a written contract given him by the holder of the legal title at request of the vendor, who had merely a contract to purchase from the holder. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

55½. Operation and effect of statute.—Where a contract for sale of land was not enforceable by reason of the statute of frauds, it was terminated and annulled when vendor elected to rescind it and notified purchaser of such rescission, and purchaser's subsequent offer of payment for the land could not revive it. *Simpson v. Green* (Civ. App.) 212 S. W. 263.

A parol contract for the sale of land cannot be enforced merely because its peculiar terms do not bring it within the general intent of the rule excepting such contracts from the statute, but such case is to be governed by the statute. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

Where a contract for the sale of land was not in writing, a note executed in aid of such contract was wanting in consideration, and is not enforceable. *Davis v. Dilbeck* (Civ. App.) 232 S. W. 927.

60. Evidence.—In action to recover interest in land, in which plaintiff relied on agreement between stepmother and his father that property, title of which was in mother, would become common property of both, evidence held insufficient to sustain such parol transfer of property. *Bauss v. Bauss* (Civ. App.) 212 S. W. 965.

Art. 3966. [2544] [2465] Conveyance to defraud creditors, etc., void.

See *Bateman v. Ramsey*, 74 Tex. 589, 12 S. W. 235; *Richardson v. Lewis* (App.) 14 S. W. 1076; *Smith v. Moore* (App.) 15 S. W. 910; *Martin Clothing Co. v. Page*, 1 Civ. App. 537, 21 S. W. 702; *Ford v. Honse* (Civ. App.) 225 S. W. 860.

1. Validity of transfer in general.—An owner of land may not create a trust in favor of third persons to defraud his creditors. *Fadell v. Taylor* (Civ. App.) 229 S. W. 965.

5. Property subject to claims of creditors.—As to wife's separate property, see *Burkitt v. Moxley* (Civ. App.) 206 S. W. 373; *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

Purchase by creditor of coal company of sufficient coal to supply company's trade, and placing coal in hands of president of company, who was to act as creditor's agent

in its sale and distribution, creditor to pay operating expenses and have net proceeds, held not, as to other creditors of the company, fraudulent. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

Where debtor and partner were conveyed land, but the partner paid all the purchase money for it, creditors could not have the land applied in payment of their debts in an action instituted after its conveyance to the wife of the partner. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

6. Exempt property in general.—Creditors cannot claim conveyance of exempt property is void, as fraudulent as to them. *Lee v. Emerson-Brantingham Implement Co.* (Civ. App.) 222 S. W. 283.

8. Insolvency element of fraud.—Gift of personal property by father to child when father is solvent is valid even as against a creditor. *Youngblood v. Hoefle* (Civ. App.) 201 S. W. 1057; *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

The question of insolvency is to be determined as of the time of the voluntary conveyance. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

One who attacks a conveyance by husband to his wife, as in fraud of creditors, must show that the husband was insolvent. *Allen v. Crutcher* (Civ. App.) 216 S. W. 236.

Intent to defraud creditors may exist even when the seller of property is solvent, though insolvency is especially important in determining whether the buyer knew facts sufficient to charge him with notice of fraudulent intent. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364. See, also, *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

A husband who was solvent when he transferred to his wife part of notes received in payment for their land claimed as a homestead had the right to do with his property as he saw fit, even to giving it to strangers, and had the right to give his wife half the proceeds of the community property sold by them by joint deed, which she demanded and received as a condition to signing. *Earhart v. Agnew* (Com. App.) 222 S. W. 188, reversing judgment (Civ. App.) 190 S. W. 1140.

14. Preference of wife.—A husband may prefer his wife to another creditor in the payment of a debt which he owes her, provided the transaction is free from fraud, and no more property is conveyed than is reasonably necessary at its fair market value to settle the debt. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

15. Consideration and payment of liabilities.—A bona fide sale of personalty in payment of a debt was constructively fraudulent to extent of difference between debt and reasonable value of property, where creditor knew debtor was insolvent and debt was much less than value of property. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

Though a son had the right to execute a voluntary note to his mother, not subject to attack by subsequent creditors because voluntary, a note made without real intention of payment or to defraud creditors was void as against existing and future creditors. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

Son's conveyance to his mother of land worth \$7,400 in payment of his prior note for \$5,800 given to her on an actual consideration of \$2,600 was fraudulent as to his creditors, the right of an insolvent debtor to prefer being subject to the qualification that no more property must be transferred than is essential to pay the debt at a fair valuation. *Id.*

Where twin brothers owed another brother \$600, and sold him their two-elevenths interest in certain land for \$1,200 in money, creditor brother in eyes of law was a purchaser as distinguished from a creditor who takes conveyance of only enough property to pay debt. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

When insolvent debtor, in payment of pre-existing debt, delivers value in excess of debt, thus placing surplus beyond reach of creditors, conveyance is fraudulent in law, and void as to excess. *Lee v. Emerson-Brantingham Implement Co.* (Civ. App.) 222 S. W. 283.

A purchaser of property alleged to have been conveyed to defraud creditors can show that he has paid value by showing the execution and delivery of negotiable notes in payment for the property. *Ford v. Honse* (Civ. App.) 225 S. W. 860.

Where a widow sold her interest in real property to her children, with intent to defraud creditors, and the children knew or were charged with knowledge of such intent, the transaction whereby the widow received notes in payment may be attacked as fraudulent to creditors. *Durrett v. Chenault* (Civ. App.) 230 S. W. 771.

Where a widow and children who were interested in lands, by conveyances inter partes made settlement, the widow getting the fee to some of the lands, and the children to others, the conveyances, in view of the fact that the widow received vendor's lien notes, could not be attacked by existing creditors as voluntary under art. 3967, for such conveyances were supported by a consideration deemed valuable in law. *Id.*

A consideration of love and affection and a sum of \$20 for land conveyed was merely a nominal consideration which was not valuable in law as against a creditor, where it was grossly inadequate in proportion to the value of the land conveyed. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

17. — Transactions between husband and wife.—Where husband conveyed property to wife in fraud of creditors, deed reciting that consideration was payment of a certain sum monthly and provision of a place for husband to live, wife could not defeat attack upon deed as fraudulent as an innocent purchaser where she did not perform her part of agreement. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

19. Fraudulent intent of debtor.—A deed executed with fraudulent intent by the husband to his wife is void as to subsequent creditors. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112. See, also, *Allen v. Crutcher* (Civ. App.) 216 S. W. 236.

Voluntary conveyance made in contemplation of grantor's entering upon hazardous speculations and with view to protect him from subsequent creditors is fraudulent. *Sikes v. First State Bank of Decatur* (Civ. App.) 197 S. W. 227.

Fraud that will invalidate title must have existed at very time conveyance was made and at very time improvements were placed upon lot. *Id.*

Where a husband had creditors when he caused a conveyance of a lot to be made to his wife as her separate property, in order to hide his property, it was fraudulent, and he could not be heard to say that he did not intend to put title in her. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

If a conveyance of land was voluntary and not upon a consideration deemed valuable in law and the grantors did not have other property within state subject to execution sufficient to pay the debt, the conveyance was void under the statute, whether or not it was the intent of the grantor to defraud. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

20. — Knowledge or notice of intent and participation therein.—One is charged with notice who has knowledge of such facts as would excite the suspicion of a man of ordinary prudence, and put him on inquiry. *Scheuber v. Wheeler* (App.) 15 S. W. 503; *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

The intent of the grantee is immaterial in a voluntary conveyance fraudulent as to the grantor's creditors. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

Grantor's statement concerning amount of indebtedness against him and creditor's security therefor held not sufficient to apprise grantee of grantor's intent to hinder and delay the creditor in collecting his debt. *Moglia v. Rios* (Civ. App.) 200 S. W. 1133.

Where a debtor sells to one creditor more property than necessary to pay his claim, intent to defraud other creditors must be shown as a fact to invalidate conveyance; the statute only authorizing a sale to be declared invalid when such intent is shown. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

Buyer of land cannot be charged with notice of fraudulent intent on the part of grantor as to creditors by reason of anything occurring after the sale to him. *Id.*

Notice that an action of debt was pending in county court against seller of land was not sufficient of itself to charge purchaser with notice of an intent on the part of the seller to defraud creditors. *Ford v. Honse* (Civ. App.) 225 S. W. 860.

21. Persons entitled to assert invalidity.—Although conveyance was for the purpose of defrauding creditors, it would be good as to a subsequent grantee having constructive notice thereof. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

22. Validity as between original parties or their representatives.—Concealment of payment of note by indorsement of fictitious assignment held not to render note an asset passing under assignee's will. *Oberthier v. Oberthier* (Civ. App.) 200 S. W. 1165.

After a son conveyed land to his mother in fraud of his creditors, he could assert no right, title, or interest therein. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

Where land was fraudulently conveyed to defraud, hinder, and delay creditors, the grantor cannot recover upon notes given or subject the land to a pretended lien, nor recover the land, and his heirs and personal representative are in no better position than himself. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

See, also, *Fadell v. Taylor* (Civ. App.) 229 S. W. 965.

Where a conveyance has been made in fraud of creditors, and possession remains with grantor, the grantee may recover possession. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674.

23. Purchasers from grantee.—When land was conveyed to defraud, hinder, and delay creditors, purchasers from the grantee, even with notice of the fraudulent character of the transaction, occupy the same position as their grantor as to the original grantor. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

25. Creditors.—Creditors of sellers by affirming contract of sale made it their own, and would be estopped to set up that it was originally illegal. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

In action upon promissory note for foreclosure of attachment lien upon land claimed to have been fraudulently conveyed, it was immaterial that the note sued upon was secured by chattel mortgages, in the absence of a showing that such mortgages gave any real security for the note or that anything was realized thereon. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

26. Subsequent creditors.—Ordinarily, only prior creditors can complain of a fraudulent conveyance. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

28. Rights and liabilities of grantees.—Title of a fraudulent grantee is protected by the statute of limitation. *Davis v. Howe* (Com. App.) 213 S. W. 609.

Where debtor with equivalent of money purchased oil lease from one who acted in good faith, though knowing debtor was insolvent, seller is not liable to debtor's creditors for money received on any theory of fraudulent conveyance. *Lee v. Emerson-Brantingham Implement Co.* (Civ. App.) 222 S. W. 283.

Where in settling an estate in which a widow and children were entitled to interests in lands the widow conveyed land to the children, receiving a life interest in a portion of the lands, and the fee of other lands, held that, if the children had notice of the widow's intention to defraud existing creditors, the transaction was valid only in so far as they received the present value of their interests. *Durrett v. Chenault* (Civ. App.) 230 S. W. 771.

29. **Reconveyance of property.**—Where land is conveyed to defraud, hinder, and delay creditors, and grantee recognizes the trust and reconveys the property to his grantor, the reconveyance will be upheld; the moral obligation to thus reconvey being regarded a sufficient consideration to support the reconveyance. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

35. **Remedies of creditor.**—Where debtor, after alleged fraudulent conveyance to his wife, died leaving an insolvent estate, the creditor, without first securing administration upon the debtor's estate and establishing his debt against the estate, could maintain a proceeding against debtor's widow and children to set aside the conveyance, and in such proceeding the debt could be established and ordered paid out of the property. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

In view of art. 240, authorizing attachment only on affidavit that defendant is justly indebted to plaintiff, a creditor of deceased could not maintain attachment against property, in the hands of deceased's widow, alleged to have been fraudulently conveyed to her by deceased during his lifetime. *Id.*

Creditors whose debtor fraudulently conveyed land to his mother, by availing themselves of an appropriate means of enforcing their right against the land in suing out attachment against the son as if the conveyance had not been made, attachment being in a sense an execution in advance, did not estop themselves to deny that debtor had such title, subsequent to his conveyance as would support his claim of homestead. *Stevens v. Cobern*, 109 Tex. 574, 213 S. W. 925.

37. **Weight and sufficiency of evidence.**—Evidence held to support a finding of fraud in husband's conveyance to wife. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112; *Diltz v. Dodson* (Civ. App.) 207 S. W. 356; *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

Evidence held insufficient to show that conveyance was made to defraud creditors. *Moglia v. Rios* (Civ. App.) 200 S. W. 1133; *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

In creditors' suit seeking to subject land of wife purchased with community funds to payment of debts of husband, evidence held insufficient to show fraud invalidating title of wife as to subsequent creditors. *Sikes v. First State Bank of Decatur* (Civ. App.) 197 S. W. 227.

In a creditors' suit seeking to subject improvements placed on minor daughter's land with community funds to payment of debts of her father, evidence held insufficient to show that improvements were placed on land with intent to defraud subsequent creditors. *Id.*

That father made his home upon lot of his daughter, who was very young and unmarried, insured property, and paid taxes in his own name was entirely consistent with good faith. *Id.*

Evidence held to show transfer was fraudulent as to creditors. *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

While insolvency of a grantor at time of a conveyance or by reason thereof is not in itself sufficient to render void said conveyance as to subsequent creditors, and while the creation of debts thereafter by the grantor is not sufficient to establish the fraudulent intent with which the conveyance was made, yet such facts and circumstances connected with entire transaction may constitute proof sufficient to show an intent to defraud subsequent creditors. *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

Fact that one creditor of a debtor, also the principal creditor, advises debtor not to give deed of trust to another creditor, which advice is accepted and acted upon, standing alone does not show agreement or conspiracy to defraud such other creditor invalidating conveyance for value to principal creditor. *McWhorter v. Langley* (Civ. App.) 220 S. W. 364.

Fraudulent intent in a conveyance and notice thereof on the part of the grantee may be shown by circumstances, but the circumstances relied on should be such that an inference of fraud must necessarily be deduced from them. *Id.*

Art. 3967. [2545] [2466] Voluntary conveyances.

Cited, *Stephens v. Adair*, 82 Tex. 214, 18 S. W. 102.

Right of subsequent creditors to avoid gift.—A voluntary conveyance in fraud of existing creditors, recorded on the day of its execution, is not void as to future creditors because the grantor afterwards engages in extensive speculations, and soon becomes insolvent. *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554.

If the conveyance alleged to be fraudulent left the grantor's estate insolvent, the mere fact that at the time of the conveyance the creditor held security then of value, which later lost its value, would not prevent the creditor from being classed as a prior creditor within the statute. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Under this article, a conveyance made with intent to defraud subsequent creditors may be held void, where grantee had knowledge at time of conveyance of fraudulent purpose of grantor. *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

Where plaintiff, who attacked a conveyance, under this and the preceding article, by husband to his wife as in fraud of creditors, failed to show that the demand on which she recovered judgment against the husband two years after the conveyance was in existence at the time of the conveyance, or that the husband was insolvent at the time of the conveyance, there can be no recovery. *Allen v. Crutcher* (Civ. App.) 216 S. W. 236.

A husband's gift to his wife, merely because without consideration and voluntary, is not void as to subsequent creditors. *Fenton v. Miller* (Civ. App.) 213 S. W. 14.

Art. 3969. [2547] [2468] Loan of chattels.

Ownership of property.—The statute contemplates ownership of the property. See *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

Rights of parties and purchasers.—The statute does not make a secret lien on chattels void as to the owner or to his assignee for the benefit of creditors, or to one who purchases from such assignee after suit has been begun to foreclose the lien. *San Antonio Brewing Ass'n v. Arctic Ice-Machine Mfg. Co.*, 81 Tex. 99, 16 S. W. 797.

Where personal property lent by plaintiff had been in the possession of the borrower for more than two years, and the loan was not evidenced by an instrument in writing, a purchaser from the borrower, with or without notice, took absolute title, for title was conclusively presumed to be in the borrower, this being so though the borrower was yet liable for the conversion, limitations not having run against plaintiff's claim. *Williams v. Davenport* (Civ. App.) 212 S. W. 675.

Art. 3970. [2548] Chattel mortgage void, when.

See *Smith v. Moore* (App.) 15 S. W. 910.

Ownership of property.—Purchase by creditor of coal company of sufficient coal to supply company's trade, and placing coal in hands of president of company, who was to act as creditor's agent in its sale and distribution, creditor to pay operating expenses and have net proceeds, held not, as to other creditors of the company, fraudulent. *Spadra-Clarksville Coal Co. v. Security Nat. Bank of Dallas* (Civ. App.) 206 S. W. 200.

Validity of mortgage in general.—This article does not apply where the property covered by the oral mortgage to a bank was automobiles, which the bank permitted the owner to keep on display and to demonstrate, but which he could not sell without authority from the bank for each particular sale. *Border Nat. Bank v. Coupland*, 240 Fed. 355, 153 C. C. A. 281.

As to assignment for the benefit of creditors, see *Lovenberg v. National Bank of Texas*, 67 Tex. 440, 5 S. W. 816.

A deed of trust by an insolvent to secure preferred creditors is not void by reason of the fact that after the execution of the deed the owner was employed by the trustee to take charge of and sell out the stock. *Bettes v. Weir Plow Co.*, 84 Tex. 543, 19 S. W. 705.

Chattel mortgage whereby cotton oil company mortgaged seed to plaintiff who furnished funds for purchase and agreed to act as plaintiff's agent in disposition of product, etc., held not in violation of statute. *Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson* (Civ. App.) 200 S. W. 197.

Landlord's lien.—This article has no application to parties to lease in which lessor expressly reserved lien upon tenant's goods placed upon rented premises. *John Church Co. v. Martinez* (Civ. App.) 204 S. W. 486.

Security for purchase price.—This article does not apply to a lien resulting from a conditional sale. *Park v. South Bend Chilled Plow Co.* (Civ. App.) 199 S. W. 843.

Art. 3971. Sales of merchandise and fixtures in bulk; notice to creditors; liability as receiver.

See *Texas Auto Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 211 S. W. 629; *Hall v. Conine* (Civ. App.) 230 S. W. 823.

Construction.—A conveyance of a stock of goods to a creditor by a bill of sale, without complying with the law, was void as to other creditors, though the grantee may have intended to receive and hold the goods in trust for all creditors, where it did not appear that the grantor intended that the goods should be so received and held, and the bill of sale was absolute on its face. *Kell Milling Co. v. H. O. Wooten Grocery Co.* (Civ. App.) 195 S. W. 342.

Mortgaging a stock of goods in bulk is a "transfer," if not a "sale," prohibited by the statute. *Beene v. National Liquor Co.* (Civ. App.) 198 S. W. 596.

A sale of merchandise in bulk without compliance with the statute, was void as against creditors of the seller. *Rachofsky v. Rachofsky* (Civ. App.) 203 S. W. 1134.

Instructions submitting issue whether sale in bulk was made to hinder, delay, or defraud creditors impliedly submitted issue whether the sale was in good faith and for value. *Id.*

Where a retailer obtained goods by falsely representing that he had the money to pay therefor, the wholesaler upon discovering the fraud could demand and accept a return of the goods without becoming liable to creditors under the statute. *John T. Barbee & Co. v. American Brewing Ass'n* (Civ. App.) 207 S. W. 334.

One who purchased a note given by the buyers as part consideration for goods purchased would not be a "creditor," within the statute. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

A dealer in monuments, having on hand marble, granite, etc., was a "merchant" or "trader" within the act, though at time he sold his entire stock of goods without complying with act he was not engaged in that business, but was engaged in other lines of employment. *Teich v. McAuley* (Civ. App.) 212 S. W. 979.

A deed of trust conveying to the trustees a debtor's stock of merchandise and his interest in certain land does not, as to the land, fall within the statute. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

Conveyances not made in conformity with the statute are not absolute nullities, but void only when attacked by a creditor whose rights have been ignored. *Id.*

Creditors' remedies.—Where a sale has been made in violation of the Bulk Sales Law, a creditor may have his remedy by garnishment against the transferee. *Kell Milling Co. v. H. O. Wooten Grocery Co.* (Civ. App.) 195 S. W. 342.

A purchaser of a stock of goods in bulk in violation of the statutory requirements is personally liable for the debt of the seller of the goods; and a purchaser who disposes of the goods and places them beyond the reach of the seller's creditor by garnishment, attachment, or other process, becomes personally liable to the creditor, whatever his liability if he had continued to hold the goods. *Hay v. Behrens Drug Co.* (Civ. App.) 214 S. W. 940.

The remote purchaser's promise to pay the original seller's debt is not within the statute of frauds. *Id.*

A creditor named in a deed of trust conveying to and authorizing the trustees to sell a debtor's land and stock of merchandise for the benefit of certain creditors, itself included, cannot avail itself of a violation of the statute to secure an advantage over the other creditors in the distribution of assets, though the trustees, after the service of a writ of garnishment upon them by it, used money resulting from the sale of the debtor's stock of goods to redeem the land from prior incumbrances. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

Title of purchaser.—Sellers and buyers would be estopped from claiming that sale was in violation of the statute to defeat just debts, which both had agreed to pay and made provision to pay out of the consideration for sale. *Warren v. Karlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

Art. 3973. Not applicable in what cases.

See *Kell Milling Co. v. H. O. Wooten Grocery Co.* (Civ. App.) 195 S. W. 342.

Art. 3973a. Actionable fraud.—Actionable fraud in this State with regard to transactions in real estate or in stock in corporations or joint stock companies shall consist of either a false representation of a past or existing material fact, or false promise to do some act in the future which is made as a material inducement to another party to enter into a contract and but for which promise said party would not have entered into said contract, provided however that whenever a promise thus made has not been complied with by the party making it within reasonable time, it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith but was prevented from complying therewith by the act of God, the public enemy or by some equitable reason. [Acts 1919, 36th Leg., ch. 43, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

1. **Actionable fraud—Nature and elements in general.**—"Fraud" is any act or concealment which involves a breach of legal duty, trust, or confidence justly reposed and is injurious to another, or by which an undue and unconscientious advantage is taken of another. *Horton v. Smith* (Civ. App.) 145 S. W. 1088; *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

"Actionable fraud" exists where one makes a false representation of a material fact knowing it to be false, or of his own knowledge, when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or to refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain to his damage. *Wortman v. Young* (Civ. App.) 221 S. W. 660. See, also, *Ferrell v. Millican* (Civ. App.) 156 S. W. 230; *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

2. — **Intent.**—One, though not intending to deceive, may be liable for a false statement of a character calculated to mislead and deceive. *Texas Cotton Products Co. v. Denny Bros.* (Civ. App.) 78 S. W. 557; *O'Neal v. Weisman*, 39 Civ. App. 592, 88 S. W. 290; *Paschal v. Hudson* (Civ. App.) 169 S. W. 911. See, also, *Gibbens v. Bourland* (Civ. App.) 145 S. W. 274.

Fraudulent intent on part of owner of building not to perform promise to pay for material sold to contractor held necessary element of seller's right of action. *M. T. Jones Lumber Co. v. Villegas*, 8 Civ. App. 669, 28 S. W. 558.

Transferrer of note, falsely purporting to be secured by a vendor's lien, held liable to the transferee for the amount paid, whether guilty of an intentional fraud or not. *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

Representations by vendor that he would put water on land within 60 days will not amount to fraud unless it is alleged and proved that he had no intent to perform at time of making them. *Mid-Continent Life Ins. Co. v. Pendleton* (Civ. App.) 202 S. W. 769.

3. — **Fiduciary or confidential relations.**—One who sells his stock in a corporation, for less than its value, to one engaged in the management of the corporation, induced to do so by the latter's fraudulent representations as to the financial condition of the corporation, can recover damages. *Hume v. Steele* (Civ. App.) 59 S. W. 812.

In action against part owner of property by abandoned wife of other owner for fraud-

ulently obtaining the entire ownership, where defendant had been her husband's partner and she had trusted him regarding its management since her abandonment, his fraudulent misrepresentations regarding its value were actionable. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

4. Fraudulent representations.—If a party intentionally misrepresents a material fact, or produces a false impression by words or acts, in order to mislead or obtain an undue advantage, it is a case of manifest fraud. *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717; *Smith v. Smith* (Civ. App.) 213 S. W. 273.

False representations are legally fraudulent if made through ignorance, carelessness, or mistake, and the other party is deceived and misled thereby. *Davis v. Driscoll*, 22 Civ. App. 14, 54 S. W. 43. See, also, *Commercial Nat. Bank v. First Nat. Bank* (Civ. App.) 77 S. W. 239, judgment reversed, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879; *Cohen Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 44 Civ. App. 381, 93 S. W. 437.

If the vendor of land made false representations as to what the land would produce, and the purchaser relied thereon and would not have purchased had he known such representations to be false, he could maintain an action for deceit. *Buckingham v. Thompson* (Civ. App.) 135 S. W. 652.

A prospectus of a corporation, which gives information as to the property, machinery, and appliances of the corporation and its financial condition, contains representations of fact, and, if false and inducing one to purchase stock, the corporation is liable for the damages sustained. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

To charge party for fraud in having made false statement in good faith, there must have been a false statement of some material fact, which, being relied on, misled another to his prejudice. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

Allegation of representation that property was good income property, and that plaintiff was thereby induced to believe that it was rented for \$50 a week, held not to show fraud supporting a recovery. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Any false statement of fact that might materially affect the price of stock or the judgment of a purchaser is fraudulent, which statement may consist in suppression of truth or assertion of what is false. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

A representation that there was no lien against land was not fraudulent, although previous to entering into the contract there had been some proceedings to include the land within a drainage district, but the final order had been revoked, although the land was subsequently taken into the drainage district. *Medley v. Lamb* (Civ. App.) 223 S. W. 1048.

A false statement to the purchaser of a share of an oil company by the seller concerning the capacity of an oil well, as to which the seller stated he had received a confirmatory telegram from one in whom the purchaser had confidence, is a misstatement of a material fact, giving a cause of action. *Philpott v. Edge* (Civ. App.) 224 S. W. 263.

5. — Matters of fact or of law.—Statement of one that he has a landlord's lien on property is not necessarily a mere conclusion of law, which may not be actionable. *Texas Cotton Products Co. v. Denny Bros.* (Civ. App.) 78 S. W. 557.

6. — Matters of fact or of opinion.—Expressions of opinion known to be false and uttered with fraudulent intent held actionable. *Houston v. Darnell Lumber Co.* (Civ. App.) 146 S. W. 1061; *White v. Peters* (Civ. App.) 185 S. W. 659; *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364; *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598; *Wortman v. Young* (Civ. App.) 221 S. W. 660; *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721. See, also, *American Cotton Co. v. Frank Heierman & Bro.*, 37 Civ. App. 312, 83 S. W. 845.

A statement, which by reason of its form or subject-matter amounts merely to an expression of an opinion, is not actionable. *Wortman v. Young* (Civ. App.) 221 S. W. 660; *Hunter v. Interstate Building & Loan Ass'n*, 24 Civ. App. 453, 59 S. W. 596; *Buckingham v. Thompson* (Civ. App.) 135 S. W. 652; *Garrett v. Green* (Civ. App.) 164 S. W. 1105; *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

Where improvements made by the sellers and purchasers of a corporation's entire capital stock exceeded the amount unpaid on the stock purchasers cannot recover damages for misrepresentations that it was fully paid in, the value of the improvements having been credited. *Vick v. Park* (Civ. App.) 173 S. W. 989.

Misrepresentations to prospective purchaser as to the returns from corporate stock, though partaking of the nature of opinion and of promissory character, held actionable, and ground for purchaser to recover exemplary damages. *Texas Co-operative Inv. Co. v. Clark* (Civ. App.) 216 S. W. 220. See, also, *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

7. — Existing facts or expectations or promises.—Promises to perform an act in the future will not generally constitute fraud, although the propelling inducement to the execution of a contract, unless the promisor, when making the promise, intended not to perform it, and made it to defraud and deceive. *Lott Town & Improvement Co. v. Harper* (Civ. App.) 204 S. W. 452; *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936; *Burchill v. Hermsmeyer* (Civ. App.) 212 S. W. 767.

For application to insurance premiums, see *New York Life Ins. Co. v. Miller*, 11 Civ. App. 536, 32 S. W. 550. To contract to bore wells, see *Davis v. Driscoll*, 22 Civ. App. 14, 54 S. W. 43.

To promise to obtain funds, and conduct the business of a corporation, see *Martin v. Daniel* (Civ. App.) 164 S. W. 17. To offer to guarantee rents for one year on exchange of property, see *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

And to promise to send orders for oil, see *Hoch Hardware Co. v. Tropical Oil Co.* (Civ. App.) 189 S. W. 313.

8. — **Falsity and knowledge thereof.**—Where affirmative representations of fact are made and designed to be acted upon by another, and he does so believing them to be true, when they are false, the one making the representations is liable, regardless of his knowledge of falsity or intent to deceive. *Goodwin v. Daniel* (Civ. App.) 93 S. W. 534; *McCall v. Sullivan*, 1 *White & W. Civ. Cas. Ct. App.* § 3; *Loper v. Robinson*, 54 *Tex.* 510; *Mutual Building & Loan Ass'n v. McGee* (Civ. App.) 43 S. W. 1030; *United States Gypsum Co. v. Shields* (Civ. App.) 106 S. W. 724, judgment affirmed 101 *Tex.* 473, 108 S. W. 1165; *Magill v. Coffman* (Civ. App.) 129 S. W. 1146; *Gibbens v. Bourland* (Civ. App.) 145 S. W. 274; *Foix v. Moeller* (Civ. App.) 159 S. W. 1043; *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438; *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598; *Wortman v. Young* (Civ. App.) 221 S. W. 660.

Representations in the sale of corporate stock held fraud. *Harris v. Shear* (Civ. App.) 177 S. W. 136; *Collins v. Chipman*, 41 *Civ. App.* 563, 95 S. W. 666; *Barclay v. Deyerle*, 53 *Civ. App.* 236, 116 S. W. 123; *Barber v. Keeling* (Civ. App.) 204 S. W. 139; *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829; *Philpott v. Edge* (Civ. App.) 224 S. W. 263.

One making a false statement of fact recklessly, without knowledge of its truth or falsity and with intent to influence a transaction and actually influencing it, is liable for fraud. *Gibben v. Bourland* (Civ. App.) 145 S. W. 274; *Mitchell v. Zimmerman*, 4 *Tex.* 75, 51 *Am. Dec.* 717; *Wright v. United States Mortg. Co.* (Civ. App.) 42 S. W. 789; *McCord-Collins Commerce Co. v. Levi*, 21 *Civ. App.* 109, 50 S. W. 606; *Beatty v. Bulger*, 28 *Civ. App.* 117, 66 S. W. 893; *Ford v. Sims* (Civ. App.) 190 S. W. 1165; *Mid-Continent Life Ins. Co. v. Pendleton* (Civ. App.) 202 S. W. 769; *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523; *Ford v. Sims* (Civ. App.) 190 S. W. 1165; *Graves v. Haynes* (Com. App.) 231 S. W. 383.

An action for deceit will lie if defendant made representations inducing plaintiff to extend credit to an irresponsible person without knowing whether they were true or not. *Wells v. Driskell* (Civ. App.) 149 S. W. 205; *Katzenstein v. Reid, Murdock & Co.*, 41 *Civ. App.* 106, 91 S. W. 360; *Same v. Austin, Nichols & Co.* (Civ. App.) 91 S. W. 363.

Representations to warrant relief, must be false at time of representation, and change in circumstances making them incorrect does not render them fraudulent. *Ore City Co. v. Rogers* (Civ. App.) 190 S. W. 226.

9. **Fraudulent warranties.**—Where a vendor of land, by falsely representing that he had good title and that he had it examined, led a grantee to buy it without examining the title, although the grantee could not recover on the general warranty where he had not been ejected, he could recover damages for the fraud. *Dupree v. Savage* (Civ. App.) 154 S. W. 701.

10. **Fraudulent concealment.**—Each party to a contract is bound to communicate material facts, where he knows the other party is ignorant thereof, and where they are not open or equally within his observation, and concealment of such facts is fraud. *Bullock v. Crutcher* (Civ. App.) 180 S. W. 940; *Elliott v. Clark* (Civ. App.) 157 S. W. 437.

Any false statement of fact that might materially affect the price of stock or the judgment of a purchaser is fraudulent, which statement may consist in suppression of truth or assertion of what is false. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

11. **Materiality of matter represented.**—Fraudulent representations by officers of a building association as to the amount of annual accumulations on the stock, held representations of material existing facts. *Hunter v. Interstate Building & Loan Ass'n*, 24 *Civ. App.* 453, 59 S. W. 596.

False representations as to price at which the property could be purchased material. *Paddock v. Bray*, 40 *Civ. App.* 226, 88 S. W. 419.

False representations by lessee to sublessee held not actionable. *Furneaux v. Webb*, 33 *Civ. App.* 560, 77 S. W. 828.

False representations as to the solvency of the maker of notes given in payment for timber purchased, held material. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

12. **Reliance on representations and inducement to act.**—*McCall v. Sullivan*, 1 *White & W. Civ. Cas. Ct. App.* § 2; *Wooters v. International & G. N. R. Co.*, 54 *Tex.* 294; *Cresap v. Manor*, 63 *Tex.* 485; *Bonzer v. Garrett* (Civ. App.) 162 S. W. 934; *Wilson v. Avery Co. of Texas* (Civ. App.) 182 S. W. 884; *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

Representations on sale of land held not relied on, so as to be actionable. *Wright v. United States Mortg. Co.* (Civ. App.) 42 S. W. 1026; *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

As to loan contract, see *National Equitable Soc. of Belton v. Camp* (Civ. App.) 184 S. W. 589, rehearing denied on application for writ of error *Camp v. National Equitable Soc. of Belton*, 108 *Tex.* 246, 191 S. W. 699.

And as to sale of machine, see *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574; *Hart-Parr Co. v. Krizan & Maler* (Civ. App.) 212 S. W. 835.

13. — **Duty to investigate.**—A vendor making a false representation to his vendee held liable, though the vendee could have ascertained its falsity by inquiry. *Wright v. United States Mortg. Co.* (Civ. App.) 42 S. W. 789; *Farris v. Gilder* (Civ. App.) 115 S. W. 645; *Ford v. Sims* (Civ. App.) 190 S. W. 1165; *Moore v. Beakley* (Com.

App.) 215 S. W. 957, reversing judgment (Civ. App.) 183 S. W. 380. Compare *Mossop v. Zapp* (Civ. App.) 189 S. W. 979; *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

A person injured by the false and fraudulent representations of another is not bound to exercise diligence to discover the falsity of the representations; but, in the absence of knowledge to the contrary, is entitled to rely and act on the statements of the wrongdoer. *Western Cottage Piano & Organ Co. v. Anderson*, 45 Civ. App. 513, 101 S. W. 1061; *United States Gypsum Co. v. Shields* (Civ. App.) 106 S. W. 724, judgment affirmed, 101 Tex. 473, 108 S. W. 1165; *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438; *Peck v. Robinson & Smith* (Civ. App.) 194 S. W. 456, rehearing denied 194 S. W. 831; *Moore v. Beakley* (Com. App.) 215 S. W. 957, reversing judgment (Civ. App.) 183 S. W. 380; *Graves v. Haynes* (Com. App.) 231 S. W. 383.

Buyer is entitled to rely upon seller's representations as to the value of corporate stock, without making an investigation. *Barber v. Keeling* (Civ. App.) 204 S. W. 139; *Foix v. Moeller* (Civ. App.) 159 S. W. 1048; *McDonald v. Lastinger* (Civ. App.) 214 S. W. 829.

One who undertakes to discover the truth of representations made to him is charged with the knowledge of everything which a proper investigation would disclose, and is not justified in acting upon fraudulent representations merely because they were made to him. *Newman v. Lyman* (Civ. App.) 165 S. W. 136; *Wortman v. Young* (Civ. App.) 221 S. W. 660.

14. — **Relations and means of knowledge.**—A purchaser who could determine the facts equally as well as the vendor, held not to rely on the vendor's representations. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99. But see *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

Seller of bank stock, who was a director, and claimed to have special knowledge of the value of stock, held liable for false representations relied upon; although buyer was not in confidential relationship with seller. *Barber v. Keeling* (Civ. App.) 204 S. W. 139.

15. **Injury by fraud.**—Fraud must be accompanied with damage to be actionable. *Caffall v. Bandera Telephone Co.* (Civ. App.) 136 S. W. 105; *Bonzer v. Garrett* (Civ. App.) 162 S. W. 934; *Marsalis v. Crawford*, 8 Civ. App. 485, 28 S. W. 371; *Thouron v. Skirvin*, 57 Civ. App. 105, 122 S. W. 55; *Buckingham v. Thompson* (Civ. App.) 135 S. W. 652; *Kuteman v. Lacy* (Civ. App.) 144 S. W. 1184; *Pitts v. Kennedy* (Civ. App.) 177 S. W. 1016; *Hope v. Shirley* (Civ. App.) 187 S. W. 973.

Purchasers of the entire stock of a corporation held not entitled to recover for misrepresentations by defendants that it was fully paid in. *Vick v. Park* (Civ. App.) 171 S. W. 1039.

16. **Interest or benefit to defendant.**—It is not necessary to show that a party participating in the fraud shared in the profits. *Smith v. Smith* (Civ. App.) 213 S. W. 273.

17. **Fraudulent representations or concealment as to particular facts.**—Statements as to the value of land, made by one party to a sale assuming to have special knowledge of the property value, in regard to which value the other trusts entirely to the good faith of the former, should be considered in the same way that representations as to other facts are treated. *Riggins v. Trickey*, 46 Civ. App. 569, 102 S. W. 918.

One induced by fraud to purchase land in gross cannot, in an action for deceit, recover for a mere deficiency in quantity. *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1023, certified questions answered, 102 Tex. 300, 116 S. W. 40.

One making false recommendations as to the solvency of another, either voluntarily or in answer to inquiry, held guilty of actionable fraud. *Gibbens v. Bourland* (Civ. App.) 145 S. W. 274; *Katzenstein v. Reid, Murdock & Co.*, 41 Civ. App. 106, 91 S. W. 360; *Same v. Austin, Nichols & Co.* (Civ. App.) 91 S. W. 363. See, also, *Ross v. W. D. Cleveland & Sons* (Civ. App.) 133 S. W. 315.

Fraudulent misrepresentations by the vendor that there was upon the land a well containing 10 to 12 feet of water justify a recovery by the vendee of the damages arising therefrom. *Kallison v. Poland* (Civ. App.) 167 S. W. 1104.

18. **Fraud in particular transactions.**—As to a warranty of a machine see *Danner v. Ft. Worth Implement Co.*, 18 Civ. App. 321, 45 S. W. 856.

Transfer of note to an innocent holder held actionable fraud against the maker. *McKenzie v. Easton* (Civ. App.) 138 S. W. 1089.

Seller of oats who represented that they were of a certain kind, and knowingly delivered a wholly different variety, held guilty of actionable fraud. *Handy v. Roberts* (Civ. App.) 165 S. W. 37.

That owners of land gave option to party procuring purchasers, thereby limiting their liability to their own statements and saving themselves from liability for false misrepresentations, held not fraudulent. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

As to partnership, see *Chalk v. Collier* (Civ. App.) 208 S. W. 972.

Defendants held liable for deceit in inducing plaintiff to sell his land at a less price than he would have exacted had he known the sale was through a broker. *Hope v. Shirley* (Civ. App.) 211 S. W. 246.

19. **Actions—Remedy.**—Where defendant sold land to plaintiff, and afterwards fraudulently conveyed the same land to another, who recorded his deed before plaintiff, and so became entitled to the land, an action in behalf of plaintiff against his vendor for the damages incurred by him from fraudulent conduct will not be in the nature of an action of conversion, and hence maintainable, though for real, and not personal, property. *Mitchell v. Simons* (Civ. App.) 53 S. W. 76.

One induced by fraud to enter into a contract may elect either to rescind by re-

storing what he has received thereunder, or to affirm without restoring the consideration received and sue for damages caused by the fraud. *Fordtran v. Cunningham* (Civ. App.) 141 S. W. 562.

See, also, *Day v. Steverson* (Civ. App.) 145 S. W. 1062; *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438; *Winters v. Coward* (Civ. App.) 174 S. W. 940; *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

Where a vendor of land, subject to certain vendor's lien notes which the purchaser agreed to assume, falsely represented that the interest on such notes was paid to a certain date, the purchaser could sue for damages for the fraud and deceit and was not limited to an action for breach of warranty. *Jones v. Montague* (Civ. App.) 158 S. W. 1053.

Fraudulent promises of defendant's agent to obtain stock, subscription contract, if contained in the contract, to the effect that the company would loan plaintiff money, would give plaintiff an action only for damages. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

20. — **Condition precedent.**—A return or an offer to return what a party induced to enter into a contract by fraud has received under it is not a condition precedent to the maintenance of an action for the fraud. *Covington v. Sloan* (Civ. App.) 124 S. W. 690; *Jesse French Piano & Organ Co. v. Gibbon* (Civ. App.) 180 S. W. 1185; *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

Where a deed provided that the vendee should pay a part of the cost of a well then being bored on the land, the vendee without reforming or avoiding the instrument, might sue to recover damages for false representations that there was a gushing well on the land. *George v. Hesse* (Civ. App.) 94 S. W. 1122.

A recovery for false representations, by which a party was induced to give a note upon which judgment was subsequently recovered, held to be conditional upon payment of judgment. *Empire Life Ins. Co. v. Beaumont Land & Building Co.* (Civ. App.) 146 S. W. 335.

In buyer's action for damages from seller's misrepresentations in sale of threshing machine, on ground that it did not deliver machine contracted for, it was not necessary for him to prove that he had given notice of defects required by written warranty. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

In an action for damages resulting from a seller's fraudulent representations, though the petition shows that notes were given for the purchase price, the failure to allege their payment and present status does not preclude plaintiffs from maintaining a suit if recoverable damages are otherwise alleged. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

21. — **Waiver of right of action.**—Purchaser of land held not precluded from recovering damages for deceit. *Guinn v. Ames*, 36 Civ. App. 613, 83 S. W. 232; *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

A party to a written contract cannot recover damages for false representations inducing him to enter into it, he not having demanded rescission on discovering that the representations were false, but the contract, as written, having been performed by both parties, and thereafter renewed. *Barber v. Morgan* (Civ. App.) 76 S. W. 319.

Acts of purchaser of corporate stock held not a waiver of his right of action for deceit against stockholders inducing him to purchase the stock. *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524, answers to certified questions conformed to 140 S. W. 491.

While retention and use of a horse, after discovery of the fraud by which the sale was induced, precludes a rescission, it does not prevent a recovery of damages resulting therefrom. *Hubbs v. Marshall* (Civ. App.) 175 S. W. 716.

Right of buyer of machines to recover damages for fraud and misrepresentations held not waived. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

As to waiver of fraud in obtaining an option on an interest in an oil lease, see *Wagoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

22. — **Defenses.**—Want of complete chain of title from the sovereignty held no defense. *Butler v. Anderson* (Civ. App.) 107 S. W. 656.

A person held not precluded from bringing deceit for false representations inducing a sale of land for worthless notes by the fact that, before receiving knowledge of the fraud, he sold the notes. *Russell v. Palmer* (Civ. App.) 146 S. W. 561.

23. — **Venue.**—See title 37, ch. 4.

24. — **Parties.**—See title 37, ch. 5.

25. — **Pleading.**—See notes under title 37, ch. 3.

26. — **Presumptions and burden of proof.**—See notes under title 53, ch. 4.

27. — **Admissibility of evidence.**—See notes under title 53, ch. 4.

28. — **Weight and sufficiency of evidence.**—In an action for damages for misrepresentations in effecting a sale of land. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523; *Sims v. Ford* (Civ. App.) 209 S. W. 699; *Hinds v. Allen* (Civ. App.) 213 S. W. 671; *Westervelt v. Meuly* (Civ. App.) 216 S. W. 680; *Dingman v. Pahl* (Civ. App.) 226 S. W. 446.

Direct evidence is not necessary to show fraud but the fraud may be inferred from circumstances. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488; *Graham v. Roder*, 5 Tex. 141; *Tatum v. Orange & N. W. Ry. Co.* (Civ. App.) 198 S. W. 348.

In action for having fraudulently misrepresented financial standing. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35; *Kaszenstein v. Reid, Murdock & Co.*, 41 Civ. App. 106, 91 S. W. 360; *Same v. Austin, Nichols & Co.* (Civ. App.) 91 S. W. 363.

Fraudulent representations as to corporate stock. *Barthold v. Thomas* (Com. App.)

210 S. W. 506, reversing judgment (Civ. App.) Thomas v. Barthold, 171 S. W. 1071; Dingman v. Pahl (Civ. App.) 226 S. W. 446.

Fraudulent combination between creditor and debtor selling stock of goods held not shown. Edloff v. Mason, 79 Tex. 215, 14 S. W. 1036.

Fraud on part of landowners in procuring excessive loan held not shown. Security Mortgage & Trust Co. v. Haney (Civ. App.) 27 S. W. 215.

An instruction that fraud must be proved to the satisfaction of the jury requires too high a degree of certainty in the evidence. Granrud v. Rea, 24 Civ. App. 299, 59 S. W. 841.

In an action for damages from the alleged fraud in representing that one on whose contract with defendant plaintiff was a surety was behind in his accounts. Western Cottage Piano & Organ Co. v. Griffin, 41 Civ. App. 76, 90 S. W. 884.

In an action for fraudulent division of bales of cotton shipped as full bales. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Interest in land. Young v. Barcroft (Civ. App.) 168 S. W. 392.

In buyer's action for damages, from seller's false representations as to a thresher. Rumely Products Co. v. Moss (Civ. App.) 175 S. W. 1084.

In a suit to recover the sum paid to the defendant loan society under an agreement for a future loan. National Equitable Soc. of Belton v. Dunnington (Civ. App.) 184 S. W. 590.

29. — Questions for jury and instructions.—See notes under title 37, ch. 13.

Art. 3973b. Same; actual damages.—All persons guilty of fraud, as defined in this Act, shall be liable to the person defrauded for all actual damages suffered the rule of damages being the difference between the value of the property as represented or as would have been worth, had the promise been fulfilled, and the actual value of the property in the condition it is delivered at the time of the contract. [Id., § 2.]

Measure of damages in general.—The measure of damages for fraud in the exchange of property is the difference between the value of the property received and that given in exchange at the time of the exchange. Moore v. Beakley (Com. App.) 215 S. W. 957, reversing judgment (Civ. App.) 183 S. W. 380; Medley v. Lamb (Civ. App.) 223 S. W. 1048.

For fraudulent compromise of debt the damage is the balance. Grabenheimer v. Blum, 63 Tex. 369.

For fraudulent representations inducing a purchase of shares in a building and loan association, the measure of damages is the amount of payments made by the purchaser, with interest. Hunter v. Interstate Building & Loan Ass'n, 24 Civ. App. 453, 59 S. W. 596.

For procuring deed by fraudulent representations, the measure of damages is the value of the land at the time it was conveyed. Butler v. Anderson (Civ. App.) 107 S. W. 656.

Purchaser relying on representations as to acreage can recover for shortage, not exceeding price per acre paid. Farris v. Gilder (Civ. App.) 115 S. W. 645.

A vendor fraudulently induced to accept a reconveyance in satisfaction of the vendor's lien notes cannot, where he keeps the property, recover the amount of the notes as damages for the fraud. Thouron v. Skirvin, 57 Civ. App. 105, 122 S. W. 55.

Measure of damages for false representations as to firm debts is the full amount of the firm indebtedness plaintiff was compelled to pay above amount represented. Pitman v. Self (Civ. App.) 127 S. W. 907.

For false representations inducing sale of business, held, that plaintiff could recover as damages the full value of his business. Connally & Shaw v. Saunders (Civ. App.) 142 S. W. 975.

The measure of damages for fraudulent representations that there was no road over the land sold would not be the purchase price per acre paid for the land. Bonzer v. Garrett (Civ. App.) 162 S. W. 934.

The damages recoverable in an action of deceit are such as would result from the fraudulent act within the contemplation of the parties, and did proximately result therefrom. Handy v. Roberts (Civ. App.) 165 S. W. 37.

Where one suing for fraud in sale of seed oats only owned two-thirds of the oat crop, it was error to permit him to recover the value of the loss of the whole crop. Id.

Measure of damages for seller's misrepresentations in sale of a pea thresher held market price of peas and expense. Rumely Products Co. v. Moss (Civ. App.) 175 S. W. 1084.

The measure of damages in action by vendee for fraud of vendor is not dependent upon number of false representations made on theory that certain amount should be allowed for each representation. Sims v. Ford (Civ. App.) 209 S. W. 699.

Where vendor, having procured purchaser for land by fraudulent representations as to merchantable timber standing thereon, refused to accept purchaser's proffered return of the land at the same price paid therefor by purchaser, vendor cannot complain of judgment given purchaser for the value of the timber represented to have been standing upon land, instead of the difference between the consideration for the purchase and the aggregate value of land and timber. Riley v. Atmar (Civ. App.) 213 S. W. 682.

For obtaining goods by false pretenses, by fraudulent statements as to financial status, measure of damages is ordinarily the value of the goods obtained, with 6 per cent. interest. Sanger Bros. v. Barrett (Civ. App.) 221 S. W. 1087.

Difference between actual and represented value.—For deceit in the transfer of property, the measure of damage is the difference between the actual and represented value. *Davenport v. Anderson* (Civ. App.) 28 S. W. 922; *Farmer v. Randel* (Civ. App.) 28 S. W. 384; *Ford v. Oliphant* (Civ. App.) 32 S. W. 437; *Linville v. Jones* (Civ. App.) 137 S. W. 415.

The measure of damages for fraudulent representations of the value of the corporate assets is the actual difference between the value of the assets at the time of the purchase of stock and the value as represented. *Reed v. Holloway* (Civ. App.) 127 S. W. 1189.

As to damages for misrepresentations that the land was free from Johnson grass, see *Cockrell v. Ellison* (Civ. App.) 137 S. W. 150.

Difference between value and price paid.—For misrepresentations that there was a good well of water, measure of damages is difference in amount buyer paid for land and its true value. *Linnartz v. Lawrie* (Civ. App.) 192 S. W. 789; *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804.

The measure of damages for deceit is the difference between the value of the property and the price paid. *Greenwood v. Pierce*, 58 Tex. 130; *Ellis v. Barlow* (Civ. App.) 26 S. W. 908; *McCord-Collins Commerce Co. v. Levi*, 21 Civ. App. 109, 50 S. W. 606; *Carson v. Houssels* (Civ. App.) 51 S. W. 290; *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469; *Riley v. Atmar* (Civ. App.) 213 S. W. 682; *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499. See, also, *Wimple v. Patterson* (Civ. App.) 117 S. W. 1034.

Measure of damages applied to sale of corporate stock. *Beckwith v. Powers* (Civ. App.) 157 S. W. 177.

To sale of a span of mules. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

To sale of peanut threshers. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

To sale of a jack for breeding purposes. *Womack v. Hastings & Lagow* (Civ. App.) 200 S. W. 878.

To sale of a share in an oil company. *Philpott v. Edge* (Civ. App.) 224 S. W. 263.

The measure of damages of a purchaser induced by the fraud of the vendor to purchase is the difference between the value of the land and the sum paid for it. *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1023, certified questions answered, 102 Tex. 300, 116 S. W. 40; *Day v. Steverson* (Civ. App.) 145 S. W. 1062; *Martin v. Goodman* (Civ. App.) 187 S. W. 689; *Ford v. Sims* (Civ. App.) 190 S. W. 1165; *Lott Town & Improvement Co. v. Harper* (Civ. App.) 204 S. W. 452; *Thrasher v. Walsh* (Civ. App.) 228 S. W. 961. See, also, *Pruitt v. Jones*, 14 Civ. App. 84, 36 S. W. 502; *Tompkins v. Perry*, 61 Civ. App. 183, 128 S. W. 1164; *Simmens v. Clark*, 62 Civ. App. 174, 130 S. W. 619.

The measure of damages is the difference between the value of that which plaintiff parted with and the value of that which he received. *Pickens v. Major* (Civ. App.) 139 S. W. 1040; *Weeks v. Stevens* (Civ. App.) 155 S. W. 667; *Sanders v. Dunn* (Civ. App.) 158 S. W. 1041; *Brown v. Searls* (Civ. App.) 228 S. W. 173. See *Luse v. Rea* (Civ. App.) 207 S. W. 942. Compare, *Buckingham v. Thompson* (Civ. App.) 147 S. W. 230.

Damage for vendor's misrepresentation as to acreage in tract sold at an agreed price per acre is measured by the difference between the price paid by purchaser for the land which it was represented he was receiving by his deed and the value of what he actually received as of the date of his purchase, with interest. *Vogt v. Smalley* (Com. App.) 210 S. W. 511, affirming judgment (Civ. App.) 166 S. W. 1.

For misrepresentation as to solvency of maker of notes received in part payment, and as to value of land upon which notes were to be a lien, vendor's measure of damages, is difference between land conveyed and consideration received. *Luse v. Rea* (Civ. App.) 207 S. W. 942.

Nominal damages.—In an action for deceit in the sale of a horse, a verdict for one cent damages set aside. *Traylor v. Evertson* (Civ. App.) 26 S. W. 637.

If one is induced to make an exchange of property by false representations of the other party, he is entitled to recover at least nominal damages and costs. *Moore v. Beakley* (Com. App.) 215 S. W. 957, reversing judgment (Civ. App.) 183 S. W. 380.

Elements of damages.—In a suit for fraudulent representations as to the future location of a railroad depot, plaintiff cannot recover the value of improvements made on the land; the damage being too remote. *Greenwood v. Pierce*, 58 Tex. 130.

A purchaser cannot recover as actual damages resulting from lien a fee paid an attorney for procuring a release willingly executed, nor the amount of rents which might have been realized from the property had the purchaser improved it. *Sherrick v. Wyland*, 14 Civ. App. 299, 37 S. W. 345.

For false representations in the sale of a gin which would not operate, the cost of other machinery bought for use in connection therewith, but adapted for use with various other standard makes of gins, is not a proper element of damage; but the cost in putting it in place is a proper element of damage. *Chatham Mach. Co. v. Smith* (Civ. App.) 44 S. W. 592.

Amount deducted from wages, but not indemnity for injuries or for loss of time. *Williams v. Detroit Oil & Cotton Co.*, 103 Tex. 75, 123 S. W. 405, affirming judgment 52 Civ. App. 243, 114 S. W. 167.

One induced by fraud to purchase land cannot recover for loss sustained by sale of his own land for less than its value to raise money. *Gordon v. Rhodes & Daniel*, 117 S. W. 1023, certified questions answered, 102 Tex. 300, 116 S. W. 40.

As to damages recoverable from broker, see *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1023, certified questions answered 102 Tex. 300, 116 S. W. 40.

Buyer not entitled to damages for expenses incurred in endeavoring to operate machine after ascertaining its condition was misrepresented. *Wimple v. Patterson* (Civ. App.) 117 S. W. 1034.

Attorney's fees are not recoverable as actual damages. *Thouron v. Skirvin*, 57 Civ. App. 105, 122 S. W. 55.

One who purchased land because of false representations as to what it would produce could recover of the vendor the payment he had made, with interest together with a reasonable allowance for improvements but not interest for the time he was in possession. *Buckingham v. Thompson* (Civ. App.) 135 S. W. 652.

A party induced by false representations to give an interest-bearing note which he was subsequently compelled to pay held entitled to recover the interest as a part of his damages, but not attorney's fees. *Empire Life Ins. Co. v. Beaumont Land & Building Co.* (Civ. App.) 146 S. W. 335.

Buyer of a lot, the title to a strip of which was unmarketable, could recover, cost of moving his house built partly on that strip, although he might never have to move it. *Dupree v. Savage* (Civ. App.) 154 S. W. 701.

The measure of damages of one purchasing corporate stock as a result of fraudulent representations that its actual value was its par value, held to be the difference between the amount paid for the stock and its value, plus the amounts he was required to pay to discharge corporate debts to protect the assets. *Beckwith v. Powers* (Civ. App.) 157 S. W. 177.

For damages from seller's misrepresentations as to thresher, buyer could not recover ordinary expense of threshing, preserving, and marketing crop. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

Where seller of land misrepresented there was a good well thereon, he was not liable to buyer for amount paid out by latter in digging wells. *Linnartz v. Lawrie* (Civ. App.) 192 S. W. 789.

For fraud in sale of a jack for breeding purposes, recovery cannot be had for profits, nor for feed and care after it was discovered that the jack was not available for purpose for which purchased. *Womack v. Hastings & Lagow* (Civ. App.) 200 S. W. 878.

On rescission of a contract for the purchase of a plow for false representations as to what it would do, expenses incurred by the buyer for labor, gasoline, and oil in testing the plow were recoverable. *Hackney Mfg. Co. v. Celum* (Com. App.) 221 S. W. 577, affirming judgment (Civ. App.) 189 S. W. 988.

Freight paid and expenses incurred by buyers in an attempt to make worthless tractor operate held recoverable as damages even though the purchase money notes had not been paid but profits were not recoverable. *Webb v. Emerson-Brantingham Implement Co.* (Civ. App.) 227 S. W. 499.

Amount of damages.—Where plaintiff contracted to exchange land at \$26 an acre for defendant's dry goods at their cost but defendant re-marked some goods to make cost price \$500 in excess of what it actually was, plaintiff could recover no more than \$500 from defendant. *Searls v. Brown* (Civ. App.) 204 S. W. 495.

Damages awarded held not erroneous, though there was no representation as to one parcel of land; the land having been purchased as a whole. *United Land & Irrigation Co. v. Fleming* (Civ. App.) 225 S. W. 843.

Art. 3973c. Same; exemplary damages.—All persons making the false representations or promises and all persons deriving the benefit of said fraud, shall be jointly and severally liable in actual damages, and in addition thereto, all persons knowingly and willfully making such false representations or promises or knowingly taking the advantage of said fraud shall be liable in exemplary damages to the person defrauded in such amount as shall be assessed by the Jury, not to exceed double the amount of the actual damages suffered. [Id., § 3.]

Persons liable for fraud.—Each party to a fraudulent transaction is liable for the false representations of the others, made in pursuance of the mutual understanding of the parties or in furtherance of the common plan, at least until the termination of the enterprise. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048. See, also, *Boetge v. Landa*, 22 Tex. 105.

As to agent, see *Foix v. Moeller* (Civ. App.) 159 S. W. 1048; *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

As to parties liable for fraud in shipping half bales of cotton for bales, see *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Civ. App.) 154 S. W. 1032.

As to surety, see *Bain v. Coats* (Civ. App.) 228 S. W. 571.

One of several grantors was not entitled to object, as against the grantee, that she had been misinformed as to her liability on a mortgage on the land unless she was deceived and misled by the grantee. *Cooper v. Marek* (Civ. App.) 166 S. W. 58.

Purchaser, claiming to have been defrauded, held charged with notice that one from whom he received his deed was his vendor, and that he was not the agent of the former owners. *Closner & Sprague v. Acker* (Civ. App.) 200 S. W. 421.

Exemplary damages.—Punitive damages held recoverable for false representations as to solvency. *Western Cottage Piano & Organ Co. v. Anderson*, 45 Civ. App. 513, 101 S. W. 1061.

For fraud in deducting premiums for alleged accident insurance from employé's wages, the employé could not recover exemplary damages, in the absence of proof that the deception was attended by malicious or oppressive conduct or an abuse of confidential relation followed by special damages apart from mere loss of money. *Williams v. Detroit Oil & Cotton Co.*, 52 Civ. App. 243, 114 S. W. 167, judgment affirmed 103 Tex. 75, 123 S. W. 405.

Where defendant entered into a fraudulent combination with his codefendant, a buyer of goods, to defraud plaintiff by false representations as to the financial responsibility of the buyer, interest on the price of the goods held allowed by way of punishment for the fraud. *Gibbens v. Bourland* (Civ. App.) 145 S. W. 274.

Plaintiff held entitled to exemplary damages against defendant, who fraudulently induced her to trade her bonds and wrote their agreement so as not to represent their real understanding. *Mossop v. Zapp* (Civ. App.) 189 S. W. 979.

TITLE 63

GAME, FISH, OYSTERS, ETC.

Chap.

1. Game, fish and oyster commissioner.
2. Fish, oysters, etc.

Chap.

3. Game.

CHAPTER ONE

GAME, FISH AND OYSTER COMMISSIONER

Art.

3974. Office created.
3975. Qualifications.
3976. Office, where kept.

Art.

3977. Bond and oath.
3978. Seal.
3979. General duties and powers.

Article 3974. [2508] Office created.—The Office of the Game, Fish and Oyster Commissioner is hereby created and the Governor of the State is authorized to appoint a competent person as Game, Fish and Oyster Commissioner of the State of Texas. [Acts 1895, p. 70; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

Explanatory.—Acts 1919, 36th Leg., ch. 157, relating to game, and Acts 1919, 36th Leg. 2d C. S., ch. 73, relating to fish, supersede many of the provisions of this Title of the Revised Statutes and of Chapter 6 of Title 13 of the Penal Code. Of Acts 1919, 36th Leg., ch. 157, section 1 is set forth post, this title, art. 4022, and post, Penal Code, art. 900½; section 2 is set forth post, this title, art. 4022a, and post, Penal Code, art. 900½a; sections 3–33 are set forth post, Penal Code, arts. 900½aa–900½qq; sections 34 and 35 are set forth post, this title, arts. 4039a, 4039b; sections 36–39 are set forth post, Penal Code, arts. 900½r–900½ss; sections 40 and 41 are set forth post, this title, arts. 4035a, 4035; and sections 42–47 are set forth post, Penal Code, arts. 900½t–900½vv. Of Acts 1919, 2d C. S., ch. 73, article 1 is this article; articles 2–11 are set forth post, this title, arts. 3975–3983, 4018a; articles 12, 13 are set forth post, Penal Code, arts. 923j, 923jj; articles 14, 15 are set forth post, this title, arts. 3984, 3986; art. 16 is set forth post, this title, art. 3986, and post, Penal Code, art. 917; articles 17–25 are set forth post, this title, arts. 3990–3993, 3995–3999; article 26 is set forth post, Penal Code, art. 920; article 27 is set forth post, this title, art. 3999a, and post, Penal Code, art. 908; articles 28–49 are set forth post, Penal Code, arts. 908a, 905, 906, 923o, 923oo, 923m, 870, 907, 903, 872, 901, 911, 923gg, 923ggg, 923gggg, 923nn, 918, 914, 921, 922, 923jj, 923b; article 50 is set forth post this title, 4019c; articles 51–66 are set forth post, Penal Code, arts. 923e, 871, 909a, 913, 914a, 914b, 923qq, 923r, 923rr, 923s, 923ss, 923t, 923ff, 923fff, 923fff, 923p, 912a, 923pp, 923q, 872cc, 923tt; articles 67 and 74 are set forth post, this title, arts. 4016, 4018b, 4002, 4003, 4010, 4001, 4004, 4005, 4006, 4007, 4008, 4009; article 75 is set forth post, Penal Code, art. 923u; and articles 76, 76a and 77 are set forth post, this title 4018c, 4018d, 4018e.

Art. 3975. [2509] Qualifications.—The person appointed to the office of Game, Fish and Oyster Commissioner shall be a citizen of the United States and of the State of Texas. [Acts 1895, p. 70; Acts 1899, p. 312; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 2.]

Art. 3976. [2510] Office, where kept.—The Game, Fish and Oyster Commissioner shall have his office in the State Capitol in the City of Austin, Texas, during his term of office which shall be two years. [Acts 1911, p. 62, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 3.]

Art. 3977. [2511] Bond and oath.—The Game, Fish and Oyster Commissioner shall file with the Secretary of State, a good and sufficient bond, to be approved by that official in the sum of ten thousand dollars with two or more good and sufficient securities conditioned that he will faithfully perform the duties to this office. He shall take the oath prescribed for sheriffs and when he shall have filed said bond and taken said oath, he shall enter on the duties of his office. Said bond

shall not be void on the first recovery but may be sued on from time to time in the name of the State or any persons injured until the whole amount has been recovered. [Acts 1895, p. 70; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 4.]

Art. 3978. [2512] Seal.—The Game, Fish and Oyster Commissioner shall have a seal on which shall be a five pointed star and the words, "Game, Fish and Oyster Commissioner of Texas," and which seal he shall use in issuing commissions to deputies in his department and in other official acts. [Acts 1895, p. 70; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 5.]

Art. 3979. [2513] General duties and powers.—The duties of the Game, Fish and Oyster Commissioner shall be in the execution of the Game, Fish and Oyster Laws of the State and such further duties as may be imposed upon him by legislation. In the execution of these laws he shall exercise the power and authority given to the sheriffs of the State. [Acts 1895, p. 70; Acts 1905, pp. 128-129; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 6.]

CHAPTER TWO

FISH, OYSTERS, ETC.

Art.		Art.	
3980.	Public rivers, etc., property of state, etc.; under jurisdiction of commissioner, etc.	4001.	Commissioner to keep record of special taxes collected, licenses issued, etc.
3981.	Private and public oyster beds defined; beds subject to location.	4002.	Commissioner to keep accounts with locators.
3982.	Riparian rights prescribed, etc.	4003.	Annual report of commissioner; contents; printing and distribution; dismissal from office for failure to make.
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3988, 3989.	[Superseded.]	4009.	Monthly reports by deputies; remittances.
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3995.	Locator protected in possession.	4015.	[Superseded.]
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3999a.	Individual license to take fish, etc., for sale; fee.	4018c.	Taking of brood fish by commissioner.
4000.	Duties of commissioner.	4018d.	Partial invalidity of act.
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		4019.	[Note.]
		4019a.	[Superseded.]
		4019b.	[Superseded.]
		4019c.	Dredging reefs for improvement thereof.

<p>Art. 4020-4021a. [Note.] 4021b. What included within act, and under management, etc., of game, fish and oyster commission. 4021c. Certain fresh water lakes shall not be sold; open to public; proviso, etc. 4021d. Powers of commissioner; marl, sand, shells, mudshell, and oyster beds. 4021e. Marl; purchase, etc.</p>	<p>Art. 4021f. Same; application; permit; revocation; no special privilege or exclusive right. 4021g. Sale of marl, gravel, sand, shells or mudshell; proceeds. 4021h. [Superseded.] 4021i. Permits to counties, cities, towns, etc. 4021j. [Superseded.] 4021k, 4021l. [Note.]</p>
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Article 3980. Public rivers, etc., property of state, etc.; jurisdiction of Game, Fish and Oyster Commissioner over.—All of the public rivers, bayous, lagoons, creeks, lakes, bays and inlets in this State, and all that part of the Gulf of Mexico within the jurisdiction of this State, together with their beds and bottoms, and all of the products thereof, shall continue and remain the property of the State of Texas, except in so far as the State shall permit the use of said water and bottoms, or permit the taking of the products of such bottoms and waters, and in so far as this use shall relate to or affect the taking and conservation of fish, oyster, shrimp, crabs, clams, turtle, terrapin, mussels, lobsters and all other kinds and forms of marine life, or relate to sand, gravel, marl, mudshell and all other kinds of shell, the Game, Fish and Oyster Commissioner shall have jurisdiction over and control of, in accordance with, and by the authority vested in him by the laws of this State. [Acts 1905, p. 129; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 7.]

See ante, note to art. 3974.

Took effect 90 days after July 22, 1919, date of adjournment.

Sale of lake.—A navigable lake cannot be sold. *Weider v. State* (Civ. App.) 196 S. W. 868.

Art. 3981. [2158l] Private and public oyster beds defined; beds subject to location.—All oyster beds shall be public or private; all not designated private shall be public. All natural oyster beds and oyster reefs of this State shall be deemed public, and a natural oyster bed shall be declared to exist when as many as five barrels of oysters may be found therein within twenty-five hundred square feet of any position of said reef or bed; and any lands covered by water containing less oysters than the above amount shall be subject to location at the discretion of the Game, Fish and Oyster Commissioner, but this shall not apply to a reef or bed that has been exhausted within a period of eight years. [Acts 1895, p. 70; Acts 1899, p. 314; Acts 1907, p. 236; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 8.]

Art. 3982. [2518o] Riparian rights as to gathering, etc., oysters; affidavit that oysters offered for sale were taken from private bed; limitation on locations.—Whenever any creek, bayou, lake or cove shall be included within the metes and bounds of any original grant or location of land in this State, the lawful occupant of such grant or location shall have the exclusive right to use said creek, lake, bayou or cove for gathering; planting, or sowing oysters within the metes and bounds of the official grant or patent of said land. Provided, that the Game, Fish and Oyster Commissioner may require the owner of oysters produced on such lands, when such oysters offered for sale to make an affidavit that such oysters were produced on this land. And the failure of the person claiming that such oysters were produced on his private oyster bed or bottoms, to have and to show such affidavit to the Game, Fish and Oyster Commissioner or one of his deputies, or to the person to whom he offers such oysters for sale, shall be presumptive that such oysters

were taken from a public bed, and on prosecution for the same, it shall devolve on the defendant to show that such oysters were taken from his private bed, or bottom of oysters. No person shall locate water or ground covered with water for planting oysters along any bay shore in this State, nearer than 100 yards from the shore. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 9.]

Art. 3983. [2514] Special tax on fish, shrimp, oysters, turtles and terrapin taken and sold or offered for sale; amount; payment; what constitutes a barrel of oysters; title to shells.—There shall be and is hereby levied a tax of not less than one-fifth of one per cent. per pound on all fish, and shrimp, taken and sold or offered for sale in this State, and not less than two cents a barrel on all oysters, sold or offered for sale in this State, whether from private or public beds, and offered for sale or shipment, and not less than one-half a cent per pound on all turtles, and not less than twenty-five cents on each terrapin offered for sale and shipment. Such tax shall be paid under such rules and regulations as the Game, Fish and Oyster Commissioner shall prescribe. For all purposes mentioned in this Title or Section, a barrel of oysters shall be deemed and taken to consist of three boxes of oysters in the shell, said boxes to be of the following dimensions; ten inches wide by twenty inches long and thirteen and one-half inches in depth. In filling such boxes for measurement, such oysters shall not be placed or deposited in such box in a way that will make them fill the box more than two and one-half inches in the center above the height of the box. Provided that two gallons of shucked oysters without their shells shall be considered and deemed by this Act as equal to one barrel of oysters in the shell. It is hereby specially provided that the title to the shells, from which oysters are taken, shall remain in the State and the Game, Fish and Oyster Commissioner is directed to handle, control or sell same under the same rules and regulations as fixed by law, or may hereafter be fixed by law, for the handling, control or sale of other shells or mudshell taken from the tidal waters of the State. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 10.]

Explanatory.—For article 12 of Acts 1919, 36th Leg. 2d C. S., ch. 73, prescribing a penalty for using a measurement other than as provided for in this article, see post, Penal Code, art. 923j.

For article 13 of Acts 1919, 36th Leg. 2d C. S., ch. 73, prescribing a penalty for non-payment of the taxes imposed by this article see post, Penal Code, art. 923jj.

Art. 3984. Registration of fishing boats in public waters; application; certificate; fee; marking boats.—Any person who is a citizen of the United States wishing to use a boat in catching or taking fish, green turtle, terrapin or shrimp or gathering oysters or other marine life for market in public waters of this State, in accordance with the provisions of the fish and oyster laws of this State, shall apply to the Game, and Oyster Commissioner or his deputies for permission to do so. Such applicant shall furnish said officer under oath his name, place or residence, the name and kind of boat to be used by him, together with the number of men to be employed by him. Thereupon the officer shall register such boat which register number shall be distinctly painted, as the Game, Fish and Oyster Commissioner may designate, on such boat, for which registration he shall pay the said officer one dollar and fifty cents and the said officer shall furnish the applicant with a certificate of such registration, such certificate shall be for twelve months from date of issuance. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 14.]

Art. 3985. [2514] [Superseded.]

Explanatory.—This article would seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. 10, ante, art. 3983, conferring on the Game, Fish, and Oyster Commissioner, power to make rules and regulations for payment of the special tax.

Art. 3986. [2518k] License to catch or take fish, oysters, etc; issue; term of; fee for; cancellation.—Any captain or master of any boat wishing to engage in the business of catching or taking any fish, turtle, terrapin, shrimp, or oysters or other marine life from the waters of the State for market shall, before engaging in such business, secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting him permission to take from the waters of the State, fish, turtle, terrapin, shrimp, or oysters; provided, that the license in exercising the privilege named in this license, shall at all times be governed by the fish and oyster laws of this State. For the purpose of obtaining this license the person desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he, the applicant shall set forth under oath that he is a citizen of the United States and the name, class and register number of his boat. If the application be for a license to use seines and nets, the applicant shall state the number, class and length of the seines and nets to be used by him, and if the application be for a license to gather oysters he must state the number of tongs to be used by him, and the applicant shall also agree that because of the privilege he shall receive from the State of Texas, of taking fish, turtle, terrapin, shrimp or oysters from her waters, or the marine life, all such products at all times, shall be subject to inspection by the Game, Fish and Oyster Commissioner, or any of his deputies, and that said application shall authorize said Commissioner, or any of his deputies, to enter at any time the boat or any house or place, where he, the applicant, may have such from her waters, or the marine life, all such products at all times, shall further agree to pay to the State of Texas a special tax provided for in Article 10 of this Act [art. 3983]. This application having been duly executed and handed to the Game, Fish and Oyster Commissioner, or any of his deputies, accompanied by the applicant's registration certificate and the fee for the license applied for, it shall thereupon be the duty of the Game, Fish and Oyster Commissioner, or the deputy receiving same, to issue to the applicant a license to engage in the business set forth in his application, and the license shall be subject to such limitations and control as herein prescribed and as is or may be prescribed by the laws of this State. Said license must be signed by the Game, Fish and Oyster Commissioner, or his deputy, stamped with the seal of office and state the name of the licensee, name and class of his boat and the date of issuance. Such license shall be for twelve months, if for fishing, for fish, turtle, or shrimp, and from September the first to April the first, following the date of license, if for gathering oysters; and from November the first to February the first inclusive; if granted for the purpose of catching terrapin, and for said license the applicant shall pay the sum of one dollar. The license so issued shall be kept on the boat subject to the inspection of the Game, Fish and Oyster Commissioner or any of his deputies, and it shall not be good for any other person nor on any other boat than the original named therein without the consent of the Game, Fish and Oyster Commissioner, or one of his deputies, having first been had, which consent or assignment shall be written across the face of said license; provided, that if at any time such licensed captain or master of a boat shall violate any of the fish and oyster laws of this State, or shall at

any time refuse to comply with any provision made in his application for license, the Game, Fish and Oyster Commissioner is authorized to cancel said license and the boat registration certificate, notice of which shall be given by the Fish and Oyster Commissioner in writing and delivered to the licensee, and such license to such captain and the registration of such boat shall not be renewed for three years. Any person wishing to engage in the taking or catching of any fish, turtle, terrapin, shrimp, or oysters for market as the employee of the owner or as a part of a crew of any registered boat, shall procure a license in the same manner and character as the captain or master of any registered boat engaged in taking or catching fish, turtle, terrapin, shrimp, or oysters or other marine life, for market; provided, that one license so issued under this Article shall authorize the licensee to engage in taking or catching any of the products named herein. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 15.]

Art. 3987. License to wholesale dealers in fish and oysters; application; requisites; agreement for inspection, records, etc.; forfeiture of license; tax; cancellation.—For the protection of the fish and oyster industry, any individual, firm or corporation, engaged in, or who may engage in, the business of a wholesale dealer or dealers in fish and oysters, shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm or corporation permission to engage in said occupation for one year. For the purpose of obtaining this license the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth under oath, if required, that he is a citizen of the United States by birth or not being so shall state that he has been granted full naturalization papers and by what court and at what time they were granted. Where a corporation applying for permit to conduct a wholesale business in fish, oysters and other marine products as mentioned, contains foreigners, it shall conform to the foregoing provisions as applied to individual applicants. He shall also agree that, because of the privilege which he applies for from the State of Texas, that all products handled by him shall, at all times be subject to the inspection of the Game, Fish and Oyster Commissioner, or any of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored, and inspect same. He shall also agree to keep a correct record of all fish, oysters, shrimp and other taxed marine life handled by him under this law in a book to be furnished by the Game, Fish and Oyster Commissioner; and, further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or any of his deputies, together with a fee of ten dollars for same, it shall be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to issue to the applicant a license to engage in the business set forth in the application. Said license must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of the licensee, place of business and the kind of license applied for, and shall be good for twelve months following the date of issuance. For such license the applicant shall pay one dollar for each one thousand pounds of fish handled by him, and a tax of one cent per barrel on oysters handled by him,

which tax shall be paid monthly, the tax to be paid on the first of each month, which may be due upon the said product handled during the preceding month as shown by the record books hereinbefore mentioned. * * * A wholesale dealer in the meaning and definition of this Act is any person, corporation or firm or partnership engaged in the business of buying and selling fish, oysters, shrimp, turtle, terrapin, crabs, clams, lobsters or other commercial marine life, in quantities of ten pounds or more to any customer during the same day, or whose daily sales, or whose sales for any one day, amount to more than the aggregate of one hundred pounds of above mentioned marine products. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 16; Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1 (Art. 16).]

Took effect 90 days after June 18, 1920, date of adjournment.

Explanatory.—This article is a part of article 16 of Acts 1919, 36th Leg. 2d C. S., ch. 73, as amended by Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1. For the penal provision of said article 16, see post, Penal Code, art. 917.

Arts. 3988, 3989. [Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 16, ante, art. 3987.]

Art. 3990. Deposit of estimated amount of tax, etc.—The applicant for any license under this act, based upon fish and oysters handled, shall upon the issuance of such license, deposit with the Game, Fish and Oyster Commissioner, if required to do so by such officer, an amount of money, to be fixed by the said commissioner, in addition to the ten dollars required of him as a wholesale dealer as defined in Article 16 [Art. 3987], sufficient to cover the estimated amount of tax that would be due by applicant upon monthly business of applicant, and against which deposit the tax due may be charged by the commissioner, and said applicant shall make additional deposits in sufficient amounts to at all times maintain a deposit sufficient to cover the estimated tax that may be due by applicant, which additional deposit shall be made upon request of the Game, Fish and Oyster Commissioner. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 17.]

Art. 3991. [2518m] Location for planting oysters; who may obtain; application; fee for.—Any person who is a citizen of the United States, or any corporation having been chartered in this State shall have the right of obtaining a location for planting oysters and making private oyster beds within the public waters of this State, by making written application to the Game, Fish and Oyster Commissioner, or his deputy, describing the location desired. A fee of twenty dollars cash must accompany such application. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 18.]

Art. 3992. [2518m] Examination of location; survey.—When the application and fee provided for in Article 18 [Art. 3991] has been placed in the hands of the Game, Fish and Oyster Commissioner, it shall then be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to examine thoroughly the location desired as soon as practicable, with tongs, dredge, or any other efficient manner; and, if the same be not a natural oyster bed or reef, and exempt from location by any section or article of this chapter, he shall have the location surveyed by a competent surveyor. In making said location, said surveyor shall plant two iron stakes or pipes on the shore line nearest to the proposed location, one at each end of the proposed location, which said stakes or pipes shall be not less than two inches in diameter and be set at least three feet in the ground. Said stakes or pipes shall be placed with reference to bear-

ings of not less than three natural or permanent objects or land marks. And the locator shall place and maintain under the direction of the Game, Fish and Oyster Commissioner, or his deputy, a bouy at each corner of his oyster claim farthest from the land. All locations for private oyster beds shall be made outside of the riparian limits as defined in the laws relating thereto. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 19.]

Art. 3993. [2518m] Location certificate; fee for; filing and recording; fee for; evidence.—The Game, Fish and Oyster Commissioner, or his deputy, shall give the locator a certificate signed by the Game, Fish and Oyster Commissioner and stamped with the seal of his office; such certificate shall show the date of application, date of survey, number, description of metes and bounds with reference to the points of the compass and natural and artificial objects by which said location can be found and verified. And the locator shall before such certificate is delivered to him, pay the Game, Fish and Oyster Commissioner, or his deputy, surveyor's fees, and all other expenses connected with establishing such location. If such sums, as costs of the location and establishment of the claim, are less than twenty dollars paid to such commissioner, or deputy, the difference in amount shall be returned to such locator by the Commissioner or deputy. If such expenses amount to more than twenty dollars the deficit shall be paid to the Game, Fish and Oyster Commissioner by the locator.

At any time not exceeding sixty days after the date of such certificate of location, the locator must file the same with the county clerk of the county in which the location is situated, who shall record the same in a well bound book kept for that purpose, and the original with a certificate of registration shall be returned to the owner or locator; the clerk shall receive for the recording of such certificate the same fee as for recording deeds; the original or certified copies of such certificates shall be admissible in evidence under the same rule governing the admission of deeds or certified copies thereof. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 20.]

Art. 3994. [Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 20, ante, art. 3993.]

Art. 3995. [2518m] Possession of locator protected.—Any person so locating, shall be protected in his possession thereof against trespass thereon in like manner as free-holders are protected in their possessions, as long as he maintains all stakes and buoys, in their original and correct position, and complies with all laws, rules and regulations governing the fish and oyster industries. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 21.]

Art. 3996. [2518p] Location limited; foreign corporations excluded.—No person, firm or corporation, shall ever own, lease or otherwise control more than one hundred acres of land covered by water, the same being oyster locations under this chapter, and within the public waters of this State; and any person, firm or corporation that now holds more than one hundred acres of oyster locations, shall not be permitted hereafter to acquire, lease or otherwise control more; provided that no corporation shall lease or control any such lands covered by water unless such corporation shall be duly incorporated under the laws of this State. [Acts 1913, p. 297, § 1; Acts 1919, 2d C. S., ch. 73, art. (sec.) 22.]

Art. 3997. [2518n] Staking, marking or fencing private locations.—Any person, firm, or corporation who has secured, or may hereafter secure a location for a private oyster bed in this State, shall keep the two iron stakes or pipes and buoys as provided for in Article 19 [Art. 3992], in place, and shall preserve the marks so long as he is the lessee of said location, and this shall apply also to any person, firm or corporation acquiring any location by purchase or transfer of any nature, and said locator or the assignee of any locator shall have the right to fence said location or any part thereof; provided, that said fence does not obstruct navigation through or into a regular channel or cut leading to other public waters. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 23.]

Art. 3998. [2518n] Rentals for locations; forfeiture of location.—The owner or locator of private oyster beds, under provisions of the foregoing articles shall not be required to pay any rentals on such locations for a period of five years, or till such time as he shall begin to market or sell oysters from such location or bed. When such locator shall begin to sell or market oysters from such location he shall pay the State one dollar and fifty cents per acre per annum and two cents a barrel or such tax as may be imposed under section ten of this Act [Art. 3983] on oyster sales, and failure to pay such rental by the 1st day of March each year shall annul and be a forfeiture of his lease. And if oysters are not marketed or sold from such location within five years from the date of location, such location shall become void. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 24.]

Art. 3999. Permit to gather oysters for planting or for preparation for market; persons entitled to; application; restrictions; culls; marking beds planted with oysters so taken.—Any person who is a citizen of the State of Texas, or any corporation chartered by the said State of Texas, to engage in the culture of oysters or transact business in the purchase and sale of oysters and fish and composed of American citizens, wishing to plant oysters on their own oyster locations or to take oysters from oyster reefs and public waters of the State of Texas for the purpose of preparing them for market, shall make application to the Game, Fish and Oyster Commissioner for permission to do the same. In such application the applicant shall set out distinctly the purpose for which he desires such oysters, and also the amount or number that he desires to take from the beds and waters mentioned. The Game, Fish and Oyster Commissioner may grant such permit or he may refuse to do so. But if he should grant such permit he shall require the applicant to take the oysters he is authorized to take from beds or reefs designated by such commissioner and name them in the permit; he shall mark off the exact area of such beds or reefs from which such oysters shall be taken; he shall designate the bottoms on which such oysters shall be deposited, if they are taken to be prepared for market; he shall require the applicant to cull the oysters taken on the grounds where they are to be located; he shall state what implements, such as tongs and dredges shall be used in taking such oysters and he shall make and enforce all the other regulations he may think necessary to protect and conserve the oysters on the reefs and beds from which the applicant hereinbefore mentioned is permitted to take oysters. When any person or corporation takes oysters, under the provisions of this act from the public reefs for planting purposes and places them on his or its own private bed or reef, or takes oysters from such public reefs or beds for the purpose of preparing them

for market, and places them on such beds or bottoms designated by the Game, Fish and Oyster Commissioner, where they may be prepared for market, such oysters shall become the personal property of the person or corporation planting them, in the first instance, or depositing them in the second instance. Provided, that the person or corporation planting the oysters or depositing them for preparation for market shall, by buoys or stakes or by fencing, clearly and distinctly mark the boundaries of the bed planted or the boundaries of the deposit of oysters made for preparation for market; and no prosecution of any one shall be permitted for taking such oysters unless the boundaries of the private beds and the boundaries of the deposit for the market preparation are established and maintained. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 25.]

Art. 3999a. Individual license to take fish, etc., for sale; fee for.—Any person who is an American citizen desiring to fish in the public waters of this State, or fish for oysters, fish, shrimp, turtle, terrapin, clams, crabs or other marine animal life, for the purpose of selling them, shall procure from the Game, Fish and Oyster Commissioner or his deputy, a license to do so, and such person shall pay the fee of one dollar for such license, which shall be for one year from the date thereof and obligate the holder to observe all the laws of the State enacted to conserve the marine life of such public waters. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 27.]

Explanatory.—This is a part of Acts 1919, 36th Leg. 2d C. S., ch. 73, art. 27. For the penal provision of said art. 27 see post, Penal Code, art. 908. See, also, post, Penal Code, art. 908a.

Art. 4000. Duties of commissioner.—It shall be the duty of the Game, Fish and Oyster Commissioner to collect the special tax imposed by this chapter and enforce its payment, to inspect all products so taxed and verify the weights and measures thereof, to collect all license fees, to collect all rents on locations for planting oysters, to examine or have examined all streams, lakes or ponds when requested to do so for the purpose of stocking such waters with fish best suited to such location and he shall procure and furnish such stock fish from the nearest fishery and fish hatchery, free of charge to any party or parties applying therefor. It shall be the duty of the Game, Fish and Oyster Commissioner to supply from the fish hatcheries and fisheries of this State free of charge to all parties applying therefor such number of fish for the purpose of stocking private lakes and ponds, or public waters, as may be available for distribution; provided, however, that the parties applying therefor shall pay all transportation charges on such fish and shall return to the hatchery or fishery all containers, free of cost.

It shall be lawful for the Game, Fish and Oyster Commissioner of this State and his deputies to take at any time from the public fresh waters of this State all brood fish required by him in operation of such hatcheries for the purpose of propagation and culture. It shall also be lawful for the United States Commissioner of Fisheries and his duly authorized agents to take from public fresh waters of this State all brood fish necessary in the operation of Federal Fish Hatcheries. [Acts 1913, p. 297, § 1; Acts 1917, 35th Leg. 3d C. S., ch. 12, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 87, § 1.]

Explanatory.—This article was superseded in part by Acts 1919, 36th Leg. 2nd C. S., ch. 73, art. [sec.] 67, as amended by Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1, post art. 4018b, and by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. [sec.] 76, post art. 4018c.

Art. 4000a. United States Commissioner of Fisheries may conduct fish hatching and culture.—There is hereby accorded to the United States Commissioner of Fisheries and his duly authorized agents the right to

conduct fish hatching and fish culture and all operations connected therewith at any time, in any manner, and at any place, that may be by them considered necessary and proper. [Acts 1917, 35th Leg. 3d C. S., ch. 12, § 2; Acts 1918, 35th Leg. 4th C. S., ch. 87, § 2.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 4001. [2515] Commissioner to keep record of special taxes collected, licenses issued, etc.—The Game, Fish and Oyster Commissioner shall keep a record book, which shall be well bound, and in which shall be recorded all special taxes collected, all licenses issued and license fees collected all certificates issued for locations of private oyster beds, showing the date of certificate and application, when and how the applications were executed and the manner in which the bottoms were examined and rents collected for such locations, showing also all stock fish furnished, to whom furnished, and the cost of same, the streams, lakes or ponds stocked number and kinds of fish used in each and showing all collections, and disbursements in and from his office. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 71.]

Art. 4002. Commissioner to keep accounts with locators.—The Game, Fish and Oyster Commissioner shall keep an account with each and every person, firm or corporation holding certificates for the location of private oyster beds in this State, showing the amounts received as rents, etc. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 68.]

Art. 4003. [2516] Annual report of Commissioner; contents; printing and distribution; dismissal from office for failure to make.—The Game, Fish and Oyster Commissioner shall make on the thirty-first day of August of each year, or as soon thereafter as practicable, not later than October 1st, of each year, a report to the Governor, showing the conditions of the fish and oyster industry. The report shall show the special taxes collected, the number and class of all boats engaged in the fish and oyster trade, the number of licenses issued and license fees collected, the number, place and acreage of private oyster beds and rents received therefor, and all other amounts collected from whatever source, and the disbursements therefor, as provided for in this chapter with such observations and remarks as pertain to the industry. The report shall also contain a statement of all stock furnished, to whom furnished, the cost of same, the streams, lakes or ponds stocked, the number and kind of fish used in each, and the condition of such plants, with any other data he may obtain on the subjects. The Governor shall order a sufficient number of copies of such report to be printed and filed in the Secretary of State's Office for the purpose of free distribution to parties interested therein. Failure to make such report within the time specified, the said Commissioner may, in the discretion of the Governor, be dismissed from his office. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 69.]

Art. 4004. [2518d] Boat deputies; appointment; powers.—The Game, Fish and Oyster Commissioner is authorized to appoint deputies for each of the vessels owned by the State and employed in the Fish and Oyster Department. Such boat deputies shall have and exercise the same powers and duties as the Game, Fish and Oyster Commissioner and execute a good and sufficient bond, with two or more sureties, that such deputies shall at all time be subject to the orders of the Game, Fish and Oyster Commissioner. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 71.]

Art. 4005. [2517] Shore and interior deputies; appointment; powers and duties.—The Game, Fish and Oyster Commissioner is authorized to appoint such other shore and interior deputies as he may deem necessary for the enforcement of the law. And such shore deputies and interior deputies shall have and exercise the same powers and duties as the Game, Fish and Oyster Commissioner in the enforcement of the Game, Fish and Oyster Laws, and be at all times subject to his order. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 71.]

Art. 4006. [2518k] Qualifications of deputy fish and oyster commissioners; terms of office.—No person shall hold the office of deputy fish and oyster commissioner who is not a citizen of the United States and of the State of Texas. All deputies shall hold their office at the pleasure of the Game, Fish and Oyster Commissioner. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 71.]

Art. 4007. [2518g] Oath and bond of deputy fish and oyster commissioner.—Before entering upon the duties of his office each deputy fish and oyster commissioner shall file with the Fish and Oyster Commissioner a good and sufficient bond, with two or more sureties, in the sum of one thousand dollars, and take the same oath of office as the Game, Fish and Oyster Commissioner, and said bond and oath shall be governed by the provisions of Article 4 [art. 3977]. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 72.]

Art. 4008. [2518f] Deputy fish and oyster commissioners ex officio game commissioners.—Each Deputy fish and oyster commissioner shall be ex officio game commissioner, and shall exercise the duties and powers of Game Commissioner under the direction of the Game, Fish and Oyster Commissioner. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 73.]

Art. 4009. [2518e] Monthly reports by deputies; remittances.—All deputy fish, and oyster commissioners shall make a monthly report to the Game, Fish and Oyster Commissioner of all funds collected by them, remitting along with said report all sums of money collected by them during the said month. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 74.]

Art. 4010. [2518j] Commissioner responsible for deputies.—The Commissioner shall be responsible, on his bond, for the official acts of his deputies. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 70.]

Art. 4011. [2518]

Explanatory.—This article does not seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, re-enacting most of the provisions of chapters 1 and 2 of this title.

Art. 4012. [Superseded.]

See art. 4013, Vernon's Sayles' Civ. St. 1914.

Art. 4013.

Explanatory.—This article does not seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, re-enacting most of the provisions of chapters 1 and 2 of this title.

Art. 4014. [2518c]

Explanatory.—This article does not seem to be wholly superseded by Acts 1919, 36th Leg., 2d C. S., ch. 73.

See art. 4009, ante, requiring monthly, instead of weekly, reports by deputies.

Art. 4015. [2517] [Superseded.]

Explanatory.—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, as amended by Acts 1920, 36th Leg. 3d C. S., ch. 44, art. 67, post arts. 4016, 4018b.

Art. 4016. [2518c] Compensation of deputy commissioners, etc.—Out of any available funds, the Game, Fish and Oyster Commissioner and his Chief Deputy, and all other deputy fish and oyster commissioners and employes of the Game, Fish and Oyster Commission, shall be paid their salaries and expenses monthly, upon approval of the Game, Fish and Oyster Commissioner; the Comptroller drawing his warrant in favor of each of said persons on the special funds appropriated for said purposes as follows: Game, Fish and Oyster Commissioner three thousand dollars per annum; Chief Deputy Game, Fish and Oyster Commissioner, twenty-five hundred dollars per annum; deputies on boats, one hundred and twenty-five dollars per month; mates on boats eighty dollars per month; shore deputy at Corpus Christi, sixty dollars per month; shore deputy at Rockport sixty dollars per month; first deputy at Caddo Lake one hundred dollars per month; assistant deputy at Caddo Lake, seventy-five dollars per month; deputy at Medina Lake, one hundred dollars per month; deputy at Galveston, one hundred twenty-five dollars per month; shore deputy at Houston, one hundred fifty dollars per month; deputy at fish hatchery, one hundred fifty dollars per month; three workmen at hatchery, seventy-five dollars per month. [Acts 1895, p. 70; Acts 1899, p. 313; Acts 1903, p. 190; Acts 1905, p. 130; Acts 1907, p. 234; Acts 1909, S. S. p. 325; Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S. ch. 73, art. (sec.) 67; Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1 (Art. 67).]

Took effect 90 days after June 18, 1920, date of adjournment.

Arts. 4017, 4018.

Explanatory.—These articles do not seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, re-enacting most of the provisions of chapters 1 and 2 of this title.

Art. 4018a. Commissioner to collect taxes, licenses, etc.—The Game, Fish and Oyster Commissioner is hereby authorized and empowered to collect all taxes and licenses, fines and forfeiture and all money due said department, by deputies or persons specially employed for that purpose. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 11.]

Art. 4018b. Same; other duties.—It shall be the duty of the Game, Fish and Oyster Commissioner to collect all taxes, licenses and fines as imposed by law, and to enforce their payment, to inspect all products so taxed, and to verify the weights and measures thereof; to collect license fees, to collect all rents on locations for planting oysters, to examine, or have examined, all streams, lakes, or ponds, when requested to do so, for the purpose of stocking such waters with fish best suited to such locations and he shall superintend and have control in the propagation of fish in the State fish hatchery and the distribution of such fish, and he shall have superintendence and control of the propagation and distribution of birds and game in the State reservations over which he may have control, or which may be established for such propagation. He shall also be allowed a sum not to exceed fifteen hundred dollars per annum for traveling and other expenses, to be paid on vouchers approved by the Governor, showing that such amounts have actually been expended in the performance of his duties of said office, and he shall be allowed all stationery, books, blanks, tags, State laws and charts necessary to the execution of the duties of his office. [Acts

1919, 36th Leg. 2d C. S., ch. 73, art. [sec.] 67; Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1, (art. 67).]

Took effect 90 days after June 18, 1920, date of adjournment.

Art. 4018c. Taking of brood fish by commissioner.—It shall be lawful for the Game, Fish and Oyster Commissioner of this State and his deputies or the United States Commissioner of Fisheries and his duly authorized Agents, to take at any time and in any manner from the public fresh waters of this State all brood fish required by them in operation of the State and Federal Hatcheries. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 76.]

Art. 4018d. Partial invalidity of act.—If any section of this bill shall be held unconstitutional it shall not affect any other section of this bill, and all sections save the one that may be declared unconstitutional shall continue to be in full force and effect. [Id., art. (sec.) 76a.]

Art. 4018e. Effect of act on other acts.—This Act shall be construed to be a continuation of all former Acts upon the subject, and any and all suits instituted under any former Act shall not abate, but prosecutions thereof shall continue under the provisions of such former Acts or under this Act. [Id., art. (sec.) 77.]

Art. 4019.

Explanatory.—This article does not seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, re-enacting most of the provisions of chapters 1 and 2 of this title.

Art. 4019a. [Superseded in part.]

See arts. 923o, 923oo, Penal Code, post. The provision as to mesh for turtles may still be operative after the expiration of the five-year period of absolute protection for turtles, under Penal Code, art. 914a, post.

Art. 4019b. [Superseded.]

See art. 923m, Penal Code, post.

Art. 4019c. Dredging reefs for improvement thereof.—Whenever the Game, Fish and Oyster Commissioner believes that an oyster bed can be improved by the use of dredges he may grant the use of such dredges on such reefs, but only under the superintendence, supervision and in the presence of a deputy fish and oyster commissioner. And the Game, Fish and Oyster Commissioner is authorized to purchase boats and implements and employ labor to work such public oyster reefs and beds as he thinks can be improved thereby, the expense of which shall be paid from the Fish and Oyster Fund of the State on warrants issued by the Comptroller or the sworn statement as to the correctness of such expense by the Game, Fish and Oyster Commissioner. [Acts 1913, p. 297, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 50.]

Arts. 4020–4021a.

See these articles in Vernon's Sayles' Civ. St. 1914.

Art. 4021b. What included within act, and under management, etc., of game, fish and oyster commissioner.—All the islands, reefs, bars, lakes, and bays within tidewater limits from the most interior point seaward co-extensive with the jurisdiction of this State and such of the fresh water islands, lakes, rivers, creeks and bayous within the interior of this State as may not be embraced in any survey of private land, together with all the marl and sand of commercial value, and all the shells, mudshell or gravel, or whatsoever kind that may be in or upon any island, reef or bar, and in or upon the bottoms of any lake, bay, shallow water, rivers, creeks and bayous and fish hatcheries and oyster

beds, within the jurisdiction and territory herein defined, are included within the provisions of this Act, and all such islands, reefs, bars, lakes, bays, shallow waters, rivers, creeks and bayous, and the marl, sand, shells, mudshells, gravel and oyster beds and fish hatcheries, located as herein defined, are, for the purpose of this Act, hereby placed under the management, control and protection of the Game, Fish and Oyster Commissioner. [Acts 1911, p. 118, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

Sale of lake.—A navigable lake cannot be sold, but is under the jurisdiction of the commissioner. *Welder v. State* (Civ. App.) 196 S. W. 868.

Art. 4021c. Certain fresh water lakes shall not be sold; open to public; protection of fish in.—Such of the fresh water lakes, rivers, creeks and bayous within this State as may be embraced in any survey of private land shall not be sold, but shall remain open to the public; provided should the Game, Fish and Oyster Commissioner stock them with fish, he is authorized to protect same for such time and under such rules as may be prescribed by him. [Acts 1911, p. 118, § 2; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 2).]

Art. 4021d. Powers of commissioner; marl, sand, shells, mudshell and oyster beds.—The Game, Fish and Oyster Commissioner is hereby invested by all the power and authority necessary to carry into effect the provisions of this Act, and shall have full charge and discretion over all matters pertaining to the sale, the taking, carrying away or disturbing of all marl, sand or gravel of commercial value, and all gravel and shells or mudshell and oyster beds and their protection from free use and unlawful disturbing or appropriation of same, with such exceptions, and under such restrictions and limitations as may be provided herein. [Acts 1911, p. 118, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 3).]

Art. 4021e. Marl; purchase, etc.—None of the marl, gravel, shells, mudshell or sand included in the preseding Sections of this Act shall be purchased, taken away or disturbed except as provided in this Act nor shall any oyster beds, or fish hatcheries, within the territory included in this Act be disturbed except as herein provided. [Acts 1911, p. 118, § 4; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 4).]

Art. 4021f. Same; application; permit; limitations on; revocation; no special privilege or exclusive right.—Anyone desiring to purchase any of the marl and sand of commercial value and any of the gravel, shells or mudshell included within the provision of this Act, or otherwise operate in any of the waters or upon any island, reef, bar, lake, bay, river, creek or bayou, included in this Act, shall first make written application therefor to the Game, Fish and Oyster Commissioner designating the limits of the territory in which such person desires to operate. If the Game, Fish and Oyster Commissioner, is satisfied the taking, carrying away or disturbing of the marl, gravel, sand, shells or mudshell, in the designated territory would not damage or injuriously affect any oysters, oyster beds, fish inhabiting waters thereof or adjacent thereto and that such operation would not damage or injuriously affect any island, reef, bar, channel, river, creek or bayou used for frequent or occasional navigation nor change or otherwise injuriously affect any current that would affect navigation, he may issue a permit to such person after such applicant shall have complied with all regulations and requirements prescribed by said Commissioner. The permit shall authorize the applicant to take, carry away, or otherwise operate

within the limits of such territory as may be designated therein, and for such substance or purpose only as may be named in the permit and upon the terms and conditions therein. No permit shall be assignable, and a failure to, or refusal of the holder to comply with the terms and conditions of the permit shall operate as an immediate termination and revocation of all rights conferred therein or claimed thereunder. No special privilege or exclusive right shall be granted to any person, association of persons, corporate or otherwise, to take or carry away any marl, gravel, sand, shell or mudshell from any territory or to otherwise operate in or upon any island, reef, bay, lake, river, creek, bayou, or bay included in this Act. [Acts 1911, p. 118, § 5; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 5).]

Art. 4021g. Sale of marl, gravel, sand, shells or mudshell; proceeds.—The Game, Fish and Oyster Commissioner, by and with the approval of the Governor, may sell the marl, gravel, sand, shells, or mudshell, included within this Act, upon such terms and conditions as he may deem proper, but for not less than four cents per ton, and payment thereof shall be made to said Commissioner. The proceeds arising from such sale shall be transmitted to the State Treasurer and be credited to the general fund of the State and may be expended by the said Commissioner upon itemized accounts sworn to by those performing the service or furnishing the material, and approved by said commissioner. The said account shall be filed with the Comptroller of Public Accounts, and he shall draw a warrant therefor upon the State Treasurer. [Acts 1911, p. 118, § 6; Acts 1911, S. S., p. 78, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 6).]

Art. 4021h. [Superseded by the omission thereof from the amendatory act. Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1.]

Art. 4021i. Permits to counties, cities, towns, etc.—If any county, or sub-division of a County, City or town should desire any marl, gravel, sand, shell, or mudshell included in this Act for use in the building of any road or street, which work is done by said county, or any subdivision of a county, City or Town, such county or subdivision of a County, City or Town may be granted a permit without charge and shall have the right to take, carry away or operate in any waters or upon any islands reefs or bars included in this Act; such county, subdivision of a county, City or Town to do the work under its own supervision, but such County, or any sub-division of a County, City or Town shall first obtain from the said Commissioner a permit to do so, and the granting of same for the operation in the territory designated by such County, or any sub-division of a County, City or Town, shall be subject to the same rules, regulations and limitations and discretion of the said Commissioner as are other applicants and permits. If any County, or any sub-division of a County, City or Town should desire any gravel, marl, sand, or shell or mudshell included in this Act for use in the building of any road or street, and the building of any road or street is to be done by contract, or the dredging or taking of gravel, marl, sand or shell, or mudshell for use on said road or street, is to be done by contract, then the said County or any sub-division of a county, City or Town may obtain a refund from the Game, Fish and Oyster Commissioner, of the tax levied and collected on said gravel, marl, sand or shell or mudshell as fixed by the Game, Fish and Oyster Commissioner at the time of the taking thereof by warrant drawn by the Comptroller upon the fish and oyster fund upon itemized account sworn to by the proper officer

representing said County or any sub-division of a County, City or Town and approved by the Game, Fish and Oyster Commissioner and under such other rules and regulations as may be prescribed by the Game, Fish and Oyster Commissioner. [Acts 1911, p. 118, § 8; Acts 1919, 36th Leg. 2d C. S., ch. 74, § 1 (§ 8).]

Art. 4021j. [Superseded.]

See art. 923n, Penal Code, post.

Arts. 4021k, 4021l.

Explanatory.—These articles do not seem to be superseded by Acts 1919, 36th Leg. 2d C. S., ch. 74, re-enacting the marl and sand law.

CHAPTER THREE

GAME

Art.	Art.
4022. Wild animals, birds, etc., property of people.	4037-4039. [Note.]
4022a. Game birds defined.	4039a. Fines, penalties, forfeitures, etc., to be expended in enforcement of game laws; payments from fund.
4023-4025. [Superseded.]	4039b. Warrants and payments for enforcement of game laws drawn on and made from fund herein provided only.
4026-4029. [Note.]	4040. [Note.]
4030. [Superseded.]	4041, 4042. [Note.]
4031-4034. [Note.]	
4035. Deputy game commissioners; appointment; powers; compensation.	
4035a. Special game commissioners; appointment; powers; compensation.	
4036. [Superseded.]	

Article 4022. Wild animals, birds, and fowl property of people.—All the wild animals, wild birds, wild fowl within the borders of this State are hereby declared to be the property of the people of the State. [Acts 1907, p. 278; Acts 1919, 36th Leg., ch. 157, § 1.]

See ante, note to art. 3974.

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 4022a. Game birds defined.—Wild turkeys, wild ducks, wild geese, wild grouse, wild brant, sand hill cranes, wild prairie chickens or pinnated grouse, wild pheasants, wild partridges, and wild quail of all varieties, wild doves of all varieties, wild pigeons of all varieties, wild snipe of all varieties, wild shore birds, wild robins and wild Mexican pheasants, known as "chacalaca," and wild plover are hereby declared to be the game birds, within the meaning of this Act. [Acts 1903, ch. 137; Acts 1907, p. 278; Acts 1919, 36th Leg., ch. 157, § 2.]

Arts. 4023-4025. [Superseded.]

Explanatory.—These articles, relating to hunting licenses, are superseded by Acts 1919, 36th Leg., ch. 157, §§ 21, 42-44, post, Penal Code, arts. 900½jj, 900½t-900½u.

Arts. 4026-4029.

Explanatory.—These articles do not seem to be superseded by Acts 1919, 36th Leg., ch. 157, re-enacting most of the provisions of this chapter.

Art. 4030. [Superseded.]

Explanatory.—Superseded by Acts 1919, 36th Leg., ch. 157, § 26, set forth, post, as art. 900½m, Penal Code.

Arts. 4031-4034.

Explanatory.—These articles do not seem to be superseded by Acts 1919, 36th Leg., ch. 157, re-enacting most of the provisions of this chapter.

Art. 4035. Deputy game commissioners; appointment; powers; compensation.—The Game, Fish and Oyster Commissioner shall also have power to appoint Deputy Game Commissioners in the several Counties of the State, who shall have the same power and authority as herein provided for the Game, Fish and Oyster Commissioner and shall be subject to the supervision and control of and removal by the said Game, Fish and Oyster Commissioner. Such Deputy Game Commissioners shall receive three (\$3.00) dollars per day for each day's service performed and all necessary expenses incurred, on sworn account when ordered to perform said services by the Game, Fish and Oyster Commissioner or his Chief Deputy, which account shall be approved by the Game, Fish and Oyster Commissioner and paid out of the Game fund in the State Treasury on warrant drawn by the State Comptroller. Such Deputy Game Commissioner may be ex-officio Fish and Oyster Commissioner whenever the Game, Fish and Oyster Commissioner shall so designate them. [Acts 1907, p. 255; Acts 1919, 36th Leg., ch. 157, § 41.]

*Art. 914
V.P.C., 192
Repealed
in 1925*

*Art. 2035
2035a
Combined
with*

*Art. 914
V.P.C., 192
etc*

Art. 4035a. Special game commissioners; appointment; powers; compensation.—It shall be the duty of the Game, Fish and Oyster Commissioner to appoint Special Game Commissioners who shall be ex-officio Deputy Game, Fish and Oyster Commissioners with all the powers of the latter to enforce the Game, Fish and Oyster Laws of this State. Such special game commissioners shall receive not more than one hundred twenty-five (\$125.00) dollars per month, and expenses, each to be paid out of the Special Game Funds on approval of the Game, Fish, and Oyster Commissioner. Each deputy commissioner shall take the oath of office and shall give a good and sufficient bond in the sum of one thousand (\$1,000.00) dollars, for the faithful performance of his duties. Such Special Deputy Game Commissioner shall hold their office at the discretion of the Game, Fish and Oyster Commissioner and have all the power in the discharge of their duty as are conferred on the Game, Fish and Oyster Commissioner. [Acts 1919, 36th Leg., ch. 157, § 40; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 40).]

Took effect 90 days after July 22, 1919, date of adjournment.

Art. 4036. [Superseded.]

Explanatory.—This article is superseded by Acts 1919, 36th Leg., ch. 157, § 34, post, art. 4039a.

Arts. 4037-4039.

Explanatory.—These articles are superseded in part only by Acts 1919, 36th Leg., ch. 157, §§ 34, 35, 40, 41, post, art. 4039a, 4039b, ante, arts. 4035, 4035a.

Art. 4039a. Fines, penalties, forfeitures, etc., to be expended in enforcement of game laws; payments from fund.—All money collected from fines, penalties, forfeitures of bonds for violating the Game Laws of this State, and all moneys collected for hunting licenses and hunting boat licenses, shall belong to the special game fund of this State and shall be paid over by the Game, Fish and Oyster Commissioner to the Treasurer of the State, during the first week of each month and shall be credited to such Special Game fund, and such fund shall be expended in the enforcement of the Game Laws by the Game, Fish and Oyster Commissioner their necessary expenses, and the purchase and supply of means to enable such Commissioner and Deputies to enforce such laws, and all such expenditures shall be verified by the affidavit of the Deputy Game Commissioner to the Game, Fish and Oyster Commissioner and on the approval of such expenditures by the Game, Fish and

Oyster Commissioner it shall be the duty of the Comptroller of the State to draw his warrant on the Treasurer of the State for the amount of such expenditures in favor of the person claiming the same, to be paid out of the special game fund. [Acts 1919, 36th Leg., ch. 157, § 34.]

Art. 4039b. Warrants and payments for enforcement of game laws drawn on and made from fund herein provided only.—At no time shall any warrant be issued or payment made for the enforcement of the Game Laws, employment of Deputy Game Commissioner or the furnishing of means to enforce such laws, or for the conservation or propagation of game of any kind, except on and from the special game fund herein provided for, and if at the end of each year there remains an unexpended balance in such fund the Game, Fish and Oyster Commissioner is required to expend such sums of such balance in the introduction, propagation and distribution in the State of wild game birds and wild game animals and quadrupeds, and in the collection of dressed and mounted specimen of the wild birds and wild animals of Texas. [Acts 1919, ch. 157, § 35; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 35).]

Took effect 90 days after July 22, 1919, date of adjournment.

Art. 4040.

Explanatory.—Superseded in part by art. 4035, ante.

Arts. 4041, 4042.

Explanatory.—These articles do not seem to be superseded by Acts 1919, 36th Leg., ch. 157, re-enacting most of the provisions of this chapter.

TITLE 63 A

GOVERNING BOARDS OF STATE INSTITUTIONS

Article 4042a.

Explanatory.—Superseded as to boards of managers of blind institute, deaf and dumb institute, deaf, dumb and blind institute for colored youths, Confederate home, Confederate women's home, insane asylums, epileptic colony and the orphans' home, by abolition of the boards for such institutions. See art. 7150¼h, post.

TITLE 63 B

GAS UTILITIES

Art. 4042½.	Terms defined; gas utilities affected with a public interest.	Art. 4042½h.	Compensation of witnesses; interested witnesses; free transportation.
4042½a.	Gas pipe lines declared a monopoly subject to regulation by railroad commission; duty of Attorney General.	4042½i.	Compulsory attendance of witnesses; incriminating testimony; fees of officers; contempts.
4042½b.	Railroad commission empowered to fix rates and to establish rules and regulations; review of agreements and entertainment of petitions of interested persons.	4042½j.	Gross income tax; gas utilities fund; allowance as operating expense.
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4042½d.	Discrimination prohibited; proviso.	4042½l.	Gas utilities shall keep office and records in state.
4042½e.	Rights and powers of municipalities preserved; review of municipal acts by commission.	4042½m.	Actions to review decisions of commission; appeal; burden of proof.
4042½f.	Pipe line expert shall assist commission.	4042½n.	Penalty for violations of act or regulations thereunder.
4042½g.	Employment of experts, etc., by commission; compensation; approval of Board of Control.	4042½o.	Receiver.
		4042½p.	Act cumulative.
		4042½q.	Partial invalidity.

Article 4042½. Terms defined; gas utilities affected with a public interest.—The term “gas utility” and “public utility” or “utility” as used in this Act means and includes persons, corporations and companies, their lessees, trustees, and receivers appointed by any court whatsoever, now or hereafter owning, managing, operating, leasing or controlling within this State any wells, pipelines, plant, property, equipment, facility, franchise, license, or permit for either one or more of the following kinds of business:

(1) (a) Producing or obtaining, transporting, conveying, distributing or delivering natural gas, for public use or service for compensation;

(b) or for sale to municipalities of [or] persons or companies, in those cases referred to in paragraph 3 hereof, engaged in distributing or selling natural gas to the public;

(c) or for sale or delivery of natural gas to any person or firm or corporation operating under franchise or a contract with any municipality or other legal subdivision of the State;

(d) or for sale or delivery of natural gas to the public for domestic or other use.

(2) Owning, or operating or managing a pipe line for the transportation or carriage of natural gas, whether for public hire or not, if any part of the right of way for said line has been acquired or may hereafter be acquired by the exercise of the right of eminent domain; or if said line, or any part thereof is laid upon, over or under any public road or highway of this State, or street or alley of any municipality, or the right of way of any railroad or other public utility; including also any natural gas utility authorized by any law to exercise the right of eminent domain.

(3) The business of producing or purchasing natural gas and transporting or causing the same to be transported by pipe or lines to or

near to the limits of any municipality in which said gas is received and distributed or sold to the public by another public utility or by said municipality, in all cases where such business is in fact the only or practically exclusive agency of supply of natural gas to such utility or municipality, is hereby declared to be a virtual monopoly and a business and calling affected with a public interest, and the said business and all properly employed therein within this State are hereby subject to the provisions of this Act and to the jurisdiction and regulation of the Commission as a gas utility.

Every gas utility as defined in this Act is hereby declared to be affected with a public interest and subject to the jurisdiction, control and regulation of the Commission as provided in this Act, provided, that the rates and service of any gas utility plant, property, equipment or facilities owned, or operated by a municipality shall not be subject to the jurisdiction, regulation or control of the Commission. [Acts 1920, 36th Leg. 3d C. S., ch. 14, § 1.]

Took effect 90 days after adjournment which occurred on June 18, 1920.

Art. 4042½a. Gas pipe lines declared a monopoly subject to regulation by railroad commission; duty of Attorney General.—It is declared that the operation of gas pipe lines to which this Act applies for buying, selling, transporting, producing or otherwise dealing in natural gas is a business which in its nature and according to the established method of conducting the business is a monopoly, in the mode of the conduct of which the public is interested, and as such is subject to regulation by law; and accordingly it is provided that from and after the expiration of the time this law takes effect the business of purchasing or of selling gas, or of distributing such gas or of transporting such gas or of producing or dealing in such gas shall not be conducted, unless such gas pipe line so used in connection with such business be subject to the jurisdiction herein conferred upon the Railroad Commission of Texas, hereinafter also referred to as the Commission. It shall be the duty of the Attorney General of Texas to enforce this provision by injunction or other remedy. [Id., § 2.]

Art. 4042½b. Railroad commission empowered to fix rates and to establish rules and regulations; review of agreements and entertainment of petitions of interested persons.—The Railroad Commission after due notice and upon full and fair hearing, shall have the power and it shall be its duty to fix and establish and enforce the adequate and reasonable price of gas and fair and reasonable rates of charges and regulations for transporting, producing, distributing, buying, selling, and delivering gas by such pipe lines in this State; to establish fair and equitable rules and regulations for the full control and supervision of said gas pipe lines and all their holdings pertaining to the gas business in all their relations to the public as the Commission may from time to time deem proper; to establish a fair and equitable division of the proceeds of the sale of gas between the companies transporting or producing the gas and the companies distributing or selling it; and to prescribe and enforce rules and regulations for the government and control of such pipe lines in respect to their gas pipe lines and producing, receiving, transporting, and distributing facilities and to regulate and apportion the supply of gas between towns, cities, and corporations, and when the supply of gas controlled by any gas pipe line shall be inadequate, the Commission shall have the power and it shall be its duty to prescribe fair and reasonable rules and regulations requiring

such gas pipe lines to augment their supply of gas, when in the judgment of the Commission it is practicable to do so; and it shall be the Commission's duty to exercise such power, whether upon its own motion or upon petition by any person, corporation, municipal corporation, county, or commissioner's precinct showing a substantial interest in the subject, or upon petition of the Attorney General, or of any county or district attorney in any county wherein such business or any part thereof may be carried on. All orders and agreements of any company or corporation, or any person or persons controlling such pipe lines establishing or prescribing prices, rates, rules and regulations and conditions of service, shall be subject to review, revision, and regulation by the Commission on hearing after notice as provided for herein to the person, firm, corporation, partnership, or joint stock association owning or controlling or operating the gas pipe line affected. In the event any rate or charge for gas or for service or for meter rental or any other purpose pertaining to the operation of said business shall be made or promulgated by any person, firm or corporation owning or operating any gas pipe line, or in the event of an inadequate supply of gas or inadequate service in any respect, and complaint against same shall be filed by any person authorized by this Act to file such petition, and such complaint is sustained in whole or in part, all persons and customers of said gas pipe line shall have the right to reparation or reimbursement of all excess in charges so paid over and above the proper rate or charge as finally determined by the Railroad Commission from and after the date of the filing of such complaint. [Id., § 3.]

Art. 4042½c. Commission may require reports from operators of gas utilities; determination of complaints; costs.—The Commission may require of all persons or corporations operating, owning or controlling such gas pipe lines, reports duly verified under oath, of the total quantities of gas distributed by such pipe lines and of that held by them in storage, as also of their source of supply, the number of wells from which they draw their supply, the amount of pressure maintained, and the amount and character and description of the equipment employed, and such other matters pertaining to the business as the Commission may deem pertinent. The Commission shall have the authority and power to hear and determine complaints from interested persons, firms or corporations; to require complainants to file cost bond, to require attendance of witnesses at any hearing provided for in this Act, requiring their fees to be paid by the losing party to said proceeding, and to institute suit and issue such writs and process as may be necessary for the enforcement of its orders. [Id., § 4.]

Art. 4042½d. Discrimination prohibited; proviso.—No such pipe line public utility shall directly or indirectly charge, demand, collect or receive from any one a greater or less compensation for any service rendered than from another for a like and contemporaneous service; provided this shall not limit the right of the Commission to prescribe different rates and regulations for the use of gas for manufacturing and similar purposes, and provided this shall not limit the right of the Commission to prescribe rates and regulations for service from or to other or different places, as it may determine; nor shall any such utility discriminate in favor of or against any person, place, or corporation, either in apportioning the supply of gas or in its charges therefor. [Id., § 5.]

Art. 4042½e. Rights and powers of municipalities preserved; review of municipal acts by Commission.—Nothing in this Act shall re-

strict the rights of cities, towns and municipalities to control the use of their public streets and alleys; and nothing in this Act shall be construed as taking away from the cities, towns or municipalities of this State any of their existing powers to regulate the rates, service, rules, regulations, and practices of public utilities operating in such cities, towns or municipalities. When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commissioner by filing with the Commission, on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, restriction, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved in the determination, decision, ordinance or order, of the city, town or municipality, as the Commission may deem just and reasonable. Whenever a public utility so appeals from the decision, restriction, ordinance or order of the city, or town or municipality, to the Commission, the Commission shall hear such appeal de novo and shall treat the appeal or complaint as though it were an original complaint. Whenever any local distributing company or concern whose rates have been fixed or may hereafter be fixed by any municipal government desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government of the city, town or municipality in which such utility is located and such municipal government shall determine said application, within sixty days after said application is presented to it, unless the determination thereof may be longer deferred by agreement between the municipality and the gas utility affected. If the municipal government should reject such application or fail or refuse to act on it within sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission. [Id., § 6.]

Art. 4042½f. Pipe line expert shall assist commission.—The pipe line expert provided for in Section 11 of the Act of February 20, 1917, [1918 Supp., Art. 732½j,] being an Act for the regulation of oil pipe lines, shall likewise assist the Commission in the performance of its duties under this Act, under the direction of the Commission, under such rules and regulations as it may prescribe. [Id., § 7.]

Art. 4042½g. Employment of experts, etc., by commission; compensation; approval of Board of Control.—The Commission shall have power to employ and appoint, from time to time, such experts, assistants, accountants, engineers, clerks and other persons as it shall deem necessary to enable it at all times to inspect and audit all records or receipts, disbursements, vouchers, prices, pay rolls, time cards, books and official records, to inspect all property and records of the utilities subject to the provisions hereof, and to perform such other service or services as may be directed by the Commission or under its authority. Such persons and employes of the Commission shall be paid for the service rendered, such sums at such time and under such conditions as may be fixed and prescribed by the Commission, and such salaries, wages and fees shall be paid out of the moneys and funds as in this Act directed. Provided, however, that the number of employes and appointees employed or ap-

pointed under this Act, and the sum or sums of money paid to them for their services, shall be subject to the approval of the Board of Control, and no employment or appointment hereinafter, shall be valid without such approval. [Id., § 8.]

Art. 4042¹/₂h. Compensation of witnesses; interested witnesses; free transportation.—Each witness who shall appear before the Commission or a Commissioner at a place outside the county of his residence, shall receive for his attendance three dollars per day and three cents per mile traveled by the nearest practicable route, in going to and returning from the place of meeting of said Commission or Commissioner which shall be ordered paid, upon the presentation of proper vouchers, sworn to by such witness and approved by the Commission or the chairman thereof out of the moneys and funds arising under this Act, provided, that no witness shall be entitled to any witness fees or mileage who is directly or indirectly interested in any public utility involved in or concerning which, in any way, the investigation or hearing on account of which he is summoned, shall relate, or who is in anywise interested in any stock, bond, mortgages, security or earnings of any such utility, or who shall be the agent, attorney or employé of such utility, or any officer thereof, when summoned at the instance of such utility; and no witness furnished with free transportation shall receive pay for the distance he may have traveled on such free transportation. [Id., § 9.]

Art. 4042¹/₂i. Compulsory attendance of witnesses; incriminating testimony; fees of officers; contempts.—In case any witness shall fail or refuse to obey a subpoena by the Commission, or a Commissioner, the Commission or Commissioner may issue an attachment for such witness directed to any sheriff or any constable of the State of Texas and compel him to attend before the Commission or any Commissioner thereof, and give his testimony upon such matter as may be lawfully required of him, and to bring with him and produce on examination such records, books, vouchers, memoranda, true copies thereof, prints and such other matter as may be required, if any, in such subpoena. Should a witness fail or refuse to attend on being summoned, or to answer any question propounded to him, or to produce any record or data required to be produced by such subpoena, the claim that any such testimony may tend to criminate the person giving it shall not excuse such witness from testifying or producing such records and data, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. The sheriff or constable executing any process issued by the Commissioner thereof under the provisions of this Act shall receive such compensation as may be allowed by the Commission not to exceed the fees prescribed by law for a similar service. For the purpose of enforcing this Act, and generally, the power and authority is hereby conferred upon the Commission to punish for contempt as courts of record under existing law. [Id., § 10.]

Art. 4042¹/₂j. Gross income tax; gas utilities fund; allowance as operating expense.—Except as in this section provided, every gas utility subject to the provisions of this Act, on or before the first day of January, 1921, and quarterly thereafter, shall file with the Commission a statement, duly verified as true and correct by the president, treasurer or general manager, if a company or corporation or by the owner or one of them, of an individual or co-partnership, showing the gross receipts of such utility for the quarter next preceding or for such portion of

said quarterly period as such utility may have been conducting any business, and at such time shall pay into the State Treasury at Austin, Texas, a sum equal to one-fourth of one per cent of the gross income received from all business done by it within this State during said quarter, to be designated as the "Gas Utilities Fund." The gross receipts tax charge herein required to be paid, when paid, shall be allowed as an operating expense. [Id., § 11.]

Art. 4042½k. Salaries and expenses to be paid from gas utilities fund; deficit to be paid by the state; surplus of fund; limit on expenditures; report to governor.—The salary and expense of the Expert and of his assistants, if any, and the salaries, wages, fees and expenses of every other person employed or appointed by the Commission under the provisions of this Act, and all other expenses, costs and charges, including witness fees and mileage fees and mileage, incurred by or under authority of the Commission or a Commissioner, in administering and enforcing the provisions of this Act, or in exercising any power and authority hereunder, shall be paid from and out of the gas utilities fund by the State Treasurer on warrant of the Comptroller of Public Accounts, on order or voucher approved by the Commission or the Chairman thereof. If the amount or total of such gross receipts charge collected shall not be sufficient, during any quarterly period, to pay such salaries, costs, charges, fees and expenses, then the deficit shall be paid by the State Treasurer out of the general revenue not otherwise appropriated. Until sufficient funds have accrued to said gas utilities fund from payment of said gross receipt tax, said expenses shall be paid by the State Treasurer out of the general revenue not otherwise appropriated. Any surplus remaining in the gas utilities fund, after paying all such salaries, costs, fees and charges after deducting such amount as may be contracted to be paid and incurred and such as may be reasonably estimated by the Commission for its use, shall be paid over to the general revenue fund, at the end of such quarterly period. Provided the expenses authorized in this section shall never exceed in any one calendar year the sum of twenty thousand dollars.

The Commission shall on December 1, 1920, and annually thereafter, make a sufficiently full and comprehensive report to the Governor, which shall be by him transmitted to the next succeeding session of the Legislature of the State, showing in due and sufficient detail:

1. The proceedings of said Commission to such time with respect to the gas utilities defined herein.
2. The receipts in the gas utilities fund from all sources, and indicating the different sources.
3. The expenditures made under and in accordance with this Act, the nature of such expenditures, and which shall also include in addition to other items of expenditures, the names, titles, nature of employment, salaries of and payments made to all persons employed for any purpose under the terms of this Act, with statement of traveling and other expenses incurred by each of said persons and approved by the Commission. [Id., § 12.]

Art. 4042½l. Gas utilities shall keep office and records in state.—Every gas utility as defined in the Act shall have an office in one of the counties of this State in which its property or some part thereof is located and shall keep in the said office all books, accounts, papers, records, vouchers and receipts as shall be required by the Commission. No books, accounts, papers, records, receipts, vouchers or other data required by

the Commission to be so kept shall be at any time removed from this State except upon such conditions as may be prescribed by the Commission. [Id., § 13.]

Art. 4042½m. Actions to review decisions of commission; appeal; burden of proof.—If any gas utility or other party at interest be dissatisfied with the decisions of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause or causes [causes] of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause; and said appeal shall be at once returnable to said appellate court, at either of its terms; and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them. [Id., § 14.]

Art. 4042½n. Penalty for violations of act or regulations thereunder.—Any public utility as herein defined who shall violate any provision of this Act or who shall fail to perform any duty herein imposed or who shall fail to comply with any valid order of the Commission when not stayed or suspended by order of court, shall be subject to a penalty of not less than one hundred dollars nor more than one thousand dollars for each offense, such penalty to be recoverable at suit of the Attorney General of the State of Texas in the name of the State and for its use, each violation to constitute a separate offense, and each day that such failure continues shall constitute a separate offense. Such penalty together with reasonable attorney's fees may also be recoverable by and for the use of any person, corporation or association of persons against whom there shall have been unlawful discrimination as herein defined; such suit to be brought in the name of and for the use of the party aggrieved and may be maintained in any court of proper jurisdiction, having due regard to the ordinary statutes of venue. [Id., § 15.]

Explanatory.—The latter part of this section is set forth, post, as art. 977½, Penal Code.

Art. 4042½o. Receiver.—Whenever any person, firm or corporation owning, operating or controlling such gas pipe line coming under the provisions of this Act, shall violate any of the provisions of this Act or any of the rules or regulations of the Commission, the Commission shall, whenever in its judgment the public interests require it, apply to any court of this State having jurisdiction and venue thereof for a receivership of such concern guilty of such violation. Such receiver shall control and manage the property of such gas pipe line under the direction of the court as is now provided by law in receivership matters. The grounds for appointment of receiver provided for in this section shall

be in addition to other grounds now provided under the existing law. [Id., § 16.]

Art. 4042¹/₂p. Act cumulative.—This Act shall be cumulative of all laws of this State, which are not in direct conflict herewith, regarding the control of gas and pipe line companies or similar corporations in this State. [Id., § 17.]

Art. 4042¹/₂q. Partial invalidity.—If any provisions of this Act shall be held unconstitutional or for any other reason shall be held to be void, such holding shall not have the effect to nullify the remaining parts of this Act, but the parts not so held to be void shall nevertheless remain in full force and effect. [Id., § 18.]

TITLE 64

GUARDIAN AND WARD

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| <p>Chap.</p> <ol style="list-style-type: none"> 1. General provisions. 3. Commencement of proceedings. 4. Persons entitled to be appointed guardians, and persons who are disqualified. 5. Appointment of guardian. 6. Temporary guardian. 7. Oath and bond of guardians. 8. Inventory, appraisal and list of claims. 9. Powers and duties of guardians. 10. Renting and leasing property, and investing and loaning money of ward. | <p>Chap.</p> <ol style="list-style-type: none"> 11. Sales. 12. Reports of sales and action of the court thereon. 13. Annual accounts. 14. Death, resignation and removal of guardians. 15. Claims against the estate. 16. Guardianship of persons of unsound mind, and habitual drunkards. 19. Final settlement. 21. Appeal, bill of review and certiorari. |
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CHAPTER ONE

GENERAL PROVISIONS

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| <p>Art.</p> <ol style="list-style-type: none"> 4043. Jurisdiction of county court over. 4044. Jurisdiction of district court over. 4047. Who is an habitual drunkard. | <p>Art.</p> <ol style="list-style-type: none"> 4050. Order, etc., of court shall be at a regular term, unless, etc. 4051. Provisions governing estates of decedents govern guardianships. |
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Article 4043. [2550] [2469] Jurisdiction of county court over.

See *Young v. Gray*, 60 Tex. 541.

Appointment of guardian.—The county court is a proper tribunal to appoint a guardian for the person of a minor. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Jurisdiction over estate.—Order of probate court, divesting itself of supervisory control of estate in guardianship, was a nullity. *Davis v. White* (Civ. App.) 207 S. W. 679.

Jurisdiction of habeas corpus proceedings.—The county court can issue the writ for a minor child at the instance of its father, who is its natural guardian, and alleges that it is illegally restrained. *Stirman v. Turner* (App.) 16 S. W. 787.

Art. 4044. [2551] [2470] Jurisdiction of district court over.

Custody of minor.—In controversies over custody and guardianship of children, custody will be awarded with reference to interests of children as controlling consideration. *Kirby v. Morris* (Civ. App.) 198 S. W. 995.

Art. 4047. [2554] [2473] Who is an habitual drunkard.

Meaning of term.—This definition does not apply to bond of retail liquor dealer. *Campbell v. Jones*, 2 Civ. App. 263, 21 S. W. 723.

Art. 4050. [2557] [2476] Orders, etc., of court shall be at regular terms, etc.

Jurisdiction of appellate court.—Jurisdiction to require the execution of the judgment affirmed. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Art. 4051. [2558] [2477] Provisions, etc., governing estates of decedents govern guardianships, etc.

Guardian ad litem.—The provisions of this title do not apply to minors represented only by guardian ad litem. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

CHAPTER THREE COMMENCEMENT OF PROCEEDINGS

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| <p>Art.
4061. Commenced by written application.
4062. Who may make application, and what same shall contain.</p> | <p>Art.
4067. County judge shall commence proceedings, when.</p> |
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Article 4061. [2568] [2487] Commenced by written application.
See *Ward v. Compton* (Civ. App.) 203 S. W. 129.

Art. 4062. [2569] [2488] Who may make application, and what same shall contain.

See *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184; note under art. 4067.

Art. 4067. [2574] [2493] County judge shall commence proceedings, when.

Execution against minor.—Judgment creditor not required to procure appointment of guardian for minor judgment debtor. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

CHAPTER FOUR

PERSONS ENTITLED TO BE APPOINTED GUARDIANS, AND PERSONS WHO ARE DISQUALIFIED

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| <p>Art.
4068. Father entitled, where parents live together.</p> | <p>Art.
4070. Surviving parent entitled to.
4078. Who are not qualified.</p> |
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Article 4068. [2575] [2494] Father entitled, where parents live together.

See *Stirman v. Turner* (App.) 16 S. W. 787.
Cited, *Jordan v. Jordan*, 4 Civ. App. 559, 23 S. W. 531.

Art. 4070. [2577] [2496] Surviving parent entitled.

Stepfather as surviving parent.—Surviving divorced father held natural guardian of minor on death of mother leaving second husband. *Gallamore v. Glazier* (Civ. App.) 200 S. W. 854.

Art. 4078. [2585] [2504] Who are not qualified to be guardians.

Persons entitled to appointment.—The surviving parent of minor children who was designated by them as their choice as guardian is entitled to letters of guardianship on their estates, unless disqualified by reason of some matter mentioned in the statute, although the court may be of the opinion that some other person would fill the position better. In *re McLaren's Estate* (Civ. App.) 221 S. W. 1045.

Disqualification by interest.—Where a mother of minors claims all of the estate left by her husband, it is not contrary to good morals and public policy to appoint a third person as a guardian to protect the interest of the minors. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

The statute does not disqualify administrator of minor's deceased parents. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

That a guardian was elected clerk of the probate court did not disqualify him from acting as guardian. *Schwind v. Goodman* (Com. App.) 221 S. W. 579, reversing judgment (Civ. App.) *Goodman v. Schwind*, 186 S. W. 282.

CHAPTER FIVE

APPOINTMENT OF GUARDIAN

<p>Art. 4080. Court may appoint, when. 4081. What facts must appear before ap- pointment is made. 4083. Order of appointment, requisites.</p>	<p>Art. 4084. Minor having guardian may select another, when. 4088. Court may appoint receiver, when.</p>
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Article 4080. [2587] [2506] **Court may proceed to appoint, when.**
See *Williams v. Foster* (Civ. App.) 229 S. W. 896; note under art. 4083.

Art. 4081. [2588] [2507] **What facts must appear before appoint-
ment is made.**—Before appointing a guardian, the court must be satisfied :

1. That the person for whom a guardian is sought to be appointed is a minor, a person of unsound mind, or an habitual drunkard.

2. That the court has jurisdiction of the case.

3. That the person to be appointed is not disqualified to act as such, and is entitled thereto, or in case no person who is entitled thereto, applies therefor, that the person appointed is a proper person to act as such guardian.

4. That the rights of persons or property are to be protected. All issues herein to be determined by the court on hearing, unless a jury is demanded, but it shall not be a prerequisite to such appointment that there has been a jury trial verdict and judgment that the person is of unsound mind, or is an habitual drunkard, nor is such person required to be present at the trial. All appointments of guardians under the present law without a jury are hereby validated.

The remedy herein provided is cumulative of the remedy provided in Title 64, Chapter 16, of the Revised Civil Statutes of Texas, for the guardianship of persons of unsound mind and habitual drunkards, and may be resorted to without invoking the latter remedy. [Acts 1921, 37th Leg., ch. 11, § 1, amending art. 4081, Rev. Civ. St.]

Art. 4083. [2590] [2509] **Order of appointment shall contain what.**

Jurisdiction of appellate court.—Jurisdiction to require execution of the judgment affirmed. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Requisites of order of appointment.—An order of appointment which fails to specify amount of bond and direct clerk to issue letters of guardianship, is defective. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Conclusiveness.—A judgment of the district court appointing a guardian of a minor which has been affirmed by the Court of Civil Appeals is conclusive as to matters set up in affidavits tending to show that other persons should have the custody of the minor at least for a short time, and such matters cannot properly be considered until the judgment is put into effect and the guardian has qualified. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Custody of person.—Possession of a minor cannot properly be awarded in proceedings to appoint a guardian for him. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Art. 4084. [2591] [2510] **Minor having guardian may select another, when.**

Right of infant to select another guardian.—After a minor has reached the age of 14, she has the right, subject to certain qualifications and exceptions, to select her own guardian. *Culwell v. Allen* (Civ. App.) 220 S. W. 362.

Effect of award of custody in divorce.—Minor's expressed desire to exchange the guardianship of one divorced parent for that of the other does not authorize the county court to grant guardianship of his person. *Jordan v. Jordan*, 4 Civ. App. 559, 23 S. W. 531.

Art. 4088. [2595] **Court may appoint a receiver, when.**

Cited in dissenting opinion, *San Antonio & A. P. R. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Record of appointment.—That orders of court appointing receiver of estate of person of unsound mind were not entered of record upon minutes of court, is sufficient

to void judgment taken by receiver as such in case of direct attack on judgment. *McKenzie v. Frey* (Civ. App.) 198 S. W. 1009; *Same v. Sutton* (Civ. App.) 198 S. W. 1012; *Same v. Winters* (Civ. App.) 198 S. W. 1012.

CHAPTER SIX

TEMPORARY GUARDIAN

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| <p>Art.
4091. County judge may appoint temporary guardian of person and estate</p> | <p>Art.
4096. Provisions of title 51 apply.</p> |
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Article 4091. County judge may appoint temporary guardian of person and estate of minor, when, etc.

Appointment of temporary guardian.—Evidence held insufficient to show that temporary guardian was appointed or had himself appointed for mere purpose of giving certain attorneys employment. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

Habeas corpus to determine custody.—The district court has jurisdiction under Const. art. 5, §§ 8 and 16, of a proceeding in habeas corpus to determine question of the custody of a minor, notwithstanding the county court had appointed a guardian who had taken the custody of the minor. *Anderson v. Cossey* (Civ. App.) 214 S. W. 624.

Art. 4096. Provisions of title 51 apply.

Review.—District court has jurisdiction to entertain certiorari to revise order of county court appointing temporary guardian. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

CHAPTER SEVEN

OATH AND BOND OF GUARDIANS

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| <p>Art.
4099. Bond of guardian of the estate.</p> <p>4101. Premium of surety company bond to be paid by guardian.</p> <p>4109. Surety may be relieved in same manner.</p> | <p>Art.
4110. Oath and bond to be presented within twenty days.</p> <p>4112. Sureties released, when, etc.</p> |
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Article 4099. [2600] [2519] Bond of guardian of the estate.

See *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

Liabilities of sureties.—Regarding liability of surety on guardian's bond, no interest can be charged against guardian after his death. *American Bonding Co. of Baltimore, Md., v. Fountain* (Civ. App.) 196 S. W. 675.

Surety on a guardian's bond is not liable for a misappropriation before its execution, not being made so by its terms. *Id.*

A guardian's bond is to be construed with reference to the law in force when and where it was given, and read in the light of the provisions of the law then in force. *American Indemnity Co. v. Noble* (Civ. App.) 216 S. W. 441.

That bank in which ward's funds had been deposited changed name of account to that of newly appointed guardian, but refused to honor a draft drawn by such guardian, did not relieve former guardian and his sureties for failure to turn over the money to recently appointed guardian. *Southwestern Surety Ins. Co. v. Peden* (Civ. App.) 223 S. W. 1114.

Actions on bonds.—Guardian's bond having been given for \$3,000 in favor of six wards, and guardian having made full settlement with two, bond inured to remaining four, one of whom was properly allowed to recover less than fourth of amount of bond against bondsmen. *Lynch v. Bernhardt* (Civ. App.) 201 S. W. 1051.

In suit by wards on guardianship bond, special exception based upon theory that district court had no jurisdiction until wards had invoked all remedies possessed by them in probate court was without merit. *Davis v. White* (Civ. App.) 207 S. W. 679.

— **Sufficiency of evidence.**—Any presumption of money from guardian's sale being in his hands when his bond was given held overcome by evidence that he, having no money of his own, had spent such an amount for his own benefit. *American Bonding Co. of Baltimore, Md., v. Fountain* (Civ. App.) 196 S. W. 675.

Any presumption that guardian had notes belonging to ward established no liability against surety, an outstanding debt belonging to ward not being assets in guardian's hands to charge him; negligence or fraud not being shown. *Id.*

Evidence held insufficient to authorize a finding on issue of whether property re-

ceived in settlement of a previous suit was paid for with money in his hands as guardian. *Wyatt & Wingo v. White* (Com. App.) 228 S. W. 154.

— **Conclusiveness of decree against guardian.**—Notwithstanding decree in accounting suit against guardian as executor and trustee excepted guardianship fund, if guardian in such suit or otherwise has in whole or part accounted to his wards for guardianship fund, his sureties, who were not made parties to accounting suit, are protected to the extent of such accounting. *Davis v. White* (Civ. App.) 207 S. W. 679.

Art. 4101. [2601] [2520] Premium on surety company bond to be paid by guardian.

See *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

Art. 4109. [2608] [2527] Surety may be relieved in same manner.

Discharge of surety.—Surety's letter to county judge requesting release from liability under guardian's bond did not relieve surety from liability, where no petition to be relieved therefrom was filed and where guardian was not cited to appear and give new bond. *Southwestern Surety Ins. Co. v. Peden* (Civ. App.) 223 S. W. 1114.

Art. 4110. [2609] [2528] Oath and bond to be presented within twenty days.

Custody of ward.—County judge held to have no authority to issue a writ commanding the sheriff of another county to take the minor into custody and deliver her to the sheriff of the county of the guardian's appointment, until the guardian had qualified by filing bond and taking an oath. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Art. 4112. [2611] [2530] Sureties released, when, etc.

Liability of original sureties.—Act of second guardian of minors in undertaking to deal with depository with whom minors' first guardian had left their funds as to part of the indebtedness did not release estate of first guardian, her husband, or his sureties from liability for loss of deposit. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

CHAPTER EIGHT

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Art.
4117. Additional inventory, when.

Art.
4120. Inventory may be corrected.

Article 4117. [2616] [2535] Additional inventory, when.

Additional inventories.—If a guardian refuses to comply with an order to file an additional inventory, or in the absence of a new or corrected inventory having been sought in such manner, the proper procedure by the ward is by direct suit against the guardian and his sureties for the amount received and not accounted for. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 4120. [2619] [2538] Inventories, etc., may be corrected, etc.

See *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4117.

CHAPTER NINE

POWERS AND DUTIES OF GUARDIANS

Art.
4122. Of the person.
4124. Guardian of the estate.
4127. Duty to collect estate.

Art.
4128. Shall use diligence to collect claims.
4131. Ward's education and maintenance.

Article 4122. [2621] [2540] Of the person.

Constitutionality of statute.—Such a statute is constitutional. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

Custody of ward.—The district court has jurisdiction under Const. art. 5, §§ 8 and 16, of a proceeding in habeas corpus to determine question of the custody of a minor. *Anderson v. Cossey* (Civ. App.) 214 S. W. 624.

The county judge has no authority to issue a writ commanding the sheriff of another county to take the minor into custody and deliver her to the sheriff of the county of the guardian's appointment, until the guardian has qualified by filing bond and taking an oath. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Art. 4124. [2623] [2542] Guardian of the estate.

Possession and management of estate.—A father, guardian of his minor children, cannot maintain suit against them to divest them of their interest in real property. *Kidd v. Prince* (Com. App.) 215 S. W. 844.

Substitution of guardian for next friend.—That injured minor's father, as next friend, made inadequate settlement through ignorance, held insufficient to require court to substitute the guardian for the father as next friend. *Jones v. Chronister Lumber Co.* (Civ. App.) 204 S. W. 704.

Art. 4127. [2626] [2545] Duty to collect estate.

See *Southwestern Surety Ins. Co. v. Peden* (Civ. App.) 223 S. W. 1114.

Art. 4128. [2627] [2546] Shall use due diligence to collect claims, etc.

See *Southwestern Surety Ins. Co. v. Peden* (Civ. App.) 223 S. W. 1114.

Art. 4131. [2630] [2549] Education and maintenance of ward.

In general.—Where guardian had ample funds as executor and trustee to educate and maintain wards, and was charged under the will to use such funds for that purpose, neither he nor his sureties are entitled to credit for any of guardianship fund expended for such purpose without authority from the probate court. *Davis v. White* (Civ. App.) 207 S. W. 679.

The statute extends to a third person who furnishes necessaries to the ward, the guardian, who is primarily liable, having failed. *Dallas Trust & Savings Bank v. Pitchford* (Civ. App.) 208 S. W. 724.

If a guardian fails or refuses to maintain a ward out of his estate, he should be compelled to by the remedies provided, and a third person is not justified in discharging the guardian's duty. *Id.*

A third person who supplied a ward with necessaries to an amount in excess of income of his estate had no cause of action against guardian for establishment of claim against ward's estate on theory that such cause of action existed at common law. *Id.*

Amount of allowance.—A guardian cannot, in the absence of previous direction by the court, go beyond the clear income of the estate of the ward for his education and maintenance. *Dallas Trust & Savings Bank v. Pitchford* (Civ. App.) 208 S. W. 724.

Pension money as income.—Pension money received by a guardian is "estate" of the ward, and the guardian is not entitled to credit for expenditure thereof for support and education where she did not first procure a court order as required by that article. *Anderson v. Stedum* (Com. App.) 222 S. W. 1090, affirming judgment (Civ. App.) 194 S. W. 1132.

Necessity of authorization and allowance.—Though one supplying necessaries, as maintenance and education, for a minor, is entitled to compensation out of his estate, he must present his claim for amount so expended to probate court, and have it allowed, and if he fails he is not entitled on final accounting as guardian to credits for such expenditures. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Expenses for which estate is liable.—A guardian of minors who did not have established his claims for burial expenses of their father and for his personal expenses incurred in prosecuting suit against a railroad for the father's death is not entitled to allowance of such credits on final accounting. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

CHAPTER TEN

RENTING AND LEASING PROPERTY, AND INVESTING AND LOANING MONEY, OF WARD

<p>Art. 4134. Guardian may carry on or rent farm, etc., under order of court.</p> <p>4136. May rent improved property, other than, etc., without order.</p> <p>4140. Money may be invested, how.</p>	<p>Art. 4146. Contract of investment must be approved by the court.</p> <p>4150. Guardian's liability for interest.</p> <p>4152a. Guardian may make mineral lease.</p> <p>4152b. Same; application, hearing, approval and order.</p>
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Article 4134. [2633] [2552] Guardian may carry on or rent farm, etc., under order of the court.

Power to lease.—Guardian, having executed leases of mineral interests of minors pursuant to order of court under arts. 4152a and 4152b could make a valid lease of the surface without an order, under arts. 4134 and 4136, where such surface lease related to improved property. *Buie v. Porter* (Civ. App.) 228 S. W. 999.

Art. 4136. [2635] [2554] May rent improved property other than, etc., without order.

See *Buie v. Porter* (Civ. App.) 228 S. W. 999; note under art. 4134.

Art. 4140. [2639] [2558] Money may be invested, how.

Loans.—Where guardian made loans of wards' money without authority from court, and never reported loans, and made them without taking lawful security, he was liable for money loaned, if lost to wards. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

Failure to invest.—As to liability of sureties for interest, see *Wyatt & Wingo v. White* (Civ. App.) 228 S. W. 154.

Art. 4146. [2644] [2563] Contract of investment must be approved by the court.

In general.—Where guardian made loans of wards' money without authority from court, and never reported loans, and made them without taking lawful security, he was liable for money loaned, if lost to wards. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

Art. 4150. [2648] [2567] When guardian is liable for interest.

Interest on funds of estate.—A guardian who neglected to invest or loan surplus moneys in his hands belonging to his wards held liable for the principal and 10 per cent. interest as the highest legal rate thereon defined by art. 4977 not 4974, for the time he neglected to invest. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 4152a. Guardian may make mineral lease.—The guardians of the estates of minors or any other persons, appointed under the laws of the State of Texas, which have heretofore been appointed or which may hereafter be appointed, shall have the authority to make mineral leases upon the real estate belonging to the estates of their wards. [Acts 1913, p. 261, §. 1; Acts 1915, 34th Leg., ch. 44, § 1; Acts 1919, 36th Leg., ch. 119, § 1.]

Explanatory.—Sec. 3 of Acts 1919, 36th Leg., ch. 119, repeals Acts 1915, 34th Leg., ch. 44, which in turn repealed Acts 1913, p. 261.

Power to lease.—Guardian, having executed leases of mineral interests of minors pursuant to order of court could make a valid lease of the surface without an order under arts. 4134 and 4136, where such surface lease related to improved property. *Buie v. Porter* (Civ. App.) 228 S. W. 999.

Art. 4152b. Same; application, hearing, approval, and order.—Whenever a guardian of the estate of any persons shall desire to make a mineral lease upon the real estate of his ward, he shall apply to the county judge of the county where such guardianship is pending for authority to make and execute such mineral lease, and such application shall be in writing and sworn to by such guardian, and the county judge, either in term time or vacation, shall hear such application, and shall require such proof as to the necessity or advisability of such lease, and if he shall approve the same, he shall enter an order on the minutes of the probate court, either in term time or vacation, authorizing the guardian to make such mineral lease, which order shall set out the terms upon which it shall be made; provided, that in the case of such leases executed by guardians of minors, no lease shall extend beyond the time that the ward shall become twenty-one years of age, unless at that time the lessee shall have discovered such minerals as are specified in the lease, or any of such minerals, upon the premises described in such lease, in which event the same shall remain in full force so long as such minerals or any or either of them shall be produced in paying

quantities, provided that the marriage of a female ward shall not terminate any lease made hereunder until such ward actually reaches the age of twenty-one years.

Before such application shall be heard by the county judge, notice of such application shall be given by the guardian for one week prior to the time such application shall be heard by publishing same in some newspaper of the county where said guardianship is pending, for one issue of said paper, and such notice shall state when and where such application shall be heard.

It is further provided that after notice and hearing of said application and the granting of the same by the probate court, that said guardian shall be fully authorized to make the mineral lease upon the real estate of the ward, in accordance with the judgment of the county court acting upon the same. [Acts 1913, p. 261, § 2; Acts 1915, 34th Leg., ch. 44, § 2; Acts 1919, 36th Leg., ch. 119, § 2.]

Took effect 90 days after March 19, 1919, date of adjournment.
See *Buie v. Porter* (Civ. App.) 228 S. W. 999.

CHAPTER ELEVEN

SALES

Art.

4153. Certain property to be sold.

4154. Sales of wild stock.

4155. When real estate may be sold.

Art.

4156. Guardian shall apply for order to sell real estate, when.

4162. Order of sale shall state, what.

4164. Terms of sale.

Article 4153. [2651] [2570] Perishable property shall be sold.

See *Glassgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050.

Art. 4154. [2652] [2571] Sales of wild stock.

See *Glassgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050.

Art. 4155. [2653] [2572] When real estate may be sold.

See *Glassgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050.

Sale of homestead.—Proceeds of sale held not exempt from children's creditors. *Ridling v. Murphy* (Com. App.) 228 S. W. 165.

Collateral attack on sale.—Judgment ordering sale cannot be attacked collaterally on account of failure to state statutory grounds in application, and sale must be sustained in subsequent action of trespass to try title. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

Art. 4156. [2654] [2573] Guardian shall apply for order to sell real estate, when.

See *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

Art. 4162. [2660] [2579] Order of sale shall state what.

Collateral attack.—County court's orders have absolute verity in collateral proceeding, presumption prevailing that, when, in order for sale by guardian, property is confined to certain interest in certain estate, court understood what it intended should be sold by guardian, and confined sale to property described. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

The fact that a guardian was clerk of the probate court at the time of sale at his instance he giving the notice of the application would not subject the order to collateral attack. *Schwind v. Goodman* (Com. App.) 221 S. W. 573, reversing judgment (Civ. App.) *Goodman v. Schwind*, 186 S. W. 282.

Art. 4164. [2662] [2581] Terms of sale.

Sale in consideration of property instead of cash and notes.—Where order for sale of ward's property required one-third cash and balance in vendor's lien notes, and the

guardian accepted groceries instead, the ward held entitled to have the sale set aside. *Bishop v. Greek* (Civ. App.) 199 S. W. 367.

The fact that the ward used some of the groceries did not make him liable to refund their value before suing to set aside the sale. *Id.*

Guardian's representation to purchaser that he would give the ward other property, held not to relieve transaction of vice. *Id.*

CHAPTER TWELVE

REPORTS OF SALES AND ACTION OF THE COURT THEREON

Art. 4177. Action of court upon the report.	Art. 4180. Conveyance of real estate, etc.
4178. Sale to be set aside, when.	

Article 4177. [2675] [2593] Action of the court on the report; proviso.

Bond required by proviso.—Successor of guardian required to give bond identical with that given by original guardian. *American Indemnity Co. v. Noble* (Civ. App.) 216 S. W. 441.

Art. 4178. [2676] [2594] Sales shall be set aside, when.

Title to property sold.—Purchaser at guardian's sale could not defeat action to set aside the sale on the ground that the guardian was not authorized to purchase the lots in the first place, and they therefore became his property, when in fact the deed thereto was taken in the name of the ward. *Bishop v. Greek* (Civ. App.) 199 S. W. 367.

Art. 4180. [2678] [2596] Conveyance of real estate.

Property conveyed.—Deed of ward's land, executed by guardian in consummation of sale under order in probate, describing land as interest which ward had in real estate belonging to her deceased father's estate as one of heirs at law, held not to cover lands of ward derived ultimately from father through her deceased brother and mother. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

Necessity of proving authority of grantor.—A deed signed by grantor, per another as curator, reciting that grantor by said curator appeared before the notary and acknowledged its execution, was executed by her curator, and in the absence of evidence of his authority no title passed. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

CHAPTER THIRTEEN

ANNUAL ACCOUNTS

Article 4185. [2683] [2601] Annual account of guardian of person.

See *Prince v. Ladd* (Sup.) 15 S. W. 159.

Custody and support of children under divorce judgment.—Under agreement settling property rights of divorced parties and providing for deposit by husband of fund for support and education of minor son, which was approved and entered as part of divorce judgment, wife held not required to file reports or vouchers of expenditures for son, case not being controlled by the guardianship statute. *O'Neil v. Graves* (Civ. App.) 223 S. W. 264.

CHAPTER FOURTEEN

DEATH, RESIGNATION AND REMOVAL OF GUARDIANS

Art. 4199. Removal of guardian without notice, when.	Art. 4204. Subsequent guardian shall account for what.
4200. Removal after citation.	

Article 4199. [2696] [2614] Removal of guardian without notice, when.

See *Prince v. Ladd* (Sup.) 15 S. W. 159.

Art. 4200. [2697] [2615] Removal after citation.

See *Prince v. Ladd* (Sup.) 15 S. W. 159.

Art. 4204. [2701] [2619] Subsequent guardian shall account for what.

Liability for loss of estate.—The only way in which successor can escape liability to wards is to show he has been unable to collect from persons liable to wards' estate and from estate of first guardian and bondsmen, though he was diligent. *Kunz v. Ragsdale* (Civ. App.) 200 S. W. 269.

Act of second guardian of minors in undertaking to deal with depositary, with whom minors' first guardian had left their funds, as to part of the indebtedness, did not release estate of first guardian, her husband, or his sureties, from liability for loss of deposit. *Id.*

Pleading.—See notes under art. 1827.

CHAPTER FIFTEEN

CLAIMS AGAINST THE ESTATE

Art.		Art.	
4206.	Guardian may pay claim without authentication, when.	4224.	Claim held by guardian, established how.
4207.	Claim shall not be allowed unless supported by affidavit, etc.	4230.	Claim established by judgment shall be filed, etc.
4217.	Claims shall be examined, etc., by the court.	4233.	Payment of claims.
		4234.	Creditor may obtain order for payment.

Article 4206. [2703] [2621] Guardian may pay claim without authentication, when.

Presentation of claim.—As to claim against the estate of the insane surety, see *Webber v. Swift & Co.* (Civ. App.) 226 S. W. 509.

Necessity of authentication.—It is not necessary that a claim against the estate of minors be authenticated where it was contracted by the guardian on behalf of the estate. *Harrison v. Ilgner*, 74 Tex. 86, 11 S. W. 1054.

Art. 4207. [2704] [2622] Claim shall not be allowed unless supported by affidavit, etc.

See *Harrison v. Ilgner*, 74 Tex. 86, 11 S. W. 1054; *Yates v. Watson* (Com. App.) 221 S. W. 966. Affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4224.

Art. 4217. [2714] [2632] Claims shall be examined, etc., by the court.

See *Yates v. Watson* (Com. App.) 221 S. W. 966. Affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4224.

Art. 4224. [2721] [2639] Claim held by guardian, established how.

Guardian's claim for expenses.—One supplying necessities, as maintenance and education, for a minor, must present his claim for amount so expended to probate court, and have it allowed and approved, and if he fails he is not entitled on final accounting as guardian to credits for such expenditures. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

A guardian of minors who did not have established his claims for burial expenses of their father and for his personal expenses in suit for the father's death is not entitled to allowance of such credits on final accounting. *Id.*

Art. 4230. [2727] [2645] Claim established by judgment shall be filed, etc.

See *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66.

Art. 4233. [2730] [2648] Payment of claims.

See *Yates v. Watson* (Com. App.) 221 S. W. 966. Affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4224.

Art. 4234. [2731] [2649] Creditor may obtain order for payment.

See *Glassgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050.

CHAPTER SIXTEEN

GUARDIANSHIP OF PERSONS OF UNSOUND MIND AND HABITUAL DRUNKARDS

<p>Art. 4233. County judge shall issue warrant on information.</p> <p>4243. If verdict is against defendant.</p>	<p>Art. 4245. Provisions as to minors apply to persons of unsound mind.</p>
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Article 4238. [2735] [2653] County judge shall issue warrant on information.

See *Ward v. Compton* (Civ. App.) 203 S. W. 129.

Art. 4243. [2740] [2658] If verdict is against defendant.

Appointment without verdict.—Unless a person has been determined to be of unsound mind by a verdict of a jury, appointment of a guardian is absolutely void. *Ward v. Compton* (Civ. App.) 203 S. W. 129.

The appellate court cannot allow such appointment to stand, although it is for the best interests of all concerned. *Id.*

Art. 4245. [2742] [2660] Provisions as to minors apply to persons of unsound mind.

See *Ward v. Compton* (Civ. App.) 203 S. W. 129.

DECISIONS RELATING TO SUBJECT IN GENERAL

Validity of contracts.—One entitled to disaffirm an act voidable because of an incapacity to perform it must disaffirm the voidable act within a reasonable time after the disability has been removed. *White v. Holland* (Civ. App.) 229 S. W. 611.

Validity of conveyances.—Mortgagee lending money to person of unsound mind is not entitled to recover all of it, where only part of it was expended for necessities. *Bass v. Joseph* (Civ. App.) 201 S. W. 1047.

CHAPTER NINETEEN

FINAL SETTLEMENT

<p>Art. 4271. Citation, when account is filed.</p> <p>4272. Same.</p>	<p>Art. 4273. Action of court upon account.</p>
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Article 4271. [2768] [2686] Citation when account is filed.

Cited, *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75.
See *Young v. Gray*, 60 T. 541.

Art. 4272. [2769] [2687] Same.

Cited, *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75.
See *Young v. Gray*, 60 T. 541.

Art. 4273. [2770] [2688] Action of the court upon account.

Cited, *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75.

CHAPTER TWENTY-ONE

APPEAL, BILL OF REVIEW AND CERTIORARI

Art. 4290. Right of appeal.	Art. 4299. Appeal shall be tried de novo.
4297. Judgment of district court shall be entered of record, etc.	4300. Bill of review may be brought.
	4301. Certiorari.

Article 4290. [2789] [2707] Right of appeal.

See *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4300.

Cited, *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

Omitted heirs.—Heirs omitted from a decree distributing the estate of a deceased ward may appeal without bond under this article from a judgment dismissing their bill of review, brought in the county court, to open the decree of distribution. *Young v. Gray*, 60 Tex. 541.

Art. 4297. [2796] [2714] Judgment of district court shall be entered of record, etc.

Judgment of district court.—On the entry upon the minutes of the county court as its judgment that which the district court rendered on appeal from order appointing guardian, such order is as effectually vacated as though it had never been rendered. *Drew v. Jarvis*, 110 Tex. 136, 216 S. W. 618.

Jurisdiction of appellate court.—Court of Civil Appeals has jurisdiction to require the execution of judgment affirmed. *Williams v. Foster* (Civ. App.) 229 S. W. 896.

Art. 4299. [2798] [2716] Appeal shall be tried de novo.

Disposition of case on appeal.—Upon appeal from a probate court order appointing guardian of a minor's person and estate, a district court order appointing guardian for minor's person only is erroneous, since it does not dispose of entire case. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Awarding custody of minor.—In proceeding to appoint a guardian for minor's personal property, appealed to district court from county court, a district court order awarding custody of child is void. *Sparkman v. Stout* (Civ. App.) 212 S. W. 526.

Art. 4300. [2799] [2717] Bill of review may be brought.

See *Linch v. Broad*, 70 Tex. 92, 6 S. W. 751.

Orders reviewable.—Where one-third of judgment recovered in favor of minors which was paid to their guardian and by him paid to their attorneys was never inventoried by the guardian, and no decision was made by the court concerning it, there was nothing relating to such third to review on bill of review of judgment approving the guardian's final account. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

Art. 4301. [2800] [2718] Certiorari.

See *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548; note under art. 4300.

In general.—District court has jurisdiction to entertain certiorari to revise order of county court appointing temporary guardian, under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4096, 4301. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

TITLE 65

HEADS OF DEPARTMENTS

Chap.	Chap.
1. Secretary of state.	8. State superintendent of public instruction.
2. Comptroller of public accounts.	9. General provisions.
5. Attorney general.	
6. Commissioner of agriculture.	

CHAPTER ONE

SECRETARY OF STATE

Art.	Art.
4304. Shall register governor's acts.	4319. Chief clerk may act, when.
4305. His general duties.	4319a. Exchange of reports of appellate courts, supreme court, and court of criminal appeals, session acts, revised statutes, etc.
4309a. Reports of appellate courts transferred to university library.	
4309b. Same; use of books.	
4309c. Revised statutes for university library.	

Article 4304. [2802] Shall register governor's acts.

Cited, *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Art. 4305. [2803] His general duties.

Cited, *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Art. 4309a. Reports of appellate courts transferred to university library.—Twenty-five sets each of the printed reports of the decisions of the Courts of Civil Appeals, the Court of Criminal Appeals and the Supreme Court of this State now in the possession of the Secretary of State shall be transferred to the Library of the University of Texas and the Librarian of said Library shall hereafter be the custodian of said printed reports. [Acts 1921, 37th Leg. 1st C. S., ch. 26, § 1.]

Took effect Nov. 15, 1921.

Art. 4309b. Same; use of books.—Said reports while in the possession of the University Librarian shall be accessible to those using the University Library to the same extent that other books in such Library are so accessible to such persons. [Id., § 2.]

Art. 4309c. Revised statutes for University library.—The Secretary of State is hereby authorized and directed to turn over to the University Library twenty-five volumes each of the Revised Civil Statutes of 1911 and the Revised Criminal Statutes of 1911 for the use of the University Library. [Id., § 3.]

Art. 4319. [2817] Chief clerk may act, when.

Certified copies of records.—Company's charter certified to be a true copy of that filed in office of the Secretary of State by the chief clerk. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

Art. 4319a. Exchange of reports of appellate courts, Supreme Court, and Court of Criminal Appeals, Session Acts, revised statutes, etc.—The Secretary of State is hereby authorized and directed in addition to the exchanges he is now authorized to make under existing law, to make exchanges of the reports of the several appellate courts of this State, of the Supreme Court and the Court of Criminal Appeals, of the Session Acts of the Legislature, of the existing and future re-

vised Civil and Criminal Statutes of this State, and of other State publications and department reports of this State for the court reports, session acts, revised statutes, Civil and Criminal, and other State publications and department reports of the United States Government, of the other States of the Union, and of foreign countries, for the benefit of the Law Library of the University of Texas, provided that the Secretary of State shall always keep on hand a sufficient number of copies of all State publications to meet the reasonable current demands of the State. [Acts 1919, 36th Leg. 2d C. S., ch. 32, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

CHAPTER TWO

COMPTROLLER OF PUBLIC ACCOUNTS

Article 4343. Chief clerk.

See *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248.

CHAPTER FIVE

ATTORNEY GENERAL

Art.

4418. Shall advise the governor.

4427. Enforce forfeitures of charters, when.

Art.

4434. Governor to order suits, etc.

Article 4418. [2891] Shall advise the governor, etc.

Opinions.—Holdings and opinions of the Attorney General of the state are persuasive, although not binding on the courts. *Smith v. Cathey* (Civ. App.) 226 S. W. 158.

Art. 4427. [2900] Enforce forfeiture of charters, etc.

Railroad.—As to remedies available, see *East Line & Red River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690.

Monopolies.—See *Queen Ins. Co. v. State* (Civ. App.) 22 S. W. 1048; notes under title 130.

Art. 4434. [2907] Governor authorized to order civil suits.

Suit to recover lands.—See *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029; note under art. 5467.

CHAPTER SIX

COMMISSIONER OF AGRICULTURE

Art.

PROTECTION OF FRUIT TREES,
SHRUBS AND PLANTS

4459. Proceedings where diseased trees, etc., are found.

PINK BOLLWORM QUARANTINE

4475a-4475k. [Superseded.]

4475l. *Pectinophora gossypiella* declared a public nuisance.

4475ll. "Pink bollworm" defined.

4475m. "Cotton" or "cotton products" defined.

Art.

4475mm. Policy of state declared.

4475n. Zone on Texas border may be created.

4475o. Special emergency quarantine.

4475p. Destruction of cotton, cotton products or fields of cotton; valuation; report to state comptroller.

4475pp. Supervision of cotton growing in particular areas; submission to and report by Pink Bollworm Commission; non-cotton zones; compensation to owners.

Art.	Art.
4475q. Compensation claim board; duties, proceedings and expenses.	4475s. Cooperation with federal government.
4475qq. Pink Bollworm Commission; salary and expenses.	4475ss. Appropriation; payment of claims for damages and compensation; payment of salaries and expenses.
4475r. Entry into fields or premises.	4475t. Zones continued in effect and validated.
4475rr. Investigations; inspectors; compensation and expenses.	

PROTECTION OF FRUIT TREES, SHRUBS AND PLANTS

Article 4459. Proceedings where diseased trees, etc., are found.— That no person in this State shall knowingly or wilfully keep any peach, almond, apricot, nectarine or other trees affected with the contagious disease known as yellows. Nor shall any person keep for sale any apple, peach, plum or other tree affected with nematode galls, crown galls, fire blight, or root rot. Nor shall any person knowingly or wilfully keep any plum, cherry or other trees affected with the contagious disease or fungus known as black knot or plum canker; nor any tree, shrub or plant infested with or by the San Jose scale or other insect pest dangerously injurious to or destructive of trees, shrubs or other plants; nor any grapefruit, orange or lemon trees, citrus stocks, cape jasmynes or other trees, plants or shrubs infested with "white fly", Florida red scale, cottony cushion scale, wooly aphid, or other injurious insect pests, or citrus canker, or other contagious diseases of citrus fruits; nor subtropical plants, shrubs, evergreens or ornamentals; nor any china, forest or other trees, shrubs, or plants, infested with injurious insect pests or contagious diseases. Every such tree, shrub or plant shall be a public nuisance, and as such it shall be the duty of the Commissioner of Agriculture or his representatives to abate it and no damage shall be awarded for entering upon the premises upon which there are trees, shrubs or plants infected with yellows, black knot, citrus canker, plum canker, fire blight, crown gall or other infectious or dangerous disease, or infected with San Jose scale, Florida red scale, cottony cushion scale, wooly aphid, or other dangerous insect pest, for the purpose of legally inspecting the same; nor shall any damages be awarded for the treatment by the Commissioner of Agriculture or his duly authorized agents or representatives of such trees, shrubs or plants, or for altogether destroying such trees if necessary to suppress such insect pest or disease, if done in accordance with the provisions of this article. But the owner of the trees, shrubs or plants shall be notified immediately upon its being determined that such trees, shrubs or plants should be destroyed, by a notice in writing signed by the commissioner or the person or persons representing him, which said notice in writing shall be delivered in person to the owner of such trees, shrubs or plants, or left at the usual place of residence of such owner, or if such owner be not a resident of the locality, to notify by leaving such notice with the person in charge of the premises, trees, shrubs or plants, or in whose possession they may be. Such notice shall contain a brief statement of the facts found to exist, whereby it is necessary to destroy such trees, shrubs or plants, and shall call attention to the law under which it is proposed to destroy them, and the owner shall within ten days from the date upon which such notice shall have been received, remove and burn all such diseased or infected trees, shrubs or plants. If, however, in the judgment of said commissioner, or person representing him, any tree, shrub or plant infected with any disease, or infested with dangerously injurious insects, can be treated with sufficient remedies, he may direct such treatment to be carried out by the

owner under the direction of the commissioner, agent, employé or representatives. In case of objections to the findings of the chief inspector, employés or representatives of the commissioner, an appeal may be made to the commissioner, whose decision shall be final. An appeal must be taken within five days from service of said notice, and shall act as a stay of proceedings until it is heard and decided. When the commissioner, or chief inspector, or employé, or representative appointed by him, shall determine that any tree or trees, shrub or other plants must be treated or destroyed forthwith, he may employ all necessary assistance for that purpose, and such representative or representatives, agent or agents, employé or employés may enter upon any or all premises necessary for the purpose of such treatment, removal or destruction. But such commissioner or the person representing him shall, before such treatment or destruction, first require the owner or person in charge of the trees, shrubs or plants, to treat or destroy same as the case may be; and upon the refusal or neglect upon the part of said owner or person in charge to so treat or destroy such trees, plants or shrubs, then such commissioner, chief inspector, or person or persons representing him shall treat or destroy such trees, shrubs or plants, and all charges and expenses thereof shall be paid by such owner or person in charge of said trees, shrubs or plants, and shall constitute a legal claim against such owner or person in charge, which may be recovered in any court having jurisdiction upon the suit of such commissioner or chief inspector, or the county attorney of the county where the premises are situated, together with all costs, including an attorney fee of ten dollars, to be taxed as other costs. [Acts 1909, p. 316; Acts 1921, 37th Leg., ch. 49, § 1, amending art. 4459, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

Constitutionality.—Rev. St. art. 4459, authorizing commissioner of agriculture to declare any trees infested with injurious insect pests or contagious diseases of citrus fruits a public nuisance, with absolute power to summarily destroy them, and making the commissioner's finding as to the existence of such pests or contagious diseases final, held invalid in so far as it makes the decision of the commissioner of agriculture final as to the existence of insect pests. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

Police power.—The state's police power to define public nuisances is limited to declaring only those things to be such nuisances which are so in fact. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

Review of proceedings.—Findings by commissioner of agriculture as to existence of citrus canker reviewable. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

PINK BOLLWORM QUARANTINE

Arts. 4475a-4475k.

Explanatory.—These articles, originally composed of Acts 1917, 35th Leg. 3d C. S., ch. 11, were superseded by Acts 1919, 36th Leg. ch. 41, which was in turn superseded by Acts 1920, 36th Leg. 3d C. S., ch. 42, set forth post as arts. 4475l-4475t.

Art. 4475l. *Pectionphora gossypiella* declared a public nuisance.—The *Pectionphora gossypiella*, Saunders, known as the pink bollworm, is recognized as a destructive pest of cotton, and is hereby declared a public nuisance and a menace to the cotton industry, and its eradication is a public necessity. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 1.]

Took effect Nov. 15, 1921.

Art. 4475ll. "Pink bollworm" defined.—The "pink bollworm" in this Act shall mean the insect in its various stages of development, including the egg, larval, pupal and adult stages. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 2.]

Art. 4475m. "Cotton" or "cotton products" defined.—The term "cotton" or "cotton products" in this Act shall mean cotton in the seed, ginned lint cotton, seed, hulls, cotton in the bolls, cotton stalks, and any and all character of cotton products except oil and meal. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 3; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 3.]

Art. 4475mm. Policy of state declared.—It is hereby declared the policy of the State in endeavoring to control and eradicate the pink bollworm to employ all such methods as scientific research demonstrates to be successful and as may be sanctioned by constitutional warrant, including inspection of cotton plants in the fields, or of cotton and cotton products wherever stored; the quarantine and fumigation of cotton and cotton products found to be contaminated; supervision of the growing of cotton in areas known to be contaminated; destruction of infested fields of cotton, or cotton, or cotton products; and the prevention of planting of cotton in areas where infestation has been found. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 4.]

Art. 4475n. Zone on Texas border may be created.—If the Commissioner of Agriculture of this State determines, through his cooperation with the Secretary of Agriculture of the United States, that the pink bollworm exists outside of Texas but adjacent to the Texas border, he shall certify that fact to the Governor, who shall thereupon cause the convening of the Pink Bollworm Commission appointed as hereinafter provided for, which Commission shall give notice of, and hold, a hearing in the manner provided in Section 8 hereof [Art. 4475pp] at some central and easily accessible point in the county or counties in this State along the boundary adjacent to such infestation, and investigate into the danger to the cotton industry of Texas from such infestation adjacent to the Texas border and make such recommendation to the Governor as they deem sufficient to the protection of the cotton industry of the State. Should this report express the conclusion that it is dangerous to the cotton industry of Texas that cotton be grown in this State along the boundary adjacent to such infestation, the Governor shall thereupon proclaim such area as may be set out in said report a non-cotton zone, in which it shall be unlawful to plant, cultivate or grow any cotton for such period as the proclamation may specify; and if such report indicates that it will be safe to grow cotton under rules and regulations within such zone adjacent to the infestation outside of Texas, the Governor shall thereupon issue his proclamation declaring it unlawful to grow cotton within such area as may be recommended by the Pink Bollworm Commission, except under such rules and regulations as the Commissioner of Agriculture shall promulgate. Should the report of the Pink Bollworm Commission indicate that it may be dangerous to the cotton industry of this State to allow the free movement of contaminated material from such infested territory into this State the Governor shall thereupon proclaim a quarantine against such infested territory, and thereafter it shall be unlawful to import into Texas from such quarantined territory any thing or substance liable to be contaminated with pink bollworm, and it shall be the duty of the Commissioner of Agriculture of this State to maintain a rigid inspection of articles liable to be contaminated which are being carried from such quarantined territory into the State of Texas. Provided, however, before recommending the establishment or continu-

ance in any county in this State bounded by an international boundary line, of a non-cotton zone, under this or any other section of this Act, the Pink Bollworm Commission shall give careful consideration to the conditions existing, or likely to exist, on the non-Texas side of said boundary line, and the evidence concerning such conditions shall be such as to reasonably show that the establishment of a non-cotton zone in said county will effectively protect the cotton industry of this State against the further spread of the infestation. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 1; Acts 1919, 36th Leg., ch. 41, §§ 1, 2; Acts 1920, 36th Leg. 3d C. S., ch. 42, §§ 5, 6; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 5.]

Art. 4475o. Special emergency quarantine.—If the pink bollworm shall be found in any gin, cotton seed oil mill, cotton seed warehouse, compress, or transportation vehicle in the State, or in any field of cotton, the Commissioner of Agriculture of the State shall immediately certify that fact to the Governor, who shall proclaim a special emergency quarantine surrounding the known location of the pest to such extent as may be determined sufficient to prevent the spread of the pink bollworm, and it shall be unlawful for any person or persons to ship any cotton or cotton products of any kind from such quarantined district, or transport any car, vehicle, or freight, or any other article liable to carry the pink bollworm from the quarantined area through, or to any other point in the State, except under such rules and regulations as the Commissioner of Agriculture shall promulgate; such emergency quarantine shall continue in full force and effect until such time as a hearing, as provided for in this Act, can be held by the Pink Bollworm Commission provided for herein. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 5; Acts 1919, 36th Leg., ch. 41, §§ 5, 7; Acts 1920, 36th Leg. 3d C. S., ch. 42, §§ 7, 8; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 6.]

Art. 4475p. Destruction of cotton, cotton products or fields of cotton; valuation; report to state comptroller.—When it is deemed necessary to the protection of the cotton industry of Texas that the Commissioner of Agriculture shall destroy cotton, cotton products, or fields of cotton in which the pink bollworm shall have been found or which are probably contaminated by being near infestation of the pink bollworm, he shall report such condition to the Governor, setting out in detail the area or amount of cotton or cotton products to be destroyed. The Governor shall thereupon declare such cotton or fields of cotton a public menace. Before the destruction of such cotton or cotton products the Compensation Claim Board, hereinafter provided for, shall go upon the premises and report to the Commissioner of Agriculture the value of the fields of cotton or cotton products to be destroyed. The Commissioner of Agriculture shall then be empowered to use all authority requisite to the complete destruction of such cotton, cotton products or fields of cotton to prevent the spread of the pink bollworm from such localities. The Commissioner of Agriculture shall certify to the fact of such cotton products or fields of cotton having been destroyed and shall file such report and certificate with the State Comptroller, who shall issue his warrant upon the State Treasurer for such sum as may be declared just and due. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 6; Acts 1919, 36th Leg., ch. 41, §§ 6, 8; Acts 1920, 36th Leg. 3d C. S., ch. 42, §§ 9, 10; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 7.]

Art. 4475pp. Supervision of cotton growing in particular areas; submission to and report by Pink Bollworm Commission; non-cotton

zones; **compensation to owners.**—Whenever the Commissioner of Agriculture of this State shall deem it necessary to the protection of the cotton industry of Texas that the growing cotton within any area within the State, except as provided for in Sections 5 and 6 of this Act [arts. 4475n, 4475o] be placed under supervision, or that cotton growing be prohibited as a means of aiding in the control and eradication of the pink bollworm, he shall cause to be made a thorough examination of such area by a competent and experienced entomologist, who shall, after going upon the premises and after making an examination in person, report the result thereof to the Commissioner of Agriculture. Should this report express the conclusion that the pink bollworm exists within the territory under investigation, the Commissioner of Agriculture shall certify this report to the Governor, who shall cause the Pink Bollworm Commission, hereinafter provided for, to hold a hearing at some central and easily accessible point within the area under investigation; due notice of the time and place of such hearing shall be published in some newspaper in or near the county or counties under investigation, at least ten days before such hearing. It shall be the duty of the Commissioner of Agriculture to present to the Commission a statement setting forth the following facts:

1. The name of the entomologist making the examination on behalf of the State Department of Agriculture.
2. The date when such examination was made.
3. The locality where the pink bollworm is alleged to exist.
4. Any other information deemed necessary by the Commission for the discharge of its duties under the provisions of this Act.

Such statement shall be verified by oath of the person making the same and shall be filed and preserved in the office of the Commissioner of Agriculture and be open to the inspection of the public. It shall be the duty of the said Pink Bollworm Commission to make a report to the Governor immediately after the hearing. Should this report and recommendation be for the prevention of the planting of cotton in any area and for the establishment of a non-cotton zone, such recommendation shall specify the area to be embraced in the proposed non-cotton zone. Upon the receipt of this report, it shall be the duty of the Governor to declare the growing of cotton within such area as may be recommended by the Pink Bollworm Commission a public menace, and thereafter it shall be unlawful to plant, cultivate or grow cotton, or to allow cotton to grow within such zone, such proclamation of the Governor to remain in effect until the Pink Bollworm Commission, herein provided for, shall have certified that the condition of menace no longer exists. In the event of the establishment of any non-cotton zone as authorized by this Act, all persons prevented from producing cotton in the non-cotton zones shall be entitled to receive compensation from the State in the measure of the actual and necessary losses sustained thereby. The Compensation Claim Board, herein provided for, shall have full power and authority to determine the amount of compensation to such persons. In determining the actual and necessary losses, the Compensation Claim Board shall take into consideration the value of the average yield of cotton and other crops second in economic importance thereto in that vicinity; the total amount of land planted to crops during the year for which compensation is claimed; the percentage of such land customarily planted in cotton in that vicinity, and such other factors as they deem essential. The words "cultivated crops" as used above shall not be construed to

include any small grain crops, hay or pasture crops which are not cultivated during the growing season. Provided that no person shall be entitled to compensation who does not in good faith obey the proclamation of the Governor establishing such non-cotton zone. Should the report of the Pink Bollworm Commission express the conclusion that it will not be dangerous to the cotton industry of Texas to permit the growing of cotton within such district under such rules and regulations as it shall be deemed adequate to prevent the spread of the pink bollworm, it shall be the duty of the Governor to proclaim such area as may be set out in the report of the Pink Bollworm Commission a regulated zone, in which it shall be unlawful to plant, cultivate and market cotton under such rules and regulations as shall be promulgated therefor by the Commissioner of Agriculture, which may include the planting of seed from non-infested territory, ginning at designated gins, milling or disinfecting of all seed produced within such zone, marketing, cleaning of fields, and such other rules as may be found necessary; provided that no ginner shall be authorized to gin cotton from regulated zones unless he shall disinfect all seed under such rules as the Commissioner of Agriculture shall prescribe. Such proclamation of the Governor, establishing such regulated zone shall remain in effect until the Pink Bollworm Commission, herein provided for, shall have certified that the condition of menace no longer exists. [Acts 1917, 35th Leg. 3d C. S., ch. 11, §§ 3, 7; Acts 1919, 36th Leg., ch. 41, §§ 3, 10; Acts 1920, 36th Leg. 3d C. S., ch. 42, §§ 11, 12; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 8.]

Art. 4475q. Compensation claim board; duties, proceedings, and expenses.—As soon as practicable after the passage of this Act the Governor shall appoint a Compensation Claim Board for the State, who shall serve until relieved therefrom by the Governor, whose duty it shall be to determine in the manner herein provided the measure of compensation due persons prevented from growing cotton and the damages sustained by persons having cotton condemned and destroyed as provided for herein. The said Board shall be composed of three citizens of the State residing outside any area under quarantine under the provisions of this Act, at least two of whom are actually engaged in the production of cotton. Before entering upon their duties, the members of the Board shall take the constitutional oath of office required of officers of the State, and shall organize by electing one of its members chairman and the Commissioner of Agriculture shall act as ex-officio secretary. They shall have authority to administer oaths for the purpose of taking testimony. The concurrence of two members of the Board shall constitute legal action. The members of the Board shall receive as compensation the sum of five (\$5.00) dollars per day and actual necessary traveling expenses when engaged in the performance of their duties. The Compensation Claim Board shall conduct a public hearing in the county or counties from which the claims for compensation have been filed, due notice of which hearing shall be given by publication in some newspaper published in or near the county or counties in which the claimant resides, not less than ten days before the date of such hearing, and by mailing from the office of the Commissioner of Agriculture a letter to each claimant, not less than ten days before the date of such hearing, which notices shall state the time and place of each hearing. Every such claim for compensation from the State shall be made under oath, attested by two citizens of the county in which the claimant resides, upon blanks to be furnished by the Commis-

sioner of Agriculture, and except when the claim is for compensation for losses under previous acts, shall be filed in the office of the Commissioner of Agriculture not later than November 15 of the year for which claim for compensation is made. Claims for compensation for losses incurred under previous Acts shall be filed within ninety days after this Act takes effect, but no such claim shall be paid out of any appropriation made herein. Every such claim shall state:

1. The name and postoffice of the claimant.
2. The location of the farm upon which the claim is based.
3. The total acreage of all cultivated crops produced in the year in which such claim is presented.
4. All other information deemed essential by the said Compensation Claim Board for the performance of the duties devolved upon them by this Act.

Each allotment of compensation shall be evidenced by a written order, entered in a permanently bound book kept by the Board in the office of the Commissioner of Agriculture, and a certified copy of each allotment shall be given the claimant. If any claimant is dissatisfied with the action of the Claim Board on his claim, he shall have the right within six months after the decision of the Claim Board to make application to the District Court of the county of which he is a resident or in which his cotton was destroyed or in which he was prevented from growing cotton and have the action of the Claim Board reviewed by such District Court. If the State, acting through the Commissioner of Agriculture, is dissatisfied with any such decision of the Claim Board, it shall likewise have the right to resort to said court for such review. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 14; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 9.]

Art. 4475qq. Pink Bollworm Commission; salary and expenses.—

As soon as practicable after the passage of this Act, the Governor of the State shall appoint a Pink Bollworm Commission for the State composed of five men who shall serve until relieved therefrom by the Governor, whose duties are defined herein. One shall be appointed upon the recommendation of the Commissioner of Agriculture of Texas; one upon the recommendation of the Secretary of Agriculture of the United States; one upon the recommendation of the District Judge of the county or counties under consideration; and two upon his own discretion; provided that the latter two citizens shall be actual cotton growers. Should any of the officials herein authorized to make recommendations for appointment fail or refuse so to do, or should any person so nominated refuse to serve or become incapacitated for service, the Governor shall make such appointment upon his own discretion. The Pink Bollworm Commission shall take the constitutional oath of office and shall have authority to administer oaths for the purpose of taking testimony. They shall organize by electing one of their number chairman and the Commissioner of Agriculture shall be ex-officio secretary. They shall receive a salary of five (\$5.00) dollars per day and actual and necessary traveling expenses while actually engaged in the performance of their duties. [Acts 1920, 36th Leg. 3d C. S., ch. 42, § 11; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 10.]

Art. 4475r. Entry into fields or premises.—For the purpose of complying with the requirements of this Act, the Commissioner of Agriculture and his authorized agents shall have the power to enter into any field or fields of cotton or upon any premises in which cotton or its

products may be stored or held, and may examine any products or container of cotton or thing or substance liable to be infested with the pink bollworm, and shall have power to enter upon any premises for the purpose of issuing permits and to examine all books and records of purchasers or handlers or common carriers of cotton and cotton products. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 8; Acts 1919, 36th Leg., ch. 41, § 11; Acts 1920, 36th Leg. 3d C. S., ch. 42, § 15; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 11.]

Art. 4475rr. Investigations; inspectors; compensation and expenses.—The Commissioner of Agriculture shall make adequate investigation to determine the presence of the pink bollworm in the State and shall take prompt action to secure the establishment and maintenance of an effective quarantine of all infested areas that may be discovered within the State, pursuant to the provisions of this Act. For the purpose of carrying out the provisions of this Act, the Commissioner of Agriculture may employ inspectors, and such other help as he may deem necessary, and may prescribe the duties of such inspectors and other help; provided that no person shall be appointed as an inspector who has not had at least two years actual experience as an entomologist, or two years training as an entomologist in the Science Department of some reputable college or university; and provided further that such inspectors shall be paid not exceeding one hundred and fifty (\$150.00) dollars per month and their necessary expenses. [Acts 1917, 35th Leg. 3d C. S., ch. 11, §§ 4, 11a; Acts 1919, 36th Leg., ch. 41, §§ 4, 15, 16; Acts 1920, 36th Leg. 3d C. S., ch. 42, § 16; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 12.]

Art. 4475s. Cooperation with federal government.—It shall be the duty of the Commissioner of Agriculture to co-operate with the Secretary of Agriculture of the United States in any measure authorized and to be undertaken by authority of the Federal Government in preventing the introduction or establishment of the pink bollworm in the State of Texas. In the event that the Congress of the United States should appropriate any moneys with which to assist the State of Texas in the payment of compensation to farmers for being deprived of the right to plant cotton, and should such appropriation by Congress provide for this money to be disbursed by the State of Texas, the Treasurer of the State of Texas is hereby authorized to receive such moneys from the United States Government, and the Commissioner of Agriculture is hereby authorized to disburse same in accordance with the laws of the State of Texas and the United States. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 9; Acts 1919, 36th Leg., ch. 41, § 12; Acts 1920, 36th Leg. 3d C. S., ch. 42, § 17; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 13.]

Art. 4475ss. Appropriation; payment of claims for damages and compensation; payment of salaries and expenses.—For the purpose of carrying out the provisions of this Act there is hereby appropriated out of any funds in the general revenue not otherwise appropriated the sum of one hundred twenty-five thousand (\$125,000.00) dollars, one hundred thousand (\$100,000.00) dollars of which may be used in the payment of compensation and damages which may become due under the provisions of this Act, and the remaining twenty-five thousand (\$25,000.00) dollars of which may be used in the payment of expenses incurred in the administration of this Act, which shall include salaries, expenses, printing, postage, telegraph, telephone, express, etc., needed

in the enforcement of this Act. All claims for damages and claims for compensation arising from the enforcement of the provisions of this Act shall be paid on certified statement by the Chairman of the Compensation Claim Board, or upon certified copy of the final judgment of a court of competent jurisdiction, by warrants drawn by the Comptroller of the State upon the State Treasurer, and all salaries and other expenses of whatsoever nature incurred in the administration of this Act shall be paid in the usual way upon a certified statement of the Commissioner of Agriculture. [Acts 1921, 37th Leg. 1st C. S., ch. 41, § 14.]

Explanatory.—Sec. 15 is set forth, post, as art. 729½a, Penal Code. Sec. 16 repeals all laws in conflict.

Art. 4475t. Zones continued in effect and validated.—All regulated zones and non-cotton zones in effect for 1921 are hereby renewed and carried forward and shall be subject to the provisions of this Act, and all procedure taken to establish such zones when this Act becomes effective are hereby validated, and all unexpended portions of appropriations heretofore made for the control and eradication of the pink bollworm are hereby re-appropriated and carried forward. [Id., § 17.]

CHAPTER EIGHT

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

Art.
4509. Election of.

Art.
4510. General duties.

Article 4509. Election of.

See *Nance v. Johnson*, 84 Tex. 401, 19 S. W. 559.

Art. 4510. General duties.

Appeals.—Taxpayers, unless they have exhausted the statutory remedies, cannot maintain a suit to enjoin the payment of the school fund to a teacher on the ground that the teacher maintained a sectarian school, and that the trustees had no authority to make the contract. *Nance v. Johnson*, 84 Tex. 401, 19 S. W. 559.

Appeal to higher school officials from refusal of school trustees to form school district from parts of other districts is a condition precedent to remedy in the district court. *Jennings v. Carson* (Com. App.) 220 S. W. 1090, reversing judgment (Civ. App.) 184 S. W. 562.

Such appeal is also a condition precedent to the issuance of an injunction against the abolition of a district and the consolidation of its territory with other districts. *County Trustees of Navarro County v. Bell Point Common School Dist.* (Civ. App.) 229 S. W. 697.

An appeal must be taken to the superintendent before parties aggrieved by an order of a district board appointing a depository can be reviewed by the courts. *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

CHAPTER NINE
GENERAL PROVISIONS

Art.
4520¹/₄. Inventories of public property filed
with Superintendent of Public
Buildings and Grounds.
4520¹/₄a. Disposition of public property.

Art.
4520¹/₄b. Requisitions for furniture, etc., by
department heads.
4520¹/₄c. Payment for purchases for de-
partments.

Article 4520¹/₄. Inventories of public property filed with Superintendent of Public Buildings and Grounds.—Within sixty days after this Act becomes effective and on or before the 31st day of January each year thereafter, it shall be the duty of the head of each department of the State government, with his office located in the capitol or in the State land office building in the City of Austin, to make up and file with the Superintendent of Public Buildings and Grounds a complete inventory of all furniture, fixtures, machinery, machines, typewriters and other office utilities belonging to the State, except books and stationery. If the head of any such department, in making up his inventory, finds that he has not on hand any such property of the State which has been received by him, then he shall at the same time file with the Superintendent of Public Buildings and Grounds a statement showing the disposition of such property, and if the same be lost or disposed of without authority, or by reason of the carelessness or negligence of such officer, then such officer shall be responsible to the State therefor and shall replace the same in his Department or pay the reasonable value thereof, to be ascertained by the Superintendent of Public Buildings and Grounds, to the State. It shall be the duty of the Superintendent of Public Buildings and Grounds to check up such inventories from time to time and make demand on the heads of the various departments of the State government, subject hereto, for the restoration or payment for all property not lawfully accounted for by such departmental head. [Acts 1918, 35th Leg. 4th C. S., ch. 42, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 4520¹/₄a. Disposition of public property.—The departmental heads subject to this Act shall neither purchase nor sell any of the personal property enumerated in Section 1 hereof, but when they have any such property which may no longer be used by them they shall deliver the same to the Superintendent of Public Buildings and Grounds, taking his receipt therefor, who in turn may deliver the same to some other department in need of such property or utility. It shall be the duty of the Superintendent of Public Buildings and Grounds to furnish the various departments referred to in this Act with all furniture, fixtures, office necessities and utilities named in Section 1 of this Act [Art. 4520¹/₄], except stationery and books, and where he does not have the same on hand, he shall purchase the same. Where a system of purchasing these articles is provided by law through the State Purchasing Agent, then the Superintendent of Public Buildings and Grounds shall obtain the same through the State Purchasing Agent's contract; otherwise he shall purchase the same on his own record in the open market and supply the departmental heads therewith; provided, however, that all purchases made prior to the 31st day of August, A. D., 1918, shall be made as now provided in the appropriation bills. [Id., § 2.]

Art. 4520¹/₄b. Requisitions for furniture, etc., by department heads.—When the head of any department of the State Government mentioned in this Act is in need of any furniture, fixtures, machinery, machine, typewriter or other utilities, except books and stationery, he shall make a written requisition addressed to the Superintendent of Public Buildings and Grounds stating his particular needs; which requisition shall be kept on file by the Superintendent of Public Buildings and Grounds in his office as a permanent record. It shall be the duty of the Superintendent of Public Buildings and Grounds to furnish suitable requisition blanks to the heads of all departments covered by this Act. The Superintendent of Public Buildings and Grounds, shall keep on file in his office a permanent record showing the requisitions received by him from the various departmental heads and showing what dispositions were made of same. [Id., § 2a.]

Art. 4520¹/₄c. Payment for purchases for departments.—Provided that until funds are appropriated for the purpose of this Act to be expended hereunder, the purchase made for any particular department shall be paid for out of the existing appropriation made for such department available for such purpose, and the account for same shall be approved by the head of the department for which said purchases were made, and the Superintendent of Public Buildings and Grounds. [Id., § 2b.]

TITLE 66

HEALTH—PUBLIC

Chap.	Chap.
1. Texas state board of health.	6b. Water supply.
2. Sanitary code.	7. Embalming board.
5. Special quarantine regulations.	8. Venereal diseases.
5a. Sale of quarantine property to the United States.	9. Employment of diseased persons.
6. Pure food regulations.	10. Barber and beauty shops.
6a. Bakeries.	11. Ophthalmia neonatorum.

CHAPTER ONE

TEXAS STATE BOARD OF HEALTH

Art.	Art.
4536. Members of board may enter, examine and inspect, etc.	4541. City health officer.

Article 4536. Members of board may enter, examine and inspect, etc.

Legislative policy.—Legislative policy indicated. *Debenham v. Short* (Civ. App.) 199 S. W. 1147.

Art. 4541. City health officer.

Liability of officers.—Health officers of a municipality are not liable in damages for discrimination in enforcement of an ordinance requiring school children to be vaccinated. *Zucht v. King* (Civ. App.) 225 S. W. 267. See, also, art. 979.

CHAPTER TWO

SANITARY CODE

Art.	DEPOTS, RAILWAY COACHES AND SLEEPING CARS
4553a. Sanitary code.	Art.
QUARANTINE AND DISINFECTION	Rule 61. Water coolers to be provided; manner of cleaning.
Rule 28. School may be reopened after disinfection and vaccination.	4553aa. Sale or advertisement of drugs for cure of venereal diseases, etc.

Article 4553a. Sanitary code.

Police power.—Legislature under police power has authority to authorize establishment of quarantine regulations for protection of the public against contagion, and incident thereto to authorize arrest and detention of persons whose condition is such as to spread disease. *Ex parte Hardcastle*, 34 Cr. R. 463, 208 S. W. 531, 2 A. L. R. 1539.

The power to enact laws for sanitary purposes and protection of the health of the public is inherent in every sovereignty. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Any occupation, trade, or profession may be regulated in the interest of the public health, safety, or morals. *Id.*

QUARANTINE AND DISINFECTION

Rule 28. School may be reopened after disinfection and vaccination.

Validity of vaccination requirement.—Resolution of school board excluding unvaccinated children from schools held not unreasonable where there was smallpox within the district and danger that it would spread and be communicated from one person to another. *Staffel v. San Antonio School Board of Education* (Civ. App.) 201 S. W. 413.

Charter of independent school district authorizing board of education to establish,

manage and control schools, held to authorize board to prescribe vaccination as condition of admission to schools if requirement is not unreasonable. *Id.*

Resolution of board of education for exclusion from schools of unvaccinated children held not in violation of Const. art. 7, §§ 1, 2, 3, 4, and 5, or Rev. St. 1911, §§ 2899-2901, as to public free schools. *Id.*

An ordinance denying pupils right to attend school unless vaccinated for smallpox, there being smallpox in the community, does not deprive pupils or parents of liberty or property without due process of law under Const. U. S. Amend. 14, and Const. Tex. art. 1, § 19. *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S. W. 303.

An ordinance, denying pupils the right to attend school unless vaccinated for smallpox, does not interfere with any rights of conscience in matters of religion under Const. art. 1, § 6. *Id.*

DEPOTS, RAILWAY COACHES AND SLEEPING CARS

Rule 61. Water coolers to be provided; manner of cleaning.

See *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

Art. 4553aa. Sale or advertisement of drugs for cure of venereal diseases, etc.—Any person who shall publish, deliver or distribute or cause to be published, delivered or distributed in any manner whatsoever or who shall permit placards or posters to be or remain on buildings or outhouses or premises controlled by him containing an advertisement concerning a venereal disease, lost manhood, lost vitality, impotency, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence and calling attention to a medicine, article or preparation that may be used therefor or to a person or persons from whom or an office or place at which information, treatment or condition may be obtained, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than two hundred dollars. The provisions of this article, however, shall not apply to didactic or scientific treatises which do not advertise or call attention to any person or persons from whom, or any office or place at which information, treatment or advice may be obtained, nor shall it apply to advertisements or notices issued by a municipal or county board or department of health, or by the department of health of the State of Texas. [Acts 1918, 35th Leg. 4th C. S., ch. 92, § 2.]

Explanatory.—The act amends chapter 2 of title 66, Revised Civil Statutes, 1911, by adding thereto article 4553aa. Took effect 90 days after March 27, 1918, date of adjournment.

CHAPTER FIVE

SPECIAL QUARANTINE REGULATIONS

Article 4566. [4337] Corporate authorities may establish quarantine.

See *Lum v. City of Bowie* (Sup.) 18 S. W. 142.

CHAPTER FIVE A

SALE OF QUARANTINE PROPERTY TO THE UNITED STATES

Art.	Art.
4574¼. Commission to sell to United States state property used for quarantine purposes.	4574¼c. Same; substitute members.
4574¼a. Same; powers.	4574¼d. Surrender of property on completion of sale.
4574¼b. Same; negotiation of sale; deeds.	4574¼e. Disposition of receipts from sale

Article 4574¹/₄. Commission to sell to United States state property used for quarantine purposes.—A Commission composed of the Governor of the State of Texas, the Attorney General of Texas and the State Health Officer of this State, is hereby created for the purpose of negotiating the sale and delivery to the United States Government of all State property owned and used by the State of Texas for quarantine purposes along the Gulf of Mexico and on the Mexican border of the Rio Grande River upon such terms as are most advantageous to the State of Texas. [Acts 1919, 36th Leg., ch. 34, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 4574¹/₄a. Same; powers.—Said Commission is hereby vested with power and given complete authority to sell to the proper authorities of the United States all property owned by the State of Texas, and actually used in quarantine service of the State, including lands, quarantine stations, wharves, boats, residence houses and all appurtenances, equipment and apparatus necessary for the proper exercise of the quarantine service or used in such service. [Id., § 2.]

Art. 4574¹/₄b. Same; negotiation of sale; deeds.—The said commission shall, as soon as this Act becomes effective, proceed to negotiate terms of sale and delivery of said property to the proper authorities of the United States, and when said terms and conditions of sale have been agreed upon by the commission and the representatives of the United States Government, the Governor of the State of Texas is hereby authorized to execute deeds and convey said quarantine property to the proper authorities of the United States Government, upon the receipt of the amount of money agreed upon, or upon proper guarantee that the said amount of money will be paid to the State of Texas within a given time. [Id., § 3.]

Art. 4574¹/₄c. Same; substitute members.—In case of the inability of any member of this commission to act at the proper time in the negotiation and sale of this property he is hereby authorized and empowered to appoint a representative to act in his place, and all expenses incurred by any member, or members, of this commission or their representatives shall be paid out of the expense fund of their respective departments. [Id., § 4.]

Art. 4574¹/₄d. Surrender of property on completion of sale.—Upon the execution and delivery of the deed conveying any of said quarantine properties to the United States, the officers and employes of the State, in charge of such property and employed by the state in the quarantine service, in which such property is used, shall surrender such property to the proper representatives of the United States, and the positions and employment of such officers and employes under the State shall thereupon terminate. [Id., § 5.]

Art. 4574¹/₄e. Disposition of receipts from sale.—All money paid for said properties shall be paid into the State Treasury immediately upon receipt and shall be credited to the General Revenue, and at the time such money is paid into the State Treasury the commission shall file in the office of the Comptroller of Public Accounts a statement showing the amount of money so paid and for what the same was received, and upon the complete performance of the duties imposed upon the Commission by this Act, the commission shall file in the office of the Comptroller a full statement of all sales made and of all amounts received in payment for the property sold. [Id., § 6.]

CHAPTER SIX

PURE FOOD REGULATIONS

Art.
4575a. Office of dairy and food commissioner and dairy and food department abolished, and duties transferred to state health officer.
4575b. Transfer of appropriations; employees.

Art.
4585a. Condemnation, confiscation and forfeiture of articles adulterated or misbranded; suit, etc.
4587. Drugs, confectionery and foods, when deemed adulterated.
4588. Term "misbranded" defined.

Article 4575a. Office of Dairy and Food Commissioner and Dairy and Food Department abolished, and duties transferred to State Health Officer.—The office of Dairy and Food Commissioner of the State of Texas, and the Dairy and Food Department of the State are hereby abolished.

All the authority, powers, duties, functions, rights and liabilities vested in and conferred upon said Commissioner and said Department by Articles 4575 to 4595 inclusive of Chapter 6, Title 66 of the Revised Civil Statutes of Texas of 1911 as amended by Chapter 47 of the General Laws of the Thirty-second Legislature at its Regular Session in 1911, by Chapter 125 of the General Laws passed by the Thirty-sixth Legislature at its Regular Session in 1919, by Chapter 150 of the General Laws of the Thirty-sixth Legislature passed at its Regular Session in 1919 and by any other existing statute or law of the State of Texas, shall hereafter vest in, be had and performed by the State Health officer of this State, and all laws relating to said Dairy and Food Commissioner and said Dairy and Food Department shall be administered under and through the State Health Department of this State.

All powers and authority heretofore conferred by law upon said Dairy and Food Commissioner and said Dairy and Food Department shall be exercised by the State Health officer in accordance with the terms of such law or laws and this Act. [Acts 1921, 37th Leg., ch. 10, § 1.]

Art. 4575b. Transfer of appropriations; employees.—All appropriations heretofore made for the Dairy and Food Commissioner or the Dairy and Food Department, or the Pure Food and Drug Department, shall hereafter be available to the State Health Officer of this State, to be used by said State Health Officer in the performance and exercise of the duties, authority, powers and functions herein transferred; provided that the State Health Officer is hereby authorized to dispense with any employee not needed, after the consolidation herein authorized, and may rearrange the work and duties of the office to avoid any duplication of work. [Id., § 2.]

Art. 4585a. Condemnation, confiscation and forfeiture of articles adulterated or misbranded; suit, etc.

Judgment.—On motion for new trial, in suit for the destruction of a coffee adulterant sold by defendants, evidence held to show that the judgment for destruction of the adulterant was in fact an agreed judgment, rendered with consent of defendants, and was not unknown to them. *State v. Acme Coffee Co.* (Civ. App.) 219 S. W. 509.

Art. 4587. Drugs, confectionery and foods, when deemed adulterated.

See *State v. Acme Coffee Co.* (Civ. App.) 219 S. W. 509.

Art. 4588. Term "misbranded" defined.

See *State v. Acme Coffee Co.* (Civ. App.) 219 S. W. 509.

CHAPTER SIX A

BAKERIES

Art.
4595¹/₄. Sanitary requirements in respect
to buildings.
4595¹/₄a. Conduct of bakeries.

Art.
4595¹/₄b. Vehicles, containers, etc.
4595¹/₄c. Care of materials, etc.
4595¹/₄d. Partial invalidity.

Article 4595¹/₄. Sanitary requirements in respect to buildings.—That any building, occupied or used as a bakery wherein is carried on the business of the production, preparation, storage or display of bread, cakes, pies, and other bakery products intended for sale for human consumption, shall be clean, properly lighted, drained and ventilated. Every such bakery shall be provided with adequate plumbing and drainage facilities including suitable wash sinks, toilets and water closets. All toilets and water closets shall be separate and apart from the rooms in which the bakery products are produced or handled. All wash sinks, toilets and water closets shall be kept in a clean and sanitary condition, and shall be in well lighted and ventilated rooms. The floors, walls and ceilings of the rooms in which the dough is mixed and handled, or the pastry prepared for baking, or in which the bakery products or ingredients of such products are otherwise handled or stored, shall be kept and maintained in a clean, wholesome and sanitary condition. All openings into such rooms, including windows and doors, shall be kept properly screened or otherwise protected to exclude flies. No working rooms shall be used for purposes other than those directly connected with the preparing, baking, storage and handling of food, and shall not be used as washing, sleeping, or living rooms, and shall, at all times, be separate and closed from the living and sleeping rooms. Rooms shall be provided for the changing and hanging of wearing apparel apart and separate from such work rooms and such rooms, as to be provided for the changing and hanging of wearing apparel shall be kept clean at all times. [Acts 1921, 37th Leg., ch. 63, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 4595¹/₄a. Conduct of bakeries.—No employee or other person shall sit or lie upon any of the tables, benches, troughs, shelves, which are intended for the dough or bakery products. No animals or fowls shall be kept or allowed in any bakery or other place where bread or other bakery products are produced or stored. Before beginning the work of preparing, mixing, and handling the ingredients used in baking, every person engaged in the preparation or handling of bakery products shall wash his hands and arms thoroughly, and for this purpose sufficient wash basins and soap and clean towels shall be provided. No employee or other person shall use tobacco in any form, in any room where bakery products are manufactured, wrapped or prepared for sale. No master baker, person or any employé who is affected with any contagious or infectious disease shall be permitted to work in any bakery or be permitted to handle any of the products therein, or delivered therefrom. [Id., § 2.]

Art. 4595¹/₄b. Vehicles, containers, etc.—The wagons, boxes, baskets and other receptacles in which bread, cake, pies or other bakery products are transported, shall be kept in a clean condition at all times and free from dust, flies and other contamination. All show cases, shelves or other places where bakery products are sold, shall be kept

well covered, properly ventilated, well protected from dust and flies, and shall be kept in a clean and wholesome condition at all times. Boxes or other receptacles for the storing or receiving of bread and other bakery products, before and after the retail stores and selling places are open, shall be constructed and placed as to be free from the contamination of streets, alleys and sidewalks, and shall be raised at least ten inches from the sidewalk or street, and shall be kept clean and sanitary, and no bread shall be placed in any box along with any other articles of food other than bakery products. All such boxes shall be provided with private locks and shall be locked at all times except when open to receive or remove bread or other bakery products and when being cleaned. [Id., § 3.]

Art. 4595 $\frac{1}{4}$ c. Care of materials, etc.—All materials used in the production or preparation of bakery products shall be stored, handled and kept in a way to protect them from spoiling and contamination, and no material shall be used which is spoiled or contaminated, or which may render the bread or other bakery products unwholesome or unfit for food. The ingredients used in the production of bread and other bakery products and the sale or offering for sale of bread and other bakery products shall comply with the provisions of the laws against adulteration and misbranding. No ingredients shall be used which may render the bread or other bakery products injurious to health. [Id., § 4.]

Explanatory.—Sec. 5 of the act relates to standard weight of loaves, and is set forth post, as art. 7846 $\frac{1}{2}$. Sec. 6 imposes a penalty, and is set forth, post, as art. 711a, Penal Code.

Art. 4595 $\frac{1}{4}$ d. Partial invalidity.—That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment has been rendered. [Id., § 7.]

CHAPTER SIX B

WATER SUPPLY

Art.
4595 $\frac{1}{2}$. Test of water supply.
4595 $\frac{1}{2}$ a. Same.

Art.
4595 $\frac{1}{2}$ b. Strainers for wells, etc.
4595 $\frac{1}{2}$ c. Purification of water supply.

Article 4595 $\frac{1}{2}$. Test of water supply.—Hereafter the authorities of all cities and towns, and villages, having a population of Five Thousand (5000) inhabitants or less, in this State and all other companies, persons, corporations or receivers, who are supplying drinking water through a water work system to the public, shall, before supplying the same to the public use for drinking water, first cause the supply of water to be chemically tested for any contaminated infusion of sand, dirt or filth, or dangerous bacteria or disease bearing germs. This test to be made according to the direction of the county or city health officers, or both such health officers. [Acts 1919, 36th Leg., ch. 133, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Art. 4595 $\frac{1}{2}$ a. Same.—It is further enacted that thereafter said water as above supplied shall be subject to such test at any time and the County and City Health Officers where such water supply is furnished,

shall make such tests at least once a year and oftener where there is an outbreak of any disease that might be induced through use of impure or unclean water. [Id., § 2.]

Art. 4595½b. Strainers for wells, etc.—And it shall be the duty of all authorities of any City or town of Five Thousand (5000) inhabitants or less, or persons, firms, or the officers and agents of all incorporated companies, or receivers supplying water for such public use, in cities or towns of Five Thousand (5000) inhabitants or less, to provide proper strainers for all wells and all other sources of supply so that sand and dirt shall not be carried into the water for such public use, and to cause all of the conduits and drain pipes conveying said water to be thoroughly washed out and flushed so as to clean the same at least one time every ninety days. [Id., § 3.]

Art. 4595½c. Purification of water supply.—It shall also be the duty of any such authorities, persons, firms or receivers or their agents, when any such drinking water as furnished is pronounced unfit or infectious or impregnated with sand, or dirt, or filth, or unclean and dangerous to the public use, by the Health Officers of any such city or county as the case may be, to immediately take steps to purify, clean or sanitize the same. [Id., § 4.]

Explanatory.—Sec. 5 of this act makes it a misdemeanor to violate the provisions of the act, see Penal Code, art. 6953d.

CHAPTER SEVEN

EMBALMING BOARD

<p>Art. 4600. Application to engage in business; fee; skill required.</p>	<p>Art. 4601. Renewal of license; fee. 4601a. Repeal.</p>
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Article 4600. Application to engage in business; fee; skill required.
—Every person engaged or desiring to engage in the practice of embalming in connection with the care and disposition of dead human bodies within the State of Texas shall make a written application to the State Board of embalming for a license, accompanying the same with a license fee of ten dollars (\$10.00), whereupon the applicant as aforesaid shall present himself or herself before said board at a time and place to be fixed by said board, and if the board shall find upon examination that the applicant is of good moral character, possessed of the knowledge of the venous arterial system, the location of the heart, lungs, bladder, womb and other organs of the human body, and the location of abdominal, pleural and thoracic cavities, location of the carotid, brachial, radial, ulnar, femoral and tibial arteries, a knowledge of the science of embalming and the care and disposition of the dead, and has a reasonable knowledge of sanitation and the disinfection of bodies of diseased persons, and the apartment, clothing and bedding in case of death by infectuous or contagious diseases, the board shall issue to said applicant a license as a duly licensed embalmer, authorizing him to practice the science of embalming. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving license under the provisions of this Chapter shall have said license registered in the County Clerk's office in the county in the jurisdiction of which it is proposed to carry on said practice, and shall

display said license in a conspicuous place of business of said person so licensed. [Acts 1903, p. 123, § 5; Acts 1921, 37th Leg., ch. 92, § 1, amending art. 4600, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 4601. Renewal of license; fee.—Every registered embalmer, who desires to continue the practice of his profession, shall annually thereafter, during the time he shall continue in such practice, on such date as said board may determine, pay to the secretary of said board, a fee of five dollars for the renewal of said license. [Acts 1903, p. 123, § 6; Acts 1921, 37th Leg., ch. 92, § 2, amending art. 4601, Rev. Civ. St. 1911.]

Sec. 3 repeals all laws in conflict.

Art. 4601a. Repeal.—Nothing herein contained shall be construed to have the effect to repeal, impair or qualify the force or effect of Articles 786, 787 and 788 of Chapter 9 of Title 12 of the Revised Criminal Statutes of Texas, 1911; but the same shall be and remain as heretofore in full force and effect; any violations hereof, shall be punished as in said Articles in this Section provided. [Acts 1921, 37th Leg., ch. 92, § 4.]

CHAPTER EIGHT

VENEREAL DISEASES

	Art.
4605 $\frac{1}{4}$. Diseases declared contagious, etc.	4605 $\frac{1}{4}$ f. Druggists to keep record of sales of treatments for such diseases.
4605 $\frac{1}{4}$ a. Physicians to report venereal diseases.	4605 $\frac{1}{4}$ g. Infected person exposing another to infection.
4605 $\frac{1}{4}$ b. Instructions to patients with venereal disease.	4605 $\frac{1}{4}$ h. Prostitution declared a source of infection; suppression.
4605 $\frac{1}{4}$ c. Investigations as to existence of such disease; examination of suspects.	4605 $\frac{1}{4}$ i. Certificates of freedom from such diseases.
4605 $\frac{1}{4}$ d. Quarantine of persons afflicted with such diseases.	4605 $\frac{1}{4}$ j. Information and reports confidential.
4605 $\frac{1}{4}$ e. Patients applying for treatment to give name and address of prior physician; report of name and address of patient.	4605 $\frac{1}{4}$ k. Remedies for enforcement of act.

Article 4605 $\frac{1}{4}$. Diseases declared contagious, etc.—Syphilis, gonorrhoea and chancroid, hereinafter designated venereal diseases, are hereby declared to be contagious, infectio[n]us, communicable, and dangerous to the public health. [Acts 1918, 35th Leg. 4th C. S., ch. 85, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

Art. 4605 $\frac{1}{4}$ a. Physicians to report venereal diseases.—Any physician or other person who makes a diagnosis in, or treats a case of syphilis, gonorrhoea or chancroid, and every superintendent or manager of a hospital, dispensary, or charitable or penal institution, in which there is a case of venereal disease, shall report such case immediately, in writing to the local health officer, stating the name and address or the office number, age, sex, color, and occupation of the diseased person, and the date of the onset of the disease, and the probable source of infection, provided that the name and address of the diseased person need not be stated, except as hereinafter specifically required in Section 6 [Art. 4605 $\frac{1}{4}$ e], and provided, further, that all information and reports concerning persons having venereal disease shall be held secret in accord-

ance with provisions in Section 11 [Art. 4605¹/₄j]. The report shall be enclosed in a sealed envelope and sent to the local health officer, who shall report weekly on the prescribed form to the State Board of Health, all cases reported to him. The physicians and others residing in cities having no city health officer, shall make reports required in this section of this Act direct to the county health officer, where there is a county health officer in the county in which they reside, and where there is no county health officer, all such report shall be made direct to the State Board of Health. [Id., § 2.]

Art. 4605¹/₄b. Instructions to patients with venereal disease.—It shall be the duty of every physician and of every other person who examines or treats a person having syphilis, gonorrhea or chancroid, to instruct him in measures for preventing the spread of such disease, and of the necessity for treatment until cured, and to hand him a copy of the circular of information obtainable for this purpose for the State Board of Health. [Id., § 3.]

Art. 4605¹/₄c. Investigations as to existence of such diseases; examination of suspects.—All city, county, or other health officers, shall use every available means to ascertain the existence of, and to investigate all cases of syphilis, gonorrhea, and chancroid within their several territorial jurisdictions, and to ascertain the sources of such infections. Local health officers are hereby empowered and directed to make such examinations of persons reasonably suspected of having syphilis, gonorrhea or chancroid as may be necessary for carrying out the provisions of this Act. Owing to the prevalence of such diseases among prostitutes and persons associated with them, all such persons are to be considered within the above class. [Id., § 4.]

Art. 4605¹/₄d. Quarantine of persons afflicted with such diseases.—Upon receipt of a report of a case of venereal disease it shall be the duty of the local health officer to institute measures for protection of other persons from infection by such venereally diseased person.

(a) Local health officers are authorized and directed to quarantine persons who have, or are reasonably suspected of having syphilis, gonorrhea, or chancroid, whenever, in the opinion of said local officer, or the State Board of Health, or its executive officer, quarantine is necessary for the protection of the public health. In establishing quarantine the local Health Officer shall designate and define the limits of the area in which the person known to have, or reasonably suspected of having syphilis, gonorrhea, or chancroid and his immediate attendant, are to be quarantined and no person, other than the attending physician, shall enter or leave the area of quarantine without the permission of the local health officer.

No one but the local health officer shall terminate said quarantine, and this shall not be done until the quarantined person has become non-infectious, as determined by the local health officer or his authorized deputy through clinical examination and all necessary laboratory tests, or until permission has been given him to do so by the State Board of Health or its executive officer.

(b) The local health officer shall inform all persons who are about to be released from quarantine for venereal disease, in case they are not cured, what further treatment should be taken to complete their cure. Any person not cured, before released from quarantine, shall be required to sign the following statement after the blank spaces have been

filled to the satisfaction of the health officer. I _____ residing at _____ hereby acknowledge the fact that I am at this time infected with _____; and agree to place myself under the medical care of _____, _____ Name of Physician or clinic _____ within _____ hours.

Address _____

and that I will remain under treatment of said physician or clinic until released by the health officer of _____ or until my case is transferred, with the approval of said health officer, to another regularly licensed physician or an approved clinic.

I hereby agree to report to the health officer within four days after beginning treatment as above agreed, and will bring with me a statement from the above physician or clinic of the medical treatment applied in my case, and thereafter will report as often as may be demanded of me by the health officer.

I agree further, that I will take all precautions recommended by the health officer to prevent the spread of the above disease to other persons and that I will not perform any act which will expose other persons to the above disease.

I agree, until finally released by the health officer to notify him of any change of address and to obtain his consent before moving my abode outside of his jurisdiction.

Signature.

Date.

All persons signing the above agreement shall observe its provisions, and any failure to do so shall be a violation of this Act. All such agreements shall be filed with the health officer, and kept inaccessible to the public as provided in Section 11 [Art. 4605¹/₄j].

The Commissioners' Courts of the various counties in this State, and the city councils, or other boards of the incorporated towns and cities of the State, are hereby empowered and directed to provide suitable places for the detention of persons who may be subject to quarantine and who should be segregated for the execution of the provisions of this Act; and such Commissioners' Court, city councils and other governing boards of incorporated cities and towns are hereby authorized to incur, on behalf of their said counties, cities or towns, the expenses necessary to the enforcement of this Act. [Id., § 5.]

Constitutionality.—Legislature has power to declare that prostitution is a source of communicable diseases, and that its suppression is a public health measure, and to direct, as is done by this article, that health officers hold such persons in quarantine, and such act is not violative of provisions of Constitution, or discriminatory, arbitrary, or unreasonable. *Ex parte Brooks*, 85 Cr. R. 397, 212 S. W. 956.

Arrest.—Under this act, the proper health officer may issue a warrant by virtue of which a lawful arrest may be made without affording the person affected a preliminary hearing. *Ex parte Hardcastle*, 84 Cr. R. 463, 208 S. W. 531, 2 A. L. R. 1539.

Private physician.—There is nothing in this article which prohibits treatment by private physicians while in quarantine. *Ex parte Brooks*, 85 Cr. R. 397, 212 S. W. 956.

Effect of expiration of term of quarantine officer.—Order of city health officer for commitment of woman to city farm because afflicted with disease is not void because authorizing delivery to quarantine officer who has, since remand to him, ceased to hold office, as any officer having charge of farm would have legal custody of her. *Ex parte Brooks*, 85 Cr. R. 397, 212 S. W. 956.

Art. 4605¹/₄e. Patients applying for treatment to give name and address of prior physician; report of name and address of patient.—(a) When a person applies to a physician or other person for the diagnosis or treatment of syphilis, gonorrhoea or chancroid, it shall be the duty of the

physician or person so consulted to inquire of, and ascertain from, the person seeking such diagnosis or treatment, whether such person has heretofore consulted with, or has been treated by, any other physician or person, and if so, to ascertain the name and address of the physician or person last consulted. It shall be the duty of the applicant for diagnosis or treatment to furnish this information, and a refusal to do so, or a classification of the same and address of such physician or person consulted by such applicant shall be deemed a violation of this Act. It shall be the duty of the physician or other person whom the applicant consults to notify the physician or other person last consulted of the change of advisers. Should the physician or person previously consulted fail to receive such notice within ten days after the last date upon which the patient was instructed by him to appear, it shall be the duty of such physician or person to report to the local health officer, the name and address of such venereally diseased person.

(b) If an attending physician or other person knows or has good reasons to suspect that a person having syphilis, gonorrhoea, or chancroid is so conducting himself or herself as to expose other persons to infection, or is about so to conduct himself or herself, he shall notify the local health officer of the name and address of the diseased person and the essential facts in the case. [Id., § 6.]

Art. 4605¹/₄f. Druggists to keep record of sales of treatments for such diseases.—Any druggist or other persons who sells any drug, compound, specific or preparation of any kind used for or believed by the druggist or person to be intended to be used for the treatment of any of said venereal diseases, shall keep a record of the name and address of the person making such purchase. A copy of said record shall be mailed each week to the local health officer and by him to the State Board of Health. [Id., § 7.]

Art. 4605¹/₄g. Infected person exposing another to infection.—It shall be a violation of this statute for any infected person knowingly to expose another person to infection with any of the said venereal diseases, or for any person to perform an act which exposes another person to infection with venereal disease. [Id., § 8.]

Art. 4605¹/₄h. Prostitution declared a source of infection; suppression.—Prostitution is hereby declared to be a prolific source of syphilis, gonorrhoea, and chancroid, and the repression of prostitution is declared to be a public health measure. All local and state health officers are therefore directed to co-operate, with proper officials whose duty it is to enforce laws directed against prostitution, and otherwise to use every proper means for the repression of prostitution. [Id., § 9.]

Art. 4605¹/₄i. Certificates of freedom from such diseases.—Physicians, health officers, and all other persons are prohibited from issuing certificates of freedom from venereal disease, provided this Section shall not prevent the issuance of statements of freedom from infectious diseases written in such form, or given under such safe guards, that their use for solicitation for sexual intercourse would be impossible. [Id., § 10.]

Art. 4605¹/₄j. Information and reports confidential.—All information and reports concerning persons infected with venereal diseases shall be inaccessible to the public except in so far as publicity may attend the

performance of the duties imposed by this statute and by the laws of the State. [Id., § 11.]

For section 12 of this act see Penal Code, art. 420j.

Art. 4605¼k. Remedies for enforcement of act.—In addition to the remedies provided herein for the enforcement of the provisions of this Act, the State Health Department and all county and local health departments are hereby authorized and empowered to employ all measures provided by existing laws for ascertaining, handling, segregating and controlling contagious or infectious diseases. [Id., § 13.]

CHAPTER NINE

EMPLOYMENT OF DISEASED PERSONS

Art.
4605½. Unlawful to employ diseased persons in certain places.
4605½a. Medical examination.

Art.
4605½b. Certificate of physician.
4605½c. Sterilization of dishes, etc.

Article 4605½. Unlawful to employ diseased persons in certain places.—That it shall be unlawful for any individual, persons, firms, corporations or common carriers, operating or conducting any hotel, cafe, restaurant, dining car or other public eating place, or operating any bakery or meat market, public dairy or dairies in this State, to hereafter work, employ or keep in their employ any person or persons infected with or affected by any infectious or contagious disease, and also such persons so employed who at the time of the taking effect of the provisions herein made are infected with or affected by any contagious or infectious disease, shall at once be discharged from such employment in any of the places above enumerated in this Act. [Acts 1921, 37th Leg., ch. 66, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 4605½a. Medical examination.—Every individual, persons, firms or corporations or common carriers, operating or conducting a hotel, cafe, restaurant, dining car or other public eating place, or operating a bakery or meat market, shall institute and have made a medical examination for all their employees at intervals of time not to exceed six months, and shall after such medical examination of all their employees promptly discharge from their employment in or about the above mentioned places any person or persons found to be infected with or affected by any infectious or contagious disease. [Id., § 2.]

Art. 4605½b. Certificate of physician.—That it shall be unlawful for any individual, persons, firms or corporations operating or conducting any hotel, cafe, restaurant, dining car or other public eating place, or operating any bakery or meat market, to work or employ any person to work in any hotel, cafe, restaurant, dining car or other public eating place, or in any bakery or meat market, who, at the time of their employment, had not in his or her possession, a certificate from some reputable physician, where said person is to be employed, attesting the fact that the bearer has been examined by such physician within one week prior to the time of employment, and that such examination discloses the fact that such person to be employed was free from any and all infectious or contagious diseases. [Id., § 3.]

Art. 4605 $\frac{1}{2}$ c. Sterilization of dishes, etc.—That it shall be unlawful for any individual, persons, firms or corporations, operating or conducting a hotel, cafe, restaurant, dining car or other public eating place, or conducting or operating any bakery or meat market, to furnish to their patrons or customers any dish or other receptacle or utensil used in eating, drinking or conveying food, until such dish, receptacle or other utensil has been thoroughly cleaned and sterilized by heat or in boiling water subsequent to being used by any other person or persons; and provided further, that it shall be unlawful for any individual, person, firm or corporation, operating or conducting a hotel cafe, restaurant, dining car or other public eating place, or conducting or operating any bakery or meat market, to furnish to their patrons or customers any dish or receptacle or utensil used in eating, drinking or conveying food, if such dish, receptacle or utensil is broken or cracked in such a manner as to render their sterilization impossible or doubtful. [Id., § 4.]

Explanatory.—Sec. 5 of the act imposes a penalty and is set forth, post, as art. 696a, Penal Code. Sec. 6 repeals all laws in conflict.

CHAPTER TEN

BARBER AND BEAUTY SHOPS

Art.	Art.
4605 $\frac{3}{4}$. Registration.	4605 $\frac{3}{4}$ g. Towels, etc., to be laundered after use.
4605 $\frac{3}{4}$ a. Equipment with facilities and supplies.	4605 $\frac{3}{4}$ h. Cleansing of hands.
4605 $\frac{3}{4}$ b. Diseased persons not to act as barbers.	4605 $\frac{3}{4}$ i. Same piece of alum not to be used on different persons.
4605 $\frac{3}{4}$ c. Shop and equipment to be kept clean.	4605 $\frac{3}{4}$ j. Powder puffs, etc.
4605 $\frac{3}{4}$ d. Combs, etc., to be cleaned and sterilized.	4605 $\frac{3}{4}$ k. Head rests.
4605 $\frac{3}{4}$ e. Combs, etc., not to be used unless cleaned, etc.	4605 $\frac{3}{4}$ l. Individual cups, etc.
4605 $\frac{3}{4}$ f. Mugs, etc., to be sterilized after use.	4605 $\frac{3}{4}$ m. Posting regulations.
	4605 $\frac{3}{4}$ n. Terms defined.
	4605 $\frac{3}{4}$ o. Sleeping in shop.
	4605 $\frac{3}{4}$ p. What constitutes "barber shop" and "beauty parlor."
	4605 $\frac{3}{4}$ q. Definition of word "person."

Article 4605 $\frac{3}{4}$. Registration.—Every person owning, operating or managing a barber shop or beauty parlor that is in operation at the time of the taking effect of this Act shall, on or before September 1st, 1921, register his full name and the location of said shop or parlor in a book to be kept in the office of the Texas State Board of Health for that purpose; and every owner, operator or manager of a barber shop or beauty parlor that is first opened for business after the taking effect of this Act, shall within five days after the opening of said shop or parlor register in like manner. In event of a change in the manager or in the location of any barber shop or beauty parlor aforesaid, the manager of said shop or parlor shall call at, or communicate by United States mail with the Texas State Board of Health within five days after such change takes place and inform said Board of such change. [Acts 1921, 37th Leg., ch. 79, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 4605 $\frac{3}{4}$ a. Equipment with facilities and supplies.—The owner and operator or manager of any barber shop or beauty parlor and each of them, shall equip said shop and keep said shop equipped with facilities and supplies and with all such appliances, furnishings and materials as may be necessary to enable persons employed in and about said shop or parlor to comply with the requirements of this Act. [Id., § 2.]

Art. 4605³/₄b. Diseased persons not to act as barbers.—(a) No owner and no operator or manager of a barber shop or beauty parlor shall knowingly permit any person suffering from a communicable skin disease or from a venereal disease to act as a barber or employee or work or be employed in said shop or parlor.

(b) No person who to his own knowledge is suffering from a communicable disease or from venereal disease, shall act as a barber or work or be employed as set forth in this Section. [Id., § 3.]

Art. 4605³/₄c. Shop and equipment to be kept clean.—Every manager or person in charge of a barber shop or beauty parlor shall keep said shop or parlor and all furniture, tools appliances and other equipments used therein at all times in a cleanly condition. [Id., § 4.]

Art. 4605³/₄d. Combs, etc., to be cleaned and sterilized.—Every manager or person in charge of a barber shop or beauty parlor shall cause all combs, hair brushes, hair dusters and similar articles used in said shop or parlor to be washed thoroughly at least once each day and to be kept clean at all times, and shall cause all mugs, shaving brushes, razors, shears, scissors, clippers and tweezers used in said shop or parlor to be sterilized at least once after each time used as hereinafter provided. [Id., § 5.]

Art. 4605³/₄e. Combs, etc., not to be used unless cleaned, etc.—No barber or person affected by this Act shall use for the service of any customer a comb, hair brush, hair duster or any similar article that is not thoroughly clean, nor any mug, shaving brush, razor, shears, scissors, clippers, or tweezers that are not thoroughly clean or that have not been sterilized since last used. [Id., § 6.]

Art. 4605³/₄f. Mugs, etc., to be sterilized after use.—Every barber or other person affected by this Act immediately after using a mug, shaving brush, razor, scissors shears, clippers, or tweezers for the service of any person, shall sterilize the same by immersing them in boiling water for not less than a minute or in the case of razors, scissors, shears and tweezers, by immersing them for not less than ten minutes in a five per cent aqueous solution of carbolic acid. [Id., § 7.]

Art. 4605³/₄g. Towels, etc., to be laundered after use.—No barber or other person affected by this Act shall use for the service of a customer any towel or wash cloth that has not been boiled and laundered since last used. [Id., § 8.]

Art. 4605³/₄h. Cleansing of hands.—Every barber or other person affected by this Act shall cleanse his hands thoroughly immediately before serving each customer. [Id., § 9.]

Art. 4605³/₄i. Same piece of alum not to be used on different persons.—No barber or other person affected by this Act shall, to stop the flow of blood, use the same piece of alum or other material for more than one person. [Id., § 10.]

Art. 4605³/₄j. Powder puffs, etc.—No barber or other person affected by this Act shall use a powder puff or a sponge in the service of a customer unless the same has been sterilized since last used and no finger bowl shall be used unless the same has been sterilized since last used and fresh water or other liquid placed therein. [Id., § 11.]

Art. 4605³/₄k. Head rests.—No barber or other person affected by this Act shall permit any person to use the head rest of any barber's

chair under his control until after the head rest has been covered with a towel that has been washed and boiled since having been used before, or by clean, new paper or similar clean new substance. [Id., § 12.]

Art. 4605¾l. Individual cups, etc.—No barber or other person affected by this Act shall shave any person, when the surface to be shaved is inflamed or broken out, or contains pus, unless such person be provided with a cup, razor or lather brush for his individual use. [Id., § 13.]

Art. 4605¾m. Posting regulations.—The owner and the manager of any barber shop or beauty parlor and each of them, shall keep a copy of these regulations, to be furnished by the State Board of Health, posted in said barber shop or beauty parlor for the information and guidance of persons working or employed therein. [Id., § 14.]

Art. 4605¾n. Terms defined.—The word “barber” as used in these regulations means any person who shaves, or trims the beard, or cuts or shampoos or dresses the hair or massages the face of any person for pay, and includes “barbers’ apprentices” and shop boys. The word “manager” means any person having control of a barber shop or beauty parlor or person working or employed therein. [Id., § 15.]

Art. 4605¾o. Sleeping in shop.—It shall be unlawful for the owner or manager of any barber shop or beauty parlor to permit any person or persons to sleep in any room used wholly or in part as a barber shop or beauty parlor and no person shall pursue the barber business or be employed in a barber shop or beauty parlor in any room used as a sleeping apartment. [Id., § 16.]

Explanatory.—Sec. 17 of the act imposes a criminal penalty, and is set forth, post, as art. 696b, Penal Code.

Art. 4605¾p. What constitutes “barber shop” and “beauty parlor.”—A barber shop is any place where the work or business of a barber is done for pay, and may or may not include a beauty parlor or any work of a beauty parlor. A beauty parlor is a place where hair-dressing or manacuring of finger nails or massaging the skin, or shampooing, or washing the scalp of hair, is done for pay and may or may not include work or business of a barber. [Id., § 18.]

Art. 4605¾q. Definition of word “person.”—The expression “person affected by this Act” shall include any person working or employed in a barber shop or beauty parlor or acting as a barber, beauty specialist or manacurist. The work “persons,” shall include persons, firms, corporations and associations of persons. [Id., § 19.]

CHAPTER ELEVEN

OPHTHALMIA NEONATORUM

Art. 4605¾. Prophylactic drops shall be used.

Art. 4605¾a. State board of health shall furnish solution to poor.

Article 4605¾. Prophylactic drops shall be used.—All doctors, physicians, midwives, nurses, or those in attendance at child birth, shall use prophylactic drops in the child’s eyes of a one per cent. solution of silver nitrate, or other prophylactic solution approved by the

State Board of Health, to prevent ophthalmia neonatorum in the new born. [Acts 1921, 37th Leg., ch. 89, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Art. 4605 $\frac{7}{8}$ a. State Board of Health shall furnish solution to poor.—The State Board of Health shall be required to furnish such silver nitrate solution or other prophylactic drops free of cost to the poor of the State; namely, those upon whom it would work a hardship to buy such solution. [Id., § 2.]

Explanatory.—Sec. 3 imposes a criminal penalty and is set forth, post, as art. 810 $\frac{1}{2}$, Penal Code.

TITLE 67

HOLIDAYS—LEGAL

Art.
4606. What are legal holidays.

Art.
4606a. Victory day.

Article 4606. What days are legal holidays.—The first day of January, the twenty-second day of February, the second day of March, the twenty-first day of April, the third day of June, the fourth day of July, the first Monday in September, the twelfth day of October, the eleventh day of November, and the twenty-fifth day of December, of each year, and all days appointed by the President of the United States, or by the Governor, as days of fasting or Thanksgiving, and every day on which an election is held throughout the State, are declared holidays, on which all the public offices of the State may be closed, and shall be considered and treated as Sunday or the Christian Sabbath for all purposes regarding the presenting for payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange. [Acts 1893, p. 4; Acts 1905, p. 14; Acts 1911, p. 52, § 1; Acts 1921, 37th Leg., ch. 48, § 1, amending art. 4606, Rev. Civ. St.]

Took effect 90 days after March 12, 1921, date of adjournment.

Effect in general.—Note, falling due on Sunday, may be presented or protested on the preceding Saturday. *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660.

Closing of bank on legal holiday held not to excuse lessee's failure to make extension rental payment. *McLaughlin v. Brock* (Civ. App.) 225 S. W. 575.

Art. 4606a. Victory day.—Victory Day, the eleventh day of November of each year, the same being a legal holiday, is further set apart and designated as Victory Day, to be devoted to the celebration of the victory of America and her allies over the Imperial Government of Germany in The Great War and to be observed for that purpose in such patriotic manner as may seem best to the people of each community. [Acts 1921, 37th Leg., ch. 48, § 2.]

TITLE 67 B**HOSPITALS**

Article 4607 $\frac{3}{4}$. County and city may appropriate money for maintenance of donated hospital.—That wherever by will, or otherwise, a fund of fifty thousand dollars, or more, has been, or shall be, left for the establishment and maintenance of a hospital in a city of ten thousand inhabitants, or more, in which hospital the sick and wounded of such city, or of the State of Texas, may be admitted and may receive medical and surgical attention, the Commissioners' Court of the county and the governing body of the city in which said hospital shall be established either, or both, may from time to time appropriate and pay toward the maintenance of such hospital such sums of money as may in the judgment of the Commissioners' Court making such appropriation, or in the judgment of the governing body of the city making such appropriation be proper to provide hospital accommodations and medical and surgical attention for the sick and wounded of such county or city who are indigent. [Acts 1921, 37th Leg., ch. 42, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

TITLE 68

HUSBAND AND WIFE

- Chap.
1. Celebration of marriage.
2. Marriage contracts.

- Chap.
3. Rights of married women.
4. Divorce.

CHAPTER ONE

CELEBRATION OF MARRIAGE.

- | | |
|--|--------------------------------------|
| Art.
4608. Who are authorized to celebrate rites. | Art.
4610. License. |
| 4609. Who are not permitted to marry. | 4611. Consent of parent or guardian. |
| | 4612. Record and return of license. |

Article 4608. [2954] Who authorized to celebrate rites.

Law governing marriage.—The law of the state in which a marriage was celebrated generally affords the criterion for testing its validity. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Ceremonial marriage in general.—That there was immediate separation and no coition does not affect the validity of a ceremonial marriage. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

A marriage celebrated under the forms of law is valid and binding, whether cohabitation takes place or not, and, although there is no cohabitation, an innocent third party otherwise eligible has no lawful right to contract a second marriage with one of the parties. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

Common law marriage—Requisites and validity.—That a couple were living together, and some time intended to marry, was insufficient to show a common-law marriage. *Nelson v. State*, 84 Cr. R. 219, 206 S. W. 361.

An agreement between a man and a woman then to become and thence afterwards to be husband and wife is the gist of a common-law marriage. *Edmondson v. Johnson* (Civ. App.) 207 S. W. 586.

In a woman's action for a wrongful death of her alleged common-law husband evidence held sufficient to show that deceased was the lawful husband of another, so that plaintiff was not his common-law wife. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

"Marriage" is a status, the living together of a man and a woman as husband and wife, under an agreement, express or implied, which need not be solemnized by any ceremony, or be under license from the state, where the agreement is made effective by the parties living together publicly as husband and wife. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

Marriage relations are based either on ceremonial celebration or on an actual agreement, and a common-law marriage, in absence of conflicting testimony, may be presumed from evidence showing that the parties lived together professedly as husband and wife, and were so recognized by the community, but such evidence fails to establish the fact of marriage conclusively where there is also evidence of a later separation, and that one of the parties thereafter married another by a ceremonial marriage; the presumption of common-law marriage from habit and reputation being overcome by proof of the ceremonial marriage. *Walton v. Walton* (Com. App.) 228 S. W. 921, reversing *Walton v. Walton* (Civ. App.) 203 S. W. 133.

— **Sufficiency of evidence.**—In a suit by a woman who was asserted to have been the common-law wife of decedent, evidence held sufficient to establish that fact. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

In an action for a man's wrongful death, evidence held insufficient to show that plaintiff was his common-law wife, even if he did not have another wife living at such time; the agreement shown being one to get married, and not a marriage contract. *Lopez v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 222 S. W. 695.

In a divorce suit evidence held such that the finding of the jury that there was an agreement for common-law marriage consummated by cohabitation could not be set aside. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In a will contest, evidence held sufficient to support a finding that an alleged prior husband of contestant, who was contesting as wife of deceased, was a married man, and had induced contestant to marry him, but that no legal marriage was consummated. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

In a contest between two persons, each claiming to be the lawful wife of deceased, for appointment to administer his estate, evidence as to a common-law marriage between deceased and contestant held to present a jury question as to whether there was a marriage agreement. *Walton v. Walton* (Com. App.) 228 S. W. 921, reversing *Walton v. Walton* (Civ. App.) 203 S. W. 133.

Art. 4609. [2955] Who not permitted to marry.

Who may marry.—Final decree of divorce rendered by California court after the husband's death constituted a valid divorce, and, together with fact of living together by husband who sought divorce and his second wife, married after the interlocutory decree, validated second marriage contract. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

Where a common-law marriage relation already existed between a man and another woman, a second woman with whom he subsequently celebrated a ceremonial marriage, though she entered into the relation in good faith and in accordance with the statutory law, did not become his wife, and no valid marriage was created. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

Where a married man deceived a girl into the belief that they had been married by delivering to her the original marriage license, and she lived with him as his lawful wife according to her belief until she learned that he had a wife living, whereupon he went away fearing prosecution, she was not his wife at all and was free to marry another. *Clover v. Clover* (Civ. App.) 224 S. W. 916.

Art. 4610. [2956] License.

Failure to procure license.—Noncompliance with the statute requiring license does not affect the validity of a marriage except where the statute expressly declares that a marriage in violation thereof shall be a nullity. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Art. 4611. [2957] Consent of parent or guardian, etc.

Cited, *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880.

Marriage without consent.—Statutes regulating mode of entering the marriage relation, as to consent of parents and requirement for license, are merely directory, and noncompliance therewith does not affect the validity of a marriage, except where the statutes expressly declare a marriage in violation thereof shall be a nullity. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Art. 4612. [2958] Record and return of licenses.

Evidence.—In criminal proceedings in Texas, where the fact of a marriage having taken place on a particular day is material, the best evidence of the fact is the testimony of those who witnessed the ceremony; and a certified copy of a marriage license, or of a certificate of its solemnization, both of which are required to be recorded in a well-bound book, is not admissible. *Chew v. State*, 23 Tex. App. 230, 5 S. W. 373.

CHAPTER TWO

MARRIAGE CONTRACTS

Art. 4617. What stipulations may be made.	Art. 4618. How authenticated.
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Article 4617. [2963] What stipulations may be made.

Cited, *Proetzel v. Schroeder*, 83 Tex. 684, 19 S. W. 292.

Validity of contracts.—A post-nuptial agreement is void which revokes a marriage settlement, and provides that, in case the husband dies without issue of the marriage, his property shall descend to his heirs as if the marriage had never taken place, under Rev. St. 1879, art. 2847, prohibiting any agreement which would alter the legal order of descent. *Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S. W. 792.

Deeds executed before marriage by a husband to his future wife, granting her the property for life, to revert to him if she died without issue, but if she had issue to go to her heirs, held not prohibited as a stipulation between parties about to marry, altering the legal order of descent and distribution as contemplated by the Legislature. *Runge v. Freshman* (Civ. App.) 216 S. W. 254.

Art. 4618. [2964] How authenticated.

Instruments affected.—This article held not to govern deeds executed before marriage by a husband to his future wife to settle on her a portion of the property of which he was absolutely possessed, in consideration of her marrying, the property to be her separate estate for life, to revert to him if she died without issue, but if she had issue to go to her heirs. *Runge v. Freshman* (Civ. App.) 216 S. W. 254.

CHAPTER THREE

RIGHTS OF MARRIED WOMEN

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| <p>Art.
4621. Separate property; management; joinder of husband in conveyance, etc.; permission to convey where husband abandons wife, is insane, or refuses to join; debts or torts of husband and wife; conveyance of homestead.</p> <p>4621a. Money or property received as compensation for personal injuries to wife.</p> <p>4622. Community property; what property should be under control, etc., of wife; bank deposits.</p> | <p>Art.
4623. Presumption as to community property.</p> <p>4624. What property subject to debts of wife; husband must join in certain contracts.</p> <p>4625. Judgment and execution in such cases.</p> <p>4626. Husband failing to support wife, etc.</p> <p>4627. Community property liable for debts.</p> <p>4628. Female under twenty-one emancipated, when.</p> <p>4629a. May apply to district court to become feme sole for mercantile and trading purposes, how.</p> |
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Article 4621. [2967] Separate property; management; joinder of husband in conveyance, etc.; permission to convey where husband abandons wife, is insane, or refuses to join; debts or torts of husband and wife; conveyance of homestead.—All property, both real and personal, of the husband owned or claimed by him before marriage and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be the separate property of the wife. During marriage, the husband shall have the sole management, control and disposition of his separate property, both real and personal, and the wife shall have the sole management, control and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to the transfer of stocks and bonds belonging to her, or in which she may be given control by this Act; provided also that if the husband shall have permanently abandoned his wife, be insane, or shall refuse to join in such incumbrance, conveyance or transfer of such property, the wife may apply to the District Court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interest of the wife, to make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, in which event she may encumber, convey or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband. The homestead, whether the separate property of the husband or wife,

or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband has permanently abandoned the wife, or is insane, in which instances, the wife may sell and make title to any such homestead if her separate property, in the manner herein provided for conveying or making title to her other separate property.

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessities furnished herself and children, unless the husband joins in the execution of the contract, provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by the preceding sentence. [Act March 13, 1848; P. D. 4641, Const. art. 16, § 15; Acts 1913, p. 61, § 1; Acts 1917, 35th Leg., ch. 194, § 1; Acts 1921, 37th Leg., ch. 130, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

See *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975; *Clark v. Tulley* (Civ. App.) 200 S. W. 605; *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285; *Markley v. Mussett* (Civ. App.) 204 S. W. 126.

Cited, *Brannon v. State*, 23 Tex. App. 428, 5 S. W. 132; *Winters v. Duncan* (Civ. App.) 220 S. W. 219; *Landers v. Landers* (Civ. App.) 220 S. W. 359; *Hynson v. Gulf Production Co.* (Civ. App.) 232 S. W. 873. Cited in dissenting opinion, *San Antonio & A. P. R. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

1. **Applicability in general.**—In view of Final Title, § 6, this article cannot be given retroactive effect to create personal liability of wife who joined husband in execution of note before passage of such sections. *Akin v. Thompson* (Civ. App.) 196 S. W. 625.

Acts 33d Leg. c. 32, amending this article, does not invalidate husband's conveyance of homestead property to his wife. *McGovern v. Woolley* (Civ. App.) 200 S. W. 271.

Where a feme sole is sued, but marries while the suit is pending and before judgment rendered, art. 1893, provides the husband shall be impleaded as a defendant, when the suit shall proceed to the end against husband and wife jointly, which must be done before an effective judgment can be rendered, a requirement not affected by this article, the burden to see that the requirement is met being on plaintiff. *Powell v. Dyer* (Civ. App.) 227 S. W. 731.

10. **Conveyances of husband's separate estate.**—Husband could convey his separate property by deed of gift, if conveyance did not impair homestead rights or rights of creditors. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

11. **Actions by husband.**—If land conveyed to a wife by deed reciting it to be her separate property was held in trust for husband, a suit could be maintained by him, it not being necessary to set aside or correct deed before suing for the interest claimed. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

12. **Abandonment by husband as affecting rights of parties.**—A married woman who has been abandoned by her husband may mortgage her separate property, whether her homestead or not, without a joinder of her husband. *Harris v. Hamilton* (Com. App.) 221 S. W. 273. Reversing judgment (Civ. App.) 185 S. W. 409; *Williams v. Farmers' Nat. Bank of Stephenville* (Civ. App.) 201 S. W. 1083.

In suit on promissory note given for price of land by unmarried woman, who had subsequently married and gave renewal note, petition held not to show estoppel on defendant's part to deny that she had permanently separated from her husband when she gave note. *Sewell v. Walton* (Civ. App.) 204 S. W. 271.

Conveyance of homestead, see notes under art. 1115.

13. **Separate property and rights of husband and wife in general.**—Where the separate lands of a wife were improved with the community funds, but it did not appear that the spouses would never become reconciled, held that, as the homestead which was located on the separate property of the wife still existed for the joint use of the spouses, and the community estate remained intact, the wife would not be required to account to the community estate for the improvement of her separate property. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 842.

14. **Separate estate of wife in general.**—Where wife purchased land in own name, made cash payment with her separate funds, and executed purchase-money notes without husband joining therein, the land became her separate property. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

A conveyance to a fictitious person was inoperative, and the title remained in the grantor as her separate property; she having acquired it as a feme sole. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

16. **Conveyances or gifts to or for use of wife as her separate property.**—In trespass to try title by divorced first wife of decedent claiming through her son against her husband's second wife, such second wife, defendant, had the right to introduce testimony tending to show that her husband caused deed of the land to be made to her because he intended it as a gift. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

A wife acquired land as her separate estate if it was deeded to her or if the consideration used in paying for the property was her separate estate. *Id.*

Where husband caused deed of land to be made to his wife intending it as a gift, it became her separate property, though the deed did not state on its face that title was to be so vested in the wife. *Id.*

While a husband may give to his wife an equity in land, and a conveyance by him directly or through a trustee would vest such equity in her as her separate estate, where equity is worthless, there can be no gift, so that going through the forms of law appropriate to vest in the wife a right to acquire land of her husband at a cost in excess of its market value gave wife no beneficial interest in property and the purchase by her of a judgment against the land in consideration of her note would not be for the benefit of her separate estate. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

Before a trust, either implied or expressed, can be impressed upon a clause in a conveyance of a lot caused to be executed by a husband to his wife making it her separate property, it must first be shown that such provision was inserted either through fraud, accident, or mistake. *Markum v. Markum* (Civ. App.) 210 S. W. 835.

If a husband causes a deed for property paid for with community funds to be made to the wife for her separate use and causes the deed to so recite, it will vest the title in wife as her separate estate. *Id.*

Where deed of husband to wife upon its face discloses that the property is conveyed to her as her separate estate, this makes the property her separate estate, but the status as wife's separate property of property conveyed to wife is not affected by the fact that the deed does not on its face disclose that the property was conveyed to her as her separate property, where it appears that both husband and wife directed that the deed be made to her for the purpose and with the intent to make the conveyed property her separate property, and that at the time of the delivery of the deed it was their mutual intention that it should be her separate and not community property, and was to be taken in her name to effect that purpose. *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

Where property was acquired after marriage, and deeded by the vendor to his wife, in consideration of separate property of the wife traded for it, the husband and wife also giving their note for a certain sum, and it was the mutual intention of husband and wife that the acquired property should be her separate property, and the title was taken in her name for that purpose, and they also intended that the note should be paid out of the wife's separate funds, and such payments thereon were made from rents accruing from the property subsequent to the taking effect of Act April 4, 1917, the acquired property became her separate property, and not community property, notwithstanding the fact that the husband joined in the note, and that the deed, though made to the wife, did not disclose that the property was conveyed to her as her separate property. *Id.*

While a deed absolute on its face may have a parol trust ingrafted upon it, lands standing in the name of a wife cannot be held to be the joint property of the husband and wife, where the wife paid the entire consideration, etc., because before marriage it was agreed between the parties that they should buy the land jointly and own it in equal portions; it appearing the husband paid none of the consideration. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 313.

In a daughter-in-law and sister-in-law's action for partition against her mother-in-law and brother-in-law, evidence held insufficient to show that the deceased father-in-law intended to make a gift of certain land to the mother-in-law, his wife, when purchasing it. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

Where the owner of real estate conveyed it to a third party for the purpose of having the third party convey it to the owner's wife as her separate property, which the third party, did, but the deed showed on its face that the grantee was the wife of the original owner, and contained no recitals that the consideration was paid out of her separate estate, nor that the land was to be her separate property, such land became the wife's separate property as between herself and husband, their privies in blood, and purchasers without value or with notice, but as to purchasers for value without notice it should be treated as community property. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

19. Trusts in favor of wife.—Where wife out of her own separate property furnished all money invested in land, a resulting trust existed as between husband and wife which in legal effect vested equitable title in wife. *Chaik v. Daggett* (Civ. App.) 204 S. W. 1057.

Where wife did not place money in her husband's hands to buy land, but he had her money and invested it in land, the effect was a loan to him, and he owed her a debt, and she had no right, title, or interest in the land, only holding a lien on the same. *Koger v. Clark* (Civ. App.) 216 S. W. 434.

Wife, who conveyed half interest in property to husband, was not precluded from bringing action to cancel deed by the fact that land had been sold for taxes and resold by tax sale purchaser to husband, since a deed to husband may be treated as redemption deed, and inured to wife's benefit. *Moore v. Moore* (Civ. App.) 225 S. W. 78.

21. — Enforcement.—Right of defendant wife who furnished all money paid for land would be superior to that of plaintiff, to whom defendant husband gave trust deed on land, unless wife was party to deed or plaintiff had no knowledge of her equitable title. *Chaik v. Daggett* (Civ. App.) 204 S. W. 1057.

22½. Trusts in favor of husband.—Where equity in land conveyed by husband to wife through a trustee was worthless, the wife should be considered as holding legal

title in trust for her husband, at least as to all persons having notice that she took no beneficial interest. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

23. Proceeds or increase of or interest on separate property.—For decisions construing article before amendment, see *Hayden v. McMillan*, 4 Civ. App. 479, 23 S. W. 430; *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

Where wife bought ginning machinery, paid for it out of her separate estate, sold one-half interest to a son, and then repurchased the half interest, paying for it out of money earned by operating the mill, the half interest which she repurchased became a part of the community estate between her and her husband, under arts. 4621, 4622. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

Under the Married Woman's Act amending arts. 4621, 4622, 4624, and under art. 4627, unamended, rents from a wife's separate real estate, though community property, are not subject to community debts, despite Acts 35th Leg. c. 194, amending art. 4621, providing rents from wife's separate lands shall be her separate property. *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811.

Although the rule that rents arising from wife's separate realty becomes community property was not changed so as to make such rents the wife's separate property, by Act March 21, 1913, this statute made a great change in the law respecting such rents, in that the control, management, and disposition were vested in the wife alone, and were no longer subject to the payment of debts contracted by the husband, and so far as the husband's creditors are concerned they occupy the same status as property which is strictly the wife's separate property, so that the donation by a husband to his wife of his community interest in such rents was not in fraud of any rights of creditors, as they had no interest in such rents, and an agreement between husband and wife that money borrowed on notes signed by them both should be repaid out of rents of her separate property had the same legal effect in making the borrowed money the wife's separate property as if it had been intended that repayment was to be made out of her separate property. *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

Where a wife used as a lodging house property which the spouses occupied as a homestead, the wife is not bound to use the profits from the lodging house for the support of the husband. *King v. King* (Civ. App.) 218 S. W. 1093.

Where the husband and adult sons farmed a large parcel of land belonging to the wife, on part of which was located the family homestead, held that, since Acts 35th Leg. (1917) c. 194 the wife was entitled to recover from the husband and sons one-third of the value of the crops raised on the theory of an implied letting. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

24. Damages recovered by wife.—The amendment of this article, classifying separate and community property, did not impliedly repeal art. 4621a, providing that compensation for personal injuries sustained by the wife shall be her separate property, but where the right of action of a wife for personal injuries accrued after the passage of but before Acts 35th Leg. c. 194, went into effect, art. 4621a, providing that damages for personal injuries to a wife should be her separate property, fixed her rights, assuming that the later act repeals the earlier. *Ayo v. Robertson* (Civ. App.) 207 S. W. 979.

Art. 1839, authorizing the husband to sue alone or jointly with the wife for the recovery of her separate property, is not in conflict with or repealed by the amendment of this article, giving the wife the sole management, disposition, and control of her separate property, and the husband may therefore sue for personal injury to the wife, though the damages are her separate property under art. 4621a. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

25. Right of action.—In order to enable the wife to sue alone, she must not only allege failure or neglect on the part of her husband to join her in the suit, but also that the property is her separate estate. *Barmore v. Darragh* (Civ. App.) 227 S. W. 522.

26. Estoppel of wife to claim property.—See *Lasater v. Jameson* (Civ. App.) 203 S. W. 1151.

That the law now gives a wife control of her separate property does not require her to give notice of ownership to those who might give credit to husband on strength of his possession and use of such property, to protect it against seizure and sale for payment of husband's debts. *Burkitt v. Moxley* (Civ. App.) 206 S. W. 373.

Act of wife in permitting husband and his partner to use her machinery in business as if it belonged to them did not legally estop her from claiming property as against creditor of firm, who accepted mortgage from partners to secure debt against firm. *Id.*

A debtor's representations to a creditor that he owned lands which the creditor subsequently purchased at sheriff's sale, and that the title stood in his name, could not estop his divorced wife from asserting that her conveyance of her interests in the land to him as part of a property settlement was obtained by fraud, where he was not the wife's agent, especially where the wife had conveyed to him all of her interest in the property, and had theretofore brought suit to have the conveyance and settlement set aside on the ground that they were unjust, unfair, and inequitable. *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

28. Evidence.—In action on notes in which it was sought to foreclose trust deed alleged to have been given to secure notes, evidence held to raise issue whether realty was separate property of defendant wife. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

In suit by wife for conversion of machinery, owned by her as widow of her first husband and taken by defendant from possession of her second husband in foreclosing mortgage thereon, evidence held to sustain finding that property belonged to plaintiff's

first husband, and that on his death it came into her possession as his widow. *Burkitt v. Moxley* (Civ. App.) 206 S. W. 373.

In wife's suit for divorce claiming certain land as her separate property, evidence held to support trial court's finding that husband's claim of trust was not a stale demand, and insufficient to show that the property which the wife sought to establish as her own was her separate property. *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983.

In action to garnishee husband's bank deposit, wherein wife claimed deposit as her separate property, evidence consisting of husband's testimony held sufficient to show that the deposit was the separate property of the wife, consisting of the proceeds of her own lands. *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811.

Where land is purchased by a husband with his separate funds and deed is taken in name of wife, court may disbelieve uncontradicted testimony of husband that he did not intend to make a gift of the land to his wife, and base its decision on the presumption that a gift was intended. *Kennedy v. Kennedy* (Civ. App.) 210 S. W. 581.

In an action by a husband against his wife to establish his interest in land to which the wife held the legal title, evidence held insufficient to show that the land had been purchased with funds belonging to the husband's separate estate. *King v. King* (Civ. App.) 218 S. W. 1093.

29. Management of separate estate of wife.—For decision under article prior to amendment, see *Gossard v. Lea*, 3 Tex. Civ. App. 3, 21 S. W. 703.

The amendment of this article 4621, by the Married Woman's Act of 1913, introduced a distinct change in law in respect to the control and management of the wife's separate estate. *Red River Nat. Bank v. Ferguson*, 206 S. W. 923.

In view of Const. 1869, art. 12, §§ 14 and 15, providing for the security of married women in their private property, and declaring that the Legislature shall protect from forced sale the homestead, which was in force at the time plaintiff acquired land before her marriage to defendant, as well as Const. 1875, art. 16, §§ 15, 50-52, relating to separate property of married women and homestead rights, plaintiff, where after marriage she and her husband established a homestead on her separate property, was entitled, under this article as amended, to control of the homestead, and a decree allowing the husband to control the homestead and revenues derived therefrom, was erroneous; for the revenues derived from such property were the separate property of the wife. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

30. Contracts.—The plea of coverture is personal to a married woman, and where her contract is otherwise valid, and she desires enforcement, the opposite party cannot defeat it on the ground of her coverture. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914; *Crutcher v. Sligar* (Civ. App.) 224 S. W. 227.

Under arts. 4621, 4622, 4624, as to the separate property of the husband and wife and the husband's liability for the debts of the wife, no general power is given to married women to bind themselves personally or their separate estates by notes or other contracts. *Aiken v. First Nat. Bank* (Civ. App.) 198 S. W. 1017.

Acts 33d Leg. c. 32, amending (arts. 4621, 4622, 4624), relating to rights of married women, does not confer upon a married woman a power she did not have before to contract generally as a feme sole might, but deprives her of power she did have to bind herself by contract made by her alone for benefit of her separate estate. *Sewell v. Walton* (Civ. App.) 204 S. W. 371.

A married woman is not liable on a note executed by her, where the consideration was her husband's previous debt to the payee. *Johnson v. Holland* (Civ. App.) 204 S. W. 494.

Where note signed by husband and wife was not given for necessities for the wife or children, or for the benefit of her separate estate, wife's relation to the transaction was that of a "surety" for her husband, and she would not be liable under laws existing prior to passage of Married Woman's Act of 1913 since a wife is not authorized to join in the husband's obligations either as a joint maker or as a surety. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

Where wife through a trustee purchased property of her husband subject to liens in excess of its value, held that note given by her for judgment, which husband's vendor had against him, created no personal liability against the wife, either under the Married Woman's Act of 1913 (arts. 4621, 4622, 4624) or prior statutes, since a married woman, after buying property of her husband subject to liens for sums in excess of its value, cannot make valid contracts binding herself personally to pay such sums on the theory that such contracts are for the benefit of her separate property. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

Where a married woman agreed to pay a real estate broker a commission for effecting a sale of her separate estate, and the land was sold to a purchaser secured by the broker, the husband joining in the conveyance, the broker might recover, though the husband did not authorize his wife to enter into the contract originally. *Williams v. Doan* (Civ. App.) 209 S. W. 761.

Surviving wife had the right to bind her interest in homestead by deed of trust for purpose of extending time for payment of purchase price; under Rev. St. 1879, art. 2854, in force at such time, though she had remarried at time of execution of deed in trust; the transaction being to preserve her separate estate and being merely a change in the form of the indebtedness, and not the creation of a debt. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

In view of arts. 4629a-4629d, and notwithstanding this article, wife's contract to purchase wood for wood yard, owned by her, is void, wife having no right to make personal contract in conducting mercantile or trading business such as wood yard, as

distinguished from contract of conveyance or disposition of her separate property. *Dickinson v. Griffith Lumber Co.* (Civ. App.) 213 S. W. 341.

A bill of exchange drawn by a married woman is void and unenforceable in the hands of a transferee, whether before or after maturity, irrespective of whether the transferee paid value without notice. *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

A married woman cannot be bound by provisions in a contract for the subscription to corporate stock which would warrant forfeiture of payments for nonpayment of subsequent installments. *Texas Co-operative Inv. Co. v. Clark* (Civ. App.) 216 S. W. 220.

A married woman having had legal right, at any time before she signed and acknowledged a deed conveying her separate property, to refuse to do so, plaintiff purchaser to whom she had orally promised to convey cannot base an allegation of fraud upon her void promise to execute the conveyance. *Jackson v. Carlock* (Civ. App.) 218 S. W. 578.

Where plaintiff knew that a defendant was a married woman, and that certain land was her separate property, the law charged him with notice of the fact that her verbal contract to sell it was an absolute nullity. *Id.*

If oil lease was an absolute nullity, breach of agreement by lessors, husband and wife, with their attorney, not to compromise suit to cancel lease without consent of attorney, entitled him to judgment against husband for damages if compromise was made with intent to deprive attorney of fee, though wife was not bound by agreement, not having power to contract. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

Where plaintiff and defendant, married women, agreed to use their time and money in the acquisition of oil leases, and title was taken in the name of defendant, who had been given a general power of attorney by her husband, partition of the lease as acquired may be had at the instance of plaintiff, even though plaintiff was still under coverture; the transaction not being ordinary commercial partnership. *Crutcher v. Sligar* (Civ. App.) 224 S. W. 227.

Where a wife, when requested by broker to join her husband in signing contract to sell a lot which was her separate property and also the homestead of herself and husband, refused to do so, but authorized her husband to sign it, the broker was charged with notice of the fact that her parol contract to sell was an absolute nullity. *Collett v. Harris* (Civ. App.) 229 S. W. 885.

Under Acts 33d Leg. (1913) c. 32 (arts. 4621, 4622, 4624), a wife who had verbally agreed to convey her separate property and homestead of herself and husband could refuse to do so, and no cause of action could be based upon her void parol promise to execute such a conveyance. *Id.*

The power granted to a married woman by Acts 1913, c. 32 (arts. 4621, 4622, 4624) to manage and control her separate estate and the rents to be derived therefrom carried with it the incidental and collateral power to contract with her tenant to repair her store building and to employ others to make such repairs, and she would be liable for the breach of her contract and the proximate results of negligence on the part of those employed by her in leaving the roof off during a rain and destroying tenant's property, without protection from her coverture. *Whitney Hardware Co. v. McMahan* (Sup.) 231 S. W. 694.

An agreement by a married woman, made in the absence of her husband, for the sale of her separate property, is not void, where the husband was willing to join her in the conveyance, and joined her in an action for breach thereof. *Kollaer v. Puckett* (Civ. App.) 232 S. W. 914.

35. Conveyance of separate estate of wife.—By possession of land by persons, inquiry or whom would disclose they were tenants of married woman, notice that it is her separate property is given purchaser from grantee of such woman's husband. *Markley v. Martin* (Civ. App.) 204 S. W. 123.

Where husband alone signed trust deed and alone appeared as grantor, that later when correction in description was made a notation thereof was signed by both husband and wife, and separate acknowledgments made by them, would not make the wife a party to trust deed so as to convey her equitable title. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

The Married Woman's Act of 1913 (arts. 4621, 4622, 4624) leaves the law as it was before in reference to the sale and incumbrance of the separate real estate of a married woman; that is, such a woman, though joined by her husband, cannot make a binding contract for the sale of her separate realty, with the exception that, if the husband refuses to join in conveyance or incumbrance, the wife only may procure a court order permitting her to convey or incumber without her husband's joining therein. *Jackson v. Carlock* (Civ. App.) 218 S. W. 578.

Acts 1913, c. 32, § 1 amending this article, applied to a conveyance of the homestead, which was the wife's separate property, though the husband was insane, where the conveyance was not made or necessary for the support and maintenance of either the husband or wife, as, prior to that act, there was no statute or decision vesting any right in the wife to convey without the husband joining, and the statute did not therefore destroy or impair any vested right. *Lawson v. Armstrong* (Civ. App.) 227 S. W. 687.

41. — Mortgage—Liability on.—A married woman may mortgage or pledge her separate property to secure a debt incurred by her husband; her power in that regard not being impaired by the Married Woman's Act of 1913 (arts. 4621, 4622, 4624). *Bird v. Bird* (Civ. App.) 212 S. W. 253, 257; *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

43. — **Title of purchaser.**—For decision under prior statute, see *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 779.

That wife has advanced funds from her separate estate to pay for land does not give her right which may not be defeated by unauthorized sale of land to bona fide purchaser for value, regardless of fact that her equity was not susceptible of record. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

Where a judgment was rendered against a husband, holding title to wife's land under resulting trust, and another, who as to the debt was a surety only, the surety taking note of husband secured by a trust deed on the wife's land without notice and paying the judgment was a bona fide purchaser as against the wife, but not as to balance of a note which had been given by the husband prior to the trust deed and mentioned therein as being secured. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

Where land is in fact the separate property of a wife, but is prima facie community property, purchasers at an execution sale of such property, if without notice of the facts, take the same title that they would have taken if the property had been community property in fact. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

49. **Liability of husband or wife.**—A wife, having the right to appoint an agent, is liable for the torts of such agent, committed in the management of her business. *Barber v. Keeling* (Civ. App.) 204 S. W. 139; *Whitney Hardware Co. v. McMahan* (Civ. App.) 231 S. W. 1117.

Act of wife in joining husband in execution of vendor's lien note for purchase price of land which became a part of community estate held not to create a personal liability on part of wife. *Akin v. Thompson* (Civ. App.) 196 S. W. 625.

Petition for breach of a covenant of warranty showing, without anything avoiding the disability, that a defendant was a married woman when the deed was executed, states no cause of action against her. *Shannon v. Childers* (Civ. App.) 202 S. W. 1030.

Where seller of bank stock induces buyer by fraudulent misrepresentations to buy his stock, and also that of his wife, who participates in the fraud, they are both liable for the whole of the damage sustained by reason of such fraudulent misrepresentations. *Barber v. Keeling* (Civ. App.) 204 S. W. 139.

Plaintiff and defendant being sole heirs at law of a son, and defendant father having, out of his separate estate, paid debts of son and expenses of last sickness and burial, plaintiff wife was liable for one-half of amount so paid by defendant; the payment not being voluntary, but necessary for protection of estate. *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

Where judgment had been obtained against vendee after his default and property was subject to liens in excess of its value, vendee's wife could not, under statutes as they existed prior to the Married Woman's Act of 1913 (arts. 4621, 4622, 4624), in consideration of conveyance to her, bind herself to pay a large consideration to her husband or become personally liable on a contract assuming said judgment. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

A married woman unlawfully collecting rents on lands in person, and asserting her rights personally to hold and maintain possession, is guilty of a tort, and is liable in damages. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

A bail bond was not invalid as to a surety because she was a married woman, where the husband joined with her in the execution thereof. *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

For a tortious wrong a married woman must respond in damages, though the wrong be committed in an attempt to perform a contract, whether binding or not on the married woman, so that a married woman owning a rented building would be liable for a tortious wrong in negligently and carelessly removing the roof and not replacing it until after the tenant's property was damaged by rain; such liability being independent of her capacity to contract for repairs, and independent of her liability for an act or omission of agents. *Whitney Hardware Co. v. McMahan* (Sup.) 231 S. W. 694.

The statutes dealing with the rights of husband and wife leave the wife, as well as the husband, liable for the torts of the wife. *Id.*

50. — **Enforcement.**—Where judgment for husband and wife is reversed, and cause remanded, with costs to appellant, husband is liable for costs, though suit involved wife's separate estate. *Hambleton v. Dignowity* (Civ. App.) 213 S. W. 957.

In suit to recover for a shortage in land purchased by the acre, in the absence of allegation that the property was the separate property of a defendant, the wife of the other defendant, and allegation showing that any of the proceeds of the sale became her separate estate, and in the absence of proof of such facts, personal judgment for plaintiff purchaser against defendant wife was improper. *Gillisple v. Gray* (Civ. App.) 214 S. W. 730.

Petition by company against married woman and husband held to declare on a bill of exchange drawn by defendant wife, so that it was necessary for it to aver additional facts to show that the purpose of the contract was within the statutory exceptions to the general rule forbidding married women to contract. *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

Plaintiff suing on a married woman's check due and payable on a future day, in legal effect a bill of exchange, was not entitled to instructed verdict on evidence showing a community obligation for the benefit of husband and wife, but not a contract for the wife's separate estate or for necessities for herself and children. *Id.*

52. **Agency of wife for husband.**—Where a principal impliedly authorized his wife as his agent to purchase furniture upon the terms contained in the contract signed by

her, it is immaterial that she signs the same in her own name, and the husband is bound thereby. *Mosley v. Stratton* (Civ. App.) 203 S. W. 397.

A married woman may act as agent for her husband. *Crutcher v. Sligar* (Civ. App.) 224 S. W. 227.

Where a husband and wife jointly owned and kept a dog, the husband is chargeable with knowledge on the wife's part that the dog was afflicted with rabies. *Pettus v. Weyel* (Civ. App.) 225 S. W. 191.

55. — **Authority as agent.**—Where a principal authorized his wife as his agent to purchase household furniture on credit, and in doing so it was necessary that she contract with mortgagee to insure the property, the making of such agreement was within the scope of her authority. *Mosley v. Stratton* (Civ. App.) 203 S. W. 397.

56. **Agency of husband for wife.**—Where husband, acting as agent for wife in sale of her bank stock, fraudulently misrepresented value thereof, the wife, by transferring the stock and accepting the benefits of the sale, ratified the acts of the husband. *Barber v. Keeling* (Civ. App.) 204 S. W. 139.

This article empowers a wife to contract, and hence to appoint an agent; and, being so empowered, she may appoint as such agent her husband. *Id.*

In an action by a wife to cancel a deed executed by her and her husband, evidence held sufficient to sustain a finding that the husband acted as agent for the wife in negotiating the sale. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

A married woman was incapacitated to make a power of attorney direct to her husband to convey her separate property. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

As respects claim of innocent purchase by a wife of notes given for a worthless "trade extension campaign plan" by a merchant, the knowledge of her husband, the leading member of the company which promoted the plan and which was the payee of the notes, was her knowledge; the notes being transferred to her by him after maturity. *Loveland v. Ingle* (Civ. App.) 230 S. W. 1054.

57. — **Personal liability of husband or wife.**—Under Rev. St. 1879, art. 2851, which provided that "during the marriage the husband shall have the sole management" of the wife's property, he was liable for fees for inspection of her sheep, which by Act April 4, 1883, were to be paid "by the owner or person in charge," though they may have been in the charge of another person. *Abbott v. Stanley*, 77 Tex. 309, 14 S. W. 62.

Where husband, acting as wife's agent, sells wife's bank stock by fraudulently misrepresenting value thereof, the wife, as principal, is liable in damages arising from such fraud. *Barber v. Keeling* (Civ. App.) 204 S. W. 139.

A wife, who was named as grantee in the deed at the request of her husband, is bound by his fraud, causing the conveyance to her. *Campbell v. Turley* (Civ. App.) 224 S. W. 528.

A wife is not chargeable with the fraud of her husband, even where he was guilty of fraud in exchanging community property. *Reeves v. Shook* (Civ. App.) 225 S. W. 429.

Where a broker, when he secured husband and wife's contract to sell a lot, knew that it was then homestead and her separate property, the husband, who, although his wife refused to convey, was ready and willing to make conveyance as far as he could, was not liable in damages to the broker for his wife's failure to carry out his undertaking. *Collett v. Harris* (Civ. App.) 229 S. W. 885.

A husband merely contracting as agent of his wife, the landlord, with her tenant for repair of her building, neither concealing his agency nor agreeing to be bound individually, is not liable to the tenant for injury to his goods through negligent performance of the work. *Whitney Hardware Co. v. McMahan* (Civ. App.) 231 S. W. 1117.

Art. 4621a. Money or property received as compensation for personal injuries to wife.

Construction and relation to other statutes.—This article does not affect actions filed prior to passage thereof. *Houston Belt & Terminal Ry. Co. v. Scheppelman* (Civ. App.) 203 S. W. 167.

Acts 35th Leg. c. 194 (art. 4621), did not impliedly repeal this article. *Ayo v. Robertson* (Civ. App.) 207 S. W. 979.

In personal injury action where defendant filed no plea challenging plaintiff's right to prosecute the action without joinder of her former husband, a merely collateral attack upon the divorce decree, without showing what testimony was offered in the divorce suit to show plaintiff's residence, will not support an assignment that the evidence shows that the divorce decree is null and void, especially since in any event recovery for wife's injuries is made her separate property by this article. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

Art. 1839, authorizing the husband to sue alone or jointly with the wife for the recovery of her separate property, is not in conflict with or repealed by Acts 35th Leg. (1917) c. 194 (art. 4621), giving the wife the sole management, disposition, and control of her separate property, and the husband may therefore sue for personal injury to the wife, though the damages are her separate property under this article. *Pullman Co. v. Cox* (Civ. App.) 220 S. W. 599.

Measure of damages.—The wife's services are not to be computed as those of a servant, and a verdict based upon the circumstances and conditions of the wife and guided by the sound judgment of the jury should not be disregarded, unless upon evidence of abuse of such discretion. *City of Ft. Worth v. Weisler* (Civ. App.) 212 S. W. 280.

Art. 4622. [2968] Community property; what property shall be under control, etc., of wife; bank deposits.

See *Schenck v. Foster Bldg. & Realty Co.* (Civ. App.) 215 S. W. 877; *Jackson v. Carlock* (Civ. App.) 218 S. W. 578.

Cited, *Akin v. Thompson* (Civ. App.) 196 S. W. 625; *Sewell v. Walton* (Civ. App.) 204 S. W. 371; *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923; *Johnson v. Scott* (Civ. App.) 208 S. W. 671; *Williams v. Doan* (Civ. App.) 209 S. W. 761; *Cockrell v. State* (Cr. App.) 223 S. W. 1097; *Collett v. Harris* (Civ. App.) 229 S. W. 885.

1. **Applicability in general.**—See *Bird v. Bird* (Civ. App.) 212 S. W. 253, 257.

3. **Community property in general.**—The beneficial interests of husband and wife in community property are equal, whether the grant or deed be in the name of one of them or jointly. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

Where insurance on family home, the husband's separate property, was paid for by wife from her separate property, and proceeds were used in rebuilding after a fire, held, that this did not convert the property into community property. *Rolater v. Rolater* (Civ. App.) 193 S. W. 391.

Where married man acquired realty by deed, property became community of himself and his wife. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

Whether public land purchased from the state is community or separate property is determinable by the character of the right by which the title thereto had its inception, so that, where settlers on land, who had had the land surveyed, but had not made the payments of 50 cents an acre under Act Aug. 26, 1856 (Acts 6th Leg. c. 123), assigned their interest to a then unmarried man, who, after subsequently marrying, made the payments and received patents for the land, the land became his separate property, subject to the right of the community for reimbursement for community funds used in completing the payments. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

Where a woman rented land before she married and at the time of the marriage owned the crops growing thereon in her own separate right, the property did not become community property, the expense of growing the crop being paid out of the crop, except that the husband worked a few hours on it. *Booker v. Booker* (Civ. App.) 207 S. W. 675.

Where the community funds are used in payment of separate property of one of the spouses, or where valuable improvements are made on such property out of community funds of the spouses, the separate estate of such spouse must account to the community estate. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

Plaintiffs suing as heirs of their mother, claiming she had title by limitations, had the burden of showing that her possession was adverse within the statute, also that it had continued as long as 10 years before the mother died, since possession of father after her death could not help plaintiffs, for, if adverse possession commenced by a husband and his wife has not continued long enough before the death of one occurs, and if the survivor continues such possession until the statutory title is complete, the title does not vest in the community estate, but vests in the survivor, and becomes part of his separate estate. *Jobe v. Patton* (Civ. App.) 222 S. W. 987.

Where a part of the consideration for mother's deed to married son was services rendered mother by son prior to his marriage, pursuant to mother's contract to convey the land in consideration for such services, the land was son's separate property, though community funds may subsequently have been used to pay for it. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

Except where the deed to property acquired by husband and wife expressly declares the status of the property as community or separate property, whether it is conveyed to the wife, or the husband, or to them jointly, the status is controlled by the intention of the parties at the time of taking title, which may be ascertained by parol evidence of circumstances, contemporaneous declarations, and other relevant evidence. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903.

4. **Equitable title.**—Where the legal title to real estate was in a wife as her separate property, while the land was prima facie community property, the title vested in the husband as a member of the community was equitable only. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

5. **Right of second community.**—If land conveyed to second wife was community property of second marriage, a divorced first wife claiming in right of son after his father's death was owner of undivided half interest, subject to the second wife's right to use property as her homestead. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Where a husband, while second wife was living, purchased land for cash and notes, under presumption cash payments were made from community funds, and that deferred payments should be made from same source, wife was vested with community interest in property which was not divested, nor a trust ingrafted, by her death and her husband's remarriage and completion of payments by husband and new wife. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

Where community of which third wife was member made deferred payments on land purchased by community of husband and second wife, it was entitled to be subrogated to rights of vendor lienholder against land, whose claim it satisfied, or husband's heirs in partition could seek reimbursement equal to their inherited interest in funds expended in discharging debts against common property. *Id.*

That land unconditionally conveyed to a man during his first marriage was paid for during his second and third marriages does not disturb the title of the first community; but, subject to reimbursement of the second and third communities for their

funds used, the children of the first marriage are entitled to their mother's interest, and to share equally in the remainder with the children of the other marriages. *Hughes v. Robinson* (Civ. App.) 214 S. W. 946.

6. Life insurance.—The cash surrender value of a life policy upon the life of the husband in which wife is beneficiary is not community property, and a one-half interest therein, does not pass to the wife under a decree of divorce awarding her a half interest in the community property. *Whiteselle v. Northwestern Mut. Life Ins. Co.* (Com. App.) 221 S. W. 575, affirming judgment (Civ. App.) *Northwestern Mut. Life Ins. Co. v. Whiteselle*, 188 S. W. 22.

The use of community funds in payment of premiums for insurance upon the life of one spouse in favor of the other does not, in the absence of fraud, create in the community the right to reimbursement for the funds so used. *Id.*

Payment of the balance of the purchase money on a tract of land purchased by a husband out of insurance money on his life by his surviving wife to whom the deed ran did not destroy the community character of the property and stamp it as separate estate. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

7. Interest, increase, rents, profits and products of separate property.—Under Married Woman's Act, amending arts. 4621, 4622, 4624, and under article 4627, unamended, rents from the wife's separate estate continued to remain community property. *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811; *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

Money received as a prize on a lottery ticket purchased with the separate money of the wife is community property. *Dixon v. Sanderson*, 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801.

Where wife bought ginning machinery, paid for it out of her separate estate, sold one-half interest to a son, and then repurchased the half interest, paying for it out of money earned by operating the mill, the half interest which she repurchased became a part of the community estate between her and her husband. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

Under the Married Woman's Act, amending Rev. St. arts. 4621, 4622, 4624, and under art. 4627, unamended, rents from a wife's separate real estate, though community property, are not subject to community debts, despite Acts 35th Leg. c. 194, amending art. 4621, providing rents from wife's separate lands shall be her separate property. *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811.

If the wife borrow money for the benefit of her separate property, intending to repay it out of her separate estate, and both she and her husband intend that the borrowed fund shall not be community property, but shall belong separately to the wife, such will be its status, though the husband has signed the note and pledged his separate property to secure the loan, and an agreement between husband and wife that money borrowed on notes signed by them should be used in making improvements on her separate estate, and that the loan should be paid out of her separate estate, is sufficient to show an agreement that such money was to belong separately to the wife, and was not to be community property. *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

Where a husband prepared rented land for cotton crop, and, after his death before planting, the wife procured the seed, planted the land, cultivated and raised the crop, the crop is not a part of the community property, and hence a bank in which the proceeds of the crop were deposited by the wife cannot apply same to discharge of a community note. *State Bank of Commerce v. Cox* (Civ. App.) 218 S. W. 82.

Prior to the amendment of art. 4621 (Acts 35th Leg. c. 194), which defines separate property, rents and revenues derived from separate property became part of the community estate, and not the separate estate. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

Rents and revenues derived from wife's land occupied by husband and wife constitute community funds. *Barber v. Barber* (Civ. App.) 223 S. W. 866.

Property paid for in 1901 out of the rents and revenues of the separate property of wife in part, and joint earnings of herself and husband, and in part by her children by a prior marriage, constituted community. *Davis v. Campbell-Root Lumber Co.* (Civ. App.) 231 S. W. 167.

8. Improvements on separate property.—Where improvements on a wife's land were made with community funds of husband and wife, after the husband's death a daughter-in-law, widow of a son, was entitled to her share in such improvements as against her mother-in-law, under the rule that the separate estate of one member of the community must reimburse the community for any proper improvements made in good faith on separate estate with community funds; but, since no such claim should be permitted to affect or jeopardize the title to the land, a lien for such funds cannot be fixed on it. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

Where improvements placed on wife's land occupied by husband and wife were paid for out of community funds, husband was entitled to a one-half interest therein. *Barber v. Barber* (Civ. App.) 223 S. W. 866.

16. Evidence.—In suit to establish resulting trust, evidence held insufficient to show that one-half undivided part of land belonged to plaintiffs by reason of their father's using, in purchase of land, funds belonging to community estate of himself and first wife, plaintiffs' mother. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

Evidence held to establish that funds and securities held by a third person in trust for plaintiff and defendant was all community property. *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

Where a bank which held community notes executed by the deceased husband, applied after his death to payment of notes a deposit standing in the name of the

widow, evidence held insufficient to show that the sum of \$60 which was the first item in the widow's passbook was part of a deposit standing in the name of the husband at the time of his death; hence direction of a verdict for the widow was not improper on the ground that such sum was community property. *State Bank of Commerce v. Cox* (Civ. App.) 218 S. W. 82.

The mere fact that land conveyed to wife was paid for out of community property was not in itself sufficient to warrant conclusion that the land became community and not wife's separate property. *Zellner v. Samuelson* (Civ. App.) 220 S. W. 587.

In suit against a widow to recover an undivided fourth interest in land acquired by her and her husband during their marriage, evidence held to show that the parties at the time of acquiring title intended to provide for community ownership of the land. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903.

Subsequent transactions relative to property acquired by husband and wife cannot affect the status of the title as community, or vested in one or the other party, as such question must be determined as of time when deed was taken; but they may tend to show what the intention of the parties was with reference to the matter at time of taking deed. *Id.*

17. Management, conveyances, incumbrances or gifts of community property before separation of parties.—One who assumes, by virtue of a power of attorney, to convey land deeded to his wife during the marriage, estops himself and his heirs to claim the land, since, though the power of attorney is of no effect, the land is, community property, which during the marriage may be conveyed by the husband alone. *Dooley v. Montgomery*, 72 Tex. 429, 10 S. W. 451, 2 L. R. A. 715.

The husband being by statute the managing head of the family appointed to make conveyances of community property, a deed by the wife alone is void, unless the facts exist which create an exception in extreme cases, and where a married woman conveyed her interest in community land, her deed, being a nullity, could not be vitalized by her husband's subsequent acquiescence, but could only be ratified by an act by him having essential elements of a conveyance. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

The husband is entitled to the exclusive management and disposition of the community estate during marriage, which right continues and is likewise exclusive after the wife's death for the purpose of discharging the ordinary debts of the community estate; such power of the surviving husband overriding that of the wife's administrator. *Stone v. Jackson*, 105 Tex. 385, 210 S. W. 953.

Husband and wife cannot, by mere postnuptial agreement between themselves, change the character of their property to be thereafter acquired so as to convert community into separate property. *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

A husband may make to his wife a gift of his interest in the community property then in esse, when it can be done without injury to the rights of others. *Id.*

While the community status of rents collected from wife's separate property could not be affected by the mere agreement between the husband and wife, made when he conveyed the property to her, that the rents that should thereafter accrue from the premises should be her separate property, yet if such agreement was thereafter observed and actually carried out by delivering the rents into her possession, such collected rents became her separate property, unless the gift was in fraud of creditors' rights. *Id.*

In absence of a showing that conveyance of land to wife for payments out of community property was in fraud of rights of existing creditors, or that husband for any reason could not by gift to wife make the land a part of her separate estate, the land on wife's death is a part of her separate estate and not community property. *Zellner v. Samuelson* (Civ. App.) 220 S. W. 587.

The death of either husband or wife does not affect the priority of a valid mortgage lien on their community property, or postpone it to subsequent unsecured debts against the community estate; such a lien being a vested right which cannot be destroyed by death or administration. *Fernandez v. Holland-Texas Hypoteek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

Where a wife knew of the existence, on land which was the community property of herself and her husband, of an expensive pumping plant and pipe line, and that third persons were exercising control over the plant, and that her husband had recognized their rights, she could not claim that she had no notice of the claim of such persons under a sale to them by the husband of his interest therein, as being personal property, and not realty, as attached to the land. *Markley v. Christen* (Civ. App.) 226 S. W. 150.

That the husband alone signed chattel mortgage on household goods did not make the mortgage void on the ground that it was a mortgage of the community property, since under this article, the husband alone may dispose of the community property. *Mason v. Green* (Civ. App.) 226 S. W. 829.

A deed from a man in which his wife did not join conveyed to the grantee all the community interest in the land except the homestead claim. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

24. Abandonment or separation or dissolution of community as affecting title of parties.—Where husband, when he abandoned wife, sold community personalty, and appropriated proceeds as his share of community estate, delivering to wife community realty as her share, wife had equitable title to realty or exclusion of interest by husband. *Mother Mary Angela v. Battle* (Civ. App.) 198 S. W. 1030.

Where a husband abandoned his wife, leaving her in possession of the community lands, which possession she retained for 16 years, the wife could not acquire title to the lands by limitations. *Hardin v. Hardin* (Civ. App.) 217 S. W. 1108.

Where a husband abandoned his wife, leaving her in possession of about 400 acres of land, held that, under Rev. St. 1911, art. 4622, which was in force at the time of abandonment, which continued until the death of the wife some 16 years thereafter,

the wife did not acquire title to the entire parcel of land on the theory there was a relinquishment by the husband of his interest therein. *Id.*

Under Constitution of the Republic of Texas, Bill of Rights, §§ 6, 7, forfeiture of a wife's interest in the community property for her adultery could not have resulted from a mere divorce proceeding, but could be decreed only in a direct proceeding for the purpose of declaring the forfeiture, with full opportunity on her part to be heard. *Stedum v. Kirby Lumber Co.*, 110 Tex. 513, 221 S. W. 920, reversing judgment (Civ. App.) 154 S. W. 273.

If, in an agreement of separation and settlement of property rights between a man and his wife, who thereafter obtained a divorce, the husband obtained more than his just share of the community property, he held the excess over and above his just share in trust for the benefit of the wife because of the fiduciary or trust relation presumed by law to exist between husband and wife, and equity will impress a trust thereon, especially where the wife's interest was at least three times as much as the husband agreed to pay therefor. *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

25. — Abandonment or separation as affecting right to manage, incumber or convey.—Where a husband abandoned his wife and she and children of the marriage are in necessitous circumstances, she may, without the husband's joinder or consent, convey community property passing good title. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

The husband may make a valid sale of community property constituting the homestead, where the wife voluntarily abandons and is living in abandonment of her husband at the time of such sale. *Murphy v. Lewis* (Civ. App.) 198 S. W. 1059.

There can be no estoppel by reason of representations of the wife as to her power to sell community property and convey by her deed alone, based on her husband's alleged abandonment, where at the time of the representations and conveyance the husband is in possession of the land and fulfilling his duties as custodian thereof. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

That a husband abandoned his wife and their minor children, leaving her in possession of certain personal property and land, but otherwise unprovided for, and remained away until after his wife's death about 15 years later, and after such abandonment contributed nothing to their support and claimed no interest in their earnings, authorized a finding that the wife had power to control and dispose of the property belonging to the common estate in her possession when she was abandoned, or which she afterwards acquired possession of. *Hardin v. Hardin* (Civ. App.) 217 S. W. 1108.

29. Actions for community property.—A woman who married a second time after void divorce proceedings against her first husband cannot sue her first husband for partition of community real estate, since maintenance of such action is dependent upon a valid divorce. *Givens v. Givens* (Civ. App.) 195 S. W. 877.

Where a trunk containing baggage of the husband and wife, most of which was community property, and part of which belonged to the wife, was lost by the innkeeper, both husband and wife could sue to recover the damage in the same suit. *Zeiger v. Woodson* (Civ. App.) 202 S. W. 164.

In trespass to try title by divorced first wife of decedent, claiming through her son, against second wife, where by judgment court did not attempt to reform deed to second wife, it was not necessary that grantors should have been made parties. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Suit on a policy of insurance issued to a wife covering household goods constituting the community property of the wife and her husband was properly brought in the name of the husband. *Allemania Fire Ins. Co. v. Angier* (Civ. App.) 214 S. W. 450.

Under this article, and art. 4623, it was proper to refuse, in a suit to quiet title, where plaintiff claimed that property purchased by his wife was community property, an instruction that there was a presumption that property was purchased with community funds, and that the burden of proving the contrary to the satisfaction of the jury was on defendant. *Moss v. Ingram* (Civ. App.) 224 S. W. 258.

Wife is not a necessary party to an action against husband to try the title to, affect an interest in, or foreclose a lien on community real estate, and in determining whether the wife's homestead interest alone renders her a necessary party to an action affecting property impressed with the homestead exemption, the test is whether the plea of homestead would in itself be a defense to the suit. *Cooley v. Miller* (Com. App.) 228 S. W. 1085.

30. — Right of action by abandoned wife against husband.—That defendant husband without just cause abandoned plaintiff wife and infant child, taking with him not only the money belonging to the community estate, but property belonging to the wife, authorized suit not only for separate property, but for interest in community estate. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

37. Descent and distribution.—On death of a husband and probate of his will, his title to lands purchased subsequent to divorce from his first wife passed to his son by his second wife, to whom he devised, subject to rights of creditors. *McDaniel v. Lauchner* (Civ. App.) 206 S. W. 221.

Despite the declaration of this article, that any funds on deposit in any bank, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, at the death of a husband funds on deposit in his name will be deemed community estate; the purpose of the statute enacted in 1913 (Acts 33d Leg. c. 32 [arts. 4621, 4622, 4624]) being primarily for the protection of married women, and incidentally married men, by preventing the honoring of checks on their deposits by the opposite spouse, and not intended to change the general presumption on death. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

Art. 4623. [2969] Presumption as to community property.

Applicability in general.—Despite art. 4622, declaring that any funds on deposit in any bank, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, at the death of a husband funds on deposit in his name will be deemed community estate; the purpose of the statute enacted in 1913 (Acts 33d Leg. c. 32 [arts. 4621, 4622, 4624]) being primarily for the protection of married women, and incidentally married men, by preventing the honoring of checks on their deposits by the opposite spouse, and not intended to change the general presumption on death. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

In an action for divorce and division of community property, it was only necessary for plaintiff, wife, to allege that such property was acquired by joint labor during their marriage to make out her case as to its character under this article, and husband's general denial and plea of limitations was insufficient to permit a defense that they lived part of the time in a state where the wife had no shares in such property, and he should have pleaded such facts and pleaded and proved the laws of such state to warrant such issue. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

Under art. 4622, declaring that all property acquired by either husband or wife during marriage, except that which is the separate property of either, shall be deemed common property, and this article, it was proper to refuse, in a suit to quiet title, where plaintiff claimed that property purchased by his wife was community property, an instruction that there was a presumption that property was purchased with community funds, and that the burden of proving the contrary to the satisfaction of the jury was on defendant. *Moss v. Ingram* (Civ. App.) 224 S. W. 258.

Presumptions and burden of proof.—Where property is acquired by husband or wife during the marriage relation, there is a presumption that it is community property. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903; *Hughes v. Robinson* (Civ. App.) 214 S. W. 946; *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118; *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

Evidence that the property claimed as a deceased wife's separate property was purchased during marriage, and possessed by the husband at her death; that the wife, at marriage, had property invested in another state, which was subsequently reinvested in Texas, mostly in a homestead, recognized as common property; and that part of the property claimed was made by the husband with her money in such a way as to make it common property,—is insufficient to show that the property was the wife's separate estate, though she attempted to dispose of it as such by will. *Peet v. Commerce & E. S. Ry. Co.*, 70 Tex. 522, 8 S. W. 203.

N. came to Texas some time after 1827, and there married. In 1836 he served in the army of Texas, and became, under the ordinance of December 5, 1835, § 10, entitled to a bounty warrant for 320 acres of land. He died either in the year 1838, 1839, or 1840, leaving a child by said marriage, and it did not appear that his wife survived him. Held that, the presumption is that the right to the bounty was community property, and the burden is on one who claims that it was the separate estate of N. to show that the marriage took place after the services were rendered. *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S. W. 560.

In absence of evidence, held, that there was no presumption that payments on indebtedness on husband's separate property made during the existence of the marriage relation were made from community funds. *Rolater v. Rolater* (Civ. App.) 198 S. W. 391.

Presumption that property acquired during marriage is community property may as between parties, their blood privies, and purchasers without value or with notice, be rebutted by parol evidence, but not as to bona fide purchasers for value without notice. *Crawford v. Gibson* (Civ. App.) 203 S. W. 375.

In suit involving rights of heirs to lot acquired by husband and wife during marriage, and conveyed by wife after death of husband, held undisputed facts in evidence were sufficient to rebut presumption that lot was community property. *Id.*

Certain realty having been acquired by a husband long subsequent to his divorce from his wife, there is no presumption it belonged to their community estate. *McDaniel v. Lauchner* (Civ. App.) 206 S. W. 221.

Where a husband, while second wife was living, purchased land for cash and notes, under presumption cash payments were made from community funds, and that deferred payments should be made from same source, wife was vested with community interest in property which was not divested, nor a trust ingrafted, by her death and her husband's remarriage and completion of payments by husband and new wife. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

Where plaintiffs sought an interest in land as community property of their mother and stepfather, the burden is upon them to show the community interest and its extent, where being acquired by deed after the death of the wife it was presumptively the separate property of the husband, and plaintiffs asserting an equitable title were bound to show that purchaser had prior notice of their equity; mere knowledge of the stepfather's marriage to plaintiffs' mother being insufficient. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

Property purchased from a husband's separate estate is presumed to have been given to the wife so as to become her separate estate where the deed was taken in her name, but the presumption may be rebutted. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

The presumption is that land deeded to a married man was community property; so one claiming it was the wife's has the burden of showing it. *Hughes v. Robinson* (Civ. App.) 214 S. W. 946.

Property conveyed to the wife, without any recitation showing it to be her separate property, is presumed to be a part of the community, which presumption becomes conclusive as to purchasers from the husband for a valuable consideration without notice, and cannot be affected by parol evidence showing the property to be the wife's separate property. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

Money borrowed by the husband or the wife, in the absence of agreement to the contrary, is presumed to be community property, even though the separate property of one of the spouses is mortgaged to secure the loan. *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101.

The mere fact that property presumed the community estate of a decedent might have been his separate estate is no ground for attacking a finding that the property was community estate; those asserting that it was his separate estate having the burden of proving the same. *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

There is a presumption that land bought by a husband during the existence of the marital relation between himself and his wife was community property, and the burden was on the wife, sued, after her husband's death, for partition, to establish that it was her separate estate even though the deed was executed to her. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

Ordinarily, in the absence of contrary intention, showing that part of the initial payment for property purchased by husband and wife constituted the separate property of the husband would be sufficient to rebut the presumption the property became community property, and would require a holding that the husband owned a separate interest in the proportion his separate funds bore to the total price, whether title was taken in the name of husband, or wife, or jointly. *Cummins v. Cummins* (Civ. App.) 224 S. W. 903.

Art. 4624. What property subject to debts of wife; husband must join in certain contracts.

See *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811; *Armstrong v. Turbeville* (Civ. App.) 216 S. W. 1101; *Jackson v. Carlock* (Civ. App.) 218 S. W. 578; *Winters v. Duncan* (Civ. App.) 220 S. W. 219; *Whitney Hardware Co. v. McMahan* (Civ. App.) 231 S. W. 1117.

Cited, *Gossard v. Lea*, 3 Civ. App. 3, 21 S. W. 703.

Construction in general.—Married Woman's Act of 1913 (arts. 4621, 4622, 4624), authorizing the wife, by implication, to become joint maker or surety of another when joined by her husband, confers upon the wife powers with which she was not theretofore invested, and the maxim "Expressio unius est exclusio alterius" has marked application. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

Authority to contract in general.—No general power is given to married women to bind themselves personally or their separate estates by notes or other contracts. *Aiken v. First Nat. Bank* (Civ. App.) 198 S. W. 1017.

Acts 33d Leg. c. 32 (arts. 4621, 4622, 4624), relating to rights of married women, does not confer upon a married woman a power she did not have before to contract generally as a feme sole might, but deprives her of power she did have to bind herself by contract made by her alone for benefit of her separate estate. *Sewell v. Walton* (Civ. App.) 204 S. W. 371.

Where note signed by husband and wife was not given for necessities for the wife or children, or for the benefit of her separate estate, wife's relation to the transaction was that of a "surety" for her husband, and she would not be liable under laws existing prior to passage of Married Woman's Act of 1913 (arts. 4621, 4622, 4624). *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

The power of the wife to mortgage her separate property for the debts of her husband was not impaired by the Married Woman's Act of 1913 (arts. 4621, 4622, 4624). *Id.*

Under Married Woman's Act of 1913 (arts. 4621, 4622, 4624) a wife is not authorized to join in the husband's obligations either as a joint maker or as a surety. *Id.*

Rev. St. 1911, art. 4624, which, prior to amendment, authorized married woman to incur indebtedness for benefit of her separate property, did not authorize wife to make herself personally liable on contracts assuming the payment of purchase money due on property bought by her. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

Rev. St. 1911, art. 4624, which, prior to amendment, authorized married woman to contract debts for benefit of separate property, conferred no authority to borrow money for investment purposes. *Id.*

A married woman may mortgage or pledge her separate property to secure a debt incurred by her husband; her power in that regard not being impaired by the Married Woman's Act of 1913 (arts. 4621, 4622, 4624). *Bird v. Bird* (Civ. App.) 212 S. W. 253, 257.

In view of arts. 4629a-4629d, and notwithstanding art. 4621 and the Married Woman's Act of 1913, wife's contract to purchase wood for wood yard, owned by her, is void; wife having no right to make personal contract in conducting mercantile or trading business such as wood yard, as distinguished from contract of conveyance or disposition of her separate property. *Dickinson v. Griffith Lumber Co.* (Civ. App.) 213 S. W. 341.

Under Acts 33d Leg. (1913) c. 32, (arts. 4621, 4622, 4624), a bail bond was not invalid as to a surety because she was a married woman, where the husband joined with her in the execution thereof. *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

Under Acts 33d Leg. (1913) c. 32 (arts. 4621, 4622, 4624), even if a married woman had made a contract in writing, properly acknowledged, to convey a lot which was her separate property and the homestead of herself and husband, she could not be bound thereby, for she could repudiate and refuse to comply with it up to the time she declared

to the officer taking her acknowledgment that she did not wish to retract, as she could not legally contract beforehand in regard to her right to retract so as to deprive herself of that right. *Collett v. Harris* (Civ. App.) 229 S. W. 885.

— **Joinder of husband.**—Under arts. 4621, 4622, 4624, as amended by Acts 33d Leg. c. 32 (arts. 4621, 4622, 4624), held that, where a married woman agreed to pay a real estate broker a commission for effecting a sale of her separate estate, and the land was sold to a purchaser secured by the broker, the husband joining in the conveyance, the broker might recover, though the husband did not authorize his wife to enter into the contract originally. *Williams v. Doan* (Civ. App.) 209 S. W. 761.

A note or other document executed by the wife not joined by the husband, is a nullity. *Schenck v. Foster Building & Realty Co.* (Civ. App.) 215 S. W. 877.

Where wife purchased land as her separate property with husband's consent and approval, husband's failure to join wife in executing purchase-money notes secured by vendor's lien did not affect validity of lien. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

— **Personal liability of husband or wife.**—Wife would not be personally liable upon notes executed by her in part payment for land conveyed to her, her husband signing the notes pro forma. *Benjamin v. Youngblood* (Civ. App.) 207 S. W. 687.

Where judgment had been obtained against a vendee after his default and property was subject to liens in excess of its value, vendee's wife could not, under statutes as they existed prior to the Married Woman's Act of 1913 (arts. 4621, 4622, 4624), in consideration of conveyance to her, bind herself to pay a large consideration to her husband or become personally liable on a contract assuming said judgment. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

The mere fact that a wife got the money on her note did not render her personally liable on the note, although it was executed for indebtedness incurred before the authority given by Rev. St. 1911, art. 4624, to a wife to contract debts, for benefit of her separate property was taken away by amendment of that statute. *Mills v. Frost Nat. Bank* (Civ. App.) 208 S. W. 698.

Wife could not be made personally liable on note signed by wife and husband in absence of showing that the money borrowed and deed of trust executed to secure note went for the benefit of her separate estate or for necessaries such as to subject her property. *Fernandez v. Holland-Texas Hypotheek Bank of Amsterdam, Holland* (Civ. App.) 221 S. W. 1004.

A wife is not personally liable on a note given by her for land bought by her, nor is the husband who signed such note pro forma personally liable thereon, regardless of whether the property bought was community property or the separate property of the woman. *Givens v. Davis* (Civ. App.) 227 S. W. 367.

— **Avoidance of contract by other party.**—Where husband did not join wife in execution of purchase-money notes on her purchase of land as her separate property, wife, after electing on death of husband to hold the property, could not defeat lien by plea of coverture, since the husband's failure to join in execution of notes did not render them void, but at most voidable. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

Necessaries.—A husband is not liable for necessaries furnished the wife after she has abandoned him without fault on his part, where he has furnished her with sufficient means to supply herself with such necessaries. *Sanger Bros. v. Trammell* (Civ. App.) 198 S. W. 1175.

Note executed by abandoned wife stands on same footing as if it was executed for necessaries, where proceeds were used in purchase of necessaries. *Williams v. Farmers' Nat. Bank of Stephenville* (Civ. App.) 201 S. W. 1083.

Attorney cannot recover from married woman for services in prosecuting a divorce suit, not instituted by her in good faith and with probable cause; such services not being a necessary. *Yeager v. Bradley* (Civ. App.) 226 S. W. 1079.

Debts or liabilities charged on separate estate.—Wife by merely executing jointly with her husband note does not bind herself personally or her separate property notwithstanding Married Woman's Act of 1913, amending this article. *First State Bank of Tomball v. Tinkham* (Civ. App.) 195 S. W. 880.

In determining liability to execution of Texas lands of a married woman for a debt contracted outside the state, the laws of the state where debt was contracted govern. *Walker v. Goetz* (Civ. App.) 218 S. W. 569.

A wife's property, consisting of part of the notes received by her and her husband on sale of their community land, having been delivered to the wife by the husband as a condition of her joining in the deed were not liable for the debts of the husband. *Earhart v. Agnew* (Com. App.) 222 S. W. 188, reversing judgment (Civ. App.) 190 S. W. 1140.

A provision of a statute or municipal charter making married women personally liable for benefits to their homestead property for street improvements is not inconsistent with this article. *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703.

Art. 4625. [2971] Judgment and execution in such cases.

Cited. *Aiken v. First Nat. Bank of Bridgeport* (Civ. App.) 198 S. W. 1017; *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923; *Winters v. Duncan* (Civ. App.) 220 S. W. 219.

Art. 4626. [2972] Husband failing to support wife, etc.

See *Schepflin v. Small*, 4 Civ. App. 493, 23 S. W. 432.

Art. 4627. [2973] Community property liable for debts.

Community debts—What are.—The same binding effect is given to a judgment rendered against the husband alone on a community debt when suit is brought before as when brought after the death of the wife, with respect to the liability of the community property to satisfy the same. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Community and separate debts—Property liable for.—Under the Married Woman's Act amending Rev. St. arts. 4621, 4622, 4624, and under art. 4627, unamended, rents from a wife's separate real estate, though community property, are not subject to community debts, despite Acts 35th Leg. c. 194, amending art. 4621, providing rents from wife's separate lands shall be her separate property. *Texas Lumber & Loan Co. v. First Nat. Bank* (Civ. App.) 209 S. W. 811.

Community property is the primary fund for the payment of community debts, and where there exists sufficient community property to pay community debts, no resort can be had to the separate property of a deceased husband for the purpose of paying such debts. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

The heirs of the wife on her death are entitled, not to one-half of the community property then existing, but to one-half of what may remain after the discharge of the debts contracted by either husband or wife during marriage for which such property is liable. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Community funds in name of wife may be impounded by garnishment in aid of judgment against husband. *Szanto v. First State Bank of Mt. Calm* (Civ. App.) 212 S. W. 971.

Rights and remedies of creditors and purchasers.—Where a husband dies leaving a second wife and an unsettled estate held by him in community with the first wife, the creditors of such estate are entitled to the whole of the first wife's share to the extent of their debts in preference to the heirs of the first marriage. *Stayton, C. J., dissenting. Hoffman v. Hoffman*, 79 Tex. 189, 15 S. W. 471.

It is not obligatory on a debtor to interpose limitations to defeat a debt he still owes, and the omission of a surviving husband to plead limitations against a community obligation cannot be treated as actuated by a fraudulent intent against the heirs of the wife, when such omission is just as prejudicial to his interests in and to community property as to that of the wife's heirs. *Stone v. Jackson*, 109 Tex. 385, 210 S. W. 953.

Since, under Act March 13, 1848 (Acts 2d Leg. c. 79; 3 Gammel's Laws, p. 77), and Act Aug. 26, 1856 (Acts 5th Leg. c. 123; 4 Gammel's Laws, p. 469), community property was expressly made liable for the debts of both husband and wife contracted during marriage, purchasers of such property at an execution sale in 1873 acquired all the right, title, and interest that the community or either member of it had therein, as no other holding would fully effectuate the clear purpose of the statutes. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

Art. 4628. [2974] Female under 21 emancipated by marriage.

See *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Art. 4629a. May apply to district court to be feme sole for mercantile and trading purposes, how.

Contracts by wife.—In view of arts. 4629a-4629d, and notwithstanding art. 4621, and the Married Woman's Act of 1913, wife's contract to purchase wood for wood yard, owned by her, is void, wife having no right to make personal contract in conducting mercantile or trading business such as wood yard, as distinguished from contract of conveyance or disposition of her separate property. *Dickinson v. Griffith Lumber Co.* (Civ. App.) 213 S. W. 341.

DECISIONS IN GENERAL

Right to possession and disposition of body of deceased spouse.—See *Foster v. Foster* (Civ. App.) 220 S. W. 215; *Curlin v. Curlin* (Civ. App.) 228 S. W. 602.

Support of spouse.—At common law no duty rested upon the wife to support the husband. *King v. King* (Civ. App.) 218 S. W. 1093.

CHAPTER FOUR

DIVORCE

Art.	Art.
4630. Marriage may be annulled, when.	4635. Condonation, connivance and collusion.
4631. Divorce may be granted in what cases.	4637. Debts and alienations after suit.
4632. Plaintiff must be resident in state and county.	4638. Inventory and appraisement, etc.
4633. Husband and wife may testify.	4639. Temporary orders, etc.
4634. Division of property.	4640. Alimony.
	4641. Custody of children.

Article 4630. [2976] Marriage may be annulled, when.

Grounds.—Where consent of a party to a marriage is gained by conspiracy, fraud, and misrepresentation of material facts, the marriage can be annulled. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Right of action.—The question of a father's right to maintain a suit in his own behalf to annul the marriage of his minor son is one affecting the remedy, and is governed by the law of the forum. *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Art. 4631. [2977] Divorce may be granted in what cases.

1. **In general.**—Final decree of divorce rendered by California court after the husband's death constituted a valid divorce. *Kinney v. Tri-State Telephone Co.* (Civ. App.) 201 S. W. 1180.

Parties cannot be divorced for incompatibility, or because they live unhappily together, or merely because they possess unruly tempers, or for marital wranglings. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

2. **Cruelty—Acts constituting.**—Where defendant husband would leave home for considerable period without informing his wife of his whereabouts, and on returning would abuse her and threaten to take her life, held, that his treatment was such as would warrant a divorce. *Smith v. Smith* (Civ. App.) 200 S. W. 1129.

The general rule is, in absence of physical violence or fear of it, that conduct complained of must be such as is reasonably calculated to produce degree of mental distress that will impair health of complaining spouse or render living together insupportable. *Claunch v. Claunch* (Civ. App.) 203 S. W. 930.

Drunkenness alone is not a ground for divorce as cruelty. *Id.*

"Studied vexatious and deliberate insults," heaped upon defendant husband by plaintiff wife, leaving no room to doubt that her treatment of him was of such cruel nature as to render his living with her insupportable, warranted decree for defendant. *Lefevre v. Lefevre* (Civ. App.) 205 S. W. 842.

Under statutes authorizing divorce for excesses, cruel treatment, or outrages rendering living together insupportable, husband is not entitled to divorce, unless cruelty of wife was intended to injure him. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

In an action for divorce upon grounds of cruel treatment, it is not necessary to show actual violence committed; "cruelty," as used in statute, being broad enough to include outrages upon the feelings inflicting mental pain and anguish, where the conduct has been studied, willful, and deliberate. *Id.*

If ill treatment is of such a nature as to render their living together insupportable, physical violence need not always be shown, and excesses, cruel treatment, or outrages of such a nature as will produce a degree of mental distress, threatening to impair the health of the injured party, is sufficient, so that where a husband was unsanitary in his person, cursed the wife not only in privacy, but in the presence of others, neglected her and refused to furnish her and their children proper clothing, but allowed the wife to work to help support herself and the children while earning good wages himself, neglected her in her sickness, etc., and such acts were not occasional, but persistent, the wife was entitled to a divorce. *Erwin v. Erwin* (Civ. App.) 231 S. W. 834.

4. — **Provocation.**—Where a wife provokes her husband to cruel treatment, she cannot be granted a divorce on account of such treatment. *Smith v. Smith* (Civ. App.) 200 S. W. 1129.

5. — **Condonation.**—"Condonation" is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offending spouse shall thereafter treat the injured party with conjugal kindness. It is not absolute, but is based upon the repentance of the guilty party, and conditioned upon nonrepetition of the offense and future kind treatment; a violation of it in other respect reviving the original offense. *Parker v. Parker* (Civ. App.) 204 S. W. 493.

Where wife lived with husband after his last assault upon and cruel treatment of her only under some kind of hallucination or abnormal condition that rendered her irresponsible for her own conduct, she could not condone his treatment, and is entitled to divorce therefor. *Mahurin v. Mahurin* (Civ. App.) 208 S. W. 558.

6. — **Recrimination.**—While recrimination need not be of equal degree, it must be of the same general character, and such as is reasonably calculated to have provoked the misconduct of defendant. *McNabb v. McNabb* (Civ. App.) 207 S. W. 129.

Although recrimination was not pleaded, defendant wife had right to have issue submitted, where raised by the evidence, since even where there is no answer, it is the duty of the court to hear any testimony which shows that plaintiff is not entitled to a divorce. *Id.*

Accusations, recrimination, and conduct of wife towards husband must be considered as against her claim for divorce for cruelty. *Tanton v. Tanton* (Civ. App.) 209 S. W. 429.

Divorces sought for on ground of cruelty will not be granted where the cruelty approaches mutuality and both have indulged therein. *Wiedner v. Wiedner* (Civ. App.) 231 S. W. 448.

8. — **Evidence.**—Evidence held insufficient to support a decree of divorce for "cruel treatment," such as to render living together insupportable. *Bolt v. Bolt* (Civ. App.) 199 S. W. 309.

Clear and convincing proof should be demanded before the marriage relation is dissolved. *Rowden v. Rowden* (Civ. App.) 212 S. W. 302.

11. **Abandonment—Elements of.**—Indecent proposals by a husband to his daughter-in-law held sufficient to justify his wife in abandoning him, so that he could not secure divorce for desertion. *Knight v. Knight* (Civ. App.) 220 S. W. 609.

12. — **Offer of renewal of cohabitation.**—Fact that husband visited wife, who had abandoned him, for purpose of trying to persuade her to return, did not interrupt running of period of abandonment. *Dickerson v. Dickerson* (Civ. App.) 207 S. W. 941.

15. — **Evidence.**—In wife's action for divorce, evidence held to show that wife had been separated from husband without cohabitation for more than 10 years, not including the time she was in an insane asylum, so as to entitle her to divorce. *Landers v. Landers* (Civ. App.) 220 S. W. 359.

Art. 4632. Plaintiff must be resident; military service; suit not to be heard within 30 days; remarriage; divorce where marriage was to escape penalties for seduction; additional ground for divorce.—No suit for divorce from the bonds of matrimony shall be maintained in the courts of this State unless the petitioner for such divorce shall at the time of exhibiting his or her petition, be an actual bona fide inhabitant of the State for a period of twelve months, and shall have resided in the county where the suit is filed six months next preceding the filing of the suit; provided that a citizen of this State who is, or has been absent from this State for more than six months in the military or naval service of this State or of the United States shall be entitled to sue for a divorce in this State and in the county in which he or she had his or her residence before going into such service; provided that, such suit shall not be heard or divorce granted; before the expiration of thirty days after the same is filed; and provided further, that neither party to a divorce suit, wherein a divorce is granted upon the ground of cruel treatment, shall marry any other person for a period of twelve months next after such divorce is granted, but the parties so divorced may marry each other at any time, upon obtaining a license as provided in Article 4610; provided that where a man marries the woman whom he seduces to escape penalties of the law punishing for seduction, the man shall not be entitled to a divorce for any cause within three years after such marriage, provided that this Act shall not apply to any case where either the husband or wife is insane.

Provided further that in addition to the grounds for divorce now provided by statute, that where any husband and wife have lived apart without co-habitation for as long as ten years, the same shall be sufficient grounds for divorce. [Act May 27, 1873, p. 117. P. D. 3459. Acts 1913, p. 183, § 1; Acts 1921, 37th Leg., ch. 82, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.

Cited, *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

Residence.—Plaintiff does not comply with this article, by acquiring residence in county where divorce suit is filed 6 months preceding filing, but actually residing there only 2½ months, though she had bona fide intention during all that time to make county her home. *Hunt v. Hunt* (Civ. App.) 196 S. W. 967.

This article was not complied with where plaintiff had actually resided in county where suit filed 6 months next preceding filing of amended petition for divorce, but not 6 months next preceding original institution of suit. *Id.*

In suit to obtain divorce and recover separate property and community interest, objection that allegations failed to show that plaintiff wife had resided in county, and had been actual bona fide inhabitant of the state for 12 months, might be good as far as suit for divorce is concerned, but would have no pertinency so far as suit for her property is concerned. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

An actual residence in the state and county is essential to give the court jurisdiction. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

A soldier of the United States who was stationed at San Antonio, Tex., under orders of his superiors, though actually there for more than 12 months, cannot be deemed to have been an inhabitant of the state for 12 months, and to have resided in the county for 6 months preceding the filing of a petition for divorce from his wife, within this article, it not appearing that the soldier, who testified that he intended to make San Antonio his home, had made any declarations to third persons, or that he had done any act evidencing such an intent. *Id.*

A wife's act in merely going to another state to secure divorce, and in residing there the required length of time, but without any intention to remain permanently or

indefinitely, is not sufficient to give the courts of such state jurisdiction of her divorce proceedings. *Richmond v. Sangster* (Civ. App.) 217 S. W. 723.

The term "inhabitant" carries with it the idea of a fixed and permanent residence, as distinguished from a temporary residence, to give the court jurisdiction over the divorce action; hence a petition, merely alleging that plaintiff was an actual bona fide inhabitant of the state and had resided in the county where suit was filed for more than 12 months next preceding the filing, is open to demurrer. *Motes v. Motes* (Civ. App.) 229 S. W. 342. See, also, *Landers v. Landers* (Civ. App.) 220 S. W. 359.

Petition.—An allegation in the petition that the petitioner was "a bona fide citizen" of the county, and had been for more than six months prior thereto, was insufficient. *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90.

Proof as to inhabitancy of state and residence of county, is as essential as any other fact in a divorce case, and though the question is not raised by plea in abatement, it is not waived, but the plaintiff must allege and prove residence as part of his case. *Gallagher v. Gallagher* (Civ. App.) 214 S. W. 516.

Evidence.—Evidence held to show that plaintiff was a bona fide inhabitant of the state, and had resided in county in which divorce action was brought the requisite time to give court jurisdiction. *Dickerson v. Dickerson* (Civ. App.) 207 S. W. 941.

In a suit for divorce and division of community property, defendant's evidence held to show that he did not acquire a residence in Mississippi during his stay there. *Bobbitt v. Bobbitt* (Civ. App.) 223 S. W. 478.

In an action to set aside a judgment of divorce, findings in the divorce suit that the plaintiff wife had been a resident of Texas for 12 months next preceding the action, and a resident of the county in which it was begun for 6 months prior to institution, held warranted by the evidence. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Time for hearing.—Court did not err in hearing and granting divorce more than 30 days after the filing of the original petition, but less than 30 days after filing of so-called "first amended original petition," where the latter petition merely answered defendant's plea to the jurisdiction and other facts pleaded by him specially, and restated cause of action without specifying any ground for divorce; such petition being in effect a first supplemental petition. *Barras v. Barras* (Civ. App.) 217 S. W. 252.

It was improper to hear the suit and grant divorce on the second day after filing; the statute being mandatory. *Beeler v. Beeler* (Civ. App.) 218 S. W. 553.

Divorce granted in less than 30 days after filing of suit, is void, and not merely voidable, so that motion to set it aside after the term need not show a meritorious defense to suit. *Snow v. Snow* (Civ. App.) 223 S. W. 240.

There must be full 30 days between the day of filing and the day of judgment; the day of the filing and the thirtieth day being excluded. *Snow v. Snow* (Civ. App.) 223 S. W. 240.

Insanity.—This article absolutely prohibits divorce where either party is insane. *Daugherty v. Daugherty* (Civ. App.) 198 S. W. 985.

Divorce decree, recognizing existence and validity of husband's note secured by deed of trust in wife's land, was not conclusive, in subsequent action to foreclose the deed of trust, that wife if insane at time of execution thereof was sane at time of divorce, and therefore ratified it, notwithstanding the provision of this article, that no divorce shall be granted unless both parties are sane; the plaintiff in subsequent action not having been a party to the divorce suit. *White v. Holland* (Civ. App.) 229 S. W. 611.

Judgment.—Interlocutory divorce order, "that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein," etc., held not to have dissolved the bonds of matrimony. *Kinney v. Tri-State Telephone Co.* (Com. App.) 222 S. W. 227, reversing judgment (Civ. App.) 201 S. W. 1180.

Where husband for whom interlocutory divorce judgment had been rendered died before entry of final judgment but after expiration of the year he was required to wait before final judgment could be entered, the final judgment where not entered nunc pro tunc had no validity as a judgment. *Id.*

Decree of divorce is absolute in Texas from its entry, unless set aside or appealed from, so that a provision in decree in Oklahoma, where it is not shown that the law of that state is to the contrary, that the decree shall not be absolute until six months after entry is of no effect in Texas. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Remarriage.—As a general rule, statutes of a state prohibiting remarriage within a stated time after divorce and making such marriage void have no extraterritorial force, and do not invalidate a marriage within the limited time in another state, whose laws do not prohibit such remarriage. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Art. 4633. [2979] Husband and wife competent witnesses.

Construction in general.—This article is a direction to the court, and does not establish a rule to guide the jurors as to the burden of proof, so that, after the court had charged that the burden was on plaintiff to make out his case by preponderance of the evidence sufficient to satisfy the jury, a charge requested by defendant that the burden was on plaintiff to establish material allegations by full and satisfactory evidence was properly refused. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Right of non-answering defendant.—Where divorce was granted on plaintiff's unsupported evidence at a special term, where criminal cases alone were to be tried under the call of the court and defendant husband's appearance, reciting he agreed "that this cause may be taken up at any time for trial," was filed, without laying over 10 days, but on the day of its filing, and at plaintiff's instance, plaintiff could not, on the ground

of collusion in procuring the decree by default or the lack of jurisdiction of the court, set the divorce aside, notwithstanding art. 1880, as to waiver of service, art. 1867 providing that service of citation shall be served at least 10 days before first day of return term, and art. 4633, as to confession by want of answer; for art. 1714, excepting divorce cases from those may be tried in vacation, does not except divorce cases from being tried at special term under art. 1720. *Guerra v. Guerra* (Civ. App.) 213 S. W. 360.

In an action by husband for divorce on the ground of cruelty, failure of defendant to deny charges made by the plaintiff raised no presumption in favor of the truthfulness of plaintiff's testimony, and plaintiff being only witness to that fact, court was not required to accept his testimony as true. *Wiedner v. Wiedner* (Civ. App.) 231 S. W. 448.

Burden of proof.—This article imposes upon plaintiff substantially the same burden as that imposed upon the state in a criminal prosecution to establish the offense charged beyond a reasonable doubt. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

In an action for divorce on the ground of the wife's adultery, the charge against her may be proved by circumstantial evidence; but such evidence must conform to the rule, applied in criminal prosecutions, that each fact necessary to the conclusion must be proved beyond a reasonable doubt, that all such facts must be consistent with each other and with the ultimate fact, and that, taken together, they must be conclusive, producing a reasonable and moral certainty that the wife was guilty. *Id.*

Weight and sufficiency of evidence.—The statute permitting husband and wife to testify against each other in proceedings for divorce did not repeal the statutory requirement that the evidence, to entitle to a divorce, must be full and satisfactory, and the testimony of the parties should be scrutinized more cautiously. *Knight v. Knight* (Civ. App.) 220 S. W. 609.

Where the husband's testimony in his proceeding for divorce was such as to arouse suspicions as to its truth, and was not corroborated by other evidence as to matters which might have been shown, if true, it was not sufficient to entitle him to a divorce, even though uncontradicted. *Id.*

In an action for divorce on the ground of the wife's adultery, evidence by the husband of finding his wife and another man in a room together under suspicious circumstances, uncorroborated by the testimony of any other witness as to those circumstances, and only to a slight extent by testimony of associations of the wife with other men, which were not of a suspicious character, held insufficient to warrant granting the decree, in view of the denials of wife and the other man and their explanation of the situation. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

In action by husband for divorce on the ground of the wife's adultery, the decree should not be based on his uncorroborated testimony as to the charge. *Id.*

Evidence held not to support decree granting wife a divorce for cruelty. *Hubbard v. Hubbard* (Civ. App.) 231 S. W. 160.

Whether a divorce case be tried with or without a jury, the trial court must be satisfied from all the testimony that a divorce should be granted as a matter of law, and in case of appeal the Court of Civil Appeals must be likewise satisfied. *Erwin v. Erwin* (Civ. App.) 231 S. W. 834.

Conclusiveness of findings of jury.—It is the trial court's duty to refuse the decree, if after the jury found for plaintiff the trial judge, in the exercise of his judicial discretion did not find the material facts had been established by full and satisfactory evidence, though he could not ignore the verdict and award a divorce to defendant; his authority over the verdict being restrictive, and not independent. *McCrary v. McCrary* (Civ. App.) 230 S. W. 187.

Review.—There not being in the opinion of the appellate court the full and satisfactory evidence required by this article, for divorce, it has the duty and authority to set aside the decree and reverse. *Tanton v. Tanton* (Civ. App.) 209 S. W. 429.

In an action for divorce, the weight and sufficiency of the evidence is for the trial court. *Wagley v. Wagley* (Civ. App.) 230 S. W. 493.

Art. 4634. [2980] Division of property.

See *Gully v. Gully* (Sup.) 231 S. W. 97.

Cited, *Turner v. Turner* (Civ. App.) 204 S. W. 133.

Jurisdiction of court to order division in general.—Court on granting divorce may by decree provide for use and occupancy of homestead of spouses by wife and children of marriage, such decree not depriving husband of his title to such land. *Smith v. Smith* (Civ. App.) 200 S. W. 1129.

The court has power in a divorce suit to enter such a decree as will properly protect the wife and minor children in the use of the community property constituting a homestead, but cannot divest title thereto out of one of the parties. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

Where the property upon which husband lived, though he was separated from wife, was the separate property of the wife, and had been purchased with her separate funds, and had been awarded to her by divorce decree, court did not err in giving wife a writ of possession as against husband and in denying him his homestead right in the property. *Landers v. Landers* (Civ. App.) 220 S. W. 359.

The power of the court to determine property rights is dependent upon the granting of a divorce to one of the parties. *Ledbetter v. Ledbetter* (Civ. App.) 229 S. W. 576.

Division of property in general.—In action for divorce and partition of property, jury held authorized to prorate premium on insurance on wife's furniture and house.

constituting husband's separate property, on basis of ratio which each bore to the whole sum of insurance. *Rolater v. Rolater* (Civ. App.) 198 S. W. 391.

In an effort to get at the mutual intent of divorced husband and wife in an agreement settling property rights, their acts under the agreement—that is, their own construction of it—is the dominating consideration. *O'Neill v. Graves* (Civ. App.) 223 S. W. 264.

Disposition of community property.—In suit for divorce and division of community property, every material issue must be proved, and cannot be established by presumption. *Rolater v. Rolater* (Civ. App.) 198 S. W. 391.

Property not disposed of by divorce judgment.—Divorced wife, whose property rights were not disposed of in divorce decree and whose interest in community fund was not subject to any debts contracted by her husband, held entitled to recover one-half from the husband's administratrix. *Jones v. Frazier* (Civ. App.) 201 S. W. 445.

If there was any right in the community to reimbursement for premiums paid for insurance upon the life of the husband in favor of the wife, it should have been asserted and determined in a divorce decree which purported to adjudicate all the property rights of the spouses, and could not be asserted by the divorced wife in a subsequent suit. *Whiteselle v. Northwestern Mut. Life Ins. Co.* (Com. App.) 221 S. W. 575, affirming judgment *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Civ. App.) 188 S. W. 22.

Support of children.—The power of the court in a divorce suit to grant to the mother who has been awarded the custody of the minor children the use of the homestead for a designated period is an equity power to be exercised primarily for the benefit of the minor children that the mother may fulfill her duty to support them. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

Review.—In action for divorce, court's action in charging wife with one-half of a certain sum collected by her thereby finding that she received the benefit of the full sum held not reviewable when supported by evidence. *Rolater v. Rolater* (Civ. App.) 198 S. W. 391.

Where judgment of divorce was entered for wife, and property declared community, each party being entitled to an undivided one-half interest, and defendant appealed, but died after submission of the cause on appeal, a motion by appellee, requesting the court to reverse the cause and order it dismissed from the docket of the trial court will be granted, since the issues thereby become moot, including the property rights. *Ledbetter v. Ledbetter* (Civ. App.) 229 S. W. 576.

Art. 4635. [2981] Condonation, connivance and collusion.

Condonation.—In a divorce case, cruel treatment committed prior to the time plaintiff husband condoned his wife's misconduct may be considered, where the evidence is conflicting as to whether there was cruel treatment subsequent to such condonation. *Smith v. Smith* (Civ. App.) 218 S. W. 602.

When a husband informs a private detective of his suspicions regarding his wife and employs the detective to get evidence of the wife's adultery, a divorce will not be granted on account of adultery brought about by the detective, whether committed with the detective or another. *Id.*

A wife's return to home of her husband, without resuming cohabitation, but merely for the purpose of investigating whether her suspicions concerning his adultery were justified, and which resulted in confirming those suspicions, so that she again left, was not a condonation of his offense. *Knight v. Knight* (Civ. App.) 220 S. W. 609.

Art. 4637. [2983] Debts and alienations after suit filed.

Validity of conveyance.—The validity of a conveyance executed by a husband pending a divorce suit, so far as it affected the wife's interests in the community property, depended upon whether it was made with the fraudulent view of injuring her rights. It would not be affected by the mere fact that there was not sufficient estate remaining to satisfy a claim subsequently established by her against his estate for waste of her community interest. *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

Art. 4638. [2984] Inventory and appraisement; injunction.

Injunctive relief.—A wife, suing for divorce in California, may maintain a suit in Texas to enjoin her husband from contracting debts against or conveying community property in Texas, and may require an inventory and an appraisement to be made of real and personal estate. *Turner v. Turner* (Civ. App.) 204 S. W. 133.

In suit for divorce and to establish wife's right to property, denial of temporary injunction with respect to control of property held not prejudicial, especially as the appeal was from an order made in vacation on a preliminary hearing. *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983.

In divorce action, where a wife sought to have her husband restrained from disposing of community cotton, an injunction, allowing husband to sell the cotton, but restraining him from using the proceeds pendente lite, held properly granted as against the objections that no bond was required, and that the wife's petition failed to allege there were no community debts for which defendant might properly sell the cotton. *Van Ness v. Van Ness* (Civ. App.) 218 S. W. 1076.

The statute making the giving of a bond a condition precedent to the issuance of an injunction applies to a divorce suit. *Ex parte Coward*, 110 Tex. 587, 222 S. W. 531.

Art. 4639. [2985] Temporary orders.

See *Turner v. Turner* (Civ. App.) 204 S. W. 133; *Van Ness v. Van Ness* (Civ. App.) 218 S. W. 1076; *Ex parte Coward*, 110 Tex. 587, 222 S. W. 531.

Extent of power.—Statute conferring on trial court, or judge thereof, in divorce case, power to make such temporary orders respecting property and parties as shall be deemed necessary or equitable, does not confer unlimited power and discretion to make any such order. *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983.

Court has power to give one of the parties to a divorce suit the exclusive custody and control of community property during the pendency of suit, when it is made to appear that such relief is necessary and equitable. *Hunt v. Hunt* (Civ. App.) 215 S. W. 228.

The power of making temporary orders respecting the property and parties in divorce action given court by this article, is a broad power, and is not restricted by the statutes relating to the division of property upon trial of the case, and to authority of court to grant alimony during pendency of suit. *Id.*

The court is authorized to make temporary orders, as is an order for custody of the children pending a divorce suit. *Goodman v. Goodman* (Civ. App.) 224 S. W. 207.

Temporary injunction.—This article does not dispense with requirement of art. 4649 that petition in divorce suit for injunction be verified. *Lingwiler v. Lingwiler* (Civ. App.) 204 S. W. 785.

If art. 4649, relating to injunction suits, requiring that petitions be verified, applies to a divorce proceeding, wherein district court, by art. 4639, has special authority to make temporary orders respecting property of parties, verification of petition for divorce, irregular in that it was before notary public who was an attorney of record, is subject to amendment, and does not defeat jurisdiction of district court to enter order prohibiting disposition of property of community estate. *Ex parte Gregory* 85 Cr. R. R. 115, 210 S. W. 204.

Where district court indorsed its order for issuance of injunction, prohibiting disposition of property of community estate involved in divorce suit, on day before divorce petition was filed and injunction writ issued by clerk, injunction was nevertheless effectual, and husband, in disregarding it, was guilty of a contempt. *Id.*

Wife seeking divorce may ask injunction to restrain husband from interfering with her in the cultivation and harvesting of crops, and in the use of teams and farm implements, and from molesting or intruding himself upon wife's presence, even though wife had an adequate remedy at law of which she could have availed herself. *Hunt v. Hunt* (Civ. App.) 215 S. W. 228.

Receiver.—Where wife sued for divorce and to establish land as her separate property, and husband set up express parol trust in him, it was improper pending outcome of suit, to commit property to husband's charge, since he was an interested party, in view of art. 2129, as to receivers, notwithstanding broad powers of court, in suits for divorce, to make equitable orders. *Rudasill v. Rudasill* (Civ. App.) 206 S. W. 983.

In action for divorce and for settlement of property rights, the appointment of a receiver of a portion of the property involved rests largely within the discretion of the trial court. *Reum v. Reum* (Civ. App.) 209 S. W. 760.

Art. 4640. [2986] Alimony.

Allimony.—Alimony is not in the nature of a "debt" for the collection of which execution may issue; order for its payment being enforceable by contempt proceedings. *Beeler v. Beeler* (Civ. App.) 218 S. W. 553.

Order for alimony.—Where the facts justify granting of alimony, an order, making the grant to the wife pending appeal, may be made to continue in force until termination of the appeal, which does not prevent granting of alimony, but the order continues and terminates with the final decree on appeal, and order for alimony until further order is objectionable. *Beeler v. Beeler* (Civ. App.) 218 S. W. 553.

Attorney's fee.—In a proper case the trial court has authority to render judgment in favor of the wife for attorney's fee, but the right thereto is a matter largely within the discretion of the trial court, and where wife was given the only property owned by the husband and wife for the purpose of providing necessaries for herself and minor children placed in her custody, and the payment of expenses and costs incurred by her in connection with divorce suit, and where the husband was in bad health and it was uncertain as to when he would regain his health sufficient to earn his livelihood, refusal to award wife an attorney's fee held not an abuse of discretion. *Wilson v. Wilson* (Civ. App.) 231 S. W. 830.

Art. 4641. [2987] Custody of children.

Power of court in general.—The verdict of the jury is unnecessary on the issue of the custody of children in a divorce suit, and its verdict is merely advisory. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

District courts are vested with very broad discretion in the matter of awarding the custody of children in divorce proceedings, and a very clear case of abuse of that discretion is necessary before an appellate court will interfere. *Moore v. Moore* (Civ. App.) 213 S. W. 949.

District courts are vested with very broad discretion in the matter of awarding the custody of children in divorce proceedings. *Id.*

Pending suit for divorce, the court is authorized to make temporary order for custody of the children. *Goodman v. Goodman* (Civ. App.) 224 S. W. 207.

The court of a foreign state, which granted a divorce and awarded custody of a child to the mother, does not have jurisdiction exclusive of the courts of other states to determine the right to the custody of the child after conditions have changed subsequent to the entry of the decree. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Grounds for award of custody.—Trial court in awarding custody of a minor child in divorce proceedings should be controlled and actuated solely by a consideration of best interest of child. *Smith v. Smith* (Civ. App.) 200 S. W. 1129.

The fact that a divorced wife, to whom the custody of the child had been granted, remarried within the state, as permitted by its laws, shortly after the divorce was granted, does not show her unfitness to have the custody of the child. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Judgment.—The award made court in divorce proceedings is conclusive on the parents, so that neither of them can thereafter petition the county court for guardianship of the person of a child whose custody was awarded to the other. *Jordan v. Jordan*, 4 Civ. App. 559, 23 S. W. 531.

A divorce decree awarding custody of child to the mother is *res judicata* that at the date of the decree she was a proper person for its custody. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

Modification of judgment.—On opening a decree in a divorce suit during the same term at which it was entered in order to modify provisions as to custody of children, notice to the opposite party is not a necessary prerequisite, the case being still pending during the term, and the parties having notice that the judgment is during such time subject to annulment and modification. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

District court may modify divorce decree at a term subsequent to that at which it was rendered, by transferring custody of infant child of the parties from one to the other. *Milner v. Gatlin* (Civ. App.) 211 S. W. 617.

Though the court during the term at which a decree was rendered can vacate, modify, or correct it, a supplemental decree, changing the custody of the child entered after the close of the term at which the divorce was granted, is invalid. *Vickers v. Faubion* (Civ. App.) 224 S. W. 803.

The provision of a divorce decree awarding custody of a child to its mother does not bar a subsequent proceeding to change the custody on proof that the situation and character of the respective parties have changed since the former decree, so as to make a change of custody necessary for the best interests of the child. *Id.*

Where a district court in divorce proceedings has determined the custody of minor children, such court has not the exclusive authority to change its determination, but *habeas corpus* before another court will lie by the husband against the wife under changed conditions to obtain a modification of the order as to custody. *Foster v. Foster* (Civ. App.) 230 S. W. 1064.

Order for support.—Where a mother had been granted the custody of the children in a divorce suit, it was proper on the reopening of the case for the trial court to determine from the evidence then before him what provision was necessary for their support; conditions having changed since the original decree. *Phillips v. Phillips* (Civ. App.) 203 S. W. 77.

Under agreement settling property rights of divorced parties and providing for deposit by husband of fund for support and education of minor son, which was approved and entered as part of divorce judgment, wife held not required to file reports or vouchers of expenditures for son, case not being controlled by the guardianship statute, particularly art. 4185, and she being entitled to receive all income, and not merely what was necessary for son. *O'Neil v. Graves* (Civ. App.) 223 S. W. 264.

A father, owning an adequate estate, could be required to pay the value of necessities for his minor children when furnished by the mother, from her own adequate estate, after divorce decree awarding the custody of the children to the mother and failing to provide for their maintenance; the father not being relieved of his primary duty to support the children by a divorce decree which is either silent as to their custody and maintenance or awards their custody to the mother. *Gully v. Gully* (Sup.) 231 S. W. 97.

Review.—On appeal from judgment modifying judgment as to custody of children, it may be presumed, in aid of the judgment, that evidence was offered as to the circumstances of defendant's leaving the state and the employment of her attorneys, as bearing upon whether such attorneys continued to represent her, and were therefore authorized to receive notice of the proceedings to modify. *Kentz v. Kentz* (Civ. App.) 209 S. W. 200.

Where the trial court in a divorce proceeding brought by the wife has awarded the husband an absolute divorce on his cross-bill on account of the wife's adultery, but has given the custody of a nine year old female child to the wife, its discretion in so awarding the custody of the child will not be interfered with on appeal, where the court also found that the wife had reformed. *Moore v. Moore* (Civ. App.) 213 S. W. 949.

Appeal does not lie from order for custody of children pending suit for divorce; the statute not providing for appeal from a temporary order of such kind. *Goodman v. Goodman* (Civ. App.) 224 S. W. 207.

TITLE 69

INJUNCTIONS

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Article 4643. [2989] Writs of injunction granted, when.

See *Butler v. Borroun* (Civ. App.) 218 S. W. 1115; *George v. Jonesville Oil & Gas Co.* (Civ. App.) 226 S. W. 445.

Cited, *Hamilton v. Davis* (Civ. App.) 217 S. W. 431; *Garitty v. Halbert* (Civ. App.) 225 S. W. 196. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

3. Nature and purpose of injunction in general.—The erection of a cotton gin in a business district will not be enjoined as a nuisance at the suit of owners of residences in the neighborhood in order to force defendants to buy property of plaintiffs, or to protect one not a party to the suit from competition in his line of business. *Strieber v. Ward* (Civ. App.) 196 S. W. 720.

Injunction is an equitable relief granted by a court of chancery to prevent irreparable injury as the consequence of an unlawful act for which common-law courts offer no relief, or at least no adequate relief. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

In an action for damages for the burial of plaintiff's husband in a place not chosen by her, an injunction to restrain opposition by defendant to removal of the body to the place selected by her was properly denied, where the court might have found from the evidence that there was in fact no opposition to the removal. *Foster v. Foster* (Civ. App.) 220 S. W. 215.

Courts of equity will not exercise their power to restrain acts to allay mere apprehension of injury, but only where the injury is imminent and irreparable. *Southern Oil Corporation v. Waggoner* (Civ. App.) 224 S. W. 230.

The extraordinary writ of injunction is not available to protect one from threatened injury which is purely conjectural. *Browning v. Hinerman* (Civ. App.) 224 S. W. 236.

4. Nature of right protected.—Where defendant, leasing certain land in an inclosed pasture in which plaintiffs also owned and leased land, obtained permission from plaintiffs to occupy certain lands and graze cattle thereon, agreeing to remove all of the cattle not later than a specified date, but failing to do so, plaintiffs' right to have the cattle in excess of those which defendant's own land would sustain removed was not doubtful so as to justify the denial of a mandatory injunction. *Popham v. Wright* (Civ. App.) 229 S. W. 335.

5. Discretion of court.—The granting or refusing of a temporary injunction is largely within the sound discretion of the trial court. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198; *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 214 S. W. 490; *Beirne v. North Texas Gas Co.* (Civ. App.) 221 S. W. 301; *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63; *George v. Jonesville Oil & Gas Co.* (Civ. App.) 226 S. W. 445.

Injunction is in sound discretion of judge, unless the facts on which it is sought present solely questions of law. *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644.

In a suit to enjoin the maintenance and operation of a cotton gin, the conflicting rights of the parties in the respective uses of their properties being involved, the right to an injunction is not absolute, but rests in the sound discretion of the trial court. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

6. Jurisdiction.—Since this article gives county court jurisdiction to enjoin party to pending suit from doing some act as to the subject-matter which would render the

judgment ineffectual, defendant, enjoined by county judge from threatened sale of \$200 automobile replevied, could not urge lack of jurisdiction because of the amount. *Sweeney v. Alderete* (Civ. App.) 196 S. W. 367.

Injunction suit by state to compel railway company to obey orders of Railroad Commission not declared void by any court was properly brought in a state court; Judicial Code (Act Cong. March 3, 1911, c. 231, 36 Stat. 1148, 1149 [U. S. Comp. St. §§ 993, 997]) §§ 207, 208, not applying. *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

Federal court which appointed receiver held not to have exclusive jurisdiction over suit to enjoin railroad company from removing division headquarters from a town at which they were established pursuant to contract made by receiver. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Where plaintiff had previously sued defendant to determine title to certain land and appeal therein from judgment for plaintiff was pending, court of another district had jurisdiction to restrain defendant from cutting timber from such lands pending appeal in view of this article. *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

Unless restrained by statute, any district court where the venue is properly laid may exercise its constitutional right to issue injunctions. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Where proceedings were brought to restrain execution on a justice's judgment from which an appeal has been taken to the district court, the district court of another county wherein the injunction suit was pending had jurisdiction notwithstanding the provision relating to the district judge's power to grant writs of injunction in case of disability of a resident judge. *Id.*

Where county court at law had jurisdiction of parties in a forcible detainer case and judgment was regular upon its face, district court did not have jurisdiction to enjoin issuance and execution of a writ of possession; an appeal having been taken to appellate court from county court. *Crosby v. Arrietta* (Civ. App.) 209 S. W. 252.

While there may be circumstances under which a court has power to restrain a defendant from prosecuting suit in another court of equal jurisdiction and dignity, nevertheless comity and propriety dictate that such relief should not be granted save in extraordinary cases; hence defendant will not be restrained at the instance of the state from prosecuting in another county suits against those to whom the state had granted permits under Acts 35th Leg. c. 83 (arts. 5904-5904w), to prospect for oil, etc., on lands claimed by the state. *Prairie Oil & Gas Co. v. State* (Civ. App.) 214 S. W. 363.

Though district court directed a writ of injunction to enjoin collection of judgment recovered in county court, the county court had jurisdiction to try the case; the judgment not appearing void on its face. *Cotulla State Bank v. Herron* (Civ. App.) 218 S. W. 1091.

As between courts of co-ordinate jurisdiction, courts of equity will not ordinarily interfere by way of injunction in the absence of special circumstances presenting ground for equitable relief; the general rule being that as between such courts the one first acquiring jurisdiction of the subject-matter of an action is permitted to retain it to the end. *Twin City Co. v. Birchfield* (Civ. App.) 228 S. W. 616.

Plaintiffs, in action to construe an instrument in which other parties affected by construction thereof had not been joined, were not entitled to an injunction restraining the prosecution of a similar action instituted by other parties affected by the construction of the instrument in which all parties so affected had been joined, though subsequent to the filing of the second suit which constituted the commencement thereof under art. 1812, such plaintiffs by amendment made all affected persons parties to their action, since jurisdiction, not having been acquired prior to such amendment, was not invaded by the filing of the subsequent suit. *State Nat. Bank of San Antonio v. Lancaster* (Civ. App.) 229 S. W. 883.

7. — **Adjudication of all issues.**—Jurisdiction having been obtained by reason of suit for injunction, the court may retain jurisdiction to adjudicate all the issues properly involved. *Stewart v. Patterson* (Civ. App.) 204 S. W. 768.

11. **Inadequacy of remedy at law.**—Where, in an action to secure a mandatory injunction and enjoin the owner of an oil lease from violating his vendor's contract to sell oil to plaintiff, it appeared that plaintiff had a plain, complete, and adequate remedy at law, held error to grant a temporary injunction. *Simms v. Southern Pipe Line Co.* (Civ. App.) 195 S. W. 283.

An injunction will not be granted merely because the relief thereby furnished will be more speedily obtained than by means of the legal remedy. *Id.*

Whether contracting party agreeing to pay a specified sum on breach of contract in restraint of trade is limited to an action at law on breach, or whether he is entitled to injunctive relief, depends on intention of parties deducible from contract. *Miller v. Chicago Portrait Co.* (Civ. App.) 195 S. W. 619.

To enable property owners to enjoin performance of alleged illegal contract of city for paving street, they must show that performance would injuriously affect them, and that they have no adequate protection at law. *Sayles v. City of Abilene* (Civ. App.) 196 S. W. 1000.

Injunction will not be granted to prevent county judge from enforcing contract for excessive attorney's fees in inheritance tax proceeding, since adequate legal remedy would be afforded by certiorari proceedings in district court. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Injunction will not be granted where appeal or certiorari affords adequate legal remedy. *Id.*

Plaintiff's remedy for erroneous decision of county court is by appeal and not by suit to enjoin condemnation proceedings. *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

In suit to enjoin condemnation proceeding in county court, proof held insufficient to show that plaintiff could not be adequately compensated by damages, in view of arts. 6518-6530. *Id.*

Husband having sued for divorce in one county was not entitled to injunction restraining the wife from suing for divorce in another county and secreting the children, since the husband could avail himself of such matter in any suit brought by wife. *Lingwiler v. Lingwiler* (Civ. App.) 204 S. W. 785.

If a plaintiff sued before a justice of the peace on a labor claim, has lost his right to maintain suit by assigning his right of action, such defense is available before the justice. *Pena v. Baker* (Civ. App.) 207 S. W. 426.

In granting injunction the court is not confined to the general rules of equity practice on the subject, and will give relief where applicant has a substantial right cognizable in law that is or is about to be invaded, where injunction is necessary to restrain some act prejudicial to him. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

Injunction cannot be made to serve the purpose of an appeal. *Race v. Decker* (Civ. App.) 214 S. W. 709.

Equity will not grant a temporary injunction requiring tenants to remove from plaintiff's property, but the available remedies provided at law must be followed. *Moore v. Norton* (Civ. App.) 215 S. W. 373.

In view of articles 3154-3158, a candidate for a party nomination to the state Legislature at a primary election has a complete remedy to contest the election on account of illegal votes of females being cast against him under the Women Suffrage Act, arts. 3171a-3171g and cannot enjoin the tax collector from issuing poll tax receipts to women entitling them to vote at the primary, even though the suffrage act is unconstitutional; the election cannot be contested before it is held by preventing the collector from discharging a political function required of him by law. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Where lease gave lessee the right to remove fixtures placed in the building by lessee, court's refusal to enjoin lessee from removing such fixtures on ground that he had agreed to sell fixtures to lessor, leaving lessor to his action at law for damages, held not an abuse of discretion, where lessee was solvent and where there was no showing that fixtures could not be removed without injuring the building. *Beirne v. North Texas Gas Co.* (Civ. App.) 221 S. W. 301.

Where an irrigation company contracts to irrigate land beyond its capacity, a suit for damages is not an adequate remedy to aggrieved landowners, and one for mandatory injunction to compel the furnishing of water lies. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

Injunction will not be granted when the party seeking such relief has a clear and equally adequate remedy at law. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

Where all the grounds alleged by plaintiff as basis for writ of injunction against suit to collect a debt on notes given for machinery bought by him of defendants were available as defenses, either in a suit of a defendant against plaintiff pending in the court of another county, or in plaintiff's suit against another defendant pending in a federal court, plaintiff was not entitled to writ of injunction restraining the first-mentioned defendant from prosecuting his suit in the court of another county. *Twin City Co v. Birchfield* (Civ. App.) 228 S. W. 616.

Where commissioners had no legal right to order a road opened across plaintiff's land under art. 6876, he had a right to enjoin their action as being without jurisdiction by suit in district court; the remedy by appeal to the county court under article 6882 being inadequate. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

Injunction cannot be invoked to try the right to an office, provision being made in art. 6403, for ouster of any intruder into or usurper of any office through an information in the nature of quo warranto, but injunction will lie in a proceeding by one elected precinct weigher and in possession of the office against one unlawfully claiming to hold another office which authorizes him to discharge the duties of weighing in the precinct conjointly with plaintiff and collect fees for labor performed by him. *Troilo v. Gittinger* (Civ. App.) 230 S. W. 233.

The statutory remedy by impounding animals unlawfully running at large and selling them to pay for the damage done by them given by arts. 7222-7226, is of doubtful adequacy, since the damage might exceed the value of the animals, or the animals doing the damage might not be identified, and therefore such remedy does not prevent the granting of an injunction to restrain an owner from unlawfully permitting his hogs to run at large. *Coleman v. Hallum* (Com. App.) 232 S. W. 296.

Even if the vendor's independent suit to recover on vendor's lien notes notwithstanding the purchaser's suit to cancel the notes were improperly brought, the purchaser's remedy was by plea in abatement, not by injunction against the vendor from prosecuting his independent suit, which would be, in effect, an injunction by the court restraining itself from trying the case. *Spark v. Lasater* (Civ. App.) 232 S. W. 345.

12. — Trespass and injury to real property.—The building of a gin in a business district will not be enjoined as a nuisance at the suit of owners of residences in the neighborhood, where said property will not be rendered worthless or uninhabitable, and defendants are able to respond in damages. *Strieber v. Ward* (Civ. App.) 196 S. W. 720.

In applications by lessors of oil leases for injunction restraining lessees from drilling oil wells, the trial court should be actuated by the broad spirit of progressiveness and development, and no unnecessary impediment or delay in the development of the

natural resources of the country should be allowed to intervene if the rights of the litigants can otherwise be preserved. *Emde v. Johnson* (Civ. App.) 214 S. W. 575.

In an action where plaintiff sought an injunction to prevent defendants from trespassing on land, and adopted that procedure for the purpose of relieving himself of the burden of establishing title, as he would have to in an action at law to try title, but the pleadings put in issue plaintiff's title, and there was a showing by defendants controverting plaintiff's claim of title, judgment in his favor was erroneous, where he merely proved possession. *Butler v. Borroum* (Civ. App.) 218 S. W. 1115.

14. — **Judgment and execution.**—Execution sale of land will not be enjoined because value of land grossly exceeds judgment, since judgment debtor, under art. 3754, can protect himself by requiring sales in 50-acre lots. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

Where an execution was issued and a levy made under a final justice court judgment against plaintiff, and after the levy but before sale a writ of garnishment was sued out against him in a suit pending in the county court against his judgment creditor, and plaintiff answered that he was indebted for the amount of the justice court judgment and paid the amount in the registry of the county court, the judgment creditor being insolvent, plaintiff was not entitled to injunction restraining sale, since if he had pleaded such facts in his answer to the writ of garnishment, he would have been entitled to a judgment discharging the writ. *Littlefield v. Ham* (Civ. App.) 204 S. W. 356.

Defendant in an action before a justice of the peace is not entitled, in his writ to enjoin the issuance of execution upon a judgment in such action adverse to him, to relief from any defects complained of in the judgment which could have been corrected either by motion before the justice to correct the judgment or by an appeal. *Race v. Decker* (Civ. App.) 214 S. W. 709.

Writ of injunction will not issue against execution of a writ of sequestration which has already been executed; the remedy of the complaining party being an action for damages. *Spero v. Peters* (Civ. App.) 219 S. W. 514.

18. **Injunction ineffectual or not beneficial.**—See *Merchants' Transfer Co. v. Hildebrand* (Civ. App.) 200 S. W. 551.

A petition to restrain the holding of an election to determine whether the boundaries of school district should be changed, which alleged injuries to plaintiffs if the boundaries were changed, does not show an injury entitling plaintiffs to the injunction, since the injury would result, not from holding the election, but from the change in boundaries, and if the election were void it could not result in a change of boundaries. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

19. **Injury to defendant.**—Where a suit to enjoin construction and operation of an ice factory is instituted after the work has progressed so far that defendant's loss, if restrained, will exceed the value of plaintiffs' property, equity will not grant the injunction but will leave plaintiffs to recover any damages sustained if the factory, when put in operation, proves to be a nuisance. *Goose Creek Ice Co. v. Wood* (Civ. App.) 223 S. W. 324.

Temporary injunction will be denied in a doubtful case where granting of it would cause greater detriment to defendant should he ultimately prevail than would be caused to complainant by its refusal should he ultimately prevail. *Collins v. Humble Oil & Refining Co.* (Civ. App.) 223 S. W. 696.

In an action where both parties are in good faith claiming title under oral leases, the defendant being in actual possession of the land, and no immediate injury to plaintiffs being threatened, an injunction to restrain defendant from drilling for oil will not be issued, where large injury may be done to defendant thereby. *Browning v. Hinerman* (Civ. App.) 224 S. W. 236.

Where defendant in August, 1919, obtained permission from plaintiffs to graze cattle on lands within an inclosure, and agreed to remove all of the cattle not later than May 20, 1920, and the defendant has had all seasons of the year in which to remove the cattle, but still refuses to do so until compelled to, a mandatory injunction will not be denied on the ground that it would be inequitable to require their removal in the winter season, as it appears that he is willfully and fraudulently retaining possession. *Popham v. Wright* (Civ. App.) 229 S. W. 335.

22. **Possession to support suit.**—One having actual prior possession of land under a deed fully descriptive thereof under which it claimed title, was entitled to recover against naked trespassers in a suit for injunction to prevent trespasses and the cutting of timber. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

23. **Right of individual to restrain acts against public welfare.**—Street railway having valid franchise to use city streets has such an interest in the use of the city streets that it may sue to restrain the use thereof by jitneys licensed under alleged invalid ordinance. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

A union depot company owning and operating a station, abutting a regularly dedicated city park on which it has, under agreement with the city, spent thousands of dollars for grading, fencing, and beautifying, is entitled to injunction against appropriation of any part thereof for sidewalk purposes. *El Paso Union Passenger Depot Co. v. Look* (Civ. App.) 201 S. W. 714, judgment affirmed (Com. App.) 228 S. W. 917.

The right of a private party to restrain the obstruction of a public highway is dependent upon sustaining some special injury different in kind from that sustained by the public. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 207 S. W. 960.

Charter of City of Corpus Christi, art. 12, § 1, providing that any citizen who is a property taxpayer may maintain an action to restrain the execution of any illegal,

unauthorized, or fraudulent contract or agreement on behalf of the city, does not mean the taxpayer may act for the city in prosecuting a suit; the suit being, not in behalf of the city, but to restrain the city council from making such a contract. *City of Corpus Christi v. Mireur* (Civ. App.) 214 S. W. 528.

A suit for relief from a public nuisance, such as the proposed obstruction of the public highways of the county, cannot be maintained by individuals alone, suing as such, unless they can show some special injury to them which is not suffered by the public at large, but, in a suit to enjoin drilling of oil and gas upon the public highways of a county, allegations of plaintiffs' petition that they owned the fee simple title to lands abutting on different public roads, and that producing wells on the adjoining roads would drain the oil from such lands, sufficiently showed special injury not suffered by the general public. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

A taxpayer and citizen may not maintain suit against public officers, acting under color of authority to restrain their action, without showing special damages to himself, whether they are alleged to be acting merely *ultra vires* or under unconstitutional law; and so not to prevent the carrying out of the State Depository Law by the state depository board; its provisions being beneficial to him through decreased taxes on account of profits therefrom to the state. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

When contest as to legality of construction of road by commissioners of district involves common or general interest of a section of the public to whom injury is alleged to have been done by an illegal agreement of the commissioners, prior to election, to locate the road on a particular route, the courts will recognize the right of the taxpayers to maintain suit to enjoin such construction. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

Where a city purchased land with park bonds, but the sellers did not make any reservation or embody in their conveyance any covenants dedicating the land to park purposes, and so have no vested rights to compel use of the land for a park, nevertheless, as citizens and taxpayers, they can sue to enjoin the city from wrongful diversion of such park fund, and from expending the funds except as provided by charter. *City of Beaumont v. Matthew Cartwright Land & Improvement Co.* (Civ. App.) 224 S. W. 589.

Abutting property owners have no right to restrain the building or operating on a certain street of a street car line, any more than citizens at large have, unless they are granted such right by legislative authority. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

A municipal corporation can seek protection of the public rights by injunction in a court of equity on the same footing as private persons and corporations may seek redress. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63.

Taxpayers of a road district had the right and authority to institute suit to restrain the commissioners' court from using road money for other purposes than building the roads. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

In an action to enjoin encroachment upon an alley by construction of a building, where the facts show that plaintiff, owner of an adjoining lot, suffered no injury, inconvenience, or special damage not suffered by the general public, he is not entitled to enjoin encroachment. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

24. Proceedings in aid of which injunction is authorized.—In a suit for conversion in unlawfully seizing property on an execution, to support which there is no judgment, a writ of injunction may issue to prevent the sale of the property prior to final determination. *Ramsel v. Miller* (Civ. App.) 202 S. W. 1050.

25. Costs.—See *Whitesides v. Wood* (Civ. App.) 210 S. W. 333.

In suit to enjoin live stock inspectors acting under the Live Stock Commission from dipping cattle for tick eradication without statutory warrant, the court erred in rendering judgment perpetuating injunction and taxing costs against a defendant, who had resigned before institution of suit and another who resigned before trial. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

26. Grounds for granting or denying temporary injunction.—It is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of title, unless the possession has been forcibly or fraudulently obtained by the defendant and the equities require that the possession wrongfully invaded be restored and original status preserved pending the decision of the issue of title. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316; *Hodges v. Christmas* (Civ. App.) 212 S. W. 825.

A preliminary injunction will not issue to compel the transfer of oil by the producer to a pipe line company under a contract between the company and the producer's vendor until the question of the producer's liability under the contract has been finally determined. *Simms v. Southern Pipe Line Co.* (Civ. App.) 195 S. W. 283.

Where lumber company, not party defendant in trespass to try title, joined with defendants in application for temporary injunction to restrain plaintiffs from removing timber from land, lumber company became party defendant, and not a mere volunteer having no right to ask for an injunction. *Allen v. Knox* (Civ. App.) 195 S. W. 1169.

Injunction pending litigation is authorized when it appears that a party is doing some act prejudicial to the applicant. *Id.*

The function of a temporary injunction is to afford preventive relief only. *Id.*

In determining the allowance of a temporary injunction, the rule is that it will be allowed, if there is a case of probable right and probable danger to the right without the injunction. *Dunsmore v. Blount-Decker Lumber Co.* (Civ. App.) 198 S. W. 603.

Issuance of temporary injunction against use of air hammers in boiler factory held erroneous as determinative of entire controversy, destroying status quo and putting

plant out of business pending hearing. *John Dollinger, Jr., Inc., v. Horkan* (Civ. App.) 202 S. W. 978.

A petition alleging a final enforceable judgment in favor of plaintiff as against defendants and a final enforceable judgment in favor of defendants as against plaintiff, without showing whether the two suits grew out of the same transaction or if defendants' judgment was upon a liquidated claim, and that alleged insolvency of defendants, justified issuance of temporary injunction against levy of execution. *Pierson v. Farmers' State Guaranty Bank* (Civ. App.) 206 S. W. 730.

Where a county had opened a public road through plaintiff's land, and plaintiff had fenced along the road, and it had been used by the public for several years, a temporary injunction restraining the use of the road prior to trial of a suit of trespass to try title to the strip of land used for the road was properly refused in view of the situation of the parties and the interest of the public. *Haverbekken v. Corvell County* (Civ. App.) 207 S. W. 971.

On motion for temporary injunction by oil company to restrain city from enforcing ordinance prohibiting cutting of sidewalks to give access to filling station, evidence held sufficient to sustain refusal. *Oriental Oil Co. v. City of San Antonio* (Civ. App.) 208 S. W. 177.

Oil company, suing to restrain city from enforcing ordinance prohibiting company from cutting sidewalks to give access to filling station, and failing to allege it received written permit to make alterations in sidewalk and curbing, as required by another ordinance, held not entitled to temporary injunction. *Id.*

In lessee's action against lessor to recover leased premises, where it appears that lessor's forfeiture of leasehold interest and repossession are unwarranted, lessee's right to a temporary injunction, requiring restoration of the possession of the premises to lessee and restraining lessor from interfering with such possession, will not be denied upon ground that to grant such injunction will be to grant all the relief that is to be obtained upon a final decree. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316.

Where, on account of the war, a city passed an ordinance increasing street railway fares, it cannot be said that the court abused its discretion in refusing an injunction to restrain city from enforcing an ordinance repealing the ordinance, where the city officials made affidavit that after armistice was signed most of material necessary for operation of street railway had declined, and that conditions which impelled council to grant temporary relief had ceased to exist, and that the "jitney" menace had then become so nearly obliterated that earnings of company had reached practically the highest point in its existence, the street railway not having shown in its bill the actual statistics to support its allegation that the normal fare was unreasonable. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

A bill asking for temporary injunction, contrary to the rule in ordinary actions, will be taken most strongly against the applicant, and must negative any reasonable inference from the facts stated that he may not be entitled to the recovery sought. *Id.*

In a suit by the lessee of an oil and gas lease against the purchaser of a part of the land omitted by mutual mistake from the lease, to restrain him from drilling for oil, a temporary writ of injunction was not appropriate, it appearing that the rival claimants were acting in good faith, that their ultimate rights were uncertain, and that the interest of the public at large, arising from an early development of the region for oil, was at stake. *Texas Pacific Coal & Oil Co. v. Howard* (Civ. App.) 212 S. W. 735.

In trespass to try title, where plaintiffs have been ejected from actual possession of land by defendants, possession will be restored and the original status of the property preserved by temporary injunction pending decision of the issue of title. *Hodges v. Christmas* (Civ. App.) 212 S. W. 825.

Where plaintiffs asserted rights in oil lands claimed by the state and obtained temporary injunctions restraining licensees of the state from proceeding with operations, the state is entitled to a temporary injunction restraining defendants from drilling wells on the line between their property and that in controversy, which wells would have the effect of draining the oil from under the lands in controversy. *Prairie Oil & Gas Co. v. State* (Civ. App.) 214 S. W. 363.

Where verified answer to petition to enjoin execution on ground of fraud in violating agreement not to take personal judgment against purchaser of property subject to vendor's lien notes alleges that petitioner had notice of judgment before term expired, and had actual knowledge of judgment more than two years before suit, it was error to award temporary injunction on the pleadings. *Boykin v. Patterson* (Civ. App.) 214 S. W. 611.

Where the executive committee of a syndicate formed to acquire oil leases entered into a contract with a corporation, which the members of the committee controlled, enforcement of such contract will be temporarily enjoined, in a controversy between directors subsequently elected by the stockholders and the executive committee; all the parties being before the court, and it being the purpose of the executive committee to enforce the contract, unless temporarily enjoined. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

An interlocutory injunction is not open to attack because it granted all the relief prayed for. *Id.*

In suit by plaintiffs, who owned lot 16 and a portion of lot 15, and who alleged that they were entitled to the use of an alley taken from a portion of lot 15, against defendant, who claimed that he was the owner of the alley and who had moved a house thereon, held, that the court was warranted in granting preliminary temporary injunction. *Boynton v. Milmo* (Civ. App.) 218 S. W. 510.

In a suit to restrain enforcement of a judgment where there was no allegation that petitioner did not learn of the judgment against him until after the term at which it was rendered and the evidence showed that defendant did have such knowledge and did not show that the judgment was procured through the fraud of the plaintiffs unmixed with the fraud of defendant, it was error to deny a motion to dissolve a temporary injunction. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

Evidence held insufficient to sustain an order granting a temporary injunction against the construction and operation of an ice factory on the ground that the noises, fumes, and waste water would interfere with the enjoyment of plaintiffs' homes. *Goose Creek Ice Co. v. Wood* (Civ. App.) 223 S. W. 324.

Generally when possession of property has been taken with owner's consent, temporary mandatory injunction will not issue to transfer the possession to plaintiff in advance of a final trial of title or right of possession. *Collins v. Humble Oil & Refining Co.* (Civ. App.) 223 S. W. 696.

In purchaser's action against foreign corporation to rescind sale on ground of fraud and to obtain a temporary injunction restraining vendor from selling or assigning purchase-money notes during pendency of the action, the injunction should be granted, regardless of whether the court is able to enforce it; purchaser having the right thereto. *Roberts v. Stewart Farm Mortgage Co.* (Civ. App.) 226 S. W. 1108.

In purchaser's action against vendor's lessee to recover possession of the premises, the court was not authorized to issue a mandatory injunction on a preliminary hearing requiring lessee to give purchaser possession pending adjudication on the merits. *Colby v. Osgood* (Civ. App.) 230 S. W. 459.

27. **Duration of preliminary injunction.**—See art. 4650, and notes.

28. **Mandatory injunction.**—Where railroad dug ditch on its property, and damage to land of adjoining owner could be repaired completely, and revetment constructed to prevent further damage, adjoining owner was not entitled to mandatory injunction to compel railroad to fill in and restore land to former natural surface. *Ingrando v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 203 S. W. 925.

Plaintiff must make out a clear case before a mandatory injunction will issue. *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 214 S. W. 490.

Where plaintiffs and defendant both owned or leased land within an inclosed pasture, defendant was entitled to keep such number of cattle in the pasture as the acreage controlled by him was capable of sustaining and no more, and where he had more than the court found his land would sustain, plaintiffs were entitled to a mandatory injunction for their removal, though other persons also had lands within the inclosure. *Popham v. Wright* (Civ. App.) 229 S. W. 335.

29. — **Transfer of possession.**—An injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property. *Hodges v. Christmas* (Civ. App.) 212 S. W. 825.

The status of property may be restored by temporary mandatory injunctions during the pendency of suits, while it is not the function of preliminary injunctions to transfer possession of the property, but mandatory injunctions will be granted in extreme cases upon such hearing. *Boynton v. Milmo* (Civ. App.) 218 S. W. 510.

Injunction cannot generally be used pending final determination of a suit for possession of property to transfer such possession from defendant to plaintiff. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

A court of equity may grant a mandatory injunction to compel a trespasser to restore possession of the property, though the owner may have an adequate remedy at law. *Hill v. Brown* (Civ. App.) 225 S. W. 780.

"Trespass" implies force and "fraud" includes acts involving a breach of duty, trust, or confidence injurious to another, or by which an undue and unconscientious advantage is taken of another, and implies a willful act whereby another is sought to be deprived of what he is entitled to either at law or in equity, so that a finding that defendants were unlawfully, fraudulently, and forcibly holding possession of plaintiffs' premises as mere trespassers, authorizes a mandatory injunction to compel restoration of possession. *Id.*

30. **Proceedings which may be restrained in general.**—See *North British & Mercantile Ins. Co. of London & Edinburgh v. Klaras* (Com. App.) 222 S. W. 208, affirming judgment (Civ. App.) 200 S. W. 584.

31. **Civil actions and proceedings.**—Purchaser of property at a sale by receiver of an insolvent corporation under order of court may enjoin sale of property under execution in a subsequent suit against corporation. *Guaranty State Bank & Trust Co. v. Thompson* (Civ. App.) 195 S. W. 960.

Execution sale of cultivated lands will not be enjoined, unless judgment debtor establishes that he owned personalty or uncultivated lands within county at date of application for writ sufficient to satisfy judgment. *Dickinson v. Comstock* (Civ. App.) 199 S. W. 863.

Where creditor of insured garnished insurer, which paid amount of policy into district court after insured sued on the policy in county court, and creditor got judgment which was paid, the district court could not perpetually enjoin enforcement of the county court judgment against the insurer in view of art. 4653, as to return of injunction writs. In such case, it was not necessary to enjoin execution of the county court judgment, but such court could issue necessary order. *Klaras v. North British & Mercantile Ins. Co. of London & Edinburgh* (Civ. App.) 200 S. W. 584.

Judgment in cause submitted to judge is not void, so as to authorize enjoining of execution thereon, because rendered within two days of end of term, contrary to District and County Courts Rule 66 (142 S. W. xxii). *Meredith v. Flanagan* (Civ. App.) 202 S. W. 787.

Injunction to restrain sale under execution issued upon justice court judgment forfeiting bail bond was collateral attack on judgment, not permissible where judgment was not void. *Fleming v. Bonine* (Civ. App.) 204 S. W. 364.

A judgment at law procured in one state by the fraudulent conduct of the plaintiff, and which had the effect of depriving the defendant of a meritorious defense that he was not negligent in failing to urge, may be enjoined by a court of equity in another state which has acquired jurisdiction of the person of the plaintiff. *Vann v. Calcasieu Trust & Savings Bank* (Civ. App.) 204 S. W. 1062.

An injunction will not be granted to enjoin further prosecution of a suit upon ground that plaintiff recovered a judgment from a justice of the peace in another county on the same cause of action, where such judgment was vacated by a petition for certiorari granted by the county court. *Texas Novelty Advertising Co. v. Bay Trading Co.* (Civ. App.) 206 S. W. 729.

To restrain enforcement of a default judgment, it must appear that the judgment was void on the face of the record or that the defendant was not served and had a meritorious defense which it failed to present without fault. *Baker v. Memphis, D. & G. Ry. Co.* (Civ. App.) 208 S. W. 182.

Since the effect of an appeal from a justice's judgment is to annul the judgment and to confer jurisdiction on the county court, enforcement of an execution issued by the justice under the judgment may be enjoined as a proceeding under a void writ. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

In a suit to enjoin sale of trust property on attachment, plaintiff's contention that the judgment was void, because rendered solely on substituted service upon the cestui que trust, a nonresident, for the reason that, the property taken not being attachable, the judgment was in personam, was properly overruled, where the cestui was not a party to the injunction suit, and did not urge the invalidity of such judgment. *Hoffman v. Rose* (Civ. App.) 217 S. W. 424.

Court of Texas will enjoin suit for personal property and damages between citizens of Texas brought in Arkansas, if under the law that Texas courts would apply there would be a defense of innocent purchaser, but no defense under the law that Arkansas courts would apply. *Buchanan-Vaughan Auto Co. v. Woosley* (Civ. App.) 218 S. W. 554.

The title and right of possession of landlords could not have been put in issue in a forcible detainer suit brought by one of their tenants against the others, and the landlords are not bound by the judgment, and are entitled to restrain its enforcement pending determination of their suit against the first tenant, wherein they allege he procured his lease of the whole of the premises, his own and those of the other tenants, by fraud, and simply to harass the others. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

Subsequent actions may be enjoined to prevent conflicts of jurisdiction and on grounds of judicial comity, although the element of irreparable damage is not involved and where a buyer in suit against the seller for breaching a threshing machine sales contract claimed damages exceeding the purchase price, a subsequent action by the seller in another county to collect purchase-money notes and foreclose chattel mortgages securing them should be enjoined. *Blume v. J. I. Case Threshing Mach. Co.* (Civ. App.) 225 S. W. 831.

32. — **Preventing multiplicity of suits.**—Street railway having valid franchise to use city streets may by injunction proceed against city for purpose of declaring invalid legislative grant of power to license jitneys in order to avoid ruinous multiplicity of suits. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

A petition to enjoin the separate prosecution of four separate suits, before a justice of the peace, on labor claims assigned, brought in the name of the assignors, is insufficient, where it does not show that the assignees of the claim sued on were parties in the justice court. *Pena v. Baker* (Civ. App.) 207 S. W. 426.

Equity will grant an injunction to prevent a multiplicity of suits; the question of whether, in a particular case, equity will assume jurisdiction, depending, if case is not covered by a controlling precedent, upon the merits of the particular case, the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the parties, the points to be contested, and the result to follow as to whether the interests of any of the parties will be unreasonably overlooked or obstructed. Where seven members of the same household, at the instigation of one of them, brought separate damage suits against defendants for same alleged wrongful act, and where the suits were wholly without merit and for the purpose of harassing and annoying defendants and causing them to expend attorney's fees and costs and were brought in justice court, where they could not be consolidated, and for an amount just below amount which would have entitled defendants to an appeal, for purpose of preventing such appeal, equity will enjoin further prosecution of suits in justice court and require them to be tried in one proceeding in district court, since such proceeding will be a relief to defendants and will work no hardships to the plaintiffs. *Houston Heights Water & Light Ass'n v. Gerlach* (Civ. App.) 216 S. W. 634.

33. **Criminal prosecutions.**—It is a general rule that equity will not entertain a suit for injunction to restrain prosecutions as a prosecution against cattle owners for violation of the Tick Eradication Statute (art. 7314 et seq.). *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

34. **Criminal acts.**—An injunction will not issue to restrain the operation of a moving picture show on Sunday, where such operation constitutes a misdemeanor, punishable

under Pen. Code, art. 302, and no property rights of complainant are involved. *Barry v. State* (Civ. App.) 212 S. W. 304.

34½. Condemnation proceedings.—In view of arts. 6481-6534, held, that district court would not enjoin condemnation proceedings where county court had acquired jurisdiction by filing of sufficient petition and parties had failed to agree on damages as provided by article 6506. *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

Showing that commissioners would be unable to assess damages adequate to compensate plaintiff for injury to his property by proposed condemnation was necessary predicate for restraint of possession by defendant railway company. *Id.*

Condemnation proceeding in county court will not be enjoined on ground that property is not subject to condemnation. *Id.*

35. Foreclosure proceedings.—A holder of a junior mortgage is not entitled to enjoin a sale under a senior mortgage on the ground that he desires to pay the senior mortgage to protect his junior mortgage and to be subrogated to the rights of a senior owner, although a release of the junior mortgage has been executed by an unauthorized person, where the note secured by the junior mortgage and a release are deposited in court to be dealt with according to the rights of the parties, and the purported release has never been recorded. *Dellinger v. Gulf Production Co.* (Civ. App.) 215 S. W. 360.

In a minor son's suit in trespass to try title to recover under his mother's second will half of certain land left by her first will wholly to her second husband, plaintiff's right to injunction against trustee's sale held clear in view of specific averment that certain credits not shown on certain vendor's lien notes and not admitted should be allowed before the land was subjected to payment of the debt, and averment that a defendant obtained the vendor's lien notes for a fraudulent purpose. *Carr v. Froelich* (Civ. App.) 220 S. W. 137.

In suit in trespass to try title, wherein plaintiffs sought injunction against sale of the land by trustee to satisfy vendor's lien notes, if the amount or any part of the amount due on the notes was certain and ascertained, plaintiffs were required to tender the sum as a condition precedent to grant of injunction, but where they showed by their pleadings the amount due on the notes was in dispute, and asked that the sum be ascertained, a mere offer to pay was all required from them. *Id.*

36. Trespass or injury to real property.—One in possession of land containing 20 cows with calves may obtain an injunction as to a trespasser who persistently tears down the fences and turns steers among them, to their irreparable injury. *Hoskins v. Cauble* (Civ. App.) 198 S. W. 629.

One to whom one tenant in common, without consent of the other tenants, conveys a specific part of the premises, may not, pending partition, have the others enjoined from interfering with his exclusive possession of such part, on the theory that it may be equitably partitioned to him. *Kirby Lumber Co. v. Bradford Hicks Lumber Co.* (Civ. App.) 203 S. W. 418.

The removal by defendant of the surface dirt preparatory to removal of gravel, under a contract whereby plaintiff gave defendant exclusive right, for a certain period, to remove gravel, and defendant agreed to perform all labor necessary for its removal, and to pay plaintiff for gravel removed, even if not making the contract irrevocable, at least gave defendant some equities in the premises, so that plaintiff, making no offer of compensation for such work, may not have injunction against removal of gravel, on the theory of the contract being terminable as unilateral and without consideration. *Hall v. Willmering* (Civ. App.) 209 S. W. 226.

Where defendants threatened to forcibly re-enter and take possession of property deeded to plaintiff in exchange for plaintiff's property, and rescind trade for sole reason that they were unsatisfied with their bargain, after having lived upon plaintiff's property for 11 months, it was a proper exercise of the court's power in suit to restrain such acts to enjoin the institution of further suits by defendants. *Sykes v. Fischl* (Civ. App.) 212 S. W. 217.

In a proper case, one rightfully in possession of land may by a proper showing secure an injunction to restrain a trespasser from entering to commit injuries. *Butler v. Borroum* (Civ. App.) 218 S. W. 1115.

Court erred in overruling a motion to dissolve a preliminary injunction granted on a showing by plaintiffs that defendants were drilling for oil upon land to which plaintiffs held a lease, and that continued drilling might result in a dry hole, it not being alleged in fact that there was no oil under the land, or that it was plaintiff's present purpose to sell the lease; the term "requires" in this article, being mandatory in its significance, and meaning "to have imperative need of." *Browning v. Hinerman* (Civ. App.) 224 S. W. 236.

To entitle a lot owner to enjoin an encroachment upon an alley, it is not necessary that all access to his lot therefrom be cut off, and the fact that the obstruction did not cut off all access is a matter of evidence as to special or peculiar damage, which it rests upon plaintiff to prove to secure an injunction. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

38. — Stay of waste.—Where petition asserted bona fide claim of title to lands, possession for more than ten years, judgment in action pending on appeal, in petitioner's favor and against defendant for lands, and threat of defendant to cut valuable timber from lands, granting of injunction was not an abuse of discretion. *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

One acquiring an estate in fee in standing timber, with unlimited time for removal, may, when necessary to preserve his property therein, enjoin the fee owner of land from cutting and appropriating such timber. *Houston Oil Co. of Texas v. Hamilton*, 109 Tex. 270, 206 S. W. 817.

An injunction prohibiting a tenant from pasturing stock on the leased lands while they were wet was not wrongful, where there was evidence that such pasturage rendered it difficult to cultivate the lands the next year and was not in accordance with good husbandry. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

39. Violation of contract in general.—Under contract of employment wherein employé agreed not to engage in business of soliciting orders for enlarging photographs, etc., for any other firm, held, employé would not be enjoined from engaging in such business within state; liquidated damages provided being exclusive. *Miller v. Chicago Portrait Co.* (Civ. App.) 195 S. W. 619.

One who has transferred his exclusive agencies, terminable at will, for manufacturers of and dealers in building and fireproofing material, together with the good will, without any express agreement not to engage in competing business in the same territory, should not be enjoined, on his resumption of business, from representing his former customers, but he may be enjoined from soliciting or inducing his former customers not to do further business with his transferee. *Sheehan v. Sheehan-Hackley & Co.* (Civ. App.) 196 S. W. 665.

Contract of railroad company to maintain its division headquarters at particular town entered into by receiver for valuable consideration and complied with for many years may be enforced by injunction. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Where lessor has wrongfully undertaken to forfeit a leasehold interest and to repossess himself of the premises, without lessees' being in default of rent, lessees are entitled to an injunction restoring possession of premises from which they have been wrongfully evicted, and that lessor be restrained from interfering with their right to possession. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316.

Owner of oil leases, who has transferred stock and assigned certain oil leases in consideration of use of drilling equipment and casing in drilling test well, and who has sold oil leases conditioned upon the drilling of the well to certain depth, and who has insufficient funds wherewith to himself supply equipment and casing, is entitled to injunction restraining the removal of equipment and casing from premises where drilling of well has commenced. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

Where an owner of land has subdivided it and sold according to a plat showing a strip of land reserved for a pipe line, and such reservations are made in the deeds, such owner cannot thereafter drill for oil within such strip, regardless of whether the fee is in him or not, and when he does so an injunction will lie. *Gulf Sulphur Co. v. Ryman* (Civ. App.) 221 S. W. 310.

A purchaser of platted blocks and lots can enjoin obstruction of the streets shown on the plats by another owner, though the city had never in fact opened or worked the streets. *Sherman Slaughtering & Rendering Co. v. Texas Nursery Co.* (Civ. App.) 224 S. W. 478.

Deceased husband having been buried on the lot of his father, mother, and brother with the consent of the wife under an agreement that it should be the final resting place of the body, the father and mother could invoke the powers of a court of equity to restrain the widow from removing the body to another place. *Curlin v. Curlin* (Civ. App.) 228 S. W. 602.

Petition alleging that under arrangements with oil and gas lessees to take casing head gas, plaintiff had constructed valuable pipe lines, and that defendant, having acquired the leases, denied plaintiff the right to take such gas, to plaintiff's irreparable injury in that it would lose the benefit of its pipe lines, etc., is sufficient to state a cause for equitable relief. *Chas. F. Noble Oil & Gas Co. v. Altex Petroleum Co.* (Civ. App.) 230 S. W. 753.

39½. Strikes and conduct thereof.—The acts of a labor union which seeks to force an employer to unionize his restaurant by means of picketing and boycott amount to "intimidation" and "coercion," and are unlawful and subject to injunctive relief, even though no open threat or violence are proven. *Webb v. Cooks', Waiters' and Waitresses' Union, No. 748* (Civ. App.) 205 S. W. 465.

A master plumber has no ground for injunctive relief against a labor union of journeymen plumbers which withdraws its members from his employ under a rule adopted in the interest of economical conduct of its affairs, of which he has notice, that they shall not work for one not a member of the master plumbers' association; there being no boycott, and such action being in the nature of a strike, lawful under and independently of art. 5245. *Sheehan v. Levy* (Civ. App.) 215 S. W. 229.

An injunction may issue to restrain strikers from threatening persons still at work, for equity will protect the exercise of natural and contractual rights from interference or attempts at coercion. *Ex parte Tucker*, 110 Tex. 335, 220 S. W. 75.

To restrain a striking labor union and its members from destroying the business of an offending employer by their language, publications, and acts is not to infringe upon the constitutional right of free speech, and whenever the rights freely to sell and freely to purchase labor are sought to be invaded, as by a labor union's strike and acts of picketing, etc., pursuant thereto, a court of equity will restrain such unlawful acts. *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1086.

40. Breach of covenant.—Until the public interest requires the removal of a depot, the railway company may be restrained from removing it in violation of a covenant, *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621.

43. Acts of public officers, boards and municipalities.—The county commissioners' court being by Rev. St. 1879, arts. 1514, 1521, the only body empowered to authorize contracts for the erection of county buildings, injunction will not lie to restrain the issuance of bonds in payment for a county jail, to be constructed under an alleged

contract made by one of the judges of the commissioners' court, not only without the authority but directly contrary to the resolution of that court. Such bonds would be utterly void in the hands of all purchasers. *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

Commissioners' court could not be enjoined from exercising power under Acts 35th Leg. c. 60 (art. 7314 et seq.), relating to prevention of diseases in live stock in force at time of application for writ, merely because Acts 33d Leg. c. 169, in force when order was made, did not authorize action. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

As it would be unlawful to transfer taxes levied and collected for public building fund to general county fund, when that fund exhausted constitutional limit, such transfer could be enjoined. *Veltmann v. Slator* (Civ. App.) 200 S. W. 539.

Under Acts 34th Leg. c. 36, §§ 2-5, 15 (arts. 2749a-2749c, 2749f, 2849b), amending Acts 32d Leg. c. 26, the county trustees alone have authority to establish high schools, and district trustees will be enjoined from attempting to select the site. *Woodson v. Stanley* (Civ. App.) 201 S. W. 659.

A pool hall owner was entitled to injunction restraining county attorney and sheriff from interfering with his business on showing damage by their threats to prosecute him under void law as to pool halls, which prosecution would probably result in destruction of his business. *Fearis v. Gafford* (Civ. App.) 204 S. W. 675.

Where the board of water engineers is about to exercise power to adjust petitioner's property rights contrary to his constitutional right to have them adjusted by the courts, he is entitled to injunction. *McKnight v. Pecos & Toyah Lake Irr. Co.* (Civ. App.) 207 S. W. 599.

Live stock inspectors though empowered by statute to take up the work of tick eradication may be enjoined at the suit of cattle owners from dipping sound cattle in liquids, chemicals, and poisons not conforming to that prescribed for treatment of splenic fever or the eradication of fever-carrying ticks. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

In view of Charter of City of Corpus Christi, art. 12, § 1, taxpayers of the city can sue in equity to restrain it and its officers from awarding the office of city depository to a national bank which has not made the best bid for the office based on interest on daily balances and value of bond tendered, as expressly stipulated by the city charter, even though plaintiff taxpayers are officers or agents of a rival bank; acceptance of the lower bid being an attempt to execute an illegal and unauthorized, if not fraudulent, contract or agreement on behalf of the city. *City of Corpus Christi v. Mireur* (Civ. App.) 214 S. W. 528.

Though Acts 35th Leg. (1917) c. 60 (art. 7314 et seq.) requires owners within the areas prescribed to have their cattle dipped and provides a penalty, owners of cattle are not entitled to enjoin county officials from enforcing the law, where there is no evidence that such officials were threatening to prosecute the owners criminally or were intending to forcibly seize the cattle for the purpose of dipping them. *Page v. Tucker* (Civ. App.) 218 S. W. 584.

If a change of boundaries of school district by vote of the electors is not authorized by law, an attempt to change the boundaries under a void election can be enjoined, until which time the court will not interfere. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

Courts will not enjoin the enactment of city ordinances, valid or invalid, unless it is made clearly to appear that irreparable injury immediately will result from the mere enactment of the ordinance without intervention or attempt to do some act or exercise some privilege under it, and equity will interfere by injunction only when it becomes necessary to restrain some unlawful and injurious act authorized by the ordinance. *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

As the question of the maintenance and creation of school districts rests largely in the discretion of the county board of education, the refusal of a mandatory injunction to correct the dividing line will not be deemed erroneous, though the trustees of the district seeking the injunction asserted that as the line was run numerous negro families were thrown into the second district, and that there was no schoolhouse for negro children in the second district, while the first district had a substantial schoolhouse for negro children, for the courts may well presume that when the necessity for a negro school should arise in the second district, it would be divided. *Baker v. Davis* (Civ. App.) 227 S. W. 534.

A suit to enjoin the city from diverting park property to sidewalk uses for a private person is not within Special El Paso City Charter, § 71, requiring application to the city council for redress as a prerequisite to filing suit. *Look v. El Paso Union Passenger Depot Co.* (Com. App.) 228 S. W. 917, affirming *El Paso Union Passenger Depot Co. v. Look* (Civ. App.) 201 S. W. 714.

Courts cannot invade the discretion of public functionaries to correct mere mistakes of judgment. *Board of Permanent Road Com'rs of Hunt County v. Johnson* (Civ. App.) 231 S. W. 859.

44. — **Levying and collecting tax.**—Tender of all legal taxes was not condition precedent to taxpayer's suit to restrain collection of levy for public building fund, no part of which was legal. *Veltmann v. Slator* (Civ. App.) 200 S. W. 539.

Unlawful intent of commissioners to transfer tax levied for county building fund to general fund was material issue of fact, and district judge had authority to enjoin collection of tax until such issue had been determined. *Id.*

A taxpayer is entitled to injunction against collection of tax illegal because of arbitrary discrimination against him. *City of Sweetwater v. Biard Development Co.* (Civ. App.) 203 S. W. 801.

The owner of lands incorporated into a city by a charter amendment which was unconstitutional is entitled to injunction restraining the collection of city taxes on

his lands; the right to question the validity of the amendment not being vested exclusively in the state, which would result in the landowner's money being taken from him illegally and without redress. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1034.

Where tangibles, including the tangibles of railway companies in a county, are, as a result of settled practice or custom, systematically assessed below their true value, and the intangibles of the railroads assessed at their true value, a railroad against which such actual value is assessed is entitled to enjoin the collection of so much of the tax against it as was based on the assessment of its intangibles at a higher proportionate value than that of other property within the state on the ground such assessment is in violation of Const. art. 8, § 1, requiring uniform and equal taxation, and Const. U. S. Amend. 14, § 1, guaranteeing equal protection of the law. *Druessedow v. Baker* (Com. App.) 229 S. W. 493, reversing (Civ. App.) *Baker v. Druessedow*, 197 S. W. 1043.

45. — **Acts relating to roads or streets.**—Discretion of commissioners' court as to roads to be improved with proceeds of county bonds voted for improvement generally can be controlled by injunction only for fraud or gross abuse of discretion. *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160.

The power given the district court by Const. art. 5, § 8, and art. 1706, to supervise the proceedings of the commissioners' court on opening roads, permitted a full inquiry, on application for injunction to restrain opening a road by an interested landowner, as to the validity of the proceedings; the application for an injunction having the character of a direct attack. *Haverbekken v. Hale* (Civ. App.) 204 S. W. 1162.

The owners of residence property abutting a street have the right to enjoin the city from constructing a steam railroad thereon without lawful authority, upon showing special damages to property and personal discomfiture, whether plaintiffs owned the fee to the street or not. *City of Orange v. Rector* (Civ. App.) 205 S. W. 503.

Suit, to restrain issuing of bonds for improvement of a public highway, was properly dismissed, where at time petition was filed bonds were in the hands of the Attorney General for examination under art. 632; it being the duty of the Attorney General, under art. 619, to pass upon questions raised by petition. *Smith v. Reaves* (Civ. App.) 208 S. W. 545.

Action of commissioners' court in proceeding to open highway, in determining that juror of view was a freeholder, and in refusing to award landowners more damages than did jury, held conclusive except as landowners questioned it in exercise of right of appeal under art. 6882, and not to warrant injunction proceedings to restrain opening of road. *Lawrence v. Gordon* (Civ. App.) 209 S. W. 702.

Road district board has discretionary power to locate and construct pike roads which can be interfered with by injunction only where action sought to be enjoined is so arbitrary and devoid of merit as to be fraudulent, and the result of gross abuse of discretion implying not merely error of judgment but perversity of will, passion, prejudice, partiality, or moral delinquency. *Edens v. Road Dist. No. 1 of Navarro County* (Civ. App.) 211 S. W. 791.

County judges and county commissioners were properly enjoined from opening a road, where the commissioners' court did not dispose, by an order of the court, of damages awarded by jury to petitioner in proceedings to open such road, in view of the requirements of arts. 6882, 6883, since, by failure to dispose of such damages by court order, petitioner was deprived of opportunity to appeal, if he desired. *Howard v. Rushing* (Civ. App.) 213 S. W. 953.

The question of the necessity of a public road is wholly for the determination of the petitioners, and where so determined by them and the commissioners' court, and where proper legal steps have been taken, the question is not subject to review by the district court in suit to enjoin opening of the road. *Culp v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 944.

The courts of Texas have the right and are under duty to interfere by injunction at the instance of taxpayers in case of gross abuse of discretion, fraud, or perversity of will on the part of commissioners of road district in locating a road, shown to result in injury and damage to the taxpayers as individuals and as a class, the effort not being to control the board's discretion, but to require its proper exercise. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

Where plaintiff had sold certain materials to a county to be used on roads under a special road law and had accepted warrants in payment thereof, it was proper to refuse to enjoin the county from paying out funds belonging to road precincts other than those for which the materials were furnished; plaintiffs being limited in their recovery to the districts covered by the funds on which the warrants were drawn. *Austin Bros. v. Patton* (Civ. App.) 226 S. W. 702.

As the commissioners' court has discretionary power as a board to determine what roads will be improved with the proceeds of bonds, such power will not be controlled by injunction. *Strength v. Black* (Civ. App.) 226 S. W. 758.

Injunction will lie to restrain diversion to the digging of a ditch to drain private property, of funds voted for the purpose of building roads in the district where voted. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

46. — **Appointment and removal of and interference with officers.**—In view of arts. 3057-3061, and 3068, providing method of contesting results of election and providing for bond to protect contestant, equity will not intervene on behalf of contestant by enjoining contestee from taking office pending result of contest. *Jackson v. Houser* (Civ. App.) 208 S. W. 186.

Courts are cautious of interfering with action in the political departments of the government. *Id.*

Since injunction may issue to prevent the county executive committee of a party from acting in a matter outside its jurisdiction, it may also issue to restrain those who are usurping the office of such committee from hearing a primary election contest, which would be within the jurisdiction of the legal committee. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Though injunction will not be granted to determine the right to an office, the right of parties claiming to hold such office may be determined incidentally in trying the right of plaintiff to an injunction to prevent usurpers to that office from determining a primary election contest. *Id.*

District court had jurisdiction of an action by public weigher of a precinct to enjoin one, claiming to hold another office which gave him the right to weigh in the precinct and receive fees therefor, from interfering with the former's possession of his office. *Troilo v. Gittinger* (Civ. App.) 230 S. W. 233.

47. — **Publishing election returns.**—The commissioners' court, in canvassing and declaring results of elections, is exercising a political and not a judicial power, and the exercise of such power cannot be enjoined. *Moore v. Plott* (Civ. App.) 206 S. W. 958.

48. **Enforcement of void ordinance.**—Where city passed ordinance for licensing jitneys, which street railway alleged was invalid, it could sue to enjoin threatened enforcement of the ordinance directly against the city. *Lindsley v. Dallas Consol. St. Ry. Co.* (Civ. App.) 200 S. W. 207.

In order to enjoin enforcement of an ordinance reducing fares to be charged by a street railway, it was not incumbent upon the railway company to show that the reduced rate was confiscatory within the meaning of the federal Constitution, being entitled to restrain its enforcement, where the reduced rate is unreasonable, unjust, and insufficient to maintain a fair return upon the value of the property. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

Equity will restrain the hurtful exercise of unlawful powers granted to administrative and ministerial officers of a city by void ordinances, or the doing of any act injurious to a complainant under such ordinances. *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

49. **Publication of libel or slander.**—In view of Const. Bill of Rights, § 8, declaring that every person shall be at liberty to write or publish his opinions, being responsible for the privilege, and that no law shall ever be passed curtailing liberty of speech or the press, an injunction against slander, or restraining the members of a union on a strike from vilifying persons employed, etc., is beyond the power of a court of equity. *Ex parte Tucker*, 110 Tex. 335, 220 S. W. 75.

50. **Nuisance.**—An injunction should not issue to restrain the operation of a cotton gin in a city in the absence of showing that the evils anticipated from the construction and operation thereof are imminent and certain to occur; it not being sufficient that they may probably do so. *Moore v. Coleman* (Civ. App.) 195 S. W. 212.

In a suit to restrain the operation of a cotton gin as a nuisance while the evidence must show that the evils anticipated are imminent and certain to occur from the construction and operation of the gin, an instruction to that effect is properly refused. *Id.*

Evidence held not to establish that a proposed cotton gin will be so operated as to constitute a nuisance to neighboring residents. *Strieber v. Ward* (Civ. App.) 196 S. W. 720.

Mere fact that storing shingles near building of another owner would tend to increase his fire hazard does not warrant enjoining such use of his premises, since such hazard is largely an incident to the ownership of urban property. *Gray v. S. T. Woodring Lumber Co.* (Civ. App.) 197 S. W. 231.

That plaintiffs' fire hazard and rates of insurance were greatly increased by erection of wooden building on adjoining lot under valid permit, held not to entitle them, by mandatory injunction to require building to be torn down. *Focke, Wilkens & Lange v. Heffron* (Civ. App.) 197 S. W. 1027.

To entitle adjoining property owner to injunction against nuisance increasing danger from fire, allegation and proof of imminence or probability of danger from fire must be clear and unmistakable. *Shamburger v. Scheurrer* (Civ. App.) 198 S. W. 1069.

If a landowner keeps such a number of hogs in such small pens or in such a way or feeds them with garbage in such a way as to produce disagreeable and noxious odors interfering with the comfort, use, and enjoyment of another owner, such owner is entitled to injunction abating the nuisance. *Royalty v. Strange* (Civ. App.) 204 S. W. 870.

A city is held to the same measure of liability, as far as nuisances are concerned, as is a natural citizen. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

An ice factory, being a lawful and useful business enterprise in any community, its construction and operation is not a nuisance per se, though by its location and the manner of its operation it might become one. *Goose Creek Ice Co. v. Wood* (Civ. App.) 223 S. W. 344.

The construction and operation of an ice factory will not be enjoined at the suit of adjacent home owners, apprehending injury from its operation, unless it is shown that its operation will necessarily be a nuisance. *Id.*

A building for the manufacture of bed springs and mattresses is not a nuisance per se. *Haynes v. Hedrick* (Civ. App.) 223 S. W. 550.

The construction of numerous small cheap houses of secondhand lumber and of poorest workmanship, and crowded together on land adjoining expensive dwellings, will not be enjoined; such houses not constituting a "nuisance per se," even though unsightly and out of keeping with the residences on adjoining land, and even though they increase the danger of loss by fire, and increase the cost of insurance. *Worm v. Wood* (Civ. App.) 223 S. W. 1016.

A court of equity has power in proper case to restrain the construction of buildings for the conduct of a business which will materially injure or annoy adjoining owners, but there must be a threat of actual physical discomfort to persons of ordinary sensibilities and ordinary tastes and habits, such as is unreasonable and in derogation of the complaining party's rights. *Von Hatzfeld v. Neece* (Civ. App.) 223 S. W. 1034.

The conduct of a grocery store in a residential section is not a nuisance per se enjoicable in equity at once and as a matter of law. *Id.*

Conduct of grocery store by defendant in residential section, about 53 feet from the residence of the nearest plaintiff, held not such a nuisance as to be subject to injunction at the instance of complaining property owners. *Id.*

The operation and maintenance of a cotton gin is not a nuisance as a matter of law, and the reasonable, careful, and justly warranted use of property for a cotton gin held not to be enjoined because there was necessarily incident to such use discomfort and inconvenience to nearby home owners. *Oliver v. Forney Cotton Oil & Ginning Co.* (Civ. App.) 226 S. W. 1094.

A live stock barn is not a nuisance per se; but, when the act of the parties owning the building is to use it in such a way as will constitute a nuisance, and the nuisance is imminent, the parties seeking relief are entitled to writ of injunction against its erection. *Jacobs & Wright v. Brigham* (Civ. App.) 227 S. W. 249.

A garage is not a nuisance per se, but may become one when established and operated in a strictly residential section, and the construction and operation of a garage in a section of the city in which such a business has never been carried on, and which has been used exclusively for residential purposes, where the establishment and operation of the garage will seriously injure the health of the residents, impair the value of their properties, increase the fire risk of such properties, and render the vicinity undesirable as a residential district, will be enjoined. *Lewis v. Berney* (Civ. App.) 230 S. W. 246.

51. — **Public or private injury.**—Unless it should appear that a cotton gin cannot be used or controlled so as not to injure adjacent property, plaintiffs cannot enjoin its erection, for, business of ginning being legitimate, and not a nuisance per se, it is presumed that it will be conducted in such a manner as not to injure any one. *Strieber v. Ward* (Civ. App.) 196 S. W. 720.

Owner of land materially affected in value by obstruction of public highway has the right to restrain such obstruction, having sustained a special injury different from that sustained by general public. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 207 S. W. 960.

59. **Corporate acts and proceedings.**—As writ of injunction is auxiliary to main suit, and cannot be maintained separately, district court had jurisdiction to grant writ of temporary injunction enjoining persons from voting shares of stock in company, title to which was being litigated on appeal from district court's judgment. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

In suit to restrain defendants from voting stock and controlling affairs of irrigation company, allegations of petition with exhibits held sufficient as to affirmative and negative averments to be basis of writ of temporary injunction. *Id.*

65. **Interference with right to water.**—Injunction is a proper remedy to a riparian owner on navigable stream, whose rights as such have been unlawfully invaded or interfered with. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

A municipal corporation, owning a waterworks system, is not entitled to injunction restraining others from using water from a stream, unless it shows that it has that right as a riparian owner, or by limitations, or by permit, under Acts 33d Leg. c. 171, and chapter 172 (arts. 5107—1 to 5107—105), and Acts 34th Leg. c. 138, with reference to use of public water. *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173.

68. **Hearing and determination of application for injunction.**—In a suit for a permanent mandatory injunction to abate a nuisance, an order entered in vacation, denying a temporary injunction, is not res judicata on final hearing; art. 1714, empowering the court, in vacation by consent of parties to enter final judgment, being inapplicable, as actions of this kind are controlled by the injunction statutes. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

The power to grant injunctions in term time or vacation carries with it the power to refuse such writs in term time or vacation. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

68½. **Application to non-resident judge.**—An injunction issued by a nonresident district judge was void where it was erroneously thought that the resident judges were disqualified by interest. *City of Dallas v. Armour & Co.* (Civ. App.) 216 S. W. 222.

69. **Decree.**—Decree enjoining removal by railroad company of division headquarters from town held not erroneous though it enjoined removal of superintendent and train dispatchers, etc., from such town nor as prescribing company's train schedules, etc., *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

In suit to enjoin live stock inspectors acting under the Live Stock Commission from dipping cattle for tick eradication without statutory warrant, the court erred in rendering judgment perpetuating injunction and taxing costs against a defendant, who had resigned before institution of suit and another who resigned before trial. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

In suit to restrain defendant from interfering with plaintiff's use and possession of property received from defendants in exchange for her own, where defendants disputed plaintiff's title and sought to recover it for themselves, it was not improper for the court to render judgment against defendants for title and possession. *Sykes v. Fischl* (Civ. App.) 212 S. W. 217.

Where a city was entitled to priority in the use of waters of a stream, which it had dammed, for the domestic uses of its inhabitants, as against other riparian proprietors who were using the waters for irrigation, at the city's suit the court should have issued a restraining order preventing the irrigators from using the water for that purpose until further order, and should not have perpetually restrained them from using the waters for irrigation in so far as the use would interfere, or threaten to interfere, with satisfaction of the city's domestic needs. *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532.

Where suit was brought to enjoin a commissioners' court from paying and an abstract company from receiving money under a contract alleged to be invalid, and the defendants appeared on the trial and moved that the suit be dismissed, and showed that they had voluntarily rescinded the contract, the court properly dismissed the case. *Graves v. Commissioners' Court of Milan County* (Civ. App.) 218 S. W. 554.

72. — **Uncertainty.**—Decree enjoining railroad company from removing division headquarters from town held not erroneous as uncertain or indefinite. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

In suit to restrain nuisance of hog ranch near plaintiff's land situated on a tract of 50 acres only 4 acres of which nearest plaintiff's was so used, injunction merely restraining use of such land as to constitute a nuisance was erroneous as too vague, indefinite, and uncertain, and amounting to absolute prohibition against the conducting of a hog ranch anywhere on the 50-acre tract. *Royalty v. Strange* (Civ. App.) 204 S. W. 870.

73. — **Modification.**—In suit by father to annul marriage of minor son, temporary injunction restraining defendant and her counsel from communicating with son will be modified so as to permit communication for purpose of ascertaining what son's testimony will be at trial. *Thompson v. Thompson* (Civ. App.) 203 S. W. 939.

Art. 4643a. Same; mining operations.—No injunction or temporary restraining order, shall be issued by any judge of this State prohibiting any sub-surface drilling or mining operations on the application of any adjacent land owner, claiming injury to his surface or improvements, or loss of, or injury to the minerals thereunder, unless the person, corporation or partnership against whom drilling or mining operations is alleged as a wrongful act is shown to be unable to respond in damages for any injury that may result from drilling or mining operations; provided, however, that the person, corporation or partnership against whom such injunction is sought shall enter into a bond with one or more sufficient sureties, in such sum as the judge hearing the said application and having jurisdiction thereof shall fix, securing the complainant in the payment of any injuries that may be sustained by such complainant as the result of such drilling or mining operations; provided, that the court may, when he deems it necessary to protect any or all interest involved in such litigation, in lieu of such bond, appoint a trustee with such powers as the court may prescribe or appoint a receiver under the provisions of the statute, to take charge of and hold the minerals produced from the lands of the complainant or the proceeds thereof subject to the final disposition of such litigation. [Acts 1919, 36th Leg., ch. 162, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.

Right to injunction.—Where defendant, who asserted rights in oil lands claimed by the state, secured a temporary injunction restraining licensees from proceeding with operation, the state is not entitled to a temporary injunction restraining defendant from drilling wells on the lines between its own lands and those in controversy on the theory such wells would drain oil from under the lands in controversy, but the state should seek relief from the court's granting the first injunction, for, while oil belongs to the owner of the lands, and is part thereof, yet, when it escapes and comes into the control of another, the title of the first person is gone. *Prairie Oil & Gas Co. v. State* (Com. App.) 231 S. W. 1088.

Art. 4644. Appeals allowed to courts of civil appeals.—Any party or parties to any civil suit wherein a temporary injunction may be granted or refused or having been granted shall on motion be dissolved, or when motion to dissolve has been overruled, under any of the provisions of this title, in term time or in vacation, may appeal from the order or judgment granting or refusing, or dissolving or refusing to dissolve such injunction, to the court of Civil Appeals having jurisdiction of such

appeal; but such appeal shall not have the effect to suspend the order appealed from, unless it shall be so ordered by the court or judge who enters the order; provided, the transcript in such case shall be filed with the clerk of the Court of Civil Appeals not later than twenty days after the entry of record of such order or judgment granting, refusing dissolving or refusing to dissolve such injunction. [Acts 1909, p. 354, § 2; Acts 1907, p. 206, § 2; Acts 1919, 36th Leg., ch. 17, § 1.]

See *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878; *Griffith v. State* (Civ. App.) 210 S. W. 293.

Cited, *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644. Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

Nature of proceeding.—An order dissolving an injunction is ordinarily interlocutory. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Writ of error from Supreme Court.—Supreme Court has jurisdiction to grant writs of error in appeals from interlocutory orders granting injunctions under art. 4644, 4645, 4646, such not being of that class of cases in which determination of the Court of Civil Appeals is final under art. 1521 as amended 1913. *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

Judgment and orders appealable.—Under Rev. St. 1911, art. 4644, the Court of Civil Appeals had no jurisdiction of an order refusing to dissolve an injunction. *Howard v. Rushing* (Civ. App.) 213 S. W. 953; *Hamilton v. American Nat. Ins. Co.* (Civ. App.) 200 S. W. 259; *Jowell v. Lamb* (Civ. App.) 207 S. W. 987.

A "temporary injunction," means that interlocutory injunction provided for by the other articles of the chapter, and is not restricted to a restraining order. *Hoskins v. Cauble* (Civ. App.) 198 S. W. 629.

Neither the filing of an answer nor a motion to dissolve the injunction deprives defendant in an injunction proceeding of the right to appeal from a temporary writ granted upon an ex parte hearing. *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173.

A judgment dissolving a temporary injunction restraining execution and awarding fixed sum to defendant in injunction upon a plea of reconvention, constitutes a final appealable judgment denying plaintiff in injunction all relief and giving defendant a judgment against plaintiff and his sureties on the cross-action. *McKenzie v. Withers* (Com. App.) 206 S. W. 503.

In action to enjoin sale of property upon ground that judgment on which order of sale was issued was not a final judgment, the Court of Civil Appeals will not entertain appeal from interlocutory order denying application for temporary injunction, after sale has taken place and the subject-matter of such appeal has ceased to exist, to determine question of finality of the judgment, since such question can be raised on appeal from the final judgment. *Whitesides v. Wood* (Civ. App.) 210 S. W. 333.

The trial judge's exercise of discretion in granting lessees an injunction against lessor ousting them, notwithstanding defendant's denial under oath of a written lease, would be subject to review by the Court of Civil Appeals on appeal by the party aggrieved. *Phœbus v. Connellee* (Civ. App.) 223 S. W. 1019.

Where general demurrer challenged only the sufficiency of the petition to entitle plaintiffs to temporary injunction, and motion to set aside order granting injunction expressly limited defendant's appearance for such purpose, it was in effect a motion to dissolve the injunction for insufficiency of the petition to entitle plaintiffs to such relief, and order denying it was appealable. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

Under the statute, the trial court having authority to deny application for permanent injunction in vacation, his order so doing was a final judgment from which appeal could be taken. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

The Court of Appeals has jurisdiction to entertain appeals from orders granting, refusing, or dissolving a temporary injunction. *Phœbus v. Connellee* (Civ. App.) 223 S. W. 982.

Notice of appeal.—A temporary injunction order may be made in chambers, out of term and without notice or hearing, a notice of appeal is not necessary to give a right of appeal from such order; the general law (art. 2084) requiring exceptions to the ruling of the trial court and notice of appeal therefrom having no application, but to appeal from a final judgment perpetuating an injunction made in open court upon a hearing in term time in a trial upon the merits of the case, exception and notice of appeal required by the general law (art. 2084) is necessary, and where no exception was taken and notice given the appeal must be dismissed. *Blaylock v. Slocomb* (Civ. App.) 231 S. W. 864.

Entry of record of order and time for appeal.—Appeal from order refusing mandatory injunction will be dismissed; transcript not being filed in the Court of Civil Appeals within 15 days after entry of record of the order. *Brown v. Livingston* (Civ. App.) 206 S. W. 861.

Where a temporary injunction was granted on September 18th, and on October 30th a motion to dissolve was overruled, an appeal taken November 4th is too late, for under the statute an appeal from the granting of a temporary injunction must be taken within 15 days, and the action of the court on October 30th in no way modified or changed the original injunction, hence, appeal not having been taken in time, it must be dismissed. *Jowell v. Lamb* (Civ. App.) 207 S. W. 987.

The requirement that transcript on appeal from order refusing temporary injunction be filed in appellate court within 15 days after entry of record of the order, is imperative and jurisdictional; so that, filing being later, appeal will be dismissed. *Scott v. Board of Trustees of Waco Independent School Dist.* (Civ. App.) 223 S. W. 253.

Where all that appears in the transcript on appeal is a docket entry stating that a temporary writ of injunction was dissolved, the appellate court acquires no jurisdiction of the appeal, such not being "an entry of record" as contemplated by this article. *Stripling v. Partin* (Civ. App.) 223 S. W. 527.

Effect of appeal.—Under this article, as amended by Acts 36th Leg. (1919) c. 17, where the trial court did not order that an order denying an application for a temporary injunction should be suspended, the perfection of an appeal did not have the effect of suspending the order. *Odem v. Cain* (Civ. App.) 218 S. W. 1079.

Where a restriction in an injunction limited the extent of the life thereof to the date of the further order of the district court of the county, filing of supersedeas bond by plaintiff appellants in the suit did not suspend the final decree and continue the temporary injunction in effect pending the decision of the Court of Civil Appeals. *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

Art. 4645. Proceedings on appeal.—It shall not be necessary to brief such case in the Court of Civil Appeals or Supreme Court, and the case may be heard in the said courts on the bill and answer, and such affidavits and evidence as may have been admitted by the judge granting, refusing, dissolving or refusing to dissolve such injunction; provided the appellant may file a brief in the court of Civil Appeals or Supreme Court; but such appellant shall furnish the appellee with a copy thereof not later than two days before the case is called for submission in such court, and the appellee shall have until the day the case is called for submission to answer such brief. [Acts 1909, p. 354, § 3; Acts 1907, p. 206, § 3; Acts 1919, 36th Leg., ch. 17, § 2.]

Took effect 90 days after March 19, 1919, date of adjournment.

See *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

Briefs and assignments of error.—If appellant, on appeal from order on temporary injunction, elects under this article to brief the case, brief need not comply with rules for ordinary appeals. *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644.

While it is the better practice on an appeal from an order refusing a temporary injunction for the parties to make assignments of error and file briefs, yet it is not necessary to do so. *Moore v. Norton* (Civ. App.) 215 S. W. 373.

Discretion of lower court.—The granting or refusing of a temporary injunction is within the sound discretion of the district court, and that court's action is not reviewable on appeal, unless it clearly appears from the record that there has been an abuse of such discretion. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63; *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198; *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 214 S. W. 490; *Beirne v. North Texas Gas Co.* (Civ. App.) 221 S. W. 301.

An appellate court will not ordinarily interfere with the exercise of discretion by a trial judge in respect to a temporary mandatory injunction in vacation, unless a right is clearly shown to exist to which recognition has not been properly accorded. *People's Guaranty State Bank of Tyler v. Castle* (Civ. App.) 218 S. W. 519.

The trial judge's exercise of discretion in granting lessees an injunction against lessor ousting them, notwithstanding defendant's denial under oath of a written lease, would be subject to review by the Court of Civil Appeals on appeal by the party aggrieved; but such court has no original jurisdiction to exercise that discretion, which is lodged in the trial judge. *Phœbus v. Connellee* (Civ. App.) 223 S. W. 1019.

A broad discretion is vested in the trial court regarding temporary injunctions, but a denial thereof based on lack of power may be revised by the appellate court, without interfering with such discretionary power. *Blume v. J. I. Case Threshing Mach. Co.* (Civ. App.) 225 S. W. 831.

Denial of a temporary injunction rested largely in the discretion of the trial court, and its action will not be disturbed in the absence of abuse of discretion, particularly where such determination is made upon conflicting evidence. *George v. Jonesville Oil & Gas Co.* (Civ. App.) 226 S. W. 445.

Consideration of pleadings and evidence.—Answer filed after orders for receiver and injunction had been made in divorce suit cannot be considered on appeal from orders. *Claunch v. Claunch* (Civ. App.) 203 S. W. 930; *Thompson v. Thompson* (Civ. App.) 202 S. W. 175.

Arts. 4644 and 4645, authorizing and regulating appeals from orders granting temporary writs of injunction, limit power and jurisdiction of Court of Civil Appeals to consideration of questions presented by bill, answer and evidence. *Ablene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

Where case is before Court of Civil Appeals on appeal from order granting temporary injunction court must consider all orders presented for consideration. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

On appeal from an order granting a temporary injunction, *ex parte* and in chambers, only the record as it existed at the time the writ was granted can be considered. *Moore v. Plott* (Civ. App.) 206 S. W. 958.

The allegations of the petition are taken as true upon review, and it is not essential to the jurisdiction of the appellate court that an answer to the merits should have been filed. *Griffith v. State* (Civ. App.) 210 S. W. 293.

On appeal from order dissolving temporary injunction, where there is no statement of facts and no information for appellate court as to any evidence which may have been heard and considered by the court except the affidavits filed, the court will affirm order of dissolution, unless the facts shown by the petition and motion to dissolve disclosed order to be erroneous. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316.

Questions reviewed.—Where, on appeal from order refusing to dissolve temporary injunction, the transcript was filed in the Court of Civil Appeals within 15 days from the order granting such injunction, that court has jurisdiction to determine whether the original writ was authorized by the pleadings, although not to consider any of the proceedings after that time, or to review the action of the court in refusing to dissolve the injunction. *Howard v. Rushing* (Civ. App.) 213 S. W. 953.

A finding of fact by the trial court, which granted a temporary injunction, when supported by evidence, will not be disturbed on appeal. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

Dismissal of appeal.—Where the transcript consisted solely of the order refusing the injunction, the appeal bond, and the clerk's cost bill and certificate, the appeal will be dismissed, as the court could not determine whether the judge erred in refusing the injunction. *Baker v. Nipper* (Civ. App.) 198 S. W. 596.

An appeal from an interlocutory order denying application for temporary injunction to restrain sale of property will be dismissed, where sale has taken place; it being impossible to afford relief sought, and there being nothing for court to decide except a moot question. *Whitesides v. Wood* (Civ. App.) 210 S. W. 333.

The relief prayed for by plaintiff in an injunction suit against the sale of property by the sheriff cannot be granted, where the sale has taken place subsequently to the rendition of judgment in the trial court, so that the appeal therefrom involves only moot questions, except in so far as the determination of costs is concerned. *Brown v. Fleming* (Com. App.) 212 S. W. 483.

Where an application to enjoin the commissioners of a road district from paying an attorney's fee was denied, and the appeal did not suspend the order denying the writ, and the fee was paid, the appeal must be dismissed; the case having become moot. *Odem v. Cain* (Civ. App.) 218 S. W. 1079.

Where, pending an appeal from an order refusing to enjoin payment of money, money was paid, the rule is to dismiss the case and not the appeal. *Flood v. City of Dallas* (Civ. App.) 217 S. W. 194.

Determination and disposition in general.—That material allegations were denied under oath held not to justify a reversal of judgment granting temporary injunction, in absence of abuse of discretion. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

In suit for temporary injunction restraining defendant from selling intoxicating liquors at retail, after defendant's appeal from injunction order, he having given bond conditioned as a supersedeas bond, the state, on motion to the Court of Civil Appeals, is entitled to injunction restraining defendant from pursuing the occupation, and the Court of Civil Appeals will not deny the motion on equitable ground of balancing injury to state against injury to dealer by being deprived, in case of reversal, of privilege of pursuing lawful business. *Ford v. State* (Civ. App.) 209 S. W. 490.

If a decree refusing to grant an injunction was permissible under the verified pleadings of the parties, and did not constitute a clear abuse of discretion, its validity is not affected, nor will it be reversed on appeal, merely because the trial court based his decision upon an erroneous ground. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

An order overruling motion to dissolve an injunction based on conflicting evidence will not be disturbed on appeal. *Cooks', Waiters' & Waitresses' Union, No. 399, v. Theoharis* (Civ. App.) 228 S. W. 984.

Affirmance.—Where judgment rendered does not purport to give reasons for denying injunction, court on appeal is required to affirm judgment, if plaintiff's petition was subject to special exceptions directed against it, or if evidence failed to sustain cause of action, though well pleaded. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

Disobedience of mandate.—Decision of Court of Civil Appeals affirming action of trial court in granting temporary injunction does not preclude trial court from considering second motion to dissolve. *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

A judgment of the appellate court granting the motion, erroneously denied by the court below, to dissolve a temporary injunction against enforcing a judgment for possession of land, does not prevent a trial on the merits of the suit to set aside the judgment any more than would a similar judgment of the court below. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

Art. 4646. Case to have precedence on appeal.

See *Houston Oil Co. of Texas v. Village Mills Co.*, 109 Tex. 169, 202 S. W. 725.

Construction and application.—This article had no application, where at the time of dissolving the temporary injunction the court also heard evidence and passed on the merits of the application for a permanent injunction and denied such injunction. *Early-Foster Co. v. Mid-Tex Mills* (Civ. App.) 232 S. W. 1117.

Art. 4647. [2990] No injunction against a judgment, except, etc.

Injunction against judgment or execution.—Dismissal by county court of appeal from judgment of justice for less than \$100 for want of jurisdiction because appeal bond has not been approved within time required being final and reviving judgment of justice, it could not be attacked in suit to restrain execution thereon. *Womack v. Phillips* (Civ. App.) 200 S. W. 607.

The judgment creditor, as the one having the real interest in the subject-matter, is a necessary party to suit to enjoin a constable from levying execution on the ground of the judgment being void. *Nail v. Taylor* (Civ. App.) 223 S. W. 719.

— **Tender of amount due.**—A judgment debtor who had been garnisheed in an action against his creditor is entitled to restrain execution on the judgment, though he fails to tender the excess of the amount of the judgment over the claim of plaintiff in garnishment, in view of art. 279, which prevents garnishees from paying any debt to the defendant in garnishment after service of writ. *O'Brien v. Barcus* (Com. App.) 212 S. W. 941.

— **Grounds for injunction in general.**—An injunction is the proper remedy to restrain the levy of an execution for the county attorney's commissions upon a judgment for a fine which was before the issue of the execution remitted by the governor. *Smith v. State*, 26 Tex. App. 49, 9 S. W. 274.

Defendants, as sureties on a treasurer's bond, prayed relief from a judgment and execution against them on such bond, on the ground that their attorneys had failed to show that they signed the bond on condition that two other responsible persons should sign it, whose signatures the principal and one of the county commissioners promised but failed to procure, and that the bond was accepted by the county commissioners' court without their knowledge that such signature had not been obtained. Held that, as the defense would have been unavailable in the suit on the bond, the proceedings on the judgment will not be enjoined. *Ballow v. Wichita County*, 74 Tex. 339, 12 S. W. 48.

Although the jury found that defendant was prevented from defending a suit by the fraud of plaintiff, defendant was not entitled to an injunction against the judgment, where the jury also found that defendant was liable for the debt on which the judgment was based, although the debt was barred by limitations, plaintiff not having alleged that she would have pleaded limitations. *Watts v. Baker* (Civ. App.) 203 S. W. 623.

— **Void judgments.**—Judgment in cause submitted to judge is not void, so as to authorize enjoining of execution thereon, because rendered within two days of end of term, contrary to District and County Courts Rule 66 (142 S. W. xxii). *Meredith v. Flanagan* (Civ. App.) 202 S. W. 787.

In suit to enjoin enforcement of judgment, that moneys sued for and for which judgment was rendered were in the custody of another court was a matter of defense, which should have been pleaded and urged in the suit, and could not render the judgment in the suit void. *Kerr v. Hume* (Civ. App.) 216 S. W. 908.

Art. 4649. [2992] Injunctions granted on sworn petition.

Petition in general.—Where petition prays for a permanent injunction "on final hearing," and does not ask for a temporary injunction, the latter cannot be granted. *Hoskins v. Cauble* (Civ. App.) 198 S. W. 629.

Requisites of petition.—The rule of pleading that the statements of a party are to be taken most strictly against him is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently pleaded to negative every reasonable inference from the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506; *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160; *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173; *Texas Novelty Advertising Co. v. Bay Trading Co.* (Civ. App.) 206 S. W. 729; *Davis v. Santa Rosa Infirmary* (Civ. App.) 220 S. W. 125.

In suits for injunction, the pleadings must specifically and clearly state the grounds for the remedy. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

Where petition to enjoin execution on ground of fraud in violating agreement not to take personal judgment against purchaser of property subject to vendor's lien notes is not brought until three years after judgment, petition should exhibit due diligence. *Boykin v. Patterson* (Civ. App.) 214 S. W. 611.

— **Verification.**—The affidavit must state that the facts upon which the applicant relies to sustain his injunction are true, and an affidavit on information and belief is insufficient. *Butler v. Remington* (Civ. App.) 230 S. W. 224; *Gray v. S. T. Woodring Lumber Co.* (Civ. App.) 197 S. W. 231; *Lingwiler v. Lingwiler* (Civ. App.) 204 S. W. 785; *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638; *Wilkening v. Wolff* (Civ. App.) 220 S. W. 598.

In suit to restrain defendants from voting stock and conducting affairs of irrigation company, verification of petition at time court granted temporary injunction held sufficient compliance with statute. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

Art. 4639, authorizing such temporary orders in divorce as are deemed necessary and equitable, does not dispense with requirement of this article that petition in divorce suit for injunction be verified. *Lingwiler v. Lingwiler* (Civ. App.) 204 S. W. 785.

In suit by wife to obtain divorce and recover her separate property and community interest, verification to petition for injunction restraining defendants from disposing of

property, held to sufficiently indicate the matter sworn to as true and those sworn to on belief. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

Defective verification of petition for injunction because on information and belief, held waived by defendant appellants, who addressed no special exception to petition, but relied solely on general demurrer and lack of jurisdiction, complaining of improper verification only in Court of Civil Appeals. *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

If this article applies to a divorce proceeding, wherein district court, by article 4639, has special authority to make temporary orders respecting property of parties, verification of petition for divorce, irregular in that it was before notary public who was an attorney of record, is subject to amendment, and does not defeat jurisdiction of district court to enter order prohibiting disposition of property of community estate. *Ex parte Gregory*, 210 S. W. 204.

In a minor son's suit in trespass to try title to recover under his mother's second will half of certain land left by her first will wholly to her second husband, verification of plaintiff's pleadings held sufficient to sustain issuance of injunction. *Carr v. Froelich* (Civ. App.) 220 S. W. 137.

Petition for injunction is sufficiently verified when signed by the petitioner, and the jurat of the officer shows it was sworn to and subscribed before him. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

The form of affidavit verifying petition for injunction may be questioned for the first time on appeal. *Butler v. Remington* (Civ. App.) 230 S. W. 224.

Sufficiency of petition.—In suit to restrain defendants from voting stock and controlling affairs of irrigation company, allegations of petition with exhibits held sufficient as to affirmative and negative averments to be basis of writ of temporary injunction. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

Petition, in suit by water company, to restrain numerous actions to recover back meter rents, held to state a cause of action, entitling it to a temporary injunction. *San Antonio Water Supply Co. v. Green* (Civ. App.) 198 S. W. 631.

Petition to restrain sale under power in mortgage, based on uncertainty as to capacity in which defendant held it, held insufficient, not showing she would not execute release in every capacity, and there being remedy by interpleader, with payment into court. *McAllen v. Brownsville Masonic Temple Ass'n* (Civ. App.) 201 S. W. 660.

A petition, in a suit to enjoin execution on a justice's judgment from which an appeal had been taken, held sufficient as against a general demurrer, notwithstanding it did not specifically allege to what court the appeal was taken; it appearing that there was but one court to which such appeal could legally be taken. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Petition of cattle owners to enjoin live stock inspectors from requiring the dipping of cattle to eradicate fever ticks without statutory warrant held not subject to special exception as not alleging facts showing that plaintiffs would suffer irreparable injury, alleging that plaintiffs' stock would be seriously crippled and bruised, while as to milch cows there would be a total or at least a partial loss of milk and butter. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

In suit by the state to enjoin the operation of a moving picture show on Sunday as in violation of Penal Code, art. 302, a petition failing to allege facts showing that defendant was actually conducting such a show in violation of the statute held insufficient. *Barry v. State* (Civ. App.) 212 S. W. 304.

Petition held to state cause of action for injunction to restrain removal of oil drilling equipment and casing delivered to plaintiff under an executed contract. *Hinton v. D'Yarmett* (Civ. App.) 212 S. W. 518.

A petition to enjoin execution on ground of fraud in violating agreement not to take personal judgment against petitioner as purchaser of property subject to vendor's lien notes, held deficient where not alleging a defense to suit if no agreement had been made. *Boykin v. Patterson* (Civ. App.) 214 S. W. 611.

In suit to enjoin enforcement of default judgment foreclosing improvement certificate against plaintiff's property, the petition, alleging that she employed a named attorney to file an answer and take such steps as were necessary to her proper defense, and that she assumed he had answered, and that she was not apprised of the rendition of judgment against her until about 30 days before the instant suit was filed, was insufficient as a legal reason or excuse for failing to appear or answer. *Eureka Paving Co. v. Barnett* (Civ. App.) 216 S. W. 903.

Petition for injunction by fence owners, alleging that defendant tore the fence down, converted the material to his own use, threatened to kill an owner, if he found him on the land, etc., held insufficient to entitle plaintiffs to injunction. *Graham v. Knight* (Civ. App.) 222 S. W. 326.

Portion of petition of taxpayers for injunction against construction of road by commissioners, alleging that building of the road would exhaust funds of bond issue and preclude building of other roads in vicinity of their lands, etc., held to present nothing as a basis for interference by the court. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

In a suit by a purchaser of a millinery business to restrain the vendor from re-engaging in such business in her own name after having entered into an employment contract with complainant, petition held good as against general demurrer. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

— Allegations as to facts.—In suit to restrain defendants from voting stock and controlling affairs of irrigation company, allegations in petition on information and belief held sufficiently positive. *Needham v. Arno Co-op. Irr. Co.* (Civ. App.) 196 S. W. 887.

Allegation of petition for injunction against erection of buildings for lumber yard

as nuisance as to likelihood of diseases being brought into and kept in yard, asserted merely probability or uncertain contingency, and was insufficient to invoke injunctive relief. *Shamburger v. Scheurrer* (Civ. App.) 198 S. W. 1069.

Objection that petition does not state amount of tax that will be collected from petitioner stockholders is met by allegation that assessed value of property of one is \$39,000, and other \$80,000. *Veitmann v. Slator* (Civ. App.) 200 S. W. 539.

A petition to restrain a commissioners' court from allowing county officials to buy postage stamps from county funds, which did not name officers who were going to buy stamps nor the amount thereof, was too indefinite. *Edmondson v. Cumings* (Civ. App.) 203 S. W. 428.

Pleading a conclusion that petitioners for injunction were owners of the fee in a street in the absence of special exception thereto or general denial held to warrant introduction of evidence of ownership of fee. *City of Orange v. Rector* (Civ. App.) 205 S. W. 503.

Where a petition and affidavit for injunction to restrain the commissioners' court from canvassing election returns and declaring the results stated that the plaintiff desired to file a contest of election against M., and that M. absented himself so that notice thereof could not be served upon him, an injunction should not have been issued, because in failing to negative other than personal modes of serving notice of contest there was no showing that plaintiff did not have an adequate remedy at law. *Moore v. Plott* (Civ. App.) 206 S. W. 958.

Petition to enjoin consolidation of school districts for purpose of high school advantages held to allege facts as to inaccessibility of proposed high school building to plaintiffs' children, and as to assessment of their property to pay bonds, justifying relief sought. *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Where a petition for injunction, to restrain defendants from driving petitioner's cattle from certain land, alleged that petitioner owned one-fourth of a designated section, but did not further describe same, it did not authorize an injunction. *White v. McFaddin* (Civ. App.) 209 S. W. 766.

Where a petition for injunction to restrain defendants from driving petitioner's cattle from certain land failed to allege that petitioner was entitled to possession of the land, and did not negative the defendants' right to possession thereof under lease and to drive away cattle other than their own, it was error to grant a temporary restraining order on an ex parte hearing. *Id.*

In a suit to enjoin a city from interfering with reconstruction of stables destroyed as constituting a nuisance, allegation of the petition held not sufficient, because failing to show that the building intended to be erected could properly be built under the city ordinances. *City of Forney v. Mounger* (Civ. App.) 210 S. W. 240.

Petition against live stock inspectors to enjoin them from requiring dipping of cattle of several owners without statutory warrant, also plea of intervention filed by other cattle owners which adopted the allegations of the petition, held sufficiently specific as to nature of acts sought to be prevented, the persons threatening the acts, and the injury or damage which would result. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

In a proceeding by a street railway to restrain a city from enforcing an ordinance reducing fares, bill held not to show that reduced fare was unreasonable, unjust, or insufficient to maintain and pay a fair return upon the value of the property. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

In a petition for injunction, the averment of material and essential elements must be sufficiently certain to negative every inference of the existence of facts under which petitioner would not be entitled to relief. *Ernde v. Johnson* (Civ. App.) 214 S. W. 575.

In a suit to enjoin defendants from maintaining fences or other obstructions in and upon certain streets in a named town, a petition alleging that plaintiff was the owner of certain blocks, forming part of a large body of land which had been dedicated to the public, and that all conveyances of lots had recognized the plan of dedication, and naming the streets alleged to be constructed, held sufficiently to identify the premises obstructed, since the map might be referred to, although not made a part of the petition. *Zoeller v. Offer* (Civ. App.) 216 S. W. 1113.

Petition for temporary injunction to restrain defendant from coming about plaintiff's premises and molesting him held insufficient as not negating reasonable inference from facts stated that defendant was in possession of land involved prior to plaintiff's alleged purchase of an interest therein, etc. *Wilkening v. Wolff* (Civ. App.) 220 S. W. 598.

A petition of cattle owners to enjoin live stock inspectors from requiring the dipping of cattle, alleging that plaintiff's stock would be seriously crippled and bruised, and that there would be a total or partial loss of milk or butter as to milk cows, held good as against demurrer. *McCollum v. McManus* (Civ. App.) 222 S. W. 593.

Petition against mineral company and its trustees to restrain issuance of stock and payment of dividends to persons who signed trust agreement, not showing that the trustees were about to violate the terms of the agreement, they having the right to issue stock and pay dividends, held insufficient as against general demurrer. *Townsend v. Durfee Mineral Co.* (Civ. App.) 223 S. W. 876.

A petition, seeking to enjoin a party chairman from acting as such after the election of his successor who had not accepted, is insufficient, where it does not negative the existence of a party usage or rule that such officer hold over until his successor qualified, even if that office were not subject to the general rule to that effect. *Walker v. Hopping* (Civ. App.) 226 S. W. 146.

Evidence.—That plaintiff, enjoining defendant's threatened sale of automobile, originally sued for its possession, with no count for its value, raises presumption that it is

of some peculiar personal value, for which a merely money judgment would not adequately compensate. *Sweeney v. Alderete* (Civ. App.) 196 S. W. 367.

In a suit for injunction to compel removal of a ditch constructed by defendant across plaintiff's land, the special warranty deed from plaintiff's vendor was admissible as a link in his chain of title, though petition did not allege title from the sovereignty, where he testified without objection that he was the owner of the lot, and other undisputed evidence carried his title back to the sovereignty of the soil. *East Side Realty Co. v. Fowler* (Civ. App.) 202 S. W. 999.

Evidence, in suit to enjoin collection of tax, that board of equalization placed on plaintiff's property a value grossly in excess of that under its rule held sufficient, at least, to raise issue of arbitrary discrimination. *City of Sweetwater v. Biard Development Co.* (Civ. App.) 203 S. W. 801.

In suit to enjoin live stock inspectors from dipping plaintiffs' cattle for tick eradication without statutory warrant or improperly as without inspection and in injurious chemicals, evidence held sufficient to raise the issue that the mixture in which the inspectors threatened to dip the cattle was not properly proportioned or mixed and was not the official dip. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

In a suit to enjoin lessee under an oil lease from drilling a well, as having forfeited his right to sink a well in a given time on lessor's land "or on one of the adjoining surveys," evidence relating to whether a well had actually been drilled on an original adjoining survey held insufficient to show that it had not, so as to justify issuance of an injunction. *Emde v. Johnson* (Civ. App.) 214 S. W. 575.

In an action against an oil company to restrain it from taking plaintiff's share of oil of certain lands, evidence held not to show that there was any threatened future use of plaintiff's oil. *Southern Oil Corporation v. Waggoner* (Civ. App.) 224 S. W. 230.

Evidence that the purchaser for a business purpose of a lot in a restricted subdivision had negotiated for the purchase of other lots in the subdivision which he knew were restricted, that the restrictions had been generally advertised, and that he purchased at the same time two other lots which were subject to the restrictions, held to sustain finding that he knew of the general agreement with lot purchasers that all lots in subdivision should be subject to the same restrictions. *Wilson Co. v. Gordon* (Civ. App.) 224 S. W. 703.

It is not necessary that the proof should establish with absolute certainty the impairment of a right to justify the court in granting a temporary injunction which merely maintains the status quo until the final hearing. *Sutherland v. City of Winnsboro* (Civ. App.) 225 S. W. 63.

On the hearing of an application for a temporary injunction, affidavits are admissible in evidence, and their admission is a common practice. *Hill v. Brown* (Civ. App.) 225 S. W. 780.

In suit to enjoin the inspector for a county and local inspectors from requiring cattle to be dipped under the Tick Eradication Statute (art. 7314 et seq.), evidence held insufficient to show the law was being unreasonably and oppressively administered. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

In a suit to enjoin an obstruction of an alley by construction of a building, evidence held ample to support a finding that the plaintiff suffered no special or peculiar injury by reason of the encroachment. *Shelton v. Phillips* (Civ. App.) 229 S. W. 967.

Art. 4650. [2993] Judge's fiat to be indorsed on petition.

Extent of order.—In a proceeding in the nature of a quo warranto to oust a county judge, an order fixing date for hearing and temporarily restraining the respondent from receiving a warrant or salary held to be a temporary injunction, as distinguished from temporary restraining order, effective only until a time during which it has life is fixed by the judge's fiat. *Griffith v. State* (Civ. App.) 210 S. W. 293.

In suit for injunction, where the judge granted a temporary writ and indorsed his fiat on the petition setting certain date for the hearing as to whether a writ should be issued to operate until final hearing and directing the clerk to issue notice to the defendant, the injunction granted on such fiat expired on the date set for the hearing, so that the case thereafter stood as if the court had not ordered the writ. *Beirne v. North Texas Gas Co.* (Civ. App.) 221 S. W. 301.

This article authorizes the judge granting a temporary writ of injunction to limit its operation to a fixed period or a period to terminate on happening of a subsequent event at a future date not definitely fixed. *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

Injunction against mayor and other officers of a city restraining them from levying or assessing any tax on the property of plaintiffs under a claimed amendment to the charter, in view of the restriction and limitation on the period of its operation written into the injunction with deliberate design by the judge who granted it, held self-terminating and brought to an end when final judgment was rendered in suit to contest the election amending the charter and for injunction, so that after such date it had no effect. *Id.*

Art. 4651. [2994] Notice to opposite party, when.

See *Garitty v. Halbert* (Civ. App.) 225 S. W. 196.

Power to issue ex parte injunction.—Under the statute, matter of notice to defendants of plaintiff's application for injunction is in discretion of trial judge, and Court of Appeals is not authorized to reverse injunction order on ground notice was not given. *Williamson v. Cayo* (Civ. App.) 198 S. W. 643.

In wife's divorce action court had the right to issue injunction restraining husband from interfering with wife in harvesting of certain crops and in the use of certain teams and farm implements, and from molesting and intruding himself upon plaintiff's presence, without notice to husband. *Hunt v. Hunt* (Civ. App.) 215 S. W. 228.

Necessity for notice and hearing.—That defendant, having replevied an automobile claimed by plaintiff, was threatening to sell it without right, justified granting a temporary restraining order against defendant without a hearing. *Sweeney v. Alderete* (Civ. App.) 196 S. W. 367.

On petition to vacate judgment and enjoin enforcement, it is the court's duty to determine the rights of the parties to a judgment on the pleadings and evidence, and it is error to enjoin enforcement of the judgment without a hearing. *Reed & Reed v. McKee* (Civ. App.) 204 S. W. 717.

Granting a temporary injunction restraining defendants from driving the petitioner's cattle away from certain land, without a hearing, was not such an abuse of the court's discretion as to constitute error, where it was alleged that the cattle could get water at no other place in the vicinity. *White v. McFaddin* (Civ. App.) 209 S. W. 766.

To be entitled to an injunction upon an ex parte hearing, and without notice, the plaintiff must show by proper allegations a right in himself to do the act which he seeks to perpetuate, and must negative every possible hypothesis upon which defendant might lawfully do the act which he seeks to enjoin, and plaintiff must show immediate and pressing necessity which prevents a hearing. *Gill v. McFaddin* (Civ. App.) 210 S. W. 722.

In suit by stockholder in a company against it and directors for appointment of receiver and to restrain the directors from making sale of the assets of the company under an alleged fraudulent deed of trust, grant of temporary restraining order without hearing held erroneous. *Alto Cotton Oil & Mfg. Co. v. Berryman* (Civ. App.) 218 S. W. 513.

— **Showing.**—Where temporary injunction is granted on ex parte hearing, all allegations, including the prayer for relief, should be construed strictly against the petitioner, and the relief granted should not be broader than the prayer. *White v. McFaddin* (Civ. App.) 209 S. W. 766.

Petition of pasture land owner to restrain removal of dam, erected to impound water for his cattle in dry season, held insufficient to entitle him to injunction upon an ex parte hearing, not showing, except by inference, that his land abutted upon the bayou, or that defendant was not the owner of the land or entitled to the water. *Gill v. McFaddin* (Civ. App.) 210 S. W. 722.

Art. 4652. [2995] Petition to be filed and cause docketed.

Cited, *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

Art. 4653. [2996] Writs, where returnable.

See *Cotulla State Bank v. Herron* (Civ. App.) 218 S. W. 1091.

Application.—This article applies to suits going to the validity of the judgment, and not to suits to prevent the sale of property on which the judgment, however valid, is no lien. *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578.

This article applies to every one who seeks by injunction to stay the execution of a judgment, even though such person was not a party to the original suit, and where defendant was in possession of personal property and the main purpose of his suit was to enjoin execution of the judgment foreclosing a chattel mortgage thereon, he cannot avoid the provision requiring return of writ to the court rendering the judgment, on the theory that he sought to quiet his title. *Matthews v. Eyres* (Civ. App.) 206 S. W. 963.

The district court of one county has jurisdiction of a suit to enjoin execution on a justice's judgment rendered in another county from which appeal has been taken to the district court of such county notwithstanding this article; a justice court not having jurisdiction of injunction suits. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

Under art. 1830, subds. 17 and 30, and this article suit to enjoin execution of judgment not void must be brought in county in which judgment was rendered, but where the judgment attacked is void it may be attacked in any court. *Price & Beard v. Eastland County Land & Abstract Co.* (Civ. App.) 211 S. W. 478.

The venue of a suit which was primarily to recover possession of land, though injunction is asked as relief ancillary to the main suit, is governed by art. 1830, subd. 14, permitting suit for the recovery of land to be brought in the county where land is situated, not by this article. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

Where creditor of insured garnisheeing insurer, which paid amount of policy into district court after insured had sued on the policy in county court, and the creditor got judgment which was paid, the district court may perpetually enjoin enforcement of the county court judgment against the insurer, notwithstanding the provision, requiring writs of injunction to stay execution of a judgment to be returnable in the court where the judgment was rendered. *North British & Mercantile Ins. Co. of London & Edinburgh v. Klaras* (Com. App.) 222 S. W. 208, reforming judgment (Civ. App.) *Klaras v. North British & Mercantile Ins. Co. of London & Edinburgh*, 200 S. W. 584.

Jurisdiction and venue.—In a petition to enjoin the enforcement of a judgment foreclosing a lien on personal property, on the ground that the judgment creditor converted the property to his own use, and failed to apply it to the judgment, an allegation that

the property was worth more than \$500 does not deprive the county court, in which the judgment was rendered, of jurisdiction, under the provision that writs of injunction granted to stay execution on a judgment shall be tried in the court where such judgment is rendered. *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601.

In a suit to restrain the operation of a cotton gin as a nuisance, nonresident defendants, are not privileged to be sued in the county of their residence where their superintendent of construction is a resident of the county and is actively interested in the establishment of the gin. *Moore v. Coleman* (Civ. App.) 195 S. W. 212.

A suit for injunction to enforce compliance by a railroad company with a contract to establish and maintain division headquarters at a particular town, in which the company and an individual who was a proper party were joined as defendants, was instituted in the county of the individual defendant's domicile instead of that of the company. Held that, as the injunction was an ancillary proceeding, the venue was correctly laid, and the company was not entitled to assert a privilege to be sued in the county of its residence. *Houston & T. C. R. Co. v. City of Entis* (Civ. App.) 201 S. W. 256.

Where the property of one not a party to judgment has been levied upon and he claims a homestead exemption, the district court of county where plaintiff resides has jurisdiction. *Long v. Knott* (Civ. App.) 203 S. W. 1127.

A suit to stay execution of a judgment foreclosing a chattel mortgage cannot be maintained in a court of a county other than the one in which the judgment was rendered, even though it was claimed that the property involved did not belong to the mortgagor, etc. *Matthews v. Eyres* (Civ. App.) 206 S. W. 963.

This article does not authorize an injunction writ to be returned to a court of the county where such judgment was rendered instead of to the court where rendered. *Kleschnick v. Martin* (Civ. App.) 203 S. W. 948.

Under art. 1591, making certain judgments of Court of Civil Appeals final in any civil case appealed from county or from a district court, etc., and where county court under the Constitution and but for this article would have had original jurisdiction of an action in which the judgment was rendered and jurisdiction of action to enjoin collection of such judgment, a judgment of Court of Civil Appeals upon appeal from district court in the injunction suit was final. *Walker Grain Co. v. Ft. Worth Grain & Elevator Co.* (Com. App.) 209 S. W. 398.

Art. 4654. [2997] The bond for injunction.

Application.—Notwithstanding arts. 4633, 4639, the statute making the giving of a bond a condition precedent to the issuance of an injunction applies to a divorce suit. *Ex parte Coward*, 110 Tex. 587, 222 S. W. 531.

Provision mandatory.—The provision of this article, that, the complainant shall give bond, is mandatory. *Phoebus v. Connellee* (Civ. App.) 228 S. W. 982; *Boykin v. Patterson* (Civ. App.) 214 S. W. 611.

Issuance without bond.—A temporary injunction issued as directed without a bond is void. *Griffith v. State* (Civ. App.) 210 S. W. 293.

Where an interlocutory injunction was granted without the filing of the bond, the injunction may be upheld, after appeal by the filing of a bond in the amount fixed by the Court of Civil Appeals. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

Specifying amount of bond.—In suit to restrain collection of a debt on notes given for the price of machinery, and amounting to approximately \$3,200, two bonds given by plaintiff, the first in the sum of \$1,000, the second in the sum of \$3,000, were insufficient; under the statute bond should have been given in double the amount of the debt. *Twin City Co. v. Birchfield* (Civ. App.) 228 S. W. 616.

The requirement of bond of \$6,000 as a condition to the issuance of temporary injunction to restrain the eviction of plaintiff from premises alleged to be worth \$35,000, the rental value of which in excess of the amount which plaintiff agreed to pay for premises was greater than the amount of the bond, is not excessive. *Phoebus v. Connellee* (Civ. App.) 228 S. W. 982.

Liability.—Defects in injunction bonds are waived unless attacked by motion to correct or dissolve. *Mansfield v. Ramsey* (Civ. App.) 196 S. W. 330.

It is not contemplated that mistake in making injunction bond to B. E. W. instead of D. E. W., the real name of defendant, shall relieve surety of liability, but the obligee may plead and prove mistake and show true intention of parties. *Ables v. Waggoner* (Civ. App.) 208 S. W. 693.

Without pleading and proof of mistaken injunction bond in favor of defendant B. E. W. held that judgment against surety on cross-complaint of defendant D. E. W. was unauthorized, despite statutory requirement that bond be payable to adverse party. *Id.*

Art. 4662. [3005] Citation to issue to defendants.

Necessity for citation.—Where, in injunction suit, defendant filed an answer to the entire petition, in obedience to a notice of the court, both parties thereafter appearing before the judge in chambers, who heard the evidence and refused the temporary writ, such answer constituted an "appearance," under art. 1882, rendering unnecessary the issuance of a citation, as required by art. 4662, where not dispensed with by art. 4652. *City of Seymour v. Montgomery* (Civ. App.) 209 S. W. 237.

Necessary parties defendant.—Where a suit was brought to prevent levy and assessment for the payment of certain bonds, but the petition alleged that they had been sold to the state board of education, it was demurrable for failure to make the purchaser a party. *Walling v. Malone Independent School Dist.* (Civ. App.) 195 S. W. 671.

In suit by cattle owners to enjoin live stock inspectors from requiring the dipping of cattle to eradicate fever ticks without statutory warrant, the several live stock inspectors were properly joined as defendants; the suit not being to recover damages, but to enjoin threatened acts, but the live stock sanitary commission, under whom the inspectors acted, was not a necessary party to the suit. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

Art. 4663. [3006] The answer.

Cited, *Baker v. Davis* (Civ. App.) 227 S. W. 534.

Answer.—In view of art. 4644, giving right of appeal to any party to any civil suit wherein temporary injunction may be granted, and article 4645, relating to briefs and hearing on appeals, and this article, the allegations of the petition are taken as true upon review, and it is not essential to the jurisdiction of the appellate court that an answer to the merits should have been filed. *Griffith v. State* (Civ. App.) 210 S. W. 293.

Motion to dissolve temporary injunction, containing demurrers and exceptions to plaintiffs' petition and a positive and direct denial of all the equities pleaded, in the form of a regular answer to the merits of the case, held an answer. *Worm v. Wood* (Civ. App.) 223 S. W. 1016.

— **By all parties.**—The general rule is that an injunction granted against several defendants will not be dissolved until all defendants implicated have fully answered denying the equity; but where one defendant files his answer, and, from his own connection with the subject in controversy and his own personal knowledge, is able to lay such facts before the court as to render it apparent that the complaint establishes no equity, a motion to dissolve may be granted without answer of the other defendants. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

— **Verification.**—Facts alleged in unverified motion to dissolve temporary injunction could not be considered in determining whether the injunction should be dissolved. *San Antonio Water Supply Co. v. Green* (Civ. App.) 198 S. W. 631.

An answer and affidavits filed therewith held to constitute a properly verified answer which entitled defendant filing it to a dissolution of a temporary injunction theretofore granted. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

— **Sufficiency.**—In suit to enjoin inspector of live stock sanitary commission from requiring cattle to be dipped, answer held, in absence of special exception, to sufficiently aver that commission after investigation had quarantined county and declared all cattle and premises therein to be unclean, and had required such cattle to be dipped and to deny essential allegations of petition. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

Even a general denial under oath puts in issue allegations of petition for injunction and requires plaintiff to sustain allegations by proof. *Id.*

Where an answer in an injunction proceeding contained a general denial, a demurrer to the answer must be overruled. *Manton v. City of San Antonio* (Civ. App.) 207 S. W. 951.

In an action by a physician to enjoin certain physicians, as members of a hospital staff, and the hospital, from interfering with his practice in the hospital, answer filed by an attorney for the hospital reciting that the hospital withdraws from the answer filed by all the defendants held not to be construed as meaning that the plaintiff was entitled to injunction against hospital, although it stated "that the position of this defendant [the hospital] is, and always has been, neutral in the matters involved therein." *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

In an action by a physician to enjoin members of a hospital staff and a hospital from preventing him from practicing medicine in the hospital, an answer by the members of the staff held to sufficiently refute any wrongful intent or that they conspired to deprive plaintiff of any rights. *Id.*

— **Effect.**—Even where the sworn answer negatives all the equities set up in the petition, defendants are not entitled as a matter of right to dissolution of injunction, but it is still a question within the sound discretion of the trial court, guided by the facts of the particular case under consideration. *Carr v. Froelich* (Civ. App.) 220 S. W. 137; *Staffel v. San Antonio School Board of Education* (Civ. App.) 201 S. W. 413; *Harris v. Thomas* (Civ. App.) 217 S. W. 1068; *Graham v. Knight* (Civ. App.) 222 S. W. 326.

In suit to restrain defendant from pursuing business in town contrary to his agreement when he left firm which took in another member in his place, held that court erred in rendering judgment enjoining defendant, without any evidence being introduced, on pleadings and admission in paragraph of answer. *Schlag v. Johnson* (Civ. App.) 203 S. W. 369.

On motion for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true, and if in such answer, under oath, the facts constituting the claim of the plaintiff for the interposition of the court are controverted by defendant, the court will not generally interfere, but will deny the injunction. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 193.

In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true. *Id.*

Where answer denying allegations of petition for injunction is verified general equity practice of refusing the writ should ordinarily be followed. *Boykin v. Patterson* (Civ. App.) 214 S. W. 611.

On motion to dissolve an injunction on bill and answer, the answer, when sworn to, in so far as it is responsive, is taken as true. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Where one in possession of land, title to which he claimed to have secured by adverse possession, sought injunction against defendants, who, as he alleged, were trespassing, and for the purpose of avoiding the burden of an action for trespass to try title did not ask for a writ of possession, but defendants filed a plea of not guilty, such plea put plaintiff to proof of title. *Butler v. Borroum* (Civ. App.) 218 S. W. 1115.

Art. 4664. [3007] Dissolution in term time or vacation.

See *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Notice and service thereof.—It was not error to refuse to quash the service of a motion to dissolve a temporary injunction, though the precept was ambiguous in stating the place to which the motion would be heard, where the plaintiffs appeared at the time and place intended, and were therefore not misled by the ambiguity. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

Discretion of court.—Where verified answer denied every material allegation in petition and there was no evidence offered in support thereof nor agreement to submit cause on bill and answer, it was discretionary with trial judge to dissolve his temporary restraining order and refuse temporary injunction. *Peters v. City of San Antonio* (Civ. App.) 195 S. W. 989.

The judge had a right to dissolve a temporary injunction, if plaintiff's petition, standing alone, did not entitle it to such injunction. *San Antonio Water Supply Co. v. Green* (Civ. App.) 198 S. W. 631.

In a suit by one licensee of a patented process to enjoin others from using an alleged improvement in the territory allotted to him, the refusal to dissolve a temporary injunction on the filing of an answer denying the equities of the suit under oath was not error, as the trial court has some discretion in such matters, especially where the dissolution would result in greater hardship and injury than its continuance, or where the complainant by the dissolution would lose benefits which would accrue by its continuance. *Southland Sweet Potato Curing & Storage Ass'n v. Beck* (Civ. App.) 221 S. W. 656.

Right to dissolution.—Where defendants by exceptions in the answer and by motion to dissolve injunction attacked sufficiency of petition, dissolution of injunction after consideration of questions of law held not erroneous, though equities of bill were not denied under oath. *Crowell & Conner v. Howard* (Civ. App.) 200 S. W. 911.

In a suit by the lessee of an oil and gas lease to restrain the purchaser of a part of the land omitted from the lease by mutual mistake from drilling an oil well, it was not an abuse of discretion to dissolve a temporary injunction, where litigation as to the title of the omitted land was pending on conflicting evidence, and irreparable injury might result to defendant by wells drilled on adjacent land by petitioner. *Texas Pacific Coal & Oil Co. v. Howard* (Civ. App.) 212 S. W. 735.

Where taxpayer obtained temporary injunction restraining school trustees and others from tearing down and relocating a school building, on a petition praying therefor, pending an appeal by the taxpayer to the county school superintendent, and the county superintendent and county board of trustees decided in taxpayer's favor, and trustees of the school district filed motion to dissolve the injunction, in answer to which taxpayer filed supplemental petition showing the decision in his favor, court erred in granting the motion and dissolving the temporary injunction; it being alleged in the supplemental petition that the trustees were threatening and preparing to remove the building, regardless of the decision of the county superintendent. *Seat v. Jones* (Civ. App.) 225 S. W. 208.

Since the statute requiring competitive bidding for all county contracts exceeding \$2,000 does not except contracts for the services of an architect or for the purchase of a site for a county courthouse, a temporary injunction, restraining the enforcement of such contracts, made without competitive bids, will not be dissolved, though it might be determined on final hearing that the nature of those contracts created an implied exception from the statutory requirements. *Ashby v. James* (Civ. App.) 226 S. W. 732.

Where plaintiffs asked for a temporary injunction against school trustees and a county superintendent until they had their appeal from the action of the trustees to the state superintendent and state board of education, and an order was made granting the relief as asked for, the injunction was properly dissolved on a showing that the appeal had been taken and the action of the trustees had been affirmed. *McClure v. Cunningham* (Civ. App.) 230 S. W. 222.

Evidence.—Evidence held to show no defense to deed of trust or secured note, given as liquidated damages, or justification for delaying sale thereunder; so that temporary injunction of sale, granted in suit to cancel note and deed of trust, was properly dissolved on motion. *Voelter v. Holderby* (Civ. App.) 196 S. W. 727.

On motion to dissolve temporary injunction, where plaintiff's pleadings were insufficient as a basis for issuance of injunction, court did not err in refusing to admit testimony to controvert the special allegations in defendant's answer. *Worm v. Wood* (Civ. App.) 223 S. W. 1016.

Art. 4665. [3008] Refunding bond on dissolution.

Liability on bond.—Where an association of underwriters was sued in the name of the association, and in order to secure a modification of a temporary injunction a bond was entered into in which the association and the attorneys in fact bound themselves as principals jointly and severally to satisfy any judgment which might be rendered, the attorneys in fact should be bound under their express obligations as principals to pay any judgment that might be rendered against the association. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Com. App.) 229 S. W. 312.

Art. 4667. [3010] Damages for delay.

Right to damages in general.—Defendant in injunction suit, wrongfully deprived of his property by the writ by a plaintiff, who claims the property as his own, may treat the suit as a conversion and sue for the value of the property. *Anderson v. Wilson* (Civ. App.) 204 S. W. 384.

Measure and amount of damages.—The wife's action to enjoin a sale of property which had been conveyed to her by the husband in fraud of creditors, in the absence of showing that it was brought for delay, did not merit, on determination against her, the assessment of the penalty of 10 per cent. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

Where an injunction restraining defendant from building on his own land was improper, defendant was entitled to compensation for the damages proximately resulting from that restriction, and the measure of damages was, it appearing that defendant intended to occupy the building for his own mercantile purpose, the cost of securing another building, less the expense incident to doing business in the building he intended to erect, but an award of \$160 in favor of defendant, held not insufficient, but to exceed the amount to which defendant was entitled by \$7. *Bryson v. Abney* (Civ. App.) 207 S. W. 945.

Judgment, on cross-complaint against surety on bond to procure injunction against disposition of notes assigned to defendant by seller of automatic piano to plaintiffs, being for amount of principal, interest, and attorney's fees of notes, held without support in evidence. *Ables v. Waggoner* (Civ. App.) 208 S. W. 693.

In a suit to restrain execution under a justice's judgment from which appeal has been taken, actual damages for unlawful issuance and levy of the writ of execution do not include attorney's fees or the expense of attending court. *Kieschnick v. Martin* (Civ. App.) 208 S. W. 948.

In injunction suit, where such issue was not submitted to jury nor requested by either party, though defendant in its answer asked for penalty, provided under this article, held that court erred in allowing defendants 10 per cent. damages in way of statutory penalty. *Quarles v. Eaton-Blewett Co.* (Civ. App.) 210 S. W. 596.

Where a tenant claimed that the landlord had wrongfully excluded him from part of the premises by an injunction, he is not necessarily entitled to recover the value of his share of the crop on land covered by the injunction, where his cattle entered the field and ate or destroyed the crop despite the injunction. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

Punitive damages are not recoverable for wrongfully suing out a writ of injunction, no matter how improper or malicious the motive. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

Art. 4670. [3013] Persons guilty to be imprisoned.

Violation of decree and punishment.—Proprietor of motion picture show enjoined at suit of the state from operating on Sunday was not guilty of a contempt through violation of such injunction pending his appeal on account of the operation of his theater by his lessee in good faith who had sole control. *State v. Barry* (Civ. App.) 217 S. W. 957.

Review.—Though the original verbal order adjudging relator in contempt for violating an injunction directing imprisonment and fine was bad because oral and imposing a penalty in excess of that allowed, yet, where the judge amended his order reducing the fine and jail sentence to authorized limits, the commitment will not be disturbed because of the invalidity of the original order. *Ex parte Coward*, 110 Tex. 587, 222 S. W. 531.

Art. 4671. [3014] General principles of equity applicable, when.

Right to injunction.—In granting injunction under art. 4643, the court is not confined to the general rules of equity practice on the subject, and will give relief where applicant has a substantial right cognizable in law that is or is about to be invaded, where injunction is necessary to restrain some act prejudicial to him. *Hinton v. D'Yarrett* (Civ. App.) 212 S. W. 518.

Effect of general denial.—In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer; allegations of the bill not specially denied under oath must be taken as true. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

INJUNCTIONS IN PARTICULAR CASES

Art. 4674. Unlawful sale, etc., of liquors may be enjoined.

Validity of statute.—Notwithstanding Const. art. 4, § 22, the Legislature could authorize county attorney to sue to enjoin corporation from keeping and selling liquors without a license, though corporation thereby exceeded charter powers. *Ætna Club v. State*, 109 Tex. 91, 199 S. W. 1090.

Court of Civil Appeals has jurisdiction of subject-matter of state's suit to restrain defendant from selling intoxicants at retail, that is, prohibition of the sale of intoxicants, despite adoption of prohibition amendment to Constitution of United States; amendment not being a complete law, and Congress having enacted no law for its enforcement, while it gives states concurrent power. *Ford v. State* (Civ. App.) 209 S. W. 490.

Liability of club.—Under Rev. St. art. 4674, county attorney held authorized to sue to enjoin incorporated social club from keeping and selling liquors without a license, though in excess of its charter powers, and notwithstanding Const. art. 4, § 22. *Ætna Club v. State*, 109 Tex. 91, 199 S. W. 1090.

Injunction against incorporated club and its officer from using premises of club, or any part, for selling liquors, etc., related to business or occupation in which club and officer were engaged, and could not be avoided by removal to another town in county. *Ex parte Alderete*, 83 Cr. R. 353, 203 S. W. 753.

Where defendant club might lawfully dispense liquor to its members and guests so far as Penal Laws are concerned, held, that the state was not entitled to restrain it from so dispensing the same on the ground that such was not within its corporate powers, since a corporation may transact all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of its main undertaking. *Country Club v. State*, 110 Tex. 40, 214 S. W. 296, 5 A. L. R. 1185.

Art. 4680. By whom prosecuted.

Power of county attorney.—Notwithstanding Const. art. 4, § 22, the Legislature could authorize county attorney to sue to enjoin corporation from keeping and selling liquors without a license, as was done by art. 4674, though corporation thereby exceeded charter powers. *Ætna Club v. State*, 109 Tex. 91, 199 S. W. 1090.

Art. 4688a. Maintaining or operating pool hall enjoined.—The habitual, actual, threatened or contemplated use of any premises, place, room, building, or part thereof, or tent, or any kind or character of enclosure, similar or dissimilar to those named, or any unenclosed open space for the purpose of exhibiting any tables, stands, or structures, of the kind or character referred to and described in this Act shall be enjoined at the suit of either the State or any citizen thereof. The Attorney General of the State, or any District or County Attorney, or any citizen, of any county in which any pool hall is maintained, operated, or the use threatened or contemplated may either in term time or vacation apply to the district judge, in which district is located the place where such pool hall is maintained, or operated or the use threatened or contemplated (or to any district judge in Travis County) for injunction to prohibit the maintenance and operation of any such pool hall. Should the Court determine that a pool hall is being maintained or operated in violation of this act, he shall issue a temporary injunction or restraining order as may be necessary and shall issue an injunction permanently prohibiting the running thereof upon final hearing. For this purpose, jurisdiction and venue are conferred upon the several district judges and courts within the State, according to the purpose and intent of this provision. This remedy by injunction shall be considered in addition to the remedy by prosecution and may be exercised independently of and without reference to whether or not any prosecution has been instituted or may, or may not, be instituted. Any person who may use or who may be about to use or who may aid or abet any other person in the use of any such premises or places named in this act in violation of this act may be made a party defendant in such suit. [Acts 1919, 36th Leg., ch. 14, § 3.]

Explanatory.—For secs. 1 and 2 of Acts 1919, 36th Leg., ch. 14, see Penal Code, arts. 633a, 633b.

The act took effect May 1, 1919.

Art. 4688b. Sale of liquors within certain prescribed zones.—The Attorney General is hereby authorized to enjoin the sale of spirituous, vinous or malt liquors capable of producing intoxication, in violation of this Act, or any conduct in violation of this Act, and suit therefor may be maintained in the name of the State of Texas in Travis County, Texas, and the District or County Attorney of any county wherein any sale of such liquors are made in violation of any term of this Act, or any conduct in violation of this Act, is hereby authorized to maintain, in the proper court of said county, or in Travis County, Texas, suit in the name of the State to enjoin and prevent such sale or other violation of this Act. [Acts 1918, 35th Leg. 4th C. S., ch. 12, § 6.]

Explanatory.—For the remainder of Acts 1918, 35th Leg. 4th C. S. ch. 12, see Penal Code, arts. 610d-610m.

For similar provision in Acts 1919, 36th Leg. 2d C. S., ch. 78, § 38, see Penal Code, art. 588 $\frac{1}{4}$ rr.

Art. 4689. Use of premises for bawdy houses enjoined.

Bawdy houses.—One seeking to enjoin the maintenance of a bawdyhouse as expressly entitled by arts. 4689, 4690, is not barred from questioning the validity of a proviso contained therein, where his right to injunction is not based on such proviso. *Baker v. Coman*, 109 Tex. 85, 198 S. W. 141.

Art. 4690. By whom brought; proceedings as in other injunction cases.

Petition and answer.—One seeking to enjoin the maintenance of a bawdyhouse as expressly entitled by arts. 4689, 4690, is not barred from questioning the validity of a proviso contained therein, where his right to injunction is not based on such proviso. *Baker v. Coman*, 109 Tex. 85, 198 S. W. 141.

TITLE 70

INJURIES RESULTING IN DEATH—ACTIONS FOR

Art.	Art.
4694. Action for injuries resulting in death, brought when.	4696. Exemplary damages.
4694a. Contract releasing liability invalid.	4698. For whose benefit action to be brought.
4694b. Repeal; partial invalidity.	4699. Who may bring the action.
4695. Character of wrongful act.	4704. Damages to be apportioned by jury.

Article 4694. [3017] Actions for injuries resulting in death, brought when.—An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

(1) When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of another person, association of persons, joint stock company, corporation or trustee or receiver of any person, corporation, joint stock company, or association of persons, his its or their agents or servants, such persons, association of persons, joint stock company, corporation, trustee or receiver, shall be liable in damages for the injuries causing such death. The term corporation as used in this Act shall include all municipal corporations, as well as all private and public and quasi public corporations; except counties, and common and independent school districts.

(2) When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of the proprietor, owner, charterer or hirer of any industrial or public utility plant, or any railroad, street railway, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, wrongful act, neglect, carelessness, unskilfulness, or default of his, their, or its servants or agents, such proprietor, owner, charterer, or hirer shall be liable in damages for the injuries causing such death.

(3) When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness or default of the receiver or receivers, trustee or trustees or other person or persons in charge of, or in control of any railroad, street railway, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or any industrial plant, public utility plant, or any other machinery, or by the wrongful act, neglect, carelessness, unfitness, unskilfulness or default of his or their servants or agents, such receiver or receivers, trustee or trustees or other person shall be liable in damages for the injuries causing such death, and the liability here fixed against such receivers, trustees, or other persons shall extend to all cases in which the death is caused by reason of any bad or unsafe condition of the railroad, street railway or other machinery under the control or operations of such receivers, trustees, or other persons and to all other cases in which the death results from any other reason or cause, for which an action may be brought for damages on account of personal injuries, the same as if said railroad, street railway, or other machinery was being operated by the owner thereof. [Acts 1860, p. 32; Acts 1887, p. 44; Acts 1892, S. S., p. 5; Acts 1913, p. 288, § 1; Acts 1921, 37th Leg., ch. 109, § 1, amending art. 4694, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.

See Galveston, H. & S. A. Ry. Co. v. Cook (Sup.) 16 S. W. 1033; Lawson v. Haskell Telephone Co. (Civ. App.) 224 S. W. 390.

Cited, *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *International & G. N. R. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860; *Hines v. Walker* (Civ. App.) 225 S. W. 837; *Town of Jacksonville v. McCracken* (Com. App.) 232 S. W. 294.

1/2. Constitutionality.—This article as amended in 1913 by Laws 1913, c. 143, entitled "An act to amend article 4694 of the Revised Civil Statutes of 1911, giving cause of action where injuries resulting in death is caused by the negligence of a corporation, its agents or servants, and declaring an emergency," held void in so far as it makes a natural person liable for a wrongful act of his agent; such provision not being embraced in title, in violation of Const. art. 3, § 35. *Rodgers v. Tobias* (Civ. App.) 225 S. W. 804; *Anderson v. Smith* (Civ. App.) 231 S. W. 142.

Act of 1913 (Laws 1913, c. 143), entitled "An act to amend article 4694 of the Revised Civil Statutes of 1911, giving cause of action where injuries resulting in death is caused by the negligence of a corporation, its agents or servants, and declaring an emergency," held not to authorize provisions relating to all subjects covered by the specified article, but only such subjects as are embraced in the portion of the title describing the statute to be amended. *Rodgers v. Tobias* (Civ. App.) 225 S. W. 804.

1. Right of action in general.—Plaintiff brought an action under this statute against a sheriff and his bondsmen, for the death of her husband, who was killed by a deputy of the sheriff, while attempting to escape from arrest. Held, that a principal's liability, under this statute, for the acts of his agent is confined to the class of cases mentioned in the first clause of the section, and that plaintiff has no cause of action against the sheriff. *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749.

At common law, no action would lie for injury resulting in death, and Legislature of state could grant by statute or withhold any right of action. *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 201 S. W. 1072.

In actions to recover damages for injuries to or the death of children, as in cases to recover damages for the death or injuries to adults, suit cannot be maintained unless defendant has been guilty of a breach of duty. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

Under the common law, damages were not recoverable for death; the right of action having died with deceased. *City of Dallas v. Halford* (Civ. App.) 210 S. W. 725.

A wife injured by contact with an electric wire on going to the aid of her husband, who had come in contact therewith and who died from his injury, can maintain a suit for her own injuries, and a separate suit for his death. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

2. Conflict of laws.—See *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 228 S. W. 907.

The right of action depends on the negligence of the corporation; and it is immaterial that the death occurred within the state, when the negligent act is charged to have been committed in Mexico. *De Ham v. Mexican Nat. R. Co.* (Civ. App.) 22 S. W. 249.

9. Negligence of municipal corporation.—A municipal corporation is not a "person or corporation" within this article. *City of Dallas v. Halford* (Civ. App.) 210 S. W. 725.

11. Negligence of railroad company.—Under this article, and art. 4436, inhibiting constructing roadbed without sufficient drainage, it is liable for death of one knocked from tree by its floating trestle, if failure to have insufficient drainage was proximate cause. *San Antonio & A. P. Ry. Co. v. Behne* (Civ. App.) 198 S. W. 680.

Railroad, sued for wrongful death, was not liable on proof establishing unexplained injury resulting in death, but not showing injury was caused by any negligent or wrongful act of road. *Caffrey v. Bartlett Western Ry. Co.* (Civ. App.) 198 S. W. 810.

13. Negligence of owner or landlord of building, or premises.—A necessary element of negligence is a legal duty, and without the legal duty resting upon the party charged with the breach thereof there can be no negligence or other species of tort, and where plaintiff's decedent was killed in an elevator which defendant's employes had voluntarily kept in order, defendant owed no duty to decedent to continue such service, but if defendant had agreed to maintain such elevator its failure to continue to use reasonable care to do so was a misfeasance, making it liable for plaintiff's death. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

A pit filled with live coals and hot ashes was an intrinsically and affirmatively dangerous agency, and it was the absolute and nondelegable duty of a private corporation to protect and guard against its dangers those rightfully upon the company's premises; failure to guard being negligence of the company itself, as distinguished from negligence of an employé or servant. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

15. Liability for act of agent or employé.—For decisions under prior statute, see *Sabine & E. T. Ry. Co. v. Hanks*, 73 Tex. 323, 11 S. W. 377; *Texas & P. Ry. Co. v. Hill*, 71 Tex. 451, 9 S. W. 351.

A corporation is liable for death of servant caused by negligence of a vice principal. *Coca-Cola Co. v. Williams* (Com. App.) 209 S. W. 396.

A private corporation is liable for wrongful death only where the negligence, unskillfulness, or default is act of its vice principal; and where vice principal was not negligent in directing teamster to travel certain road under the circumstances, and death of plaintiff's wife, riding on top of wagon, was due purely to negligence of teamster in driving of wagon, corporation was not liable. *Aguinaga v. Medina Valley Irr. Co.* (Com. App.) 210 S. W. 515.

Though a private corporation engaged in the manufacture and sale of cement is not liable for the death of a person caused by negligence of its agents or employés,

it is liable for injuries resulting in the death from its own wrongful acts or omissions as distinguished from the acts or omissions of servants or agents. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

In action against private corporation for death, the fact that negligent dumping of burning coal and slag into a pit was being done under orders given by a superintendent and vice principal who had been succeeded by another as superintendent and vice principal did not relieve defendant of liability simply by reason of the fact that the superintendent at the time of the accident had not reiterated the orders theretofore given. *Id.*

16. Contributory negligence.—Only ordinary care is required of one approaching a railroad crossing. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 25 S. W. 455.

Where deceased had no knowledge of the existence of an uninsulated wire and stepped upon a parapet in a building, which act involved no danger had the wire not been there, and he was not then trespassing to any appreciable invasion of the rights of others, he was not guilty of contributory negligence as a matter of law. *International Electric Co. v. Sanchez* (Civ. App.) 203 S. W. 1164.

17. — Children.—That a child escapes the watchfulness of parents and gets on a railroad track is not conclusive proof of failure in their duty to exercise ordinary care to prevent it from going into danger, which would prevent a recovery for its death. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

21. Fellow servants—Negligence of.—Petition in action for death of railroad employé due to negligence of fellow servant held to state cause of action. *Ft. Worth & R. G. Ry. Co. v. Bird* (Civ. App.) 196 S. W. 597.

27. Measure and amount of damages.—Measure of damages for death of minor's father is essentially indefinite, not capable of exact ascertainment, and so left to sound discretion of jury. *San Antonio & A. P. Ry. Co. v. Boyd* (Civ. App.) 201 S. W. 219.

The measure of damages to parents for the death of a minor son maintaining himself is the amount they would have had a reasonable expectation of receiving from him during his minority. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

Where a son gave most of his earnings to his mother, the amount she received from him measured the amount of her pecuniary loss by his death, and it was immaterial how she expended the money. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

29. — Excessive damages.—\$2,250 damages held not excessive for wrongful death of 2½ year old boy. *Schaff v. Shepherd* (Civ. App.) 196 S. W. 232.

A judgment of \$20,000 for the death of a stock dealer aged 46 years, who was a generous provider, and who left surviving a wife and five children, held not to be grossly excessive. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357.

Damages awarded to two minor children, in respective sums of \$3,000 and \$6,000, for wrongful death of their mother, held not excessive. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

Where a hack driver was killed by a collision with defendant's locomotive, a verdict for \$4,500 to his wife and \$3,000 to his minor son for pecuniary loss till he became of age held not excessive. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

A verdict of \$10,000 for the death of a healthy, robust, and bright son about seven years old, is not so large as to indicate that jury was actuated by improper motives, and will not be disturbed on appeal. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

Parents are entitled to recover only compensation for the services and contribution which they might reasonably have expected from a son of 23, and, where they were not in need of the financial aid of the son, though he was at home and devoted all his time to their service, an award of \$3,500 was excessive. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 207 S. W. 329.

In action for death of 48 year old fireman, a \$27,000 judgment, awarded to widow and seven children, was not so excessive as to require reduction by Court of Civil Appeals. *Lancaster & Wight v. Allen* (Civ. App.) 207 S. W. 984.

Where deceased was 41 years old, had a wife and six children, aged from 2½ to 15 years, was in good health, sober, and industrious, and his earnings had ranged from \$1,500 to \$2,500 per year, a verdict for \$12,500 for his wrongful death was not excessive. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

Under evidence as to contributions by deceased, 28 years old, to plaintiff, his father, 65 years old, held recovery for his death above \$1,200 was excessive compensation. *Southwestern Portland Cement Co. v. Graves* (Civ. App.) 208 S. W. 979.

In action by a woman 55 years of age for death of daughter earning \$50 per month, a verdict of \$8,000 cannot be said to be excessive where plaintiff depended upon her daughter for support, and daughter was in all respects an admirable character of exemplary habits and constantly increasing in efficiency as a stenographer. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

For the death of husband and father, 31 years old, in good health, of exemplary habits and earning over \$2,000 a year, a verdict of \$23,000 in favor of wife and children held not excessive. *Texas Power & Light Co. v. Bristow* (Civ. App.) 213 S. W. 702.

Verdict of \$1,750 given parents for death of son who at time of death was contributing \$250 per year to support of parents over and above expenses they were out on him, and in all reasonable probability would have continued to do so for next seven years, held not excessive. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

Judgment for \$8,500 in favor of a mother for death of her daughter, rendered on verdict for \$12,500 after remittitur of \$4,000 required by the court, held not excessive. *Houston Electric Co. v. Flattery* (Civ. App.) 217 S. W. 950.

\$2,400 to the widow and \$2,400 to the father and mother held not excessive damages for the death of a strong healthy man 23 years old. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

Verdict for \$5,000 in favor of a father for the death of his son, 20 years and 10 months of age, held excessive as based only on evidence that an affectionate relation of father and son existed, and that the son was considerate of and obedient to his father, and considerate of his brothers and sisters. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

\$10,250 verdict for surviving wife and \$5,250 verdict for surviving child for death of husband and father earning \$2,500 to \$3,000 a year, with life expectancy of more than 26 years, held not excessive. *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281.

\$10,000 verdict to surviving wife and children for death of 27 year old common laborer, earning \$1.50 a day, with expectancy of more than 37 years, held not excessive. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

A verdict awarding \$4,000 for the death of plaintiff's husband is not so excessive that a remittitur will be ordered to prevent reversal, since every husband has for his wife a pecuniary value beyond the amount of his earnings, which value can be assessed by the jury by the exercise of their best judgment. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

In an action for the death of plaintiff's husband, a verdict, reduced by the trial court from \$30,000 to \$12,000, was not excessive, where it appeared that the husband was 29 years old, in good health, and a hard-working farmer, cultivating land as a share cropper, though previously he had worked as a hired hand at \$20 or \$30 per month. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

Verdict of \$10,000 in favor of widow for death of husband, 56 years old, having an expectancy of little more than 16 years, who at the time of his death was receiving only \$1.50 a day, though he had been employed at \$3 or \$4 a day, and would probably have a right to expect other employment at better wages, held excessive by \$5,000. *Jefferson & N. W. Ry. Co. v. Blair* (Civ. App.) 224 S. W. 546.

In an action for the death of a boy 11 years old, bitten by a rabid dog, evidence that the father had to borrow money to send the boy to the Pasteur Institute for treatment, and that the boy was the oldest of three children, was healthy, bright, and intelligent, worked every day, and was a good hand, warranted a verdict for \$2,000 actual damages. *Holland v. Adams* (Civ. App.) 227 S. W. 512.

Where the court limited the recovery of plaintiff for the death of his son to the value of the son's services during minority after deducting the probable expense of maintenance, an award of \$15,000, the son being only four years old is so excessive that it cannot be cured by remittitur, for it is obvious that the son could not have earned during his minority an amount above the expense of his maintenance to reach \$15,000. *Hines v. Roan* (Civ. App.) 230 S. W. 1070.

An award of \$20,000 in favor of plaintiff for the death of his wife, who was 26 years old, in good health, kept her house, and was faithful in the discharge of her wifely duties, is warranted. *Id.*

A verdict for \$12,562 held not excessive for loss from wrongful death of services of a 17 year old son, who was intelligent and dutiful, and relieved plaintiff of many of her business burdens, and had an estate of his own, from which he might have assisted her beyond what he earned. *Hines v. Richardson* (Civ. App.) 232 S. W. 889.

30. **Mitigation or reduction of damages.**—That children have an older sister, who might nurture and care for them as their deceased mother would have done, is not to be considered in mitigation of damages. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

In a wife's action for the death of her husband it was not error to charge that the jury should not consider in mitigation of damages the fact of her remarriage inadmissible evidence as to such remarriage, introduced by defendant, having been admitted. *Texas Electric Ry. v. Stewart* (Civ. App.) 217 S. W. 1081.

31. **Elements of compensation—In general.**—The amount of recovery by the mother, being the sole surviving parent, is not limited to the value of the services of the deceased during minority. *Gulf, C. & S. F. Ry. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

A charge as to the cost of the maintenance of a minor son maintaining himself is properly omitted, in a parent's suit for his death. *Patterson v. Williams* (Civ. App.) 225 S. W. 89.

32. — **Loss of pecuniary benefits.**—See *Southern Traction Co. v. Dillon* (Civ. App.) 199 S. W. 698.

Surviving wife, in action for death of husband, is entitled to recover for the pecuniary loss, if any, suffered by her in husband's death. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

The measure of damages recoverable by a mother for death of minor son is the pecuniary loss resulting from his death including any pecuniary benefit she would probably have received from him during his minority, and the value of any aid she may have had reasonable expectation of receiving from him after reaching majority. *Southwestern Portland Cement Co. v. Bustillos* (Civ. App.) 216 S. W. 268.

Under the common law, a father could recover for the death of his son the value of the son's services during minority, and, under the statute, is also entitled to recover the value of such contributions or pecuniary aid as he had reasonable expectation of

receiving from the son after majority. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

34. — **Grief and loss of society, care, counsel and training.**—The wife and son of deceased are entitled to recover, as pecuniary loss for deceased's wrongful death, not only the amount he might have contributed to their support, but the value of his attention, care, and counsel to the wife, and of his intellectual and moral advice, education, and training to his son. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

In an action for death of father and husband, damages may be allowed for loss of care and counsel. *Texas & N. O. R. Co. v. Glass* (Civ. App.) 201 S. W. 730.

In action for death, where deceased leaves widow and children, damages are not limited to loss of actual earning power of deceased, and jury may award children damages for loss of a father's nurture and admonition. *Lancaster & Wight v. Allen* (Civ. App.) 207 S. W. 984.

In action for death of daughter, jury in fixing damages may consider fact that in time of sickness of plaintiff deceased would, if alive, attend and care for her with tenderness. *Ward v. Cathey* (Civ. App.) 210 S. W. 289.

The damages to a widow and children for wrongful death are limited to the pecuniary benefits, if any, which the widow and children respectively have lost, and, in fixing the amount due the minor children, the money value of the loss of the care, training, and education which the deceased would have bestowed on them if he had lived should be considered, but no damages should be allowed the widow for loss of care, consolation, training, and guidance, or for grief or loss of companionship or society. *Hines v. Mills* (Civ. App.) 218 S. W. 777.

37. **Persons liable.**—Liability for wrongful death is not limited to person whose hand inflicted the death wound, but extends to his joint tort-feasor, and where son shot deceased after there had been concerted action between father and son to wrongfully kill deceased, the father was a "joint tort-feasor." *Anderson v. Smith* (Civ. App.) 231 S. W. 142.

38. — **Receiver.**—For decision under prior statute, see *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; which case was followed in *Yoakum v. Selph*, 83 Tex. 607, 19 S. W. 145; *Houston & T. C. Ry. Co. v. Roberts* (Sup.) 19 S. W. 512; *Bonner v. Thomas* (Civ. App.) 20 S. W. 722; *Brown v. Record* (Civ. App.) 23 S. W. 704; *Dillingham v. Scales* (Civ. App.) 24 S. W. 975.

39. **Defenses.**—See *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873.

A wife injured by contact with an electric wire on going to the aid of her husband who had come in contact therewith and who died from his injury can maintain a suit for her own injuries and a separate suit for his death, and a judgment in the first is not a bar to the second, though arising out of the same negligence. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 211 S. W. 600.

44. **Weight and sufficiency of evidence.**—The amount of a father's recovery for death of his minor son must be based upon evidence before the jury, and cannot properly be left to their determination on surmise or speculation. *West Lumber Co. v. Hunt* (Civ. App.) 219 S. W. 1106.

In an action against father and son for death of plaintiff's husband shot by son, evidence held to show concerted action between father and son to wrongfully kill the husband. *Anderson v. Smith* (Civ. App.) 231 S. W. 142.

45. — **Proximate cause.**—Evidence held to show that the death of plaintiff's intestate was caused by injuries resulting from intestate's being thrown from a hack to the ground when defendant's locomotive struck the hack. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

In suit for death of a son about seven years old due to his falling into an open, unguarded well on defendant's vacant property, held, on the evidence, that negligence of defendant caused death of son. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

46. — **Negligence.**—Where electric company knew that insulation was burned off of a wire on premises of user beyond its meter, and sent a current over same of such voltage as to cause death to a person coming in contact therewith, the jury was authorized to find that it was negligent. *International Electric Co. v. Sanchez* (Civ. App.) 203 S. W. 1164.

Jury finding that unguarded, open well on defendant's vacant property into which plaintiff's intestate, a son about seven years old, fell, was attractive to children by reason of its nature and surroundings, held warranted. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

47. — **Contributory negligence.**—In suit for death of a son about seven years old due to his falling into an open, unguarded well on defendant's vacant property, held on the evidence, that son was not, considering his age and discretion, guilty of contributory negligence. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

In an action for damages for the drowning of plaintiff's son in defendants' swimming pool, evidence as to the son's knowledge of conditions, including depth of water and of his own cramping, held sufficient to warrant the jury's verdict that he was guilty of contributory negligence. *Barnes v. Honey Grove Natatorium Co.* (Civ. App.) 228 S. W. 354.

Art. 4694a. Contract releasing liability invalid.—No agreement between any owner of any railroad, street railway, steamboat, stage-coach

or other vehicle for transporting passengers or goods, or any industrial or public utility plant, or other machinery, and any person, corporation, trustee, receiver, lessee, joint stock association or other person in control of, or operating the same, shall release such owner, person, trustee, lessee, corporation or joint stock association from any liability fixed by the provisions of this Act. [Acts 1921, 37th Leg., ch. 109, § 2.]

Art. 4694b. Repeal; partial invalidity.—All laws in conflict herewith are hereby repealed. If any of the provisions of this Act are held invalid, such invalidity shall not affect any of the remaining provisions hereof. [Id., § 3.]

Art. 4695. [3018] Character of wrongful act.

See *Texas & N. O. R. Co. v. Berry*, 67 Tex. 238, 5 S. W. 817; *Lawson v. Haskell Telephone Co.* (Civ. App.) 224 S. W. 390.

Right of action of person injured.—In actions to recover damages for injuries to or the death of children, as in cases to recover damages for the death or injuries to adults, suit cannot be maintained unless defendant has been guilty of a breach of duty. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

Where surgeons operated on a child without authority, so that it amounted to a technical assault for which the child could have recovered had she survived, the parent has a cause of action, and it is not dependent on the extent of the injury to the minor child. *Moss v. Rishworth* (Com. App.) 222 S. W. 225, affirming judgment (Civ. App.) *Rishworth v. Moss*, 191 S. W. 843.

Liability to passengers or employes.—This article does not change the rules as to the liability of a railway company either to a passenger or an employé. *The T. & P. Ry. Co. v. Carlton*, 60 Tex. 397.

Art. 4696. [3019] Exemplary damages.

Right to exemplary damages.—In order to support a recovery of exemplary damages from a railway company for death, it must appear that there was some willful act or omission or gross negligence on the part of the officers of the corporation. *International & G. N. R. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860.

Whether this article authorizes punitive damages in cases not allowed by Const. art. 16, § 26, it is unnecessary to decide, on appeal by defendant, in a case where the charge limits the damages to compensation for loss, and there is nothing to indicate that the jury did not observe the charge. *Texas & P. Ry. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

Defendant, though convicted of assault and fined, is liable to exemplary damages in a civil suit; this not being a double punishment for the same offense, in view of Const. art. 16, § 26. *Hartman v. Logan* (Civ. App.) 203 S. W. 61.

Though there was evidence that a dog was vicious and that defendant knew of such viciousness, where an action for the death of a boy was tried on the theory that the dog bit the boy because it was rabid and not because of viciousness, and there was no evidence that defendant knew the dog was rabid though there was evidence that he had reason to believe so, exemplary damages were not recoverable. *Holland v. Adams* (Civ. App.) 227 S. W. 512.

In a suit for damages for the drowning of plaintiff's minor son in defendants' swimming pool, evidence showing that defendants had exercised some care for the safety of persons using the pool held to preclude a finding that defendants were guilty of gross negligence. *Barnes v. Honey Grove Natatorium Co.* (Civ. App.) 228 S. W. 354.

Art. 4698. [3021] For whose benefit action to be brought.

Cited, *Hines v. Walker* (Civ. App.) 225 S. W. 827.

Construction in general.—Under Workmen's Compensation Act 1913, § 8 (Vernon's *Sayles' Ann. Civ. St.* 1914, art. 5246kk), declaring that compensation shall be paid to legal beneficiaries to be distributed according to the law of descent, the beneficiaries as well as the apportionment must be determined by that law, and not by art. 4698, governing recovery of damages for wrongful death. *Vaughan v. Southwestern Surety Ins. Co.*, 109 Tex. 298, 206 S. W. 920, reversing (Civ. App.) *Vaughan v. Southwestern Surety Ins. Co.*, 195 S. W. 261.

Surviving husband or wife.—Where one sues as wife, evidence to show the invalidity of the marriage is admissible, though the question is not raised by defendant's pleadings; and, the evidence being conflicting, the question of its validity should be submitted to the jury, with proper instructions. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 25 S. W. 455.

That a wife is not living with her husband does not as a matter of law preclude her from recovering damages for his death, as there is probability of a reconciliation and her right of support. *Gulf, C. & S. F. Ry. Co. v. Saint* (Civ. App.) 204 S. W. 1021.

In an action for death, brought by wife as administratrix and beneficiary, evidence

held to sustain finding that husband and wife, though separated, had agreed to again assume marital relations. *Id.*

A woman cohabiting unlawfully with a man has no right to such damages, even though she did not know he had ever been married. *Lopez v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 222 S. W. 695.*

Parents.—In an action by a father and mother for injuries causing the death of their infant child, the court properly charged that, if the jury should find for plaintiffs, the damages should be apportioned between the plaintiffs as the jury should deem just and right. *Houston City St. Ry. Co. v. Sciacca, 80 Tex. 350, 16 S. W. 31.*

A wife separated from her husband and unable to locate him may sue for their child's wrongful death. *Schaff v. Shepherd (Civ. App.) 196 S. W. 232.*

In action for death of adult son, financial condition of parents was no bar to right of recovery. *Gulf, C. & S. F. Ry. Co. v. Hicks (Civ. App.) 202 S. W. 778.*

Where there is no proof that parents suing for death of their minor son could have reasonably expected him to continue to contribute to their support after attaining his majority, it will be presumed that his contributions would cease at such time. *Patterson v. Williams (Civ. App.) 225 S. W. 89.*

Child.—That a daughter of deceased was a school-teacher and capable of supporting herself does not bar her right to recover for her father's death if she suffered pecuniary loss by reason thereof. *Panhandle & S. F. Ry. Co. v. Tisdale (Civ. App.) 199 S. W. 347.*

Minor child entitled to support by father may recover for his death damages sustained, not depending on whether he had supported, or intended to support, child. *San Antonio & A. P. Ry. Co. v. Boyed (Civ. App.) 201 S. W. 219.*

Personal representative.—The amount recovered does not become part of assets of deceased, and administratrix cannot maintain action therefor. *Cole v. Mallory S. S. Co. (Civ. App.) 197 S. W. 326.*

Art. 4699. [3022] Who may bring the action.

See *Houston City St. Ry. Co. v. Sciacca, 80 Tex. 350, 16 S. W. 31; Schaff v. Shepherd (Civ. App.) 196 S. W. 232.*

Plaintiffs.—There is no misjoinder of plaintiffs in an action by the father and mother for the death of their child. *Texas & P. Ry. Co. v. Hall, 83 Tex. 675, 19 S. W. 121.*

Necessary parties.—In an action brought by a wife, on behalf of herself and two minor children, for damages for injuries resulting in the death of her husband, where it was developed on the trial that deceased had a mother, the proceedings should have been arrested until she could be made a party, or the petition should have been amended so as to make her a beneficiary under the judgment. *East Line & Red River R. Co. v. Culberson, 68 Tex. 664, 5 S. W. 826.*

A married woman, in an action for damages for negligence in causing the death of her son, who had for many years supported her, alleged that her husband had abandoned her, and for many years contributed nothing to her support; that her son had supported her, but had never given anything towards the support of his father; and asked to be permitted to prosecute the action in her own name, and for her own benefit; but, if it should be held that her husband was entitled to any benefit, that she might be permitted to prosecute the action in her own name for the benefit of both. Held that plaintiff was entitled to maintain the action without joining her husband. *Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. 828.*

A father, who lived in another state, and was not dependent on deceased, was not a necessary party to an action by deceased's surviving wife and children, who were dependent on him. *St. Louis, A. & T. Ry. Co. v. Taylor, 5 Tex. Civ. App. 668, 24 S. W. 975.*

In a suit by the wife and child of deceased to recover for deceased's wrongful death, the nonjoinder of deceased's father is not jurisdictional, but will abate the suit when made to appear of record. *St. Louis Southwestern Ry. Co. of Texas v. Anderson (Civ. App.) 206 S. W. 696.*

Authority to sue for others.—In an action for damages for an injury resulting in the death of plaintiff's husband, plaintiff sued in her name alone, and in the body of the petition alleged that the husband left a child, and claimed damages on its part as well as her own. A judgment was had for both. Held that, any one of the parties entitled to damages may bring an action for the benefit of all. *Texas & N. O. R. Co. v. Berry, 67 Tex. 238, 5 S. W. 817.*

Art. 4704. [3027] Damages to be apportioned by the jury.

See *East Line & Red River R. Co. v. Culberson, 68 Tex. 664, 5 S. W. 826.*

Apportionment of damages.—Notwithstanding this article, the court, under art. 1985, may, in a death action submitted on special issues, determine the question of the amount of damages, on the ground that jury trial was waived where the only special issue submitted or requested on the question of damages was to the yearly earnings of deceased. *Panhandle & S. F. Ry. Co. v. Huckabee (Civ. App.) 207 S. W. 329.*

As a general rule, if the damages for death are not excessive, defendant has no legal right to complain that in the apportionment between a widow and children the widow received more than was justly her share. *Jefferson & N. W. Ry. Co. v. Blair (Civ. App.) 224 S. W. 546.*